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[B-149685]

Small Business Administration—Investment Companies—Participation in Guaranteed Loan Programs

Small business investment companies (SBICs) are not eligible to participate as guaranteed lenders in either Small Business Administration's (SBA) or Farmers Home Administration's (FmHA) loan programs. As stated in 49 Comp. Gen. 32, legislative history of Small Business Investment Act demonstrates congressional intent that SBICs operate independently of other Government loan programs. Nothing in SBIC Act or Consolidated Farm and Rural Development Act, which established FmHA's authority to guarantee loans, or legislative history of either, supports SBA's position that SBICs should now be permitted to participate as guaranteed lenders in these loan programs.

In the matter of the eligibility of SBICs to participate as lenders in guaranteed loan programs of SBA and FmHA, February 3, 1977:

This decision to the Administrator of the Small Business Administration (SBA) is in response to his request for our legal opinion as to the eligibility of small business investment companies (SBICs) to participate as guaranteed lenders in both SBA's section 7(a) Guaranteed Loan program and the Farmers Home Administration (FmHA) Business and Industrial Loan program. Each of these questions will be considered separately.

Section 7(a) of the Small Business Act, as amended, 15 U.S.C. § 636(a) (1970), provides that SBA may make loans to small business concerns "* * * either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis." Basically, the question before us is whether or not SBICs established under the authority of the Small Business Investment Act of 1958, as amended, 15 U.S.C. §§ 661 *et seq.*, can qualify as "other lending institutions" under section 7(a) of the Small Business Act, *supra*. SBICs were established for the purposes of providing a source of equity capital to small business concerns, as well as the making of loans to such concerns, in order to provide them with the funds needed for sound financing, growth, modernization, and expansion. See 15 U.S.C. §§ 684(a) and 685(a) (1970 and Supp. V, 1975). Also, section 305(b) of the Small Business Investment Act, as amended, 15 U.S.C. § 685(b) (1970), provides that loans may be made by SBICs "directly or in cooperation with other lenders, incorporated or unincorporated, through agreements to participate on an immediate or deferred basis."

As pointed out in SBA's submission, our Office considered the question of whether SBICs could participate as guaranteed lenders under section 7(a) of the Small Business Act in our decision 49 Comp. Gen. 32 (1969), and we concluded that the Small Business Investment Act must be construed as precluding SBICs from participating with SBA

in making loans to small business concerns. However, it is SBA's view that the present intent of SBA and the specific factual situation with respect to such proposed loans are so different from its 1969 proposal as to justify reconsideration of that decision. In this regard SBA's submission reads in pertinent part as follows:

> First, our intent is not to interlock or piggyback Government programs for the small business sector but rather the intent is to put a velocity factor or multiplier behind presently existing funds in order to channel and expand the total flow of available financing.
>
> The basic intent is that SBIC's be permitted to originate SBA 7(a) loans just as banks now do but in contrast to banks, the SBA 7(a) guarantee would only run to the SBIC's for the time that it takes to sell the guaranteed portions to passive institutional and other investors while the SBIC would remain as servicing agent for the secondary participant. This is how the impact of presently available funds could be increased by a velocity factor.
>
> SBIC's would benefit from such a program since additional servicing income would be available, therefore, SBA anticipates requiring a quid pro quo from participating SBIC's. For example, SBA might require SBIC's to originate SBA-guaranteed loans to firms in the manufacturing sector (job creation potential), or SBA might require SBIC's to maintain a certain level or proportion of their other investments in equity interests of small business concerns which it does not now do.
>
> SBA would, of course, promulgate regulations which would tightly control SBIC activities so that no abuses such as conflicts of interest could arise.

Our 1969 decision that SBICs could not participate with SBA in making guaranteed loans to small business concerns was based on several factors. We relied primarily on the legislative history of the Small Business Investment Act, which was quoted extensively in our decision. We noted, for example, that the SBIC program was to "be launched with a minimum of Federal activity and with only a modest increase in personnel and administrative expenditures by the Small Business Administration," and was "to operate and be accounted for in complete separation from other Federal small business programs." See S. Rept. No. 1652, 85th Cong., 2d Sess. 2, 3 (1958).

Another factor that we relied upon in reaching our conclusion was the unsuccessful legislative attempt in 1961 to amend section 305(b) of the Small Business Investment Act, *supra*, to specifically include SBA among the "other lenders" referred to therein. In our decision we quoted from the testimony of the then Administrator of SBA, who had opposed the proposed amendment on the following grounds:

> Section 6 of the bill would amend section 305(b) of the act *so as to authorize SBIC's to make loans to small business concerns* directly or in *cooperation with "other lenders*, public or private, incorporated or unincorporated, *including the Small Business Administration" through agreements to participate on an immediate or deferred basis.*
>
> Under the existing provisions of section 305(b) of the act, SBIC's can make loans on a cooperative basis—but only with lending "institutions." I have no objections to section 6 of the bill insofar as it would extend coverage to individual lenders and other lenders which do not qualify as lending institutions.
>
> *However, I do not favor the proposal of section 6 that SBIC's be authorized to extend loans to small business concerns in cooperation with the Small Business Administration.* [Italic supplied.]

I would like to emphasize the difference in the lending functions of SBIC's and those of SBA. The maximum maturity of SBA business loans is fixed by statute at 10 years. The small business investment program was not established for the purpose of providing such financing for small business. At the time the Small Business Investment Act of 1958 was enacted, it was observed that, on the whole, the short-term and intermediate-term credit needs of small business were being met through existing facilities, private and governmental.

The primary purpose of the lending authority delegated under the act to SBIC's is to provide small business concerns with long-term credit which cannot be obtained from SBA—with loans of maturities in excess of 10 years. If SBIC's are to fulfill the mission intended for them by Congress, they must concentrate their efforts in this area.

By regulation, SBA could have confined SBIC loans to maturities of more than 10 years. However, this appeared to be too rigid a restriction, and to provide SBIC's with reasonable leeway a minimum maturity of 5 years was established on their loans.

SBIC's should, as far as possible, avoid this zone of overlap. In any case, they should not be attracted into it with offers of SBA participation.

Thus it was apparent, as pointed out in our decision, that the then Administrator of SBA believed that without the proposed amendment SBICs would not be authorized to extend loans to small business concerns in cooperation or in participation with SBA.

In reaching our conclusion we considered it to be very persuasive, and continue to do so, that Congress, although aware of SBA's long-standing position that the Small Business Investment Act did not allow SBIC's to participate with SBA in making loans to small business concerns, and although provided with the opportunity to amend the Act so as to expressly allow such joint participation, chose to delete the proposed amendment from the bill. In our view this action clearly demonstrated the legislative intent that SBA and SBIC's should not participate together in making loans to small businesses.

The intent of the instant proposal by SBA may be somewhat different from the original proposal, in that the SBIC would originate the loan but would then presumably sell the guaranteed portion thereof to another lending institution while remaining the servicing agent for the secondary participant. However, in light of the various statements in the legislative history of the Small Business Investment Act indicating that it was intended that SBICs operate completely independently of other Federal small business programs, which formed the primary basis for our earlier decision, we do not believe that any such differences between the two proposals are sufficient to justify a change in our position. It remains clear that under the present proposal the SBIC program would be operating in conjunction with the 7(a) program, both in the initial stage when the loan was made by the SBIC and thereafter while the SBIC continued to act as the servicing agent for the SBA guaranteed loan. Accordingly, it is and remains our view that, in the absence of legislation similar to that proposed in 1961 expressly authorizing SBA to participate with SBICs in making loans to small business concerns, it is impermissible for SBICs to

participate with SBA as guaranteed lenders under the 7(a) program.

The other question presented in SBA's submission concerns the eligibility of SBICs to participate as guaranteed lenders in FmHA's Business and Industrial Loan program. The authority of FmHA to guarantee such loans is set forth in section 310B of the Consolidated Farm and Rural Development Act, as amended, 7 U.S.C. § 1932 (Supp. V, 1975), which provides in pertinent part as follows:

(a) The Secretary [of Agriculture] may also make and insure loans to public, private, or cooperative organizations organized for profit or nonprofit, to Indian tribes on Federal and State reservations or other federally recognized Indian tribal groups, or to individuals for the purpose of improving, developing, or financing business, industry, and employment and improving the economic and environmental climate in rural communities, including pollution abatement and control. Such loans, when originated, held, and serviced by other lenders, may be guaranteed by the Secretary under this section * * *.

On December 11, 1975, FmHA promulgated revised regulations outlining the substantive procedures for FmHA guaranteed Business and Industrial loans in rural areas. See 40 Fed. Reg. 57643 (1975), now codified at 7 CFR §§ 1980.401 *et seq.* (1976). According to the revised regulatory provisions, SBICs are specifically included in the list of eligible lenders. See 7 CFR § 1980.419(b)(1). The United States, acting through FmHA, will guarantee up to 90 percent of such Business and Industrial loans that are made and serviced by eligible lenders.

On February 11, 1976, SBA advised all licensed SBICs that after reviewing the matter:

* * * [I]t is SBA's position that the B&I loan program does not fall within the functions and activities contemplated by the Small Business Investment Act [see Section 301(a) thereof, 15 U.S.C. 681(a)]. Accordingly, Licensees are hereby notified that participation in this program will be deemed a violation of such Act, and of the relevant regulation [13 C.F.R. § 107.803] thereunder.

The basis for SBA's position in this regard was articulated in an opinion of SBA's Acting General Counsel which concluded that there was no legal authority in the Consolidated Farm and Rural Development Act, or in the Small Business Investment Act, or in the legislative history of either, to support the participation by SBIC's as guaranteed lenders in FmHA's loan program. To some extent this opinion also relied on both the rejection by Congress of the proposed amendment to the Small Business Investment Act in 1961, which would have expressly authorized SBICs to participate with other lenders both public and private, and our decision 49 Comp. Gen. 32 *supra*.

SBA has now expressed some doubt as to the correctness of its initial position that SBICs are precluded from making loans that would be guaranteed by FmHA. In this regard SBA's submission reads in pertinent part as follows:

First, while the SBA Administrator's testimony (quoted in the attached opinion) opposed the participation of any Federal agency with SBIC's in financing small concerns, your opinion focused entirely on SBA participation and concluded that you could not

"concur with [our] proposal to authorize SBICs to participate with SBA in loans to small business concerns" [49 Comp. Gen. at 37].

Therefore, to the extent that our position relied on your decision, such reliance may have been misplaced.

Second, did Congress, in the 1972 legislation establishing FmHA's B&I program, intend to vest in FmHA authority to guarantee SBIC loans? If so, such authority is not based on any explicit provision of the Consolidated Farm and Rural Development Act, but must rest on an interpretive implication drawn from the general language of the 1972 law.

Third, should our position be different if the SBIC would retain only the unguaranteed portion of the B&I loan, and sell at the closing of the loan, or immediately thereafter, the guaranteed portion to non-SBIC investors? We are advised that, as a practical matter, SBIC's are not interested in retention of the guaranteed portion, but are interested in the profit and income that they may derive from the sale of the guaranteed portion, and from the servicing of the loan, and from incidental services such as management advice [Sec. 308(b) of the Small Business Investment Act, 15 U.S.C. 687(b)].

Fourth, prior to the publication by FmHA of its revised B&I regulations, when our attention had not focused on the broader implications of FmHA guaranties, SBA advised one Licensee, Cameron-Brown Capital Corporation, on March 18, 1975, that "Such [guaranteed] investment is not prohibited under the SBI Act or Regulations." * * * Moreover, SBA's then Acting Administrator, Mr. Laun, Deputy Administrator, advised the Office of Management and Budget on December 22, 1975, of the recently published FmHA regulation and wrote:

"There is nothing in the Small Business Investment Act of 1958, as amended, nor in the regulations promulgated thereunder to prohibit such guaranty, by F[m]HA. . . . This business and industrial loan program adopted by F.H.A. is beneficial to small business in rural areas and, of course, is most advantageous to SBICs."

It can thus be seen that SBA's position in the past has not been entirely consistent.

Having considered this question, we conclude that the initial position adopted by SBA—that there is no legal authority to support the participation of SBICs in FmHA's guaranteed loan program—is correct. First, as noted previously, the Small Business Investment Act, which authorized the establishment of SBICs, did not contemplate that they would participate in small business programs of other Government agencies. This exclusion from participation in other Federal small business programs would apply equally to FmHA's programs as to SBA's section 7(a) program under the reasoning of our 1969 decision.

Moreover, with respect to the question of whether Congress enacted the Consolidated Farm and Rural Development Act with the intent that FmHA be permitted to guarantee SBIC loans, we have found no support for such an interpretation, either in the actual language of the Act or its legislative history. As to the possibility of "an interpretive implication drawn from the general language of" that Act, we do not believe that such an implication exists. Even if it did, such an implication based on the general statutory language would be insufficient to counter the clear expression of legislative intent from

the Small Business Investment Act that SBICs operate independently of other Government agencies.

For the reasons discussed previously with respect to proposed SBIC participation in SBA loans, it makes no difference that the SBICs would retain only the unguaranteed portion of the FmHA Business and Industrial loan and sell at the closing of the loan, or immediately thereafter, the guaranteed portion, to non-SBIC investors. Even under this type of arrangement the SBIC would be a participant in the loan program of another Government agency, thereby engaged in activities not contemplated by the Small Business Investment Act, and would be making and servicing loans which were intended to achieve purposes other than, or at least in addition to, those contemplated by that Act, thereby violating the statutory language and intent.

Finally, we do not believe it to be particularly significant that SBA's position in regard to the legality of this practice has not been entirely consistent and since the position we have adopted here was independently arrived at and is based on our own analysis.

In accordance with the foregoing, it is our opinion that SBICs are not eligible to participate as guaranteed lenders in either SBA's 7(a) loan program or FmHA's Business and Industrial loan program. Accordingly, FmHA should revise its regulations (7 CFR § 1980.419(b)) to remove SBICs from the list of lenders that are eligible to participate in its guaranteed loan program.

[B–187742]

Contracts—Protests—Timeliness—Supplemental Statement Requested by GAO

Additional statement submitted in support of initial protest is timely because statement was not shown to have been mailed more than five days after receipt of General Accounting Office (GAO) request for additional statement, allowing for a reasonable time for protester to receive GAO request. Fact that more than 10 days elapsed between receipt of initial protest, which promised additional statement, and receipt of supplemental statement is not material.

Bids—Alternative—Acceptability

Even though low bid apparently was submitted on basis of alternative not contemplated by bidding schedule, bid may be accepted because it is responsive to specifications, both as submitted and as clarified. In circumstances protester was not prejudiced by low bidder's deviation from bid schedule instructions.

Bids—Prices—Reduction by Low Bidder—After Bid Opening

Low responsive bid may be reduced after bid opening.

In the matter of the P&N Construction Company, Inc., February 3, 1977:

This case involves the acceptability of the bid of Avco Construction, Inc. (Avco) under invitation for bids (IFB) DACW 27-76-B-0113, issued on September 27, 1976, by the Louisville District, Corps of Engineers (Corps), United States Army. The IFB calls for construction of certain recreation facilities at Brookville Lake, on the East Fork of the Whitewater River, Indiana. The Corps proposes to make award to Avco under the IFB, but P&N Construction Company, Inc. (P&N), the only other bidder, has protested this matter to our Office by mailgram dated November 1, 1976, and subsequent submissions of its attorneys.

In commenting upon this protest, Avco has raised a question concerning the timeliness of P&N's protest. The Bid Protest Procedures published by our Office at 4 C.F.R. § 20.2 *et seq.* establish a general requirement that bid protests shall be filed not later than 10 days after the basis for the protest is known or should have been known. 4 C.F.R. § 20.2(b)(2). In this case, bids were opened on October 27, 1976, and on November 1, 1976, the contracting officer formally determined Avco's bid to be responsive. P&N was also notified of this determination on November 1, and it sent a mailgram of protest to us later the same day. The mailgram was received here on November 2, 1976, and by letter of November 5, 1976, we requested the protester to submit a statement of the specific grounds for protest within five working days from receipt of our request. P&N's attorneys detailed the basis of the protest in a letter dated and mailed on November 15, which we received on November 18.

Avco originally raised the timeliness issue when it apparently was unaware of P&N's November 1 mailgram and when it considered the P&N attorneys' letter dated November 15 to have been the initial protest communication. After becoming aware of P&N's November 1 mailgram, Avco seems to have conceded the mailgram's timeliness; instead, Avco now questions the delay between our receipt of the mailgram on November 2 and our receipt of the P&N attorneys' letter on November 18, in light of P&N's statement in the mailgram that "LETTER WILL FOLLOW WITHIN TEN DAYS."

Avco's suggestion of untimeliness is not supportable. The November 1 mailgram is clearly timely under 4 C.F.R. §20.2(b)(2), because it was filed within 10 days of the time the basis for the protest became known. In addition, we cannot conclude that the November 15 letter is untimely, because 4 C.F.R. §§ 20.2(d) and 20.6 provide for submitting additional statements or information by the protester when requested

by our Office. Such statements or information must be submitted within five work days after receipt of the request. In this instance, we asked P&N by letter dated November 5, 1976, for a statement of the specific grounds of its protest. Allowing for a reasonable period for receipt of our November 5 request, we believe counsel's letter of November 15 was mailed, and therefore submitted, within the five work day period permitted by our procedures. The mere fact that more than 10 days elapsed between our receipt of the initial protest and our receipt of the November 15 letter is, in this regard, of no consequence.

The substance of the P&N protest is that Avco's bid should be declared nonresponsive for failure to conform to the IFB as to items 50 and 50A of the bidding schedule. The schedule consists of 106 numbered items on seven pages. Items 50 and 50A, as submitted by Avco, appeared as follows:

Item No.	Description	Estimated Quantity	Unit	Unit Price	Estimated Amount
*	* *	*	*	*	*
	NOTE TO BIDDER: BID ONE OPTION ONLY				
50	Stone protection for R.C. [reinforced concrete] Pipe				
	a. Riprap, Type 1	257	S.Y.	18.00	4626.00
	b. Riprap Type 2	227	S.Y.	NO BID	
50A	Stone Protection for C. M. [corrugated metal] Pipe				
	Riprap, Type 2A	227	S.Y.	21.00	4767.00

P&N contends that Avco's bid shows on its face that Avco made a mistake and did not intend to comply with the specifications. P&N further asserts that Avco's failure to comply exactly with the bidding instructions rendered the bid ambiguous and it should therefore be considered nonresponsive.

General note 11 to the Corps drawings provided:

PLANS SHOW REINFORCED CONCRETE PIPE THROUGHOUT THE PROJECT: HOWEVER, CONTRACTOR MAY USE OTHER GROUP A TYPES IN LIEU OF RCP (PER INDIANA SPECIFICATONS AND STANDARD DRAWING MP).

Items 25 through 29 of the bidding schedule called for bids on various lengths of Group A pipe, in diameters of 15, 18, 24, 30 and 48 inches. Indiana surface drainage pipe standards, appearing on sheet 25 of the detailed drawings, permit three options as to types of pipe in these diameters: reinforced concrete, standard cast iron, and fully bituminous-coated corrugated steel. Items 50 and 50A of the bidding schedule provides for furnishing riprap required for two of these options: reinforced concrete (R.C.), and corrugated metal (C.M.).

Sheet 3 of the detailed drawings included the following table in the information entitled "RIPRAP DETAILS AND NOTES:"

STA.	LAYER THICKNESS		D'		L'		AREA (S.Y.)	
	RCP	CMP	RCP	CMP	RCP	CMP	RCP	CMP
11+80	Type 1	–	12'	–	50'	–	206	–
18+14	Type 1	–	6'	–	25'	–	51	–
69+30	Type 2	Type 2A	12'	12'	53'	53'	227	227

In an effort to explain the relationship between the Corps' drawings, the Indiana pipe standards, and the way it bid on the bidding schedule, Avco submitted a letter to the contracting agency later in the day on which bids were opened. Part of the letter follows:

In our telephone conversation today about 2:00 P.M. we understand that perhaps our bid on the referenced project was non-responsive due to the way we bid and/or interpreted the requirements for bid Items 50 and 50A, stone protection. We must admit that at first, upon examining the unit price schedule, we did not understand what to bid and/or not bid on the three items listed. Upon examining the plans we thought that it was clear that in order to bid what was called for on the plans, we were obliged to bid as we did, i.e., riprap Type I and either riprap Type 2 or 2A. We cite as follows . . .

1. The schedule on plan sheet 3, above note "riprap details and notes," says:
   a. At station 11+80 there will be 206 sy of Type I riprap. This material and quantity are as noted on the plan view, sheet 7.
   b. At station 18+14 there will be 51 sy of Type I riprap. This material and quantity is noted on plan view sheet 7.
      1) When we found the above information we felt compelled to bid the 257 sy of Type I stone protection.
   c. At station 69+30 there will be 227 sy of riprap, and we presumed that depending on the type of pipe to be used, the material would be either Type 2 or 2A. We note that the plan sheet #8 calls for 227 sy of Type 2 riprap—but also it calls for 70' of 48" concrete pipe (which is consistent).
      1) Due to the above facts we felt compelled to bid 227 sy of either Type 2 or Type 2A and we chose type 2A.
      2) We note that the bid form calls for 48" pipe Group "A." The chart on Indiana State Highway Standard Sheet MP under "Pipe for Surface Drainage Group 'A'," states that 48" pipe may be concrete, structural plate steel, or fully bituminous coated corrugated steel. Since we thought we could furnish either concrete or steel pipe, we felt we were free to choose either Type 2 or 2A riprap to bid, but it seemed clear we must bid one or the other.

We hope the above clarifies our intent and understanding in this matter, and that you will agree there is logic in what we did. It does appear that 257 sy plus 227 sy of riprap will be installed on the job and there should be a unit price for the material. . . .

P&N is correct in asserting, and Avco concedes, that the Avco interpretation of the bidding requirements was not in accord with the stated intent of the Corps. The Corps states it intended that bidders select either item 50 (a and b) or 50A. The real choice here is among types of pipe to be supplied, with the type of riprap to be bid as a consequence of that choice; however, the bidding schedule creates the appearance that the primary choice concerns the riprap while obscuring the significance of the pipe. The potential for confusion is increased by the table on "RIPRAP DETAILS AND NOTES," quoted above, because either riprap is not provided there-

in for all permissible options of pipe or the table does not clearly indicate where riprap is unneeded. In addition, the bidding schedule makes no clear provision for bidders to bid on the basis of using a combination of concrete and metal pipe, even though such a combination is not precluded by the specifications and is in fact technically acceptable to the Corps. For these reasons, we are suggesting by separate letter that the Corps amend its bidding schedule, which has been in use since July 1, 1960.

The Corps maintains that although Avco was not entirely responsive on item 50, it was responsive on item 50A despite its mistaken bidding intention. Therefore, it proposes to delete $4,626 from the total price bid by Avco and to award it the contract, under the authority provided by Armed Services Procurement Regulation (ASPR) § 2-405 to waive minor informalities or irregularities which have no effect or "merely a trivial or negligible effect on price, quality, or delivery," where the relative standing of bidders would not be affected and where no other prejudice would accrue to other bidders.

Responsiveness of bids is to be determined from the face of the bid as submitted, without regard to post-opening explanations. While it is unclear from Avco's bid why a price was inserted next to item 50a, the bid makes no offer to supply Type 2 riprap required for reinforced concrete pipe at the third station shown on Table 3. By inserting prices for Items 50a and 50A, Avco's bid on its face indicates an intention to furnish reinforced concrete pipe with Type 1 riprap at the first two stations shown in the above table and corrugated metal pipe with Type 2A riprap at the third station. The protester states that Avco "intended to aggregate Item 50 and 50A by substituting Item 50A for Item 50b using 2A riprap rather than Type 2." The protester argues, and we agree, that such an intention would not have complied with the specifications. In our opinion, however, the intention or mistake attributed to Avco by the protester is not reasonably apparent from Avco's bid and appears to be a matter of conjecture by the protester.

Avco, however, has asserted after opening that it did not intend to furnish reinforced concrete pipe at the first two stations. Rather, it states it intended to furnish corrugated metal pipe at all three stations, using Type 1 riprap at the first two stations and Type 2A riprap at the third station. At worst, Avco's bid may be ambiguous, but under either our interpretation or Avco's explanation there is no question as to Avco's intention to furnish compliant pipe complete with any necessary riprap. This is because the specification neither restricts the use of a combination of metal and concrete pipe nor

requires riprap for the first two stations if metal pipe is installed. Thus, we conclude that under either interpretation Avco's bid may only be construed as responsive to the specification and, at worst, as offering to furnish unneeded riprap with metal pipe at the first two stations.

We have taken the position that where a bidder is required to bid on each of several alternatives, any one of which will meet the Government's needs, and where the bidder bids on some but not all of the options, the bid may still be responsive to those alternatives upon which a bid was actually submitted. 45 Comp. Gen. 682 (1966). Where an IFB does not provide for alternative bidding but a bidder nevertheless submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the Government is not precluded from accepting that option which will meet the IFB requirements. 33 Comp. Gen. 499 (1954). We believe, therefore, that it is clear that a bid may be responsive despite offering alternatives other than as permitted or required by the IFB.

Even though there may be uncertainty as to Avco's bidding intent as revealed solely by the bid submitted, we do not regard the ambiguity as fatal. Where under any reasonable construction of the bid submitted the low bidder is responsive, the bid will fully meet the needs of the Government, and the bid is lower than all others, we believe that the integrity of the competitive bidding system does not necessarily require rejection of the bid and award to the next low bidder. Here we cannot conclude that the defective bidding schedule was prejudicial to the protester. The difference between Avco's highest possible evaluated bid and the protester's bid is more than $24,000. Assuming that the protester would have been able to reduce its price by bidding a combination of metal and concrete pipe, with necessary riprap, it appears that a bid reduction in excess of $24,000 would not have been effected by the combination because the protester's original bid price for the pipe alone did not amount to $24,000 and the difference in the price of riprap is not sufficiently large to affect the bidding results.

For the reasons stated, we conclude that Avco's bid is responsive and may be accepted without prejudice to the protester. In addition, Avco's bid may be corrected downward by eliminating Item 50a because its bid, either as submitted or as corrected, is responsive and it is legally permissible to reduce a low responsive bid after bid opening. *Leitman* v. *U.S.*, 50 F.Supp. 218 (Ct. Cl. 1945).

Accordingly, the protest is denied.

[B-186737]

Bids—Qualified—Descriptive Literature—Unsolicited

A bidder's unsolicited descriptive data may not be disregarded where it appears that the bidder is offering the model described therein. Therefore, when such model does not comply with the Government's stated material requirements, the bid must be rejected as nonresponsive.

Contracts—Specifications—Qualified Products—Bid *v.* Invitation

Where invitation for bids called for item which required First Article testing only if item offered was not on qualified products list (QPL), bidder's notation in bid schedule that First Article testing was "not applicable," when read in conjunction with information contained in other portion of bid indicating that bidder's item was included on QPL, reasonably can be construed as bidder's offer to furnish QPL item.

In the matter of the Dominion Road Machinery Corporation, February 4, 1977:

This bid protest tests the responsiveness of the two lowest bids for the Government's road grader requirements under invitation for bids (IFB) DSA 700–76–B–1059, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio. Dominion Road Machinery Corporation (Dominion) is challenging DCSC's determination that Dominion's apparent low bid is nonresponsive to the solicitation because of the unsolicited descriptive literature contained in its bid. Moreover, Dominion asserts that the second low bid of Galion Manufacturing Division of Dresser Industries, Inc. (Galion) was not responsive for failing to offer First Article testing and, therefore, that firm should not be awarded the contract in the event Dominion's bid is ultimately found to be nonresponsive. For the following reasons, we concur in DCSC's finding that Dominion's bid was nonresponsive and that Galion's bid also was responsive to the solicitation.

Dominion's Bid

DCSC found Dominion's bid to be nonresponsive, because Dominion's inclusion of unsolicited information in its bid created an ambiguity as to whether Dominion was offering to meet the solicitation's requirements. Dominion contends that DCSC erred in considering the unsolicited information as a qualification of the bid and asserts that such information should have been disregarded. Before considering the legal merits of Dominion's arguments, it is necessary to review the factual circumstances wherein Dominion's bid was received and evaluated.

The solicitation requested bids to supply a quantity of motorized road graders meeting Federal Specification 00–G–630D dated February 16, 1970, as amended. The solicitation did not request that bidders quote a particular item, although it did give bidders the option of

indicating that they manufactured an article qualified to the applicable specification in order to show the bidders' eligibility for an "exemption from" (as distinguished from a "waiver of") First Article testing. In any event, bidders were only required to submit a price in order to be responsive. The Alternate Offers clause of the IFB stated that:

> When supplies are described by specifications and/or drawings, alternate offers in response to advertised solicitations will not be considered. Nevertheless, any reference by offerors to model or part number will be assumed to mean that the supplies so referenced conform to specifications or will be modified to conform, unless it is clear from the offer or accompanying papers that an alternate offer is intended. Supplies delivered under any resultant contract must conform to the specifications and/or drawings.

Instead of merely indicating its prices in the appropriate spaces on the Schedules, Dominion included the following information in its bid package:

(1) A letter dated April 22, 1976 stating in pertinent part as follows:

> We wish to thank you for your inquiry, DSA700-76-B-1059, and are pleased to make the attached quotes. Also enclosed you will please find specifications on our Champion D-715 Motor Grader.

(2) Attached quotes for each contract line item consisting of motor graders, of which page 1 is an example:

Quantity
7 Item #0001 Our Champion D-715 Motor Grader B-02

This includes:	*Code No.*
Exhaust Extension	M11
Clark, 4 Speed Transmission	N08
13:00 x 24-2 ply tires	R02

[28 other features also were listed, most of which had a code number. Listings for other line items were similar.]

Total—$31,118.70 each
Delivery: 90-120 Days
Freight: To New York, NY, add $522.00 each

(3) Two pages of detailed "specifications" for the Champion D-715 motor grader.

When bids were opened, the contracting officer could determine from Dominion's bid (1) that it was offering its model D-715 B-02 motor grader, and (2) the specifications for the D-715 motor grader. The record indicates that pursuant to a protest lodged by Galion, and based on the buyer's own reservations, the contracting officer requested a legal review as to Dominion's responsiveness. It was counsel's view, *inter alia*, that references to model D-715 in Dominion's bid should be disregarded under the Alternate Offers clause of the solicitation, quoted above. Nevertheless, counsel recommended that questioned portions of Dominion's bid be clarified. Upon receipt of Dominion's unequivocal offer to meet the solicitation's requirements, the contracting officer notified Galion that its protest was denied. Galion protested to

this Office. Dominion then replied to the specific allegations raised in Galion's protest.

Dominion's reply prompted a further inquiry of Dominion from the contracting officer, because Dominion had not replied to several allegations made by Galion which seemed to indicate that the model numbers inserted in Dominion's bid, along with the specification sheet, differed from the specifications. After receiving Dominion's reply, the contracting officer contacted the using activity to reconcile the apparent conflict between Dominion's explanation of its bid and the solicitation's requirements. In the opinion of the contracting officer, the using activity could not reconcile the discrepancies. Subsequently, the contracting officer, in his final report, made the following determination regarding Dominion's bid:

> 12. After reviewing Dominion's bid, including the specification sheet for Model No. D–715 attached thereto, in light of the specific questions raised by Galion's letter of 30 June 1976, together with Dominion's response to these questions, the undersigned has concluded that Dominion's bid *as originally submitted* is nonresponsive for the following reasons:
>
> a. The specification sheet for Model D–715 cannot be disregarded under ASPR § 2–202.5(f) and must be considered in determining the responsiveness of Dominion's bid * * *.
>
> b. The specification sheet for Model D–715 indicates that service brakes will be mounted on two driving wheels. The specification sheet is thus in direct conflict with paragraph 3.13.1 of Federal Specification 00–G–630D which requires that wheel mounted brakes be mounted on all four tandem wheels * * *.
>
> c. Although Item (6) on page 22 of the invitation requires that CLIN [contract line item] 0002 be equipped with an engine coolant defroster, Dominion's bid on CLIN 0002 expressly refers to Code No. S15 which is an electric defroster and thus directly conflicts with the requirement for an engine coolant defroster for CLIN 0002.
>
> d. Although Dominion's bid specified a Clark 4-speed transmission for each CLIN, Dominion now proposes to use a Clark 6-speed transmission because the 4-speed transmission will not perform satisfactorily.
>
> e. Notwithstanding Clause C10 [Alternate Offers] of the invitation, the references in Dominion's bid to a basic tool kit and Code No. U15 create an ambiguity with respect to its obligation to comply with the requirements of paragraph 3.22 of Federal Specification 00–G–630D * * *.
>
> f. The reference in Dominion's bid to shop manuals and maintenance manuals (and Code Nos. U10 and U11) and to a one year warranty create an ambiguity in regard to its undertaking to comply with the requirements of CLINs 0005 and 0010 and clause L17 * * *.

On the basis of the above, the contracting officer proposed to award the contract to Galion. At that point Dominion protested.

Upon further consideration, the contracting officer has concluded that Dominion's bid was responsive regarding the one-year warranty and the transmission offered. All other matters remain at issue.

We agree with the contracting officer that the most important issue with regard to the responsiveness of Dominion's bid is the effect of the inclusion of the specification sheet for D–715 motor graders with the bid. DCSC and Dominion agree that the specification sheet's effect on the bid is governed by Armed Services Procurement Regulation (ASPR) § 2–202.5(f) (1975). That section states:

(f) *Unsolicited Descriptive Literature.* If the furnishing of descriptive literature is not required by the invitation for bids, but such literature is furnished with a bid, it will not be considered as qualifying the bid, and it will be disregarded, unless it is clear from the bid or accompanying papers that it is the bidder's intention to qualify the bid.

DCSC relies, in part, on our decision 49 Comp. Gen. 851 (1970), as it modified B–169057, April 23, 1970. For the following reasons, we believe that reliance is well placed.

In B–169057, *supra*, the bidder, although enclosing brochures covering a number of models of mechanical presses manufactured by it, did not specify any particular model as meeting the solicitation's requirements. There were no cross-references between the brochures and the bid. In short, the only relationship the brochures had to the bid was their both being in the bid package. We distinguished an earlier case, B–167584, October 3, 1969, wherein the enclosed descriptive literature contained item-by-item descriptions of the specific items solicited in the specification. In B–167584 we held that the bid must be considered nonresponsive where the unsolicited material accompanying and referenced to the bid contained deviations from the specifications. Since there was no perceivable intended relationship between the unsolicited brochures and the bid in B–169057, we concluded that the brochures should not have been considered as qualifying the low bid and should have been disregarded in accordance with ASPR § 2–202.5(f).

Both the procuring agency and the next low bidder requested reconsideration of B–169057, *supra*, and indicated that the case appeared to be at variance with our previous cases holding that the intent of the bid must be determined from all material included in the bid package, e.g., unsolicited material. The request focused this Office's attention on the fact that ASPR § 2–202.5(f) precluded the contracting officer from considering factually conflicting unsolicited literature as rendering a bid ambiguous regarding the bidder's intent to conform to the solicitation. In reconciling B–169057 with our prior decisions, we stated in 49 Comp. Gen. 851 at 852 that:

* * * If the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid or if inclusion of the literature creates an ambiguity as to what the bidder intended to offer, then the bid must be rejected as nonresponsive to the invitation for bids. See B–166284, April 14, 1969, May 21, 1969, and B–167584, October 3, 1969. As we stated in B–166284, April 14, 1969:

"The crux of the matter is the intent of the offeror and anything short of a clear intention to conform on the face of the bid requires rejection.

* * * * * * *

"When more than one possible interpretation may reasonably be reached from the terms of a bid a bidder may not be permitted to explain the actual meaning or bid intended since this would afford the bidder the opportunity to alter the responsiveness of his bid by extraneous material."

Award of a contract pursuant to formal advertising may be made under 10 U.S.C. 2305(c) only to the low responsible bidder whose bid conforms to the invitation. We do not believe that statutory requirement may be negated by a regulatory provision, such as Armed Services Procurement Regulation 2–202.5(f),

which presumes a bid to conform or be unqualified where the intent of the bidder is ambiguous. Cf. B–166284, May 21, 1969. Nor do we believe that the invitation for bids may establish any arbitrary conventions which provide that the clear language of the bid will be ignored unless presented in a particular form.

On page three of our prior decision we stated:

"It is our view that the voluntary furnishing of literature with a bid, with nothing to evidence an intent to qualify the bid or to deviate from the advertised specifications, does not render such a bid nonresponsive."

On page four we stated:

"We believe therefore that the brochure submitted by Wayne with its bid should not be considered as qualifying its bid, and should be disregarded in accordance with the provision of ASPR 2–202.5(f)."

These statements were premised upon our conclusion, as set forth on page three of the decision preceding the first statement, that we did not believe Wayne's bid was qualified or ambiguous even taking into consideration the unsolicited brochure. The statements should not be construed to stand for the proposition that the unsolicited brochure may simply be disregarded and to the extent that such an impression is conveyed by statements in B–169057, April 23, 1970, that decision is modified.

In view of the cases cited above, the question to be decided is whether the inclusion of the literature can be reasonably said either to qualify Dominion's bid or to create an ambiguity as to what the bidder intended to offer. As Dominion notes, the bid clearly indicated Dominion's intent to supply its D–715 B–02 motor grader. If we concede that without more, the included model number should be disregarded in evaluating Dominion's bid pursuant to the "Alternate Offers" clause (*contra*, 50 Comp. Gen. 8 (1970); *Huey Paper and Material, Stacor Corporation*, B–185762, June 16, 1976, 76–1 CPD 382), nevertheless, we must conclude that the specification sheet headed by "D–715 Motor Grader" and containing, *inter alia*, "D–715 Specifications" could reasonably have been interpreted as being intended to describe the motor grader offered by Dominion.

Dominion's literature, being reasonably considered to be part of the bid, is subject to close scrutiny in order to determine whether the bid contained deviations from the solicitation. See *E. C. Campbell, Inc.*, B–185611, March 4, 1976, 76–1 CPD 155. DCSC's examination of the D–715 specifications indicated that the D–715 motor grader is equipped with hydraulic brakes on only two wheels, instead of four wheels as required and was, therefore, materially nonresponsive. Accordingly, Dominion's bid was properly rejected, because the face of the bid did not indicate Dominion's unequivocal offer to provide the requested items in total conformance with the specification requirements of the solicitation. *E. C. Campbell, Inc., supra.*

Galion's Bid

Dominion contends that Galion's insertion of "N/A" adjacent to Items 0004 and 0009 of the Schedule renders Galion's bid nonresponsive. Each of these items states that it:

* * * identifies the first article test requirement incorporated by provisions C27 and C27a of the solicitation. The quantity 1 TE (TEST) signifies the test

requirement. See para. (a) of the first referenced provision for the number of units to be tested. This is not an additional quantity of supplies being procured (See para. (e) of the same provision). Offeror will enter the total price for this requirement or "no charge" in the "amount" column. If neither is indicated, the Government will assume the requirement is offered on a "no charge" basis. In the event the first article test and approval requirement are waived, an award will not be made for CLIN[s] 0004 [and 0009].

Amendment 0002 dated April 2, 1976, modified provision C27 and C27a to the effect that they were to be included in the contract:

* * * only if unqualified graders *furnished.* [Italic supplied.]

Finally, Section F of the solicitation modified the specifications regarding unqualified graders as follows:

3.2.2 *Unqualified Graders.* Delete [the requirement that graders furnished have passed certain qualification tests] and substitute: "If unqualified graders are furnished they shall be tested in accordance with the following requirements: *First Article.*"

When read in the context of the solicitation, the above quoted portions of the specifications indicate that (1) graders furnished which are qualified under the applicable Qualified Products List (QPL) are exempt from First Article testing; (2) graders furnished which are not listed under the QPL may be tested under the First Article test criteria; and (3) a responsive grader need not be one which is qualified under the QPL. We might again mention that the solicitation did not require a bidder to offer any particular model of grader. Also, as we mentioned before, bidders were given the opportunity in clause B11 to indicate whether they manufactured a QPL qualified item. Thus, under the terms of the solicitation, bidders have the option of furnishing any item they manufacture so long as it meets the specification requirements and either passes First Article testing or is listed in the QPL.

DCSC and Galion contend, in effect, that Galion has offered to furnish a QPL item, thereby eliminating its option. That position is taken in reliance on the effect of Galion's insertion of the following information appearing in Section B (Contract Form and Representations, Certifications, and other Statements of Offeror), clause B11 (Qualified End Products):

ITEM NAME *GRADER, Mtzd. 6x4 DED*
TEST No. *AMSME-RZK-KM-16 Columbus, Ohio.* w/Rev. April/1971

Galion and DCSC contend that the above information refers to a QPL grader and that, irrespective of any condition in Galion's bid regarding its offer to supply First Article testing, any such testing would be inapplicable to Galion. While clause B11 was not used in its usual role of identifying the item and test number where end items purchased are "required to be qualified products" (See ASPR §§ 7-2003.6, 1-1107.2 (a)) by the solicitation, we believe that the information included therein, when read in conjunction with Galion's statement that First Article

testing was "Not Applicable" to its offer to comply with the specifications, reasonably can be construed as Galion's offer to furnish a QPL grader. Accordingly, we will not object to an award to Galion.

[B-185655]

Contracts—Increased Costs—Taxes—Federal Excise Taxes

No basis is seen to reform contract to reimburse contractor for general and administrative expense and profit applicable to amount of Federal Excise Tax (FET) contractor was required to pay during performance of contract. Contract's taxes clause provided that if written ruling took effect after contract date resulting in contractor being required to pay FET, contract price would be increased by amount of FET—and this is what in fact occurred. Therefore, issue presented does not involve reformation, but whether contractor has valid claim under terms of contract as written.

General Accounting Office—Jurisdiction—Contracts—Disputes

Contractor's claim which normally would be resolved through appeal to Armed Services Board of Contract Appeals (ASBCA) under contract disputes clause is properly for consideration if contractor elects to submit claim to General Accounting Office in lieu of pursuing appeal to ASBCA, and no material facts are disputed.

Contracts—Clauses—Interpretation

Claim involving question of law as to contractor's entitlement to general and administrative expenses and profit on amount of FET paid during contract performance is denied. Invitation for bids' statement that FET was inapplicable is not viewed as negating effectiveness of contract's taxes clause (Armed Services Procurement Regulation 7-103.10(a)), and where contract is specific as to price adjustment for changes in tax circumstances, adjustment is to be made as parties specifically provided for. Contract's changes clause appears inapplicable and no reason is seen why taxes clause provides basis for recovery of costs and profit claimed.

In the matter of the Consolidated Diesel Electric Company, February 7, 1977:

This decision involves a claim filed with our Office by Consolidated Diesel Electric Company (CDEC), a Division of Condec Corporation, in connection with its contract No. DAAE07-74-C-0134 with the United States Army Tank-Automotive Command. The claim is for general and administrative (G&A) expenses and profit on an amount which CDEC states it would have included in its bid to cover Federal Excise Tax (FET), but for the Army's misrepresentation in the invitation for bids (IFB) that FET was inapplicable.

CDEC contends that the Army has made an erroneous reformation of the contract (price increased to cover only the amount of FET) and that our Office should now correct this situation by properly reforming the contract (to include G&A and profit applicable to the FET). The Army believes that the controversy in no way involves reformation, but rather is a dispute under the contract, and should

be resolved by the Armed Services Board of Contract Appeals, where CDEC's appeal is now pending (ASBCA No. 20819). CDEC responds that the contracting officer has improperly attempted to dictate the choice of a forum by issuing a final decision under the contract disputes clause, that it appealed to the ASBCA only as a protective measure, and that our Office can and should decide its claim.

The Army's April 30, 1976, report to our Office contains the following factual summary:

> * * * The subject multi-year contract (Tab 1, R4) was awarded to claimant on 18 March 1974 for 510 60 ton, lowbed, heavy equipment transporter semitrailers. The semitrailers had been previously purchased by the Army Tank-Automotive Command exclusive of Federal Excise Tax (except for tires), and such tax was not paid. Another contract was awarded to another contractor in June 1973 for the M746 Truck Tractor (which is used to pull the subject semitrailer) exclusive of FET. The subject contract also provided that FET did not apply to the semitrailer, but that it did apply to the tires and the bid would include any applicable FET on the tires. The contract included the Federal, State and Local Taxes Clause, which provides in part that "with respect to any Federal Excise Tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling or regulation takes effect after the date, and—(1) results in the contractor being required to pay or bear the burden of any such Federal Excise Tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase."
>
> After contract award, the Contracting Officer requested that claimant obtain a ruling from the Internal Revenue Service so as to confirm the Army's position that FET was not applicable to the semitrailer. Claimant requested a ruling, and IRS issued a written ruling which stated that sales of the semitrailer were considered to be subject to the Federal Excise Tax. Subsequently, the Contracting Officer increased the contract price by contract modification (under the provisions of the Federal, State and Local Taxes Clause) by the amount of the additional FET imposed after contract award, and issued a final decision that claimant was not entitled to any further recovery.

CDEC cites B–159066, May 6, 1966, where an invitation for bids stated that contractors' purchases for the Federal Government were exempt from a State tax. After the IFB was issued and before award was made, a statutory amendment made the tax applicable, but the IFB was not amended to reflect this. In this and in other similar cases (B–153472, December 2, 1965; B–159064, May 11, 1966; B–169959, August 3, 1970; *Rust Engineering Company*, B–180071, February 25, 1974, 74–1 CPD 101) our Office allowed reformation of the contracts to reimburse the taxes payable for the reason that the Government's misrepresentation of tax inapplicability was reasonably relied on by the contractor to its detriment. As stated in *Rust Engineering Company, supra:*

> Reformation is properly available in cases where an innocent misrepresentation of the law by one party is reasonably relied upon by the other party to its detriment, and restitution may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, although innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See 3 CORBIN ON CONTRACTS § 618 (1960 ed.); 12 WILLISTON ON CONTRACTS §§ 1500, 1509 (3d ed. 1970).

Further, in B-159066, February 12, 1969, we considered the contractor's claim for a markup or handling charges incident to the payment of the State tax involved in B-159066, May 6, 1966, *supra*. The contractor asserted that had it been aware of the applicability, it would have treated the tax as any other projected contract cost and would have added standard percentages for overhead and profit to the amount of the actual estimated tax liability in computing its bid price. Our decision agreed with the contractor. "* * * [T]he end sought by reformation is to regard the contract as expressing the agreement which would have been reached by the parties absent the misrepresentation. * * * In this regard, there seems to be no question but that a bidder aware of the applicability of a state tax would have included profit and overhead in addition to the anticipated amount of the tax in calculating his bid price." Our decision noted that the contract's "Federal, State, and Local Taxes" clause was not controlling because it dealt with changes in applicable Federal taxes taking effect after the contract date—rather than with the amount of a contract price adjustment allowable as a result of reformation.

In the present case, we find no basis for reformation of the contract. The contracting parties specifically agreed in the clause entitled FEDERAL, STATE, and LOCAL TAXES (1971 Nov.) (see ASPR 7-103.10(a) (1973 ed.)) that if a "written ruling" took effect after the contract date which resulted in the contractor being required to pay FET, the contract price would be increased by the amount of such tax. This is exactly what occurred. Most of the above-cited decisions of our Office involved the applicability of State taxes which were not reimbursable under the contract clauses involved. The only one dealing with FET is B-159064, and that decision did not involve a situation where, as here, a written ruling took effect after the contract date which changed the applicability of the tax.

Aside from the question of reformation, CDEC suggests that even if its claim involves a dispute under the contract (as the Army maintains), the claim is appropriately for consideration by our Office because only a question of law is involved. Considering the matter on this basis presumably would require a decision on whether, as CDEC contends, it is entitled to an equitable adjustment under the contract's changes clause, or whether, as the Army believes, the Federal, State and Local Taxes clause is the only operative provision and that reimbursement thereunder is limited to the amount of FET.

Since the decision of the United States Supreme Court in *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972), the role of our Office in considering matters which are normally for resolution under the disputes clause has been limited. As the Army points out, we have declined on a number of occasions to consider contractors' requests

for decisions regarding matters of this type. These include cases where the contracting officer has not rendered a final decision pursuant to the disputes procedure (for example, *E. P. Reid, Inc.*, B-183172, March 7, 1975, 75-1 CPD 141), and also cases where the subject matter of the request is involved in a court action or is before a board of contract appeals (*Delta Electric Construction Company*, B-182820, March 28, 1975, 75-1 CPD 188). Also, decisions on disputes rendered by the boards of contract appeals either in favor of or adverse to contractors are final and conclusive and not subject to review by our Office absent fraud or bad faith. 52 Comp. Gen. 63 (1972); *cf.* 52 *id.* 196 (1972). Compare 53 Comp. Gen. 167 (1973), where we did consider a question of law as to whether a contract had come into existence although the contractor's appeal involving the same matter was then before the ASBCA, and also *Robert P. Maier, Inc.*, 55 Comp. Gen. 833, 836 (1976), 76-1 CPD 137.

We do not believe that *S&E Contractors* precludes our Office from considering a contractor's claim where the contractor elects to submit the matter here in lieu of pursuing an appeal to the board of contract appeals, and none of the material facts are disputed. Further, in the present case CDEC has offered to withdraw its appeal to the ASBCA, with prejudice, if our Office agrees to consider its claim. Also, we note that the ASBCA has stated that it will refuse to decide the merits of a claim which has been decided by our Office at the request of or with the acquiescence of the contractor. See *Urban Systems Development*, ASBCA No. 18399, 74-2 BCA § 10,867; *So-Sew Styles Inc.*, ASBCA No. 15476, 71-1 BCA § 8844. Accordingly, we believe it is appropriate to consider CDEC's claim, if no material facts are disputed. Disputed facts would, of course, have to be resolved pursuant to the disputes clause.

While CDEC asserts that only a question of law is involved here, the Army has raised a question as to whether some material facts might be disputed. In connection with CDEC's appeal to the ASBCA, the Army disagreed with several points in a stipulation of facts proposed by CDEC, and submitted its own proposed stipulation of facts. We have examined these materials, and believe there is no genuine dispute as to any of the material facts in this case. Also, we note that CDEC has stated that it is willing to have is claim decided based upon the factual summary, quoted *supra*, in the Army's April 30, 1976, report.

The only theory advanced by CDEC in support of its claim is that it is entitled to an equitable adjustment under the contract's changes clause. The Army, on the other hand, maintains that the taxes clause is the only pertinent contractual provision. The Army believes that the taxes clause is clear and unambiguous, and that it sets out the

complete relief a contractor is entitled to where, as here, the amount of FET payable is increased by a written ruling that takes effect after the contract date. The Army cites 49 Comp. Gen. 782 (1970) as supporting the principle that contract price adjustments for changes in tax circumstances should be made as specifically provided for in the contract, and notes that in the decision, our Office stated that the nonapplicability of a State tax did not involve a change within the meaning of the contract's changes clause.

CDEC attempts to distinguish 49 Comp. Gen. 782 on a number of grounds, the essential one being that the decision did not involve the threshold question of whether the taxes clause was applicable at all. In the present case, CDEC contends that the taxes clause was not applicable at the time of bidding because the Government said it was not—i.e., because the Army had stated in the IFB that FET was not applicable to the semitrailers. In this connection, CDEC contends that it was not the IRS written ruling which required payment of the tax, but rather the pre-existing law.

We are unable to see how the IFB's statement that FET is inapplicable operated to negate the effectiveness of the contract's taxes clause. The two provisions are not necessarily inconsistent. Initially, the statement that FET is inapplicable could be taken simply as an indication of the Army's belief at the time the IFB was issued. Also, the taxes clause itself may be taken to impute to a bidder knowledge of the possible applicability of FET. See B–171668, February 17, 1971. Further, the pertinent question is not necessarily the point in time when a contractor becomes obligated in an abstract legal sense to pay a tax, but whether some event has occurred within the meaning of the terms of the contract which affects the parties' rights and responsibilities. See the discussion in 27 Comp. Gen. 767 (1948) as to when a tax was "imposed" within the meaning of the contract clause there involved. In the present case, the relevant event was the issuance of the IRS written ruling.

Further, we agree with the Army that, as a general proposition, where the parties' agreement specifically provides for a contract price adjustment for certain changes in tax circumstances, adjustments are to be made in the manner and to the extent the parties specifically provided for. See 49 Comp. Gen., *supra; Lutz Superdyne, Inc.*, B-181867, September 4, 1974, 74–2 CPD 144; *Teledyne Continental Motors*, B–182062, April 25, 1975, 75–1 CPD 259. In any event, we do not perceive in what sense any "change" occurred in this case, since the pertinent contract clause (CHANGES (1958 JAN.), ASPR 7–103.2 (1973 ed.)), makes reference to a written order issued by the contracting officer which changes (within the general scope of the contract) drawings, designs, or specifications, method of ship-

ment or packing, or place of delivery. Compare *Fontaine Truck Equipment Company, Inc.*, ASBCA No. 1690 (1954), 6 CCF § 61,517, where the contractor's bid had excluded FET on materials which were to be exported, a change order was issued calling for domestic delivery, and the Board held that the contractor was entitled to an equitable adjustment for the cost of FET because of the change in the place of delivery.

As far as the taxes clause itself is concerned, we note in *Morrison-Knudsen Company* v. *United States*, 427 F. 2d 1181 (Ct. Cl. 1970), that a very similar taxes clause was to be given a liberal interpretation once it was clear that FET was involved. However, we find nothing in that decision, nor are we aware of other authority, which would support the result that a contractor in CDEC's circumstances could be entitled to an adjustment under the taxes clause not only for the amount of the tax but also for the applicable G&A and profit had the amount of the tax been included in its bid.

In view of the foregoing, we do not believe the contractor has presented any legal basis which would establish the liability of the United States. Accordingly, the claim is denied.

[B-187076]

Travel Expenses—Temporary Duty—Assignment Interrupted—Return Expenses, etc.—Illness or Death in Family

Employee who returned to duty station to attend funeral of mother alleges that mission was substantially completed before return and second trip was for different purpose. Claim for travel expenses may be paid if agency determines that mission was substantially completed or second trip was for different objective.

In the matter of Raymond Eluhow—travel expenses in connection with funeral, February 8, 1977:

By letter dated July 23, 1976, Mrs. Dolores T. Hodges, an authorized certifying officer of the Department of Housing and Urban Development, requested an advance decision regarding the propriety of certifying for payment the reclaim voucher of Mr. Raymond Eluhow for the cost of air travel from Las Vegas, Nevada, to Washington, D.C., and return. The claim was previously administratively disallowed on the basis of decision 45 Comp. Gen. 299 (1965), which states that travel in connection with the illness or death of a member of the employee's family is personal travel and cannot be reimbursed. The record shows that the employee returned to his duty station to attend the funeral of his mother.

In submitting his reclaim the employee states that his work schedule contains no prescribed period of travel but instead involves con-

tinuous travel as is deemed necessary in the conduct of various investigations. He further states that he frequently returns to his duty station for processing the raw material from said investigations. In addition, he alleges that his work was substantially completed at the time of his return to his duty station and that the second trip involved an unrelated matter.

In support of his reclaim the employee cites our decisions B–164875, August 21, 1968, and B–175511, April 25, 1972. Both of these decisions involve exceptions to the general rule stated in 45 Comp. Gen. 299, *supra*, which precludes reimbursement for travel incident to the death or illness of a family member. In B–164875, *supra*, the temporary duty travel was performed for the purpose of accomplishing two separate and distinct objectives. In B–175511, *supra*, the return travel was accomplished after the employee had "substantially completed" his mission. In the first case we held that reimbursement could be made upon a proper administrative determination that the employee would have performed travel to accomplish one of the two separate objectives. In the second case we permitted reimbursement upon an administrative determination that the employee had substantially completed his mission.

In the instant case it appears that the employee may qualify for reimbursement under either the exception stated in B–164875, *supra*, or the exception stated in B–175511, *supra*. Accordingly, if it is administratively determined that Mr. Eluhow qualified for either of the exceptions mentioned above, no objection will be raised by this Office to certification for payment of the claim.

[B–187231]

Bids—Qualified—All or None—Bid Nonresponsive

Where invitation permits multiple awards and does not prohibit "all or none" bids, insertion of "INCL" and asterisks next to various schedule line items in lieu of specific unit prices may be reasonably construed as evidencing bidder's intent not to charge for those items and in effect was tantamount to an "all or none" bid for those items for which prices were quoted.

Bids—Invitation for Bids—Requirements—Allegation of Ambiguity

Notwithstanding protester's contention that invitation for bids did not clearly state agency's requirement for line item, causing protester to submit bid based on supplying duplicate set of item where agency required only single set, award to low bidder is not subject to objection where bid prices reveal that protester would not have been low bidder in any event.

In the matter of General Kinetics, Inc., February 8, 1977:

General Kinetics, Inc. (GKI) protests the proposed award of a contract to Enclosure Corporation (Enclosure) or to either of the

two other lower bidders under invitation for bids (IFB) 5-87372/070, issued by the National Aeronautics and Space Administration's (NASA's) Goddard Space Flight Center, Greenbelt, Maryland. The IFB solicited bids for eight separate line items, including specified quantities of electronic equipment racks and rack consoles. Essentially, GKI contends that the three lower bids were nonresponsive for failing to provide separate unit and total prices for each of the eight line items and that award should be made to GKI as the low responsive bidder. GKI argues that the variety of bid notations utilized by the bidders in lieu of specific prices created substantial doubt as to what was being bid upon and what items the bidders would be obligated to furnish. However, for purposes of deciding GKI's protest, we need only discuss the bid submitted by Enclosure.

The IFB's "Solicitation Instructions and Conditions" called for both unit and extended (total) prices for each of the contract line items and further advised bidders that "in addition to other factors, offers will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple award) * * * and individual awards will be for the items and combination of items which result in the lowest aggregate price to the Government * * *." For this purpose, space was provided next to each of the line items for bidders to insert their proposed unit price and to enter a total price for the particular item.

In accordance with the solicitation instructions, Enclosure listed a unit price and computed its total price for contract line Items 1 and 2 (racks and rack consoles). With respect to the remaining items, Enclosure inserted the notation "INCL" in the spaces provided on the bid form for unit prices for Item 3 (manufacturing drawings), Item 4c (resistance test), Items 5, 6, and 7 (related hardware kits), and Item 8 (replacement parts list). As for the remainder of Item 4, namely 4a and 4b, the shock and vibration tests, Enclosure placed an asterisk ("*") in the spaces provided for the test's unit prices, as well as directly beside the IFB's "Note" inserted in regard to those items advising bidders that shock and vibration test data on similar mechanically constructed racks could be submitted in lieu of data compiled from the actual testing of a sample rack being offered for the instant procurement.

NASA interpreted Enclosure's insertion of the notation "INCL" to mean that Enclosure intended the price of the related hardware kits, manufacturing drawings, resistance test, and replacement parts list to be included in the base price of the racks and rack consoles (Items 1 and 2). NASA states that "INCL" is a common abbreviation for the word "included," and believes its interpretation to be the only reasonable conclusion that can be reached from reading Enclosure's bid,

especially in view of the direct relationship of those items to the racks and rack consoles. Similarly, it is NASA's position that the asterisks inserted in Enclosure's bid, when read in conjunction with each other and the IFB's "Note," indicate Enclosure's intent to furnish the requested shock and resistance test data from data generated by the previous testing of a similar manufactured rack in accordance with the instruction printed on the bid form and at "no charge" to the Government. NASA asserts that the election by Enclosure to compute the price of the various hardware kits, resistance tests, and parts list, into its prices for the racks and rack consoles was tantamount to its submission of an "all or none" bid, which was an acceptable method of bidding under this invitation.

GKI, on the other hand, argues that the IFB clearly required a unit price per contract line item and the absence thereof in Enclosure's bid thwarted the intent of the IFB's multiple award provision. Specifically, GKI asserts that Enclosure's intention of the notation "INCL" and the asterisk symbol throughout its bid in lieu of quoting distinct unit prices for each of the line items precluded NASA from properly evaluating the bid for each line item or combination of line items, thereby preventing NASA from determining which items or combinations thereof would result in the lowest aggregate price to the Government. Moreover, GKI asserts that a substantial ambiguity is created, in that NASA cannot determine with any degree of certainty under which of the two items (or both) bid upon Enclosure intended the price of the remaining items to be included, or whether the notation "INCL" simply meant that the items themselves were physically included in the racks and rack consoles themselves, and therefore no bid price was necessary. GKI also states that Enclosure's "liberally sprinkled asterisks" surrounding contract line Item 4, without further explanation, cloud its intent with regard to the tests covered by that item and further render the bid ambiguous.

Furthermore, GKI notes that the specification referenced by line Items 1 and 2 describes those items as physically incorporating supporting hardware kits. GKI contends that the IFB, by requesting the quotation of separate unit prices for hardware kits (Items 5 through 7), is in effect requiring bidders to supply an additional (duplicate) set of hardware kits along with the kits that are to be attached to the racks and rack consoles being procured as Items 1 and 2. Consequently, it is GKI's position that while Enclosure would supply the hardware kits as part of its obligation to furnish the racks and rack consoles, the bidder has not indicated any intent to furnish the additional hardware kits specifically required of bidders by line Items 5 through 7. Thus, GKI asserts that the Government would have no assurance that,

if awarded the contract, Enclosure would contractually be bound to deliver all the equipment, specifically, the second set of hardware kits.

Addressing first the issue of Enclosure's failure to quote a separate bid price for each of the listed line items, it is our view that Enclosure's insertion of bid prices opposite the first two items accompanied by the nomenclature indicated above for the remaining line items was tantamount to an "all or none" bid. It is our opinion that NASA reasonably determined that Enclosure's insertion of the letters "INCL" in the unit price column of its bid beside line Items 3 through 8 in lieu of distinct prices evidenced its intent not to separately charge the Government for those items if awarded a contract for the racks and rack consoles. We take this position on the basis that "INCL" is a common abbreviation for the word "included" and in view of the admitted close supporting relationship and connection of the final six line items to the equipment racks and rack consoles. NASA's interpretation of that notation in the context of the instant solicitation was reasonable.

In this regard, our Office has recognized that a bidder's intention to furnish an item at no cost to the Government may be expressed in various ways, such as the insertion in the bid schedule of the symbol "O," 40 Comp. Gen. 321 (1960), or of dashes. *Dyneteria, Inc., et al.*, 54 Comp. Gen. 345 (1974), 74–2 CPD 260. In 48 Comp. Gen. 757 (1969), at page 762, we enunciated these guidelines for evaluating whether a bidder intends to furnish an item at no charge:

> * * * First, the bidder was aware of the necessity to insert *something* next to the item; in other words, the bidder had not overlooked the item. Second, after considering the matter, the bidder decided *not* to insert a price for the item. The affirmative corollary is that the bidder obligated itself to furnish the data without cost to the Government. Therefore, where there is no explicit indication that the data was to be supplied at no cost, the bidder's intent to do so was clear and the failure to state this intent in a more positive fashion did not render the bid nonresponsive * * *.

Although we have previously held, as indicated by the cases cited by GKI, that a bidder's insertion of the words "No Bid" (*James W. Boyer Company*, B–187539, November 17, 1976, 76–2 CPD 433), "Does Not Apply" (*Ingersoll-Rand Co.*, B–183682, August 13, 1975, 75–2 CPD 107), or other language (*Rix Industries*, B–184603, March 31, 1976, 76–1 CPD 210) next to certain line items rendered the respective bids susceptible of two reasonable interpretations and thus ambiguous, despite each bidder's post-bid opening explanation or assertion that "No Charge" was intended, we are not persuaded that the import of such cases governs this particular situation. Rather, we believe that the only reasonable conclusion to be drawn is that the total price bid by Enclosure for Items 1 and 2 is intended to encompass the bid price of the remaining items.

Furthermore, we believe the same reasoning holds true for asterisks employed by Enclosure to indicate to NASA that it intended to furnish data resulting from the tests of a similar manufactured rack. While this could have been made clearer through the use of some other language or notation, the asterisks served their intended purpose of putting the Government on notice that Enclosure intended to avail itself of the opportunity provided by the IFB's "Note" to submit previous data. It certainly was within the bidder's discretion to provide the data at no additional cost to NASA, and implicit in this election was the risk that such data would not meet the IFB's requirements. Thus, we believe the asterisks served their intended purpose of advising NASA of Enclosure's election to furnish data accumulated on similar racks at no charge to the Government and did not render the bid ambiguous. Moreover, since NASA has determined Enclosure's previously generated data to be satisfactory, we need not decide whether Enclosure has agreed, by its bid, to conduct shock and vibration tests to demonstrate compliance with the specifications at no cost to the Government if the prior data were not satisfactory.

Since the IFB did not preclude "all or none" bids and bidders were advised that award would be made to the bidder submitting the most advantageous bid, GKI was on notice that award might be made to a bidder submitting an "all or none" bid. Where, as here, an invitation permits multiple awards and does not prohibit "all or none" bids, an "all or none" bid lower in the aggregate than any combination of individual bids may be accepted even though a partial award could be made at a lower unit cost. *General Fire Extinguisher Corporation*, 54 Comp. Gen. 416, 420 (1974), 74-2 CPD 278. In view thereof, we conclude that Enclosure's failure to quote prices on all of the IFB's line items did not render its bid nonresponsive.

In regard to GKI's assertion that Enclosure's bid should nevertheless be declared nonresponsive for its failure to evidence the bidder's intent to furnish the duplicate hardware required by the IFB, we are unable to conclude from our examination of the record that a proper justification exists for either rejecting Enclosure's bid or cancelling the solicitation (as alternately requested by GKI). At the outset, we note that it is NASA's position that only one kit of each type is to be furnished with the racks and rack consoles listed as Items 1 and 2, and that the solicitation was never intended to require or solicit bids on an additional (duplicate) set of hardware kits for those items. NASA further states that separate prices were requested for each of the hardware kits—Items 5 through 7—not as a means to fulfill a separate requirement for another set of those kits but rather to enable the Government to determine for itself whether it would be most advantageous

to make a single award for all the listed items or a series of individual awards (in accordance with the IFB's multiple award provision) for combinations thereof.

Thus, NASA feels that it was not reasonable for GKI to interpret the specifications as calling for a set of kits to be supplied with each rack and at the same time interpret the invitation schedule as calling for separate bids on a duplicate set of kits. In this connection, we note that none of the other bidders appears to have bid on furnishing a duplicate set of hardware racks.

We do think, and NASA acknowledges, "that the IFB was not structured in the best possible format." As NASA recognizes, if the IFB had listed the racks and consoles and required that the price of the accompanying kits, drawings, testing and part lists be included in the price of the items, "the question encountered here would never have arisen." However, we see no compelling reason to cancel the solicitation and readvertise because GKI thought from reading the invitation that a duplicate set of kits was required. Even after deducting GKI's prices for Items 5, 6, and 7 ($10,452.89) from its total bid of $168,529.89, the remainder ($158,077.00) is considerably higher than Enclosure's bid of $141,983.80 for Items 1 and 2. It is clear, therefore, that GKI was not prejudiced in any event.

Moreover, as stated above, while the IFB indicated the possibility of more than one award, NASA's determination to award on an "all or none" basis was proper. Therefore, GKI's contention that it was prejudiced by the IFB's inclusion of the multiple award provision is equally without merit.

Accordingly, we conclude that the acceptance of Enclosure's bid is not subject to legal objection, and GKI's protest is denied.

[B-114841]

Appropriations—Fiscal Year—Availability Beyond—Contracts—Installment Buying—Real Property Purchases

United States Fish and Wildlife Service may enter into purchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year.

In the matter of United States Fish and Wildlife Service—installment payments for real property, February 9, 1977:

This decision is in response to an inquiry from H. Gregory Austin, Acting Secretary of the Interior, concerning the legal propriety of

a proposal whereby the United States Fish and Wildlife Service would obtain options on real property, exercise the option for the entire tract of land, obligate the full purchase price and take title and possession of the property in the customary manner. However, payments for the property would be disbursed over a period not to exceed 4 years out of funds appropriated for the fiscal year in which the option was obtained in accordance with the wishes of, and pursuant to a contract with the landowner. (Landowners wishing full payment at the time of acquisition are entitled thereto pursuant to 42 U.S.C. § 4651 (1970) and other authorities.)

The Acting Secretary states in his inquiry that:

> This change in real property acquisition procedures is due to a reluctance on the part of property owners to sell their land to the United States and receive a lump-sum payment therefor with the resulting increased capital gains tax liability. This attitude has, in the opinion of the United States Fish and Wildlife Service, resulted in a substantial increase of the purchase price which the seller is willing to accept. It is thought that if funds could be disbursed as suggested, the costs of acquisition of real property for authorized projects could be substantially reduced.

He expresses concern, however, as to whether such deferred payments would be authorized following the end of the period of availability for fiscal year funds.

Funds appropriated to an agency for its use in a particular fiscal year are available for obligation only during that fiscal year. However, once obligated, the funds remain available for expenditure until the obligation is liquidated. See B–55181, February 15, 1946. See also 31 U.S.C. §§ 200 and 701–708 (1970, Supp. V). As we noted in 17 Comp. Gen. 664 (1937) with regard to options, funds are obligated when the option is exercised, *i.e.*, upon the creation of a mutually binding contract for purchase of the property.

The general rule relative to obligating fiscal year appropriations by contract is that (1) the contract must be made within the fiscal year covered by the appropriation sought to be charged, and (2) the subject matter must concern a need arising within that fiscal year. 32 Comp. Gen. 565 (1953) and 20 *id.* 436 (1941). Since proper exercise of the option during the fiscal year in which funds are available therefor creates a binding contract between the parties, the first requirement is thereby satisfied. The second requirement is met, provided there is a bona fide need for the property at the time the option is exercised and the funds obligated for the purchase; the timing of the actual expenditure of the funds is, for these purposes, irrelevant. We might note that not infrequently a contract is executed or an option exercised in one fiscal year, with settlement not being held and the actual payment of the purchase price not being made until the next fiscal year. The only difference in the instant circumstance is that payment, as a part of the consideration to be received by the landowner, will be made

over several fiscal years. Thus, as distinguished from the installment purchase plan we considered in 48 Comp. Gen. 494 (1969), the subject proposal is proper since amounts sufficient to cover the entire purchase price will be obligated from the appropriate fiscal year for a need occurring in that year.

Therefore, with the exception that the funds obligated should be those available for the fiscal year in which the option is exercised rather than for the fiscal year in which the option is obtained, we see no legal objection to the acquisition of real property in the manner proposed by the U.S. Fish and Wildlife Service when the landowner requests that payment be so handled.

[B–180617]

Transportation Department—Urban Mass Transportation Administration—Transit Authorities—Status—State Agencies or Instrumentalities—Entitlement to Interest Earned on Federal Grants

Federal grantor agencies should follow State law in determining whether transit authorities are State instrumentalities, and therefore permitted to retain interest earned on Federal grants, or political subdivisions of State, which may not retain such interest, pursuant to section 203 of Intergovernmental Cooperation Act of 1968. Bureau of Census classification or other reasonable criteria may be used to determine status of transit entities in absence of State guidance. Neither Act nor its legislative history requires Bureau of Census classifications to be followed.

Interest—Federal Grants, etc., to States and Their Subdivisions—Retention of Interest Earned—State Entities—Effective Date

State entities are entitled to retain interest earned on Federal grants from October 16, 1968, the effective date of section 203 of the Intergovernmental Cooperation Act of 1968 that so provides, or from the date its status as a State entity was created, if later.

In the matter of the status of transit authorities as State agencies or instrumentalities under Intergovernmental Cooperation Act of 1968, February 9, 1977:

We have been asked by the Acting Chief Counsel of the Urban Mass Transportation Administration (UMTA), of Department of Transportation, whether certain transit operators are entitled not to be held accountable for interest earned on UMTA financial assistance grants pending program disbursement.

Based on its reading of section 203 of the Intergovernmental Cooperation Act of 1968, Pub. L. No. 90–577, October 16, 1968, 42 U.S.C. § 4213 (1970), and its legislative history, UMTA's Office of Chief Counsel has concluded that any transit entity described as a local government by the Bureau of the Census is not entitled to interest earned pending program disbursement. At least one transit operator, the Southeastern Pennsylvania Transportation Authority (SEPTA) has

disputed UMTA's legal position. The Acting Chief Counsel has asked us to resolve this dispute.

He also asks our opinion as to the effective date from which interest may be earned by a grantee whose entitlement to retain such interest was in doubt prior to a ruling that it was a State agency or instrumentality. He asks: "Should we permit entitled entities to earn interest in accordance with the Act, effective the date of our ruling, or should such entities be allowed to recoup any interest they would have earned from the date of the Act on?"

Section 203 of the Intergovernmental Cooperation Act of 1968 (Act), *supra*, was enacted to provide an expeditious and efficient procedure for the transfer of grant-in-aid funds to the States. The procedures established thereunder are intended to minimize the time lapsing between the transfer and the disbursement of funds for program purposes by the State governments. The final sentence in section 203 provides that:

> * * * States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes.

The term "State" is defined in section 102 of the Act as:

> * * * any of the several States of the United States, the District of Columbia, Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State, but does not include the governments of the political subdivisions of the State. 42 U.S.C. § 4201(2), 1970.

The term "political subdivision," which is used interchangeably with the term "local government," is defined in section 103 of the Act as:

> * * * a local unit of government, including specifically a county, municipality, city, town, township, or a school or *other special district created by or as pursuant to State law*. 42 U.S.C. § 4201(3), 1970. [Italic supplied.]

In other words, "State" in the Act appears as it is usually defined in Federal statutes, except that agencies or instrumentalities of a State are included in the definition and "local governments," or governments of "political subdivisions," or "special districts" are not. The problem is to determine what criteria to use in classifying a given transit authority as either a State or local instrumentality, for purposes of the interest exemption in section 103 of the Act.

In the Senate and House committee reports to the Congress on the proposed Act, an attempt was made to clarify, for the Congress, the meanings of the terms "State," "political subdivision" and "local government" as used in the Act. The House Report No. 1845 on proposed legislation H.R. 18826 (Intergovernmental Cooperation Act of 1968), as prepared by the House Committee on Government Operations, contained at page 4 a section entitled "Section-by-Section Analysis." There, section 103 of the proposed Act was said to define "political sub-

division" and "local government" so that the two terms "* * * includ[ed] jurisdictional units listed by the Bureau of the Census as political subdivisions of a State." The House Report went on to say that:

> Section 104 defines a "unit of general local government" as "any city, county, town, parish, village, or other general-purpose political subdivision of a State." This definition is based on the Census Bureau's treatment of the term. House Report No. 1845, 90th Cong., 2nd Sess., p. 4, August 2, 1968.

Senate Report No. 1456, on proposed legislation S. 698 (Intergovernmental Cooperation Act of 1968), as prepared by the Senate Subcommittee on Intergovernmental Relations for the Senate Committee on Governmental Relations, 90th Congress, 2nd Session, p. 12, July 24, 1968, states in its section-by-section analysis of section 103 of the proposed Act that:

> Section 103, similarly provides standard definitions for "political subdivision" or "local government," meaning any local unit of government, including a county, municipality, city, town, township, or a school or other special district *created under state law.* This definition follows those jurisdictional units listed by the Bureau of the Census as political subdivisions of a State. [Italic supplied.]

In a memorandum to UMTA grantees, UMTA's Office of Chief Counsel stated that the classification of entities by the Bureau of the Census is controlling and will govern whether an entity will be considered an agency or instrumentality of the State or a political subdivision thereof. In reaching this conclusion, the memorandum states:

> In summary, the Act provides that the term "State" does *not* include the governments of the political subdivisions of the States, or special districts; according to the Act's legislative history, political subdivisions and special districts are described and listed by the Bureau of the Census.
>
> The Bureau of the Census' 1972 *Census of Governments* (U.S. Bureau of the Census, *Census of Governments*, 1972, Vol. 1, Governmental Organization; U.S. Government Printing Office, Washington, D.C. 1973) classifies local governments by five major types—counties, municipalties, townships, school districts, and special districts. Any transit system listed under any of these headings is considered, under the Act, a local government and thus *would* be held accountable to UMTA for interest earned on UMTA financial assistance pending project disbursement.

SEPTA was listed under the heading of "Special Districts" on page 437 of the Bureau of the Census' *1972 Census of Governments*, Vol. 1 (1973).

As noted above, SEPTA has challenged this ruling. SEPTA was established under the Metropolitan Transportation Authorities' Act of 1963, 66 Pa. Stat. Ann. §§ 2001 *et seq.* (1963). That statute authorizes creation, in each metropolitan area, of a separate body corporate and politic which "* * * shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 66 Pa. Stat. Ann. § 2004(a).

SEPTA's position is set forth in a memorandum of February 25, 1976. In that memorandum to UMTA, SEPTA's Chief Counsel raises several arguments in opposition to UMTA's position.

Its contention is that as an agency and instrumentality of a State (as provided by State law), SEPTA falls within the exact words of the definition of that term in section 102 of the Intergovernmental Cooperation Act. SEPTA states, in effect, that the language of that Act is plain and the application thereof to SEPTA clear. It objects to UMTA's reliance on external materials, namely, the *1972 Census of Governments*, to interpret that Act and its application to SEPTA. It states that the statements in the committee report cited by UMTA cannot "serve to introduce an entire range of Census Bureau definitions into the Act where the Act itself is otherwise silent." It further contends that:

> Even if Congress had manifested an intention that Census classification criteria should be employed in applying the Intergovernmental Cooperation Act of 1968, in the present case the Census Bureau's classification of SEPTA as a "special district" would be entit'ed to far less weight than the express declaration of the Pennsylvania legislature that SEPTA is an agency and instrumentality of the State.

SEPTA puts forth three specific reasons for reaching that conclusion. First, it notes that definitions used by the Bureau of the Census do not purport to be legal definitions but, according to its own introduction to Volume 1, "are such as, in the judgment of census researchers, tended to facilitate uniformity in data collection and keep classification problems to a minimum." The Bureau of the Census also states that classification difficulties were particularly acute in Pennsylvania, which SEPTA feels supports its conclusion that "the classification scheme chosen by Census researchers was based upon the exigencies of data collection rather than upon the underlying organic law governing the formation of each agency, instrumentality, or district. Finally, it points to several judicial decisions from the courts of Pennsylvania which state unequivocally that SEPTA is a 'State agency,' an instrumentality of the Commonwealth," etc.

We generally agree with SEPTA's legal position. Neither the provisions of the Intergovernmental Cooperation Act of 1968 nor its legislative history *requires* the use of Census classifications. On the contrary, section 103 of the Act, in defining "political subdivision," refers specifically to "other special district created by or as pursuant to State law." It seems evident to us that the paramount determinant of the status of a given entity is the description of that entity in State law. The legislative history, relied on by the UMTA acting General Counsel merely explains that the committees in drafting the language of the Act used terminology developed by the Census Bureau. The Senate Report, quoted *supra* (in contract to the House Report

cited by UMTA), states that the definition includes a "special district created under State law." In any case, neither report suggests that Census Bureau classifications must be used to determine the nature of individual entities.

Accordingly, it is our opinion that a Federal grantor agency is not required by the Intergovernmental Cooperation Act of 1968 and its legislative history to accept the Bureau of the Census' classification of an entity, such as SEPTA, in determining whether that entity is a State agency or instrumentality or a political subdivision of the State. It is bound by the classification of the entity in State law. Only in the absence of a clear indication of the status of the entity in State law may it make its own determination based on reasonable standards, including resort to the Bureau of the Census' classifications. It would not be unreasonable—as informally proposed to us by UMTA representatives—for UMTA to require a transit authority to get an opinion from the State Attorney General as to whether such authority is a State agency or instrumentality in order to assist UMTA in reaching a determination as to whether it may retain interest earned on UMTA grant funds.

In answer to UMTA's final question regarding the effective date from which interest earned by a State entity may be retained, section 203 of the Intergovernmental Cooperation Act of 1968 states that "States shall not be held accountable" for *any* interest they earn on grant-in-aid funds pending disbursement of the funds for program purposes. State entities are exempt from accountability for such interest as of the effective date of that provision, regardless of the date that their status as exempt entities was considered and confirmed. Of course if a given entity's status was changed by State law, so as to make it a State instrumentality after section 203 went into effect, the entity's entitlement would begin only when its status as a State instrumentality was created. We therefore find that SEPTA, having been created as a State instrumentality in 1963, is entitled to recoup all interest earned and paid over to UMTA from October 16, 1968, the effective date of the interest exemption of the Intergovernmental Cooperation Act.

[B–185064]

Mobile Homes—Transportation—Damage, Loss, etc.—Carrier's Liability

The law places burden on carrier to establish not only the general tendency of a mobile home to be damaged in transit, but that damage was due solely to that tendency.

Property—Public—Damage, Loss, etc.—"Inherent Vice"

Definition of "inherent vice" indicates that loss is caused in commodity without outside influence, and courts have so held.

Property—Public—Damage, Loss, etc.—Mobile Homes—Carrier's Responsibility for Avoidance of Damage

If carrier knows or should have known that goods delivered to it for transportation are in danger of loss or damage, law requires carrier to use ordinary care, skill and foresight to avoid consequences.

Property—Public—Damage, Loss, etc.—Carrier's Liability—Burden of Proof

Carrier has failed to rebut its prima facie case of liability for damage and to meet its burden of proof that sole cause of damage was due to an inherent defect. However, amount of damages is in error and is to be adjusted accordingly.

In the matter of Chandler Trailer Convoy, Inc., February 10, 1977:

Chandler Trailer Convoy, Inc. (Chandler), has requested review of a settlement issued by our Claims Division on February 9, 1976 (Claim No. Z-2608885(3)). In the settlement the Claims Division disallowed Chandler's claim for a refund of $2,299, which the Government as a subrogee collected by setoff for damage to a mobile home owned by a member of the military and transported by Chandler under Government bill of lading No. F-6530696.

The mobile home was picked up by Chandler on February 6, 1974, at Nolanville, Texas, and delivered in a damaged condition to its owner at Gray, Kentucky, on February 12, 1974. While Chandler admits that the mobile home was damaged at destination, it contends the damages were caused by inherent defects in the mobile home. An inherent defect is one of the exceptions to a carrier's common law liability for damage to property. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134 (1964).

Chandler contends that statements of a Mr. Aldridge, who on March 30, 1974, prepared an estimate of damages (later revised), is proof of the fact that the damages to the mobile home were caused by an inherent defect. Mr. Aldridge stated that the mobile home "had the appearance of over the road damage due to long hours and miles of continued road shock which so often happens on long hauls with mobile homes of this size." Chandler further states that the Aldridge March 30th estimate contains additional repairs and parts which would strengthen the frame beyond its factory specifications, and that such evidence supports Chandler's contention that the damages were due to structural failure.

Chandler alleges that Mr. Aldridge's statement supports its argument that the mobile home was the sole cause of its own damage. However, the statement is only an opinion about the propensity of

mobile homes to sustain damage when transported a great distance. The law places a burden on Chandler to establish not only the general tendency of a mobile home to be damaged in transit, but that the damage was due solely to that tendency. See *Whitehall Packing Co., Inc.*, v. *Safeway*, 228 N.W. 2d 365 (Wisc. 1975). Further, Mr. Aldridge was interviewed by a representative of the Army Claims Service and stated that the additional work, which would strengthen the frame beyond the factory specifications, was necessary in the event of another move. Thus, the suggested additional work is not proof of an inherent defect in the mobile home. The additional work was eliminated in a later estimate. We note also that the pre-move inspection report prepared by Chandler's agent indicates that the frame was not in a damaged condition at origin.

In *Missouri Pacific R.R.* v. *Elmore & Stahl*, *supra*, the court states that "inherent vice" means any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time. This definition indicates that an inherent vice in a commodity will result in the loss of the commodity without any outside influence. See *Schnell* v. *The Valescure*, 293 U.S. 296, 305–306 (1934). In fact, in the closely related insurance field the courts have held that the term "inherent vice," as a cause of loss not covered by the insurance policy, does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality in the property which brings about its own injury or destruction. *Employers Casualty Company* v. *Holm*, 393 S.W. 2d 363 (Ct. Civ. App. Texas 1965); *Mayeri* v. *Glens Falls Ins. Co.*, 85 N.Y.S. 2d 370 (Sup. Ct. N.Y. 1948). The mobile home was picked up by Chandler and transported from Texas to Kentucky, and it arrived in a damaged condition. It follows that an extraneous cause, the elements of the transportation movement, caused its damage. The mobile home would not have sustained damage had it remained at its origin and not been moved. Thus, it cannot be said that an inherent defect was the sole cause of the damage.

When a carrier knows or should have known that goods delivered to it for transportation are in peril or danger of loss or damage, the law requires a carrier to use ordinary care, skill and foresight to avoid the consequences. *Little Rock Packing Co.* v. *Chicago B & Q R.R.*, 116 F. Supp. 213 (W.D. Mo. 1953). Thus, if Chandler was of the opinion that the mobile home could not be transported without damage, it could have refused to do so. And if it was known that the mobile home was susceptible to damage, Chandler should have taken the necessary foresight to avoid the consequences.

Chandler has failed to rebut its prima facie case of liability for damage and to meet its burden of proof that the sole cause of the

damage was due to an inherent defect. However, we believe that the amount of the damages is in error.

The record contains an estimate of repair that is substantially lower ($1,500 to $2,000) than the actual amount of the claim of $2,299, and some additional items on the Aldridge March 30th estimate appear to be either the result of pre-existing damage or normal maintenance of a mobile home. Only the cost of those repairs which are attributable to the damage may be considered. 22 Am. Jur. 2d Damages § 148 (1965). Accordingly, we believe that only these items taken from the Aldridge estimate should be charged to Chandler:

Parts Necessary and Estimate of Labor Required	Parts	Labor
Frame and Chassis:		
Remove, replace body from frame in order to rebuild body under side and straighten repair frame		$192
Straighten right master frame rail		175
Straighten left master frame rail		150
Body and Interior:		
Repair and reinforce lower wood side sill plates	$10	$48
Replace lower starter aluminum panels where needed and straighten all other lower starter panels	15	24
Living Room: Repairs to wall mouling paneling and ceiling	$18	$84
Estimate		$56
Wrecker Service		$227
Total	$43	$956
Grand total		$999

We today are instructing our Claims Division to reopen the settlement and to allow Chandler $1,300 of its claim for $2,229 ($2,299 less $999), if otherwise correct.

[B-188094]

Compensation—Wage Board Employees—Prevailing Rate Employees—Entitlement To Negotiate Wages

Section 9(b) of Public Law 92-392, governing prevailing rate employees, exempts bargaining agreements, in effect on August 19, 1972, containing wage setting provisions. Certain United States Information Agency radio broadcast technicians are covered by such an agreement and therefore may continue to negotiate wage setting procedures until the parties agree to delete wage setting provisions from their agreement. Then such employees would be governed by the Prevailing Rate Statute.

Compensation—Wage Board Employees—Prevailing Rate Employees—Governed by Prevailing Rate Statute—Employees Serving Under Bargaining Agreements Exempted

Prevailing rate employees serving under bargaining agreements exempted from effects of the Prevailing Rate Statute, 5 U.S.C. subchapter IV, chapter 53, may negotiate wages and employee benefits otherwise covered by provisions of that statute. However, they may not negotiate pay and employee benefits governed by other statutes and regulations, such as overtime pay and retirement benefits.

In the matter of the United States Information Agency—entitlement of prevailing rate employees who negotiate their wages, February 11, 1977:

This action involves a request from Mr. Edward J. Nickel, Assistant Director (Administration and Management), United States Information Agency (USIA), for a ruling on whether the bargaining unit comprised of prevailing rate radio broadcast technicians represented by Local 1418, National Federation of Federal Employees (NFFE), is covered by the provisions of the Act of August 19, 1972, Public Law 92-392 (86 Stat. 564), the prevailing wage law, which has been codified as subchapter IV, chapter 53, of title 5, United States Code.

Local 1418, NFFE and the USIA entered into a collective bargaining agreement on August 15, 1968, which has governed their relationship since that time. Article XI of the agreement established a Joint Wage Council consisting of four voting members representing both management and the union. The duties of the council are set forth in section 3 of Article XI of the agreement as follows:

Section 3. The Council will meet on call by the Chairman or upon the request of any voting member. The function of the Council shall be to consider and make recommendations to the Chief, Domestic Service Personnel Division, concerning the timing of wage surveys; the identification of data sources and jobs to be surveyed; the selection of data collectors to conduct the survey; and the proposed wage schedule to be established by the Chief, Domestic Service Personnel Division based on the data collected. Wage surveys will be scheduled on the approximate anniversary of the last annual survey unless major changes in industry or other compelling reasons justify a change in schedule.

The wages of the prevailing rate employee in the bargaining unit are fixed in accordance with a special wage schedule established as a result of a wage survey conducted on the basis of recommendations of the Council. When Public Law 92-392 was enacted in August 1972, USIA assumed that employees in the bargaining unit were covered by the provisions of that law and attempted to make wage setting procedures conform to provisions of the law. It was not until August 27, 1975, after USIA sought advice and approval from the Civil Service Commission as to whether the timing and coverage of the wage survey could be changed, that the Commission advised USIA that it had no authority to approve or disapprove the request

because section 9(b) of Public Law 92-392 (5 U.S.C. § 5343 note, Supp. V, 1975) excluded that bargaining unit from coverage of the provisions of the prevailing rate law.

The USIA is currently involved in contract negotiations in which the union is attempting to negotiate specific pay issues and the agency is understandably concerned with the legal ramifications of such negotiations.

For this reason, USIA requests a ruling on the following three questions regarding that agency's authority to negotiate employee compensation:

Question 1

Does the fact that the Agency negotiates the *mechanism* (survey methodology) by which employees' wages are established mean that said wages are "negotiated" and therefore said employees are exempt from PL 92-392?

We are of the opinion that this question must be answered in the affirmative. Our view is based on section 9(b) of Public Law 92-392, which provides as follows:

(b) The amendments made by this Act shall not be construed to—

(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or

(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.

The legislative history of section 9(b) is explicit as to what it was intended to accomplish:

Savings clause for existing agreements

Section 9(b)(1) of the bill, with the committee amendment, provides that the amendments made by the Act shall not be construed to abrogate, modify, or otherwise affect the provisions of any existing contract pertaining to the wages, conditions of employment, and other employment benefits of Government employees, which contract resulted from negotiations between agencies and employee organizations. Paragraph (2) of section 9(b) states that the provisions of any contract in effect on the date of enactment of the Act may be renewed, extended, modified or improved through negotiation after the enactment date of the Act. Paragraph (3) of section 9(b) provides that the Act shall not affect any existing agreement between agencies and employee organizations regarding the various items which are negotiable, nor shall the Act preclude the inclusion of new items in connection with the renegotiation of any contract.

The provisions of section 9(b) are directed at those groups of Federal employees whose wages and other terms or benefits of employment are fixed in accordance with contracts resulting from negotiations between their agencies and employee organizations. * * * It is not this committee's intent to affect, in

any way, the status of such contracts or to impair the authority of the parties concerned to renegotiate existing contracts or enter into new agreements. However, the prevailing rate employees who are now covered by such contracts will be subject to the provisions of this Act when such contracts expire and are not renewed or replaced by new contracts. H.R. Rep. No. 339, 92d Cong., 1st Sess. 22 (1971).

From the foregoing, it is clear that Congress intended to exempt prevailing rate employees serving under those collective bargaining agreements in effect on August 19, 1972, the date of enactment of Public Law 92–392, that contained provisions covering any substantive matters concerning how their wages were to be fixed. In our opinion Article XI of the agreement here in question provides a detailed procedure for fixing the wages of employees in the bargaining unit, and hence Congress intended that such agreement was not to be affected by the provisions of Public Law 92–392. Moreover, we note that the Civil Service Commission in the exercise of its authority under 5 U.S.C. § 5343(b) and (c) has also ruled that this bargaining unit was excluded from the provisions of the prevailing rate law in its letter to USIA dated August 27, 1975, and in its letter to the President, NFFE, also dated August 27, 1975.

Question 2

If such employees are exempt from statutory pay provisions, are they therefore automatically and indefinitely entitled and, indeed, required to negotiate all aspects of their wages (e.g., the applicability and rates of base pay and premium pay)?

Employees exempted from coverage of the prevailing rate statute by section 9(b) of Public Law 92–392 are not indefinitely entitled and required to negotiate all aspects of their wages. Under the provisions of section 9(b), the agency and the union may, upon renegotiation of the agreement, elect not to continue to include provisions in the agreement concerning the fixing of wage rates. In that event, the employees in the bargaining unit would automatically be covered by the provisions of the prevailing rate statute as set forth in 5 U.S. Code, chapter 53, subchapter IV. However, as long as an exempt agreement that includes wage setting authority is renegotiated or renewed, the full range of wage setting procedures covered by the provisions of Public Law 92–392 are subject to negotiation by the parties to the agreement. On the other hand, the parties may elect to incorporate, expressly or by reference, certain provisions of the prevailing rate statute. We should point out, however, that employees covered by an exempt agreement are not entitled to the benefits of the prevailing rate statute where such provisions have not been incorporated in the agreement. See, for example, B–184858, August 19, 1976.

Question 3

If the employees are entitled to negotiate wages, may they also negotiate other benefits such as night differential, overtime rates, retirement, etc., that make up the total pay package. That is, once undertaken, what are the boundaries of negotiations?

As a general principle, the parties to the agreement may negotiate employee wages and benefits covered by provisions of the prevailing rate statute contained in subchapter IV, chapter 53 of title 5, United States Code. On the other hand, employee wages and benefits covered by other statutes and regulations may not be negotiated. Therefore such issues as basic wages and night differentials may be negotiated because they are included in the Prevailing Rate Statute. By the same token, overtime pay and retirement are covered by other statutes and regulations and therefore may not be negotiated.

[B–187814]

Bids—Invitation for Bids—Cancellation—Resolicitation—Requirements Decreased

Cancellation of invitation for bids (IFB) after bid opening and resolicitation is not unreasonable where record indicates original IFB solicited bids for only half of quantity actually needed.

Bids—Discarding All Bids—Resolicitation—Cancellation of Invitation Justified—Requirements Understated

Armed Services Procurement Regulation (ASPR) 2–404.1, prohibiting, as a general rule, cancellation and resolicitation solely due to increased requirements, does not prevent cancellation when IFB does not adequately define unchanged requirements.

Bids—Invitation for Bids—Cancellation—Resolicitation—Auction Atmosphere Not Created

Proper cancellation of IFB under ASPR 2–404.1 does not constitute auction as that term is used in ASPR 3–805.3(c) which refers to negotiated procurements.

In the matter of Engineering Research Inc., February 14, 1977:

Hoppmann Corporation (Hoppmann) protests the cancellation of invitation for bids, IFB No. N00024–76–B–6235, by the Naval Sea Systems Command, U.S. Navy (Navy). The solicitation called for the manufacture and delivery of rocket motor fins and was restricted to bidders with previous experience in manufacturing similar equipment. It permitted bids for quantities less than those specified and reserved to the Government the right to make an award for a quantity less than offered, and at the unit prices offered, unless the bidder specified otherwise. Hoppmann contends that its bid was the lowest responsive bid from a responsible bidder and that no compelling reason existed for the rejection of all bids and the resolicitation.

The initial IFB required delivery of 3200 each "Fin, Rocket Motor MK–0 Shipping (packing) condition" to be manufactured in accordance with "LD 269771, Revision B, including revisions thereon, more

fully set forth in Addendum A." Actually, the Navy intended to solicit bids for 6400 motor fins packaged two to each container. Addendum A, which was attached to the IFB, lists as applicable documents LD 269771 and 1330379, neither of which was furnished with the IFB. These drawings, in the form of aperture cards, could be obtained from the Naval Weapon Engineering Support Activity in Washington, D.C., upon a returnable deposit of $100. The subject of LD 269771 is stated as "Shipping (Packing) Condition (For Two Motor Fins)" and lists as total pieces required for "one subject item" two motor fins. The Navy's actual requirement was for 3200 sets, each consisting of two fins or a total of 6400 fins.

No request for clarification of the IFB as to quantity was made and 14 companies submitted bids. The unit prices for the five lowest bids received are as follows:

Modern Manufacturing Inc. (Modern)	Bid $63.16 per unit.
Lockley Manufacturing Inc.	Bid $83.29 per unit.
Engineering Research Inc. (ERI)	Bid $87.58 per unit.
Acme Machine & Tool Company	Bid $89.25 per unit.
Hoppmann	Bid $106.80 per unit.

The remaining bids ranged upward to $310.30. Because the four lowest bids were much lower than the Navy's estimate, each bidder was asked to verify its price and the number of fins the price covered. Each stated that its unit price covered one fin each for a total of 3200 fins. Hoppmann states that its unit price covered two fins each and was, therefore, the lowest price for the total quantity actually desired by the Navy.

ERI protested to this Office stating that the IFB, although apparently clear on its face, misled ERI and other bidders to bid on a quantity less than the Navy actually desired. ERI asked that the IFB be canceled and that a new solicitation be issued. Modern initially protested to the contracting officer after bid opening on the grounds that the solicitation was vague and misleading as to the quantity desired. After a determination by the contracting officer that the solicitation was ambiguous, the IFB was canceled and a new IFB clearly stating that 6400 fins were required was issued. Hoppmann then protested the cancellation to this Office.

In response to the resolicitation, 16 bids were received. Hoppmann submitted the same price as in its initial bid but five companies, including Modern and ERI, submitted lower prices than Hoppmann for the two fin sets. ERI's price of $93.85 per set of fins is the lowest bid received upon resolicitation.

Hoppmann points out that the item called for in the original IFB

was a rocket motor fin in "shipping (packing) condition" manufactured in accordance with LD 269771 which clearly indicates that each shipping container must contain two fins. Drawing No. 133037 indicates the same thing. Thus, Hoppmann argues the original IFB clearly required delivery of 6400 fins. Hoppmann further contends that even if ambiguity is found in the IFB, cancellation is not warranted unless the bidders who claim to have been misled would be prejudiced by an award to Hoppmann. Hoppmann doubts that Modern with a price of $63.16 for one fin could have beat Hoppmann's price of $106.80 for two fins even if Modern had initially read the IFB correctly. In this regard, Hoppmann contends that if its prices had not been exposed, the prices to be expected from a production run of 6400 fins within the same time period that the 3200 fins were to be manufactured would be higher because of the necessity for accelerating production. Hoppmann asserts that the rebidding constituted an auction and that its rights were thereby prejudiced. Further, Hoppmann contends that because of its previous experience in manufacturing the identical item for the Navy, it was the only bidder technically qualified to perform the contract. Therefore, Hoppmann requests that the original IFB be reinstated and award thereunder be made to Hoppmann.

Although originally protesting that the IFB was vague and misleading, Modern has now taken the position that the IFB clearly required 3200 fins, that its price was the lowest for this quantity and that, therefore, the cancellation should be rescinded and a contract for 3200 fins should be awarded to Modern.

ERI supports the cancellation and asserts that because at least four bidders were misled, there is prima facie evidence that the solicitation was latently ambiguous and fatally defective. ERI contends that Hoppmann's bid under the initial solicitation, on its face, does not promise to deliver 6400 fins and the Government could not be assured that its needs would be served thereby. ERI argues that Hoppmann's allegation that no company would have underbid Hoppmann, but for the exposure of its initial bid price, is based on conjecture and that, therefore, no award could be made to Hoppmann without prejudice to the other bidders.

Hoppmann's contention that it was the only bidder capable of performing the contract will not be discussed in this decision. Such a contention necessarily challenges the affirmative determination of responsibility which the contracting officer must make prior to the award of any contract. No such determination has yet been made in this case and when made, will not be reviewed by this Office in the absence of a showing of fraud on the part of procuring officials or in

other circumstances not relevant here. *Central Metal Products, Inc.*, 54 Comp. Gen. 66 (1974), 74–1 CPD 64.

The Armed Services Procurement Regulation (ASPR) sets forth guidelines governing preaward cancellations of invitations for bids. ASPR § 2–404.1 (1976 ed.) provides in pertinent part:

> 2–404.1 Cancellation of Invitation After Opening. (a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule, after opening, an invitation for bids should not be canceled and readvertised solely due to increased requirements for the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.
>
> (b) * * * Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that—
>
> (i) inadequate or ambiguous specifications were cited in invitation;
>
> * * * * * * *
>
> (viii) for other reasons, cancellation is clearly in the best interest of the Government.

Ordinarily this Office will not question the broad authority of the contracting officer to reject all bids and readvertise when a "compelling" reason to do so exists. *Spickard Enterprises, Inc.*, 54 Comp. Gen. 145 (1974), 74–2 CPD 121; 52 Comp. Gen. 285 (1972). However, this Office has held that even the use of an inadequate, ambiguous or otherwise deficient specification is not, in and of itself, a "compelling" reason to cancel an IFB and readvertise where an award under the solicitation as issued would serve the actual needs of the Government and would not prejudice the other bidders. *GAF Corporation*, 53 Comp. Gen. 586 (1974), 74–1 CPD 68.

While 14 bids were originally received, the four bids which were lower than Hoppmann did not meet the actual need of the Navy for 6400 fins. The solicitation clearly conveyed to the bidders a requirement for 3200 fins. There was no direct or indirect reference in the IFB to a requirement for 6400 fins or any indication that the 3200 figure used in the schedule was supposed to refer to sets of two fins each or containers, rather than to single fins. While the drawings are clear that each shipping container should contain two fins, it is equally clear from the language of the IFB that the primary purpose of the procurement was the acquisition of fins and that the containers were being bought only to insure the damage free shipment of the fins. The fact that the IFB required that the fins be in "Shipping (Packing) Condition" cannot reasonably be translated into a requirement for 3200 shipping containers each packed with two

fins. The Navy's actual intent, its apparent previous use of the same language, and the responses thereto of Hoppmann and of other bidders, need not be considered in the interpretation of the IFB because on its face the solicitation clearly requires 3200 fins packed two to a shipping container.

Although we believe the initial solicitation was not patently or latently ambiguous in this regard, it was defective and inadequate as a means of conveying to all bidders a requirement for 6400 fins. An IFB is defective and inadequate if the actual quantity needed reasonably can be surmised only by those bidders who have access to information beyond the confines of the IFB. The IFB, especially as it pertains to quantity, should establish a common bidding basis for all qualified reasonable bidders including those with and those without previous experience with the identical items or with the same agency. Therefore, we believe that an award to Hoppmann under the initial IFB as issued would not have assured the Navy that its needs would be met or that it had obtained the lowest price obtainable through fair competition.

In addition, we believe that an award to Hoppmann could not have been made without prejudice to the rights of the other bidders. The initial low bid of Modern of $63.16 per fin was based on an anticipated production run of 3200 fins. Modern would have had to price its second 3200 fins at approximately $43 each to bid a price below that of Hoppmann for the 6400 fins. Most of such nonrecurring costs as production engineering, setup, and special tooling were included in its price for the first 3200 fins. These costs and the costs of facilities, support services and fixed costs generally do not increase proportionately when production is doubled even though the final delivery date remains unchanged. Moreover, material costs per unit may be lower for larger production runs. The size of the production run also will normally affect the cost of labor per unit because of the increasing efficiency of such labor. Because of these considerations and the fact that there is no reasonable way of determining the effect on the price of any particular bidder of such special and temporary factors as the need for business, shop loads and schedules and the possible parts commonality with concurrent production on other contracts, it could not be said at the time of cancellation that none of the other bidders could have bettered Hoppmann's price for the 6400 fins. Indeed, the results of the rebidding tend to support this conclusion.

An award for 3200 fins to Modern would not have served the interest of the Government and would have been as unfair to the other bidders as an award for 6400 fins to Hoppmann. The Navy was not required to continue with a defective IFB after it discovered that

the IFB did not accurately state the requirement for 6400 fins. There was no increase or change of any type in the quantity needed by the Navy and thus the provision in ASPR § 2-404.1(a) that a solicitation not be canceled after opening merely to provide for increased requirements is not controlling. Rather, resolicitaiton is sanctioned in ASPR § 2-404.1(b) where, as here, the solicitation does not adequately state the Government's requirements and it is in the Government's best interest to resolicit.

We do not agree that the factual situation presented here constitutes an auction as that term is used in ASPR. While ASPR § 3-805.3(c), which pertains to negotiated procurements, prohibits auctions, it prescribes no penalties. There is nothing inherently illegal in the conduct of an auction in a negotiated procurement. *TM Systems, Inc.*, 55 Comp. Gen. 1066 (1976), 76-1 CPD 299; 53 Comp. Gen. 253 (1973). This case, however, involves a formally advertised procurement and although this Office does not sanction the disclosure of competitive information with regard to any procurement, we cannot say that the cancellation of this IFB under ASPR § 2-404.1 constitutes an auction or an improper disclosure of information. We are not unmindful of the prejudice suffered by Hoppmann and Modern after the exposure of their initial prices. We recognize that known prices of competitors often tend to influence the prices in a rebidding as do the anticipated actual costs to be allocated to that project. To some extent, the integrity of the competitive bidding system may have been compromised in this instance. However, in our opinion, the compromise would have been greater if an award under the original IFB had been made to Hoppmann or to other bidders for a total of 6400 fins.

We note that Hoppmann has also protested to the contracting officer the award, to anyone other than itself, of a contract pursuant to the Navy's resolicitation (IFB N00024-76-B-6072) for the same items. Copies of that protest have been furnished to this Office. While this decision deals with the issues required to be decided under the initial solicitation, the issues which are pertinent to the resolicitation are not before this Office for resolution and therefore are not decided herein.

For the reasons stated above, we believe that a compelling reason did exist for the cancellation. Accordingly, the protest is denied.

[B-186550]

Bids—Discarding All Bids—Low Bid Nonresponsive—Two-Step Procurement—Resolicitation of Second-Step

Rejection of bid as unreasonably high, even though bid price is lower than initial Government estimate, is proper exercise of agency discretion where record

shows that estimate was outdated and agency could reasonably determine that low bid price submitted by nonresponsive bidder accurately represented current fair market value of system that would satisfy Government's needs.

Bids—Two-Step Procurement—Evaluation—Costs—Costs *v.* Technical Requirements

Although in two-step formal advertising divergent technical approaches may be acceptable to agency, costs associated with particular approach may not be acceptable, and Government need not take into account cost of more expensive approach or system in estimating reasonable price of system that would satisfy its needs. Further, where agency reports that higher bid price is due primarily to profit and overhead rather than to differences in technical proposals, Government estimate based on apparent cost of least expensive approach is not unduly prejudicial to bidder offering higher price.

Bids—Discarding All Bids—Resolicitation—Revised Specifications—Incorporation of Terms by Reference

Propriety of incorporating by reference in resolicitation various representations and certifications submitted by bidders as part of bids previously rejected is questionable with respect to legal effect and since bidders would be precluded from modifying previous answers. However, resolicitation document is not totally defective since provisions in question basically involve bidder responsibility and thus representations may be furnished after bid opening.

In the matter of the McCarthy Manufacturing Company, February 17, 1977:

McCarthy Manufacturing Company (McCarthy) protests the award of a contract for a Media Retrieval System to Long Engineering (Long) by the General Services Administration (GSA) under solicitation D–W–01625–Q2. McCarthy alleges that the determination to reject all bids under step two of a two-step formally advertised procurement and to resolicit step two bids was improper; that such action did not enable bidders to compete on an equal basis; and that the resolicitation document was deficient.

FACTUAL BACKGROUND

On November 17, 1975, GSA issued Part 1 of a two-step formally advertised procurement, a request for technical proposals, to 19 prospective suppliers. The request called for an Electronic Instructional Media Retrieval System to be furnished, installed and made completely operational at the Bureau of Indian Affairs, Cherokee High School, Cherokee, North Carolina. Potential suppliers were admonished that the technical proposals were not to include prices or pricing information. Further instructions were provided to the effect that bids would be sought during the second step of the procurement from those firms whose technical proposals were judged acceptable either initially

or as a result of discussions. Four technical proposals were received and after evaluation, three were determined to be acceptable.

Step two was initiated on March 19, 1976, by the issuance of an invitation for bids (IFB), No. D–W–01625–Q2, to the three firms with acceptable technical proposals. Bids were opened on April 19, 1976, as follows:

Long Engineering	$114,750.00
McCarthy Manufacturing Co	149,175.00
Hartman Systems	212,954.00

Because of the disparity in bid prices, Long was asked to and did verify its bid.

On May 6, 1976, the contracting officer determined that no acceptable offer had been received. Long's bid was determined to be nonresponsive for failing to include taxes as required by the IFB. It was further determined that the bids of McCarthy and Hartman were not acceptable because they were excessive in price when compared to the Government estimate which was revised in light of Long's bid. The decision to reject all bids and readvertise was communicated to McCarthy on May 7, 1976, and was protested by McCarthy on May 10, 1976. Attempts to resolve the protest were unsuccessful and the resolicitation, seeking bids from the same contractors who had submitted acceptable technical proposals, was issued on May 13, 1976. Bids were received from the three offerors and were opened on June 1, 1976, with Long again submitting the lowest bid. Award was not made immediately due to the pendency of this protest. However, on July 29, 1976, award was made to Long following a determination by GSA that any further delay would result in substantially increased costs to the Government.

1. REJECTION OF ALL BIDS AND RESOLICITATION

McCarthy alleges that the rejection of its bid under the original solicitation and under the resolicitation were improper. McCarthy asserts that the contracting officer improperly revised the Government estimate after bid opening on the basis of the nonresponsive and very low bid submitted by Long and upon this revision improperly determined McCarthy's bid price to be excessive, even though that bid price was less than the original Government estimate.

Federal Procurement Regulations § 1–2.404–1(b)(5) (1964 ed.) authorizes cancellation of an IFB after bid opening when all the acceptable bids received are at unreasonable prices. We have held that the

rejection of bids based on a determination of price unreasonableness is a matter of administrative discretion which will not be questioned barring fraud or bad faith or unless it is otherwise unreasonable. *Hercules Demolition Corporation*, B–186411, August 18, 1976, 76–2 CPD 173; *Ward Leonard Electric Co., Inc.*, B–186445, July 29, 1976, 76–2 CPD 98.

Here, GSA explains the basis upon which it formulated its revised estimate after bid opening as follows:

> A Government estimate normally reflects the fair market value of the item being procured and is used as a guideline to assess the reasonability of the offers received. In this instance, the [original] estimate was made four years prior to the procurement and was based on systems available at that time. In the course of the instant procurement, we learned that the cost of such systems has substantially declined and that the Government estimate no longer reflected current market trends. * * * After reviewing the bids received, the contracting officer determined that a media retrieval system sufficient to meet the Government's requirements could be attained at a price substantially below the Government estimate.

We see nothing unreasonable or improper with GSA's actions. It is GSA's view, and McCarthy has submitted no evidence to the contrary, that the original Government estimate was outdated and excessively high and that the Long Engineering bid accurately reflected the fair market price of a system that would meet the Government's needs. In this regard, we point out that the fact that McCarthy's initial bid was below the original Government estimate has little bearing on the reasonableness of that bid price, B–164931, September 5, 1968, and that nonresponsive bids may be used to determine what is a reasonable price. *Support Contractors, Inc.*, B–181607, March 18, 1975, 75–1 CPD 160; B–164931, *supra*. McCarthy has not shown that the use of Long's nonresponsive bid either in revising the Government estimate or in gauging the reasonableness of McCarthy's original bid was unwarranted or unreasonable. Although McCarthy alleges that Long cannot perform at its unrealistically low price, it has not shown on this record that GSA abused its discretion in determining that Long's verified bid did represent a fair and reasonable price. Therefore, we find this aspect of the McCarthy complaint to be without merit.

2. EQUAL BASIS FOR COMPETITION

McCarthy's next allegation is that "the Government has not allowed bidders to be on the same footing." Apparently McCarthy is concerned that since the Government specifications permitted widely divergent technical proposals to be considered acceptable, any estimate of reasonable price which is based on the lowest-priced technical approach will put offerors on an unequal footing.

We find no merit to this contention. Although in two-step formal advertising different technical approaches with correspondingly different prices are to be expected, the Government is not required to pay more than what it should reasonably have to pay to satisfy its needs. The fact that a particular method or approach may be technically acceptable to the Government does not mean that the costs associated with the technically acceptable proposal necessarily will be acceptable also. In any event, GSA reports that:

> * * * a comparison of McCarthy's bid with the low offer reveals that the difference in price is not due to differences in technical proposals. The equipment offered is largely either equivalent or comparable. This agency has therefore concluded that the price disparity is due not to technical differences, but to factors such as profit, administrative overhead, and the prices at which the bidders are able to obtain equipment from their respective suppliers.

Accordingly, we do not find that GSA acted improperly or that McCarthy was unduly prejudiced with respect to how the revised estimate was formulated.

3. DEFICIENCIES IN RESOLICITATION

McCarthy complains that the resolicitation was deficient because certain pages were missing from the reissued IFB and because the IFB did not properly restrict who could submit a bid and on what basis.

The reissued IFB consisted of three pages. Pages 1 and 2 were the front and reverse sides of Standard Form 33. Page 3 recited that "This is a readvertisement for requirements as detailed in Solicitation D-W-01625-Q2 * * *," and stated:

> All terms and conditions in this Readvertisement remain the same as those cited in Solicitation D-W-01625-Q2 * * *.

There followed a space for the bidder to insert a price for Item No. 1, identified as an electronic instructional media retrieval system.

McCarthy argues that this abbreviated IFB prejudiced its opportunity to bid properly by precluding it from modifying its position with respect to various provisions and certifications dealing with:

- affirmative action
- clean air and water
- source inspections
- production points
- contract administration
- minority business enterprise
- employment of the handicapped.

GSA states that the quoted statement incorporated by reference the pages and clauses contained in the original IFB and that this permitted "intelligent bidding by all interested parties."

While the incorporation by reference of standard contract and solicitation terms and conditions is a recognized practice, *see, e.g.*, FPR §§ 1–16.101(a), 1–16.105, we have some doubt as to the propriety of incorporating by reference bidder certifications and representations which were made in connection with a bid that was not accepted by the Government. Where a bidder must complete certain representations and certifications by checking boxes reflecting affirmative or negative replies, we think the legal efficacy of incorporating by reference the responses submitted in connection with a prior bid is subject to question. Also, as the protester points out, this type of incorporation by reference deprives the bidder of an opportunity to provide a certification reflecting the bidder's current situation.

Nevertheless, we do not view the resolicitation as fatally defective. It is clear that the provisions in question basically are informational in nature and as such bear on the question of bidder responsibility, with the result that the certifications and representations need not be furnished with the bid, but may be completed after bid opening. *See*, e.g., *Bryan L. and F. B. Standley*, B–186573, July 20, 1976, 76–2 CPD 60; *Royal Industries*, B–185571, March 1, 1976, 76–1 CPD 139; *Allis-Chalmers Corporation*, 53 Comp. Gen. 487, 489 (1974), 74–1 CPD 19. Accordingly, we do not find that any bidder could reasonably be prejudiced by the absence from the resolicitation of the pages in question.

McCarthy's final complaint is that the language in the resolicitation would allow any "active bidder" to submit a bid and would permit a bidder to bid on any one of the three acceptable technical proposals submitted during step one. We disagree. As indicated above, the reissued IFB incorporated the terms and conditions of the original solicitation. The original IFB specified that it was being issued "pursuant to two-step formal advertising procedures" and that bids would be considered "only from those firms who have submitted acceptable technical proposals * * *." It was further indicated that each bid submitted under step one had to be based on the bidder's own technical proposal as accepted by the Government. Thus, we see no basis for McCarthy's complaint.

The protest is denied.

[B-114806]

Farm Credit Administration—Deputy Governors—Compensation

Compensation of Deputy Governors, Farm Credit Administration, is authorized to be fixed at not to exceed the maximum scheduled rate of General Schedule. Such compensation, although not limited by compensation of Governor and not subject to classification provisions, may not exceed rate for level V of Executive Schedule, since effect of 5 U.S.C. 5308 is to limit maximum scheduled rate of General Schedule to level V rate. Higher amounts shown on General Schedule are merely projections of what rates would be without this limitation.

By letter dated October 29, 1976, Daniel L. Monson, the General Counsel of the Farm Credit Administration (FCA), requests our opinion as to whether the compensation payable to the five Deputy Governors of FCA is limited by the compensation of the Governor. It is the view of FCA that it is not and that the compensation of the Deputy Governors may be set at any rate which does not exceed $54,410, the rate published for grade GS-18 of the General Schedule by Executive Order 11941, October 1, 1976, without regard to 5 U.S.C. 5308 (1970) which limits pay to the rate of basic pay for level V of the Executive Schedule, currently $39,600.

The administration and operation of FCA is presently governed primarily by the Farm Credit Act of 1971, Public Law 92-181, approved December 10, 1971, 85 Stat. 583 (12 U.S.C. 2001 *et seq.* (Supp. V, 1975)). This legislation provides in pertinent part as follows:

Sec. 5.7. THE FARM CREDIT ADMINISTRATION.—The Farm Credit Administration shall be an independent agency in the executive branch of the Government. * * * (12 U.S.C. 2241)

In the matter of the Farm Credit Administration—compensation of Deputy Governors, February 18, 1977:

Sec. 5.11. COMPENSATION; SALARY AND EXPENSE ALLOWANCE.—The compensation of the Governor of the Farm Credit Administration shall be at the rate fixed in the Executive Pay Schedule. * * * (12 U.S.C. 2245)

Sec. 5.27. AMENDMENTS TO OTHER LAWS.—(a) The Executive Schedule of basic pay (80 Stat. 458, 5 U.S.C. 5311-5317), as amended, is further amended by striking from positions at level IV the Governor of the Farm Credit Administration (5 U.S.C. 5315(51)) and inserting in positions at level III the additional position (58) Governor of the Farm Credit Administration. (5 U.S.C. 5314)

Sec. 5.13. FARM CREDIT ORGANIZATION— * * * The Governor shall appoint such other personnel as may be necessary to carry out the functions of the Farm Credit Administration: *Provided, That the salary of positions of Deputy Governors shall not exceed the maximum scheduled rate of the general schedule of the Classification Act of 1949, as amended.* * * * (12 U.S.C. 2247) [Italic supplied.]

Sec. 5.16. ALLOCATION OF EXPENSES FOR ADMINISTRATIVE SERVICES BY THE FARM CREDIT ADMINISTRATION; DISPOSITION OF MONEY.—(a) The Farm Credit Administration shall prior to the first day of each fiscal year estimate the cost of administrative expenses for the ensuing fiscal year in administering this Act, including official functions, and shall apportion the amount so determined among the institutions of the System on such equi-

table basis as the Farm Credit Administration shall determine, and shall assess against and collect in advance the amounts so apportioned from the institutions among which the apportionment is made.

(b) The amounts collected pursuant to subsection (a) of this section shall be covered into the Treasury, and credited to a special fund and, without regard to other law, shall be available to said Administration for expenditure during each fiscal year for salaries and expenses of said Administration. * * * (12 U.S.C. 2250)

Although subsection 5.16(b) states that the funds involved shall be available for expenditure "without regard to other law," the Congress does limit the amount of the assessments which can be obligated for administrative expenses. See the Agriculture and Related Agencies Appropriation Acts, 1976 and 1977, Public Law 94–122, approved October 21, 1975, 89 Stat. 641, 666, and Public Law 94-351, approved July 12, 1976, 90 Stat. 851, 868.

It is FCA's position that the assessments collected from the farm credit agencies and used to pay the compensation of the Governor and the Deputy Governors, pursuant to section 5.16, *supra*, although subject to the limitation cited above, should be construed to be non-appropriated funds. However, under the view we take of this case it is not necessary to decide that question at this time and we shall not do so.

FCA further contends that neither the Farm Credit Act of 1971, *supra*, nor its legislative history reflects any intent to prohibit the compensation of the Deputy Governors being fixed at a rate higher than that of the Governor. While we think the statute as enacted clearly contemplated that the Deputy Governors would be paid at a lower rate than that of the Governor, we find nothing in the law to make this mandatory.

Based on the premise that the Deputy Governors are not limited by the pay of the Governor, FCA further contends that the maximum scheduled rate of the General Schedule is $54,410, the current published rate for grade GS–18, and that the Deputy Governors' compensation may be fixed at any rate which does not exceed that amount because they are exempt from the provisions of 5 U.S.C. 5308 (1970) which limits pay to the rate for level V of the Executive Schedule, $39,600.

In support of its position FCA argues: (1) the Deputy Governors are excluded from the coverage of chapter 51 of title 5, United States Code, relating to position classification; (2) they are excluded from the coverage of subchapter III of chapter 53, relating to General Schedule pay rates, since that subchapter applies only to employees and positions covered by the classification provisions of chapter 51; (3) they are excluded from the coverage of subchapter I of chapter

53, relating to the pay comparability system, since that subchapter applies only to General Schedule rates under subchapter III (and those of two other statutory systems not here involved); and (4) the Deputy Governors, being excluded from the coverage of subchapter I of chapter 53, are exempt from the pay limitation contained therein (5 U.S.C. 5308).

We are unable to agree that the Deputy Governors may be paid at a rate in excess of the rate now paid a GS–18 employee. Section 5308 of title 5, United States Code, provides:

> Pay may not be paid, *by reason of any provision of this subchapter*, at a rate in excess of the rate of basic pay for level V of the Executive Schedule. [Italic supplied.]

Unlike the "Udall amendment" to the Legislative Branch Appropriation Act, 1977, title II, Public Law 94–440, approved October 1, 1976, 90 Stat. 1446, which does not prohibit the establishment of higher rates but merely prohibits the use of appropriated funds to pay a specified class at those higher rates, section 5308, in our view, imposes a limitation or ceiling on the rates themselves. Clearly it is "by reason of any provision of this subchapter" that the amounts in the General Schedule in excess of Executive level V are derived, and by the express language of the section they may not be paid to anyone whose rate of pay is derived from the General Schedule. The amounts in excess of Executive level V are denoted by an asterisk in Executive Order 11941, October 1, 1976, and footnoted by an express reference to 5 U.S.C. 5308 limiting basic pay to $39,600, the current rate for level V of the Executive Schedule. Such amounts are, in effect, nothing more than projections of what the pay rates would be were it not for the limitation. Therefore, the "maximum scheduled rate" of the General Schedule, that for grade GS–18, is limited under existing law to the rate for level V of the Executive Schedule, now $39,600.

Further, section 5308 was added to title 5 by section 3(a) of Public Law 91–656, approved January 8, 1971, 84 Stat. 1951, and the Congress could have readily exempted the Deputy Governors from its provisions by express language in the Farm Credit Act of 1971, *supra*, which was enacted nearly a year later on December 10, 1971, had that been its intent.

Accordingly, since 5 U.S.C. 5308 limits the "maximum scheduled rate" of the General Schedule to the rate for level V of the Executive Schedule, and section 5.13 of the Farm Credit Act of 1971, *supra*, provides that the salary rate of the Deputy Governors of FCA shall

not exceed such rate, the Deputy Governors may not be paid at a rate in excess of $39,600, notwithstanding the fact that subchapter I of chapter 53, title 5, United States Code, may not otherwise be applicable to them.

[B-187571]

Contracts—Specifications—Ambiguous—Partial Invitation Cancellation

Agency specified that instrument "capsule material" be of 316 stainless steel with intent that portion of instrument wetted by solution being measured be made of that material. Protester's design utilized 316 stainless steel capsule and wetted diaphragm of 430 stainless steel. Protester reasonably read specifications as consistent with its product although in fact product does not meet agency's needs. In view of specification ambiguity, unawarded portion of procurement should be readvertised.

Bids—Amendments—Solicitation *v.* Amendment—Provisions

Where solicitation states that there is 117 Volt A.C. power supply and instruments must run off 24 Volt D.C. power supply, solicitation amendment indicating that agency will furnish the 24 Volt D.C. converter does not contradict earlier statement that there is 117 Volt A.C. power supply.

Bids—Amendments—Failure To Acknowledge

Allegation that bid should be rejected as nonresponsive because of bidder's failure to acknowledge receipt of an amendment to invitation for bids is academic since portion of procurement which would be awarded to that bidder shall be readvertised.

In the matter of Flo Tek, Inc., February 23, 1977:

Flo Tek, Inc. protests the award of a contract to Tri-Tech Engineering Corporation (Tri-Tech) and the proposed award of a contract to Equipment & Controls, Inc. (E & C) for portions of the process instrumentation hardware sought by Invitation for Bids (IFB) 48-76, issued by the Energy Research and Development Administration's (ERDA) Morgantown Energy Research Center (MERC).

Flo Tek's low bid on several of the items was rejected as non-responsive. Flo Tek's principal contention is that this determination was erroneous.

The "Notice to Bidders" cover sheet accompanying the IFB cautioned bidders not to "include descriptive literature with the bid unless the solicitation specifically requires such literature" and that "inclusion of terms, conditions and provisions which differ from those contained in the solicitation may be cause for rejection of the offer." However, the Standard Form 33A, as amended, made a part of the

IFB, also contained a "Brand Name or Equal" clause requiring bidders to submit descriptive material in the event they were offering a product "equal" to a brand name product specified in the IFB schedule. Since the instant IFB did not identify the items sought by make and model, the "Brand Name or Equal" clause was not applicable, and there was no obligation upon any bidder to furnish descriptive material. However, the record suggests that Flo Tek's president may have misread the IFB as requiring descriptive material.

Flo Tek inserted numbers, such as "#20RF12A2" adjacent to certain portions of the specifications, and enclosed with its bid 18 pages of specifications, drawings, and installation, operation and maintenance instructions for a certain line of transmitters.

Flo Tek's bid was subjected to a technical evaluation, as a result of which the bid was found to be nonresponsive. The specifications for the transmitters stated that the "Capsule Material" was to be "316 SS [stainless steel]." The record shows that what ERDA contemplated obtaining through this specification was a transmitter of a "closed configuration" design in which the portion of the device ("capsule material") which is wetted by the flow of the solution which the instrument is measuring is made of 316 SS. The design offered by Flo Tek was of an "open configuration" design which contained two 316 SS capsules but the sensing diaphragm of which was clearly shown to be of 430 SS. It is this sensing diaphragm which is wetted by the process solution in the Flo Tek design.

The transmitter described in Flo Tek's bid does not meet the agency's requirements in that the element wetted by the solution being measured consists of 430 SS rather than 316 SS. However, Flo Tek has advised that had it been on notice of ERDA's true requirement it could have readily complied therewith. At the same time, we do not believe it was unreasonable for Flo Tek to regard its design as satisfying the requirement that the "capsule material" be of 316 SS. It appears that the specification is subject to two reasonable interpretations and therefore is ambiguous. 48 Comp. Gen. 757, 760 (1969). In this regard, we note that the procuring activity has recently changed the specification to read as follows:

> Pressure Sensor: The capsule, sensing element or measuring element metal parts, *including all diaphragms that are "wetted" by the process fluid* shall be of 316 SS. [Italic supplied.]

The question is then presented as to what action may be taken to correct the effect of the ambiguous specification. A portion of the procurement was awarded to Tri-Tech before the protest was filed. Although ERDA was successful in having performance of that contract

suspended for a limited time, performance has resumed and a substantial part of the 120-day delivery period has passed. Under these circumstances, we do not believe Tri-Tech's contract should be disturbed. However, the portion of the procurement which has not yet been awarded should be readvertised using a more precise specification.

Flo Tek next contends that it is the only bidder whose product satisfies the power supply requirements of the IFB. The original specification advised bidders as to "Electric Service" that "Alternating current supply will be nominal 117 volts, 60 Hz." In response to a request from a bidder other than Flo Tek for clarification of the power supply situation, the following specification provision was added by amendment: "Power supply: Transmitters will be supplied from an ERDA owned 24 V D.C. Power Supply." Flo Tek maintains that it submitted the only responsive bid since it alone manufactures instruments which can operate on 117 Volts A.C. or 24 Volts D.C.

ERDA states that the IFB amendment was intended to advise bidders that the Government would provide a 24 Volt D.C. power supply, and its purpose was not to require instruments which would operate from 117 Volts A.C. and 24 Volts D.C.

We do not believe the solicitation as amended necessarily contained a discrepancy or dual voltage requirement because the standard power source for this kind of instrumentation is 24 Volt D.C. What this means is that a bidder offering a standard instrument which operates off 24 Volt D.C. would have to provide some kind of converter to change the 117 Volt A.C. into 24 Volt D.C. to operate the instrument. The amendment merely made it clear that ERDA would provide the converter. It appears that ERDA's converter would operate off the 117 Volt A.C.

ERDA admits that it should have deleted the reference to 117 Volt A.C. from the solicitation. However, it is our opinion that the net effect of the amendment was to advise the offerors that they need only bid the instrument alone and not the instrument plus converter.

Finally, Flo Tek argues that the bid of E & C should have been rejected as nonresponsive because of that firm's failure to acknowledge the amendment. Since the items which would have been awarded to E & C shall be readvertised pursuant to this decision, we believe this aspect of the protest is academic.

Therefore, the protest of Flo Tek is sustained in part and the as yet unawarded portion of the procurement should be readvertised using a specification which clearly indicates the minimum needs of the Government.

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