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[B-186984]

Contracts—Protests—Persons, etc. Qualified to Protest

Protester who was listed as subcontractor in rejected proposal submitted under agency solicitation is interested party for filing protest. Moreover, subsequent untimely protest by offeror does not require that offeror be excluded from protest action because firm is interested party concerning subcontractor's timely protest.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Administrative Determination—Negotiated Procurement

Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protestor into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Evaluation of Technical Acceptability

Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake.

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Level of Effort

Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO).

Contracts—Awards—Numerous Contracts to Same Contractor—No Legal Basis for Objection to Award

Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection.

Contracts—Negotiation—Evaluation Factors—Evaluators—Conflict of Interest Alleged

Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship.

In the matter of Educational Projects, Inc., March 1, 1977:

Educational Projects, Inc. (EPI), and others, have protested EPI's exclusion from the competitive range and the award to Kirschner

Associates, Inc. (Kirschner) of a cost-reimbursement contract under request for proposals (RFP) 150–76–R017, issued by the Department of Health, Education, and Welfare (HEW), Office of Child Development, Region V, Chicago, Illinois. The contract provides for training Head Start staff in child development throughout six states in the Midwest.

Five proposals were received. After review by a technical evaluation panel, proposals submitted by EPI, Kirschner, and Success Research Consultants, Inc. (Success), were determined to be technically acceptable. However, EPI was informed by the agency that because of its high estimated costs, and for other reasons, its proposal did not fall within the competitive range. Negotiations were conducted only with Kirschner and Success, and award ultimately was made to Kirschner.

A joint protest was filed timely with this Office by the Child Development Training Program, Bemidji State University, Bemidji, Minnesota, and the Head Start Supplementary Training/Child Development Associate (HSST/CDA) Program, University of Minnesota, Minneapolis, Minnesota (the Bemidji protest). Bemidji sought to protest the exclusion of EPI from the competitive range because EPI had proposed Bemidji, among others, as a subcontractor. Approximately one month after rejection of its offer, EPI protested its rejection to this Office. In addition, EPI timely protested the contract award to Kirschner.

The procuring agency argues that we should consider EPI's exclusion from the competitive range, as raised by Bemidji, only if Bemidji qualifies as an interested party for this procurement under our bid protest procedures, 4 C.F.R. § 20.1(a) (1976). The agency suggests that EPI would not be in the position of a purchasing agent for the Government and that Bemidji is in the same position to protest as an employee of an unsuccessful offeror. The agency notes that individual employees, generally, are not considered by this Office to be interested parties for bid protest purposes.

We have stated that generally in determining whether a protester satisfies the interested party requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester. The requirement that a party be interested serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged action may be decided. *ABC Management Services, Inc.*, 55 Comp. Gen. 397 (1975), 75–2 CPD 245; *Coleman Transfer and Storage, Inc.*, B–182420, October 17, 1975, 75–2 CPD 238. The protester's position as

subcontractor should not disqualify it from participating in the protest process. *Enterprise Roofing Service*, 55 Comp. Gen. 617, 720 (1976), 76–1 CPD 5. In our opinion, the agency's analogy is not persuasive because Bemidji, unlike an individual employee, was a proposed subcontractor for a significant aspect of the services required and as such its interests were clearly affected by the agency's nonselection of EPI. In fact, EPI considers itself a contracting agent for its intended subcontractor-institutions.

Also, a question has been raised regarding the timeliness of EPI's protest concerning the rejection of its offer. Our bid protest procedures require the filing of a protest within ten working days after the protester knows the basis of its protest. 4 C.F.R. § 20.2(b)(2) (1976). While EPI's initial protest as to its exclusion from the competitive range is untimely, it is clearly an interested party as to Bemidji's timely protest and we therefore will not exclude the firm from participating fully in this protest action.

The solicitation was issued by HEW's Office of Child Development pursuant to its "Head Start Supplemental Training" (HSST) program. The HSST program goals, as stated in the solicitation, are:

> First, to provide training for Head Start Staff in child development and in early childhood education and related areas with the objective of upgrading their skills and competencies in delivering services to Head Start children; and, second, to provide staff with opportunities for appropriate training and career development to facilitate upward mobility in Head Start programs.

The solicitation points out that emphasis on the program's career development function, which is degree oriented, has conflicted with the need to provide Head Start staff with training for skills directly related to teaching Head Start children. Accordingly, the Office of Child Development has supported development of the Child Development Associate (CDA) program. This involves the granting of a CDA credential by the CDA Consortium (a private nonprofit corporation funded by the Office of Child Development) to Head Start trainees who demonstrate competencies as provided in assessment procedures developed by the CDA Consortium. The solicitation points out that the CDA credential program and college degree programs are different in that degree requirements at many institutions often require trainees to take courses which only indirectly affect Head Start classroom performance. Thus, the CDA credential is based on actual performance with children, rather than completion of a prescribed number of credit hours, although college credit also may be given for CDA credential training.

The solicitation's scope of work contemplates that the offeror first will provide CDA credential training, either through its own staff or through cooperating institutions, to Head Start staff trainees. The

offeror also is required to provide for degree–oriented courses to certain Head Start trainees consistent with the priorities provided in the solicitation's "special instructions."

HEW reports that in the previous contract year, requirements for Head Start training and technical assistance within Region V were met by awarding 15 separate contracts to the educational institutions or affiliates which were proposed by EPI as subcontractors in this case. In order to simplify contract administration and in anticipation of reducing administrative costs, HEW decided to solicit for a single contract covering this entire region. The incumbent contractors formed a "Region V Consortium" to facilitate submission of a proposal which would be responsive to the single contract requirement.

The record shows that proposals were received from five sources and were submitted to a technical panel for evaluation. On the basis of a 100 point scale, the technically acceptable proposals were rated as follows:

Firm	Rating	Estimated Cost
EPI	73. 8	566, 649
Kirschner	64. 5	422, 989
Success	58. 5	451, 405

Thereafter, EPI was determined to be outside the competitive range and was excluded from negotiations because its proposed approach of subcontracting all training to a large number of institutions was significantly more expensive than that of other acceptable offers. The contracting officer believed that even though EPI may have been willing to negotiate, as indicated in its proposal, the firm's proposed method of performance was such that meaningful negotiations were improbable.

The protesters argue that procurement regulations call for acceptance of a proposal even though it may be more costly if it offers the greatest value to the Government in terms of performance and productability. It is alleged that EPI erroneously was rejected on the basis of cost, without sufficient consideration given to overall program proficiency. The protesters point out that only EPI has the general support of the participating institutions which held the prior contracts. In fact, EPI views itself as a contracting agent for these Region V institutions. It is stated that because of the innovative nature of HEW's training program, the granting of "valid credit" for training, a contract objective, is tenuous at many institutions. Because EPI has worked with these institutions since the program's inception and has gained the general acceptance of participating accredited institutions, it is suggested that forced new arrangements with a different con-

tractor will undermine the offering of valid credit to Head Start trainees. Although EPI believes its cost estimate was realistic, based on its extensive experience and understanding of the program's requirements, it argues that the agency failed to make a reasonable effort to determine whether or not the firm's estimated costs could be considered acceptable.

It is clear from a comparison of Kirschner's and EPI's proposals that they adopted very different methods of satisfying the RFP's requirements. The most significant difference appears to be that EPI intended to subcontract both degree-oriented training and CDA training to local universities. Kirschner intended to cooperate with the universities, but to subcontract its CDA training to one firm, which would train those who in turn would provide training and supervise the Head Start trainees.

It is true, as suggested by the protester, that there is no requirement that cost-reimbursement type contracts be awarded on the basis of the lowest proposed cost, fee or combination thereof. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The primary consideration in determining to whom the award shall be made is which firm can perform the contract in a manner most advantageous to the Government. Federal Procurment Regulations § 1–3.805–2. Generally, a proposal must be considered within the competitive range for negotiations unless it is so technically inferior or out of line in price that meaningful negotiations are precluded. *PRC Computer Center, Inc.*, 55 Comp. Gen. 60, 68 (1975), 75–2 CPD 35.

In objecting to the agency's failure to negotiate, the protesters state that EPI's proposal indicated a willingness to negotiate its estimated costs and that the firm should have been permitted either to explain the relative value of its proposal or to obtain suggestions from the agency concerning ways of reducing costs without affecting quality. In this regard, EPI's proposal stated:

> The cost information and budget presented below represents EPI's best cost estimates given the information provided in the RFP and EPI's proposed approach to meeting those requirements for the 1976–1977 academic year. Nevertheless, EPI would like to state its willingness to negotiate with the Region V Office of Child Development concerning these estimated cost projections. Wherever OCD can provide information which can demonstrate costs can be reduced without a reduction in the quality of the work to meet the government's expectations of the contractor, EPI is ready to make such adjustments.

In this case the solicitation gave no indication of the Government's intention to accept the acceptable technical proposal with the lowest attendant costs irrespective of its comparative technical excellence. As a general rule an offeror may not be excluded from the competitive range if it submits a proposal which is technically superior to others in

the competitive range unless the solicitation makes it clear that the agency intends to accept the least expensive proposal which it finds technically acceptable. 52 Comp. Gen. 161, 164 (1972). Offerors are entitled to know the trade-off between technical excellence and costs.

The circumstances here, however, are unusual in that it appears that EPI's decision to propose a high quality decentralized method of performance would not have been altered even if the agency had advised offerors of its intention to award to the lowest acceptable offeror. EPI essentially does not argue that it in fact was prejudiced by the agency's failure to make clear the importance of cost in its selection criteria. Rather, EPI believes that its high quality and more expensive approach offers the Government a corresponding greater value, and it seeks to negotiate for the purpose of explaining the relative value of its approach. It is clear, however, that the agency recognized EPI's technical superiority. EPI has not indicated any flexibility in altering its proposed approach to satisfying the Government's specifications other than its willingness to remove itself completely from the procurement to allow the Government to contract separately and directly with the individual institutions indicated in its proposal. This, of course, would not be an acceptable approach as indicated by the solicitation. Moreover, EPI's express offer in its proposal to negotiate costs with the Government was predicated on the assumption that the Government could demonstrate that costs could be reduced without a reduction in the quality of the work. In our opinion, the agency's failure to state its intention to make award on the basis of a technically acceptable proposal offering the lowest attendant costs may have misled EPI into believing it could submit its high quality proposal in the false hope of convincing the agency of its value. Nevertheless, the contracting officer in evaluating proposals reasonably considered EPI to be wedded to its high quality approach; and in view of the agency's priorities and the 25 percent higher costs than Kirschner's proposed costs, we cannot conclude that EPI was prejudiced by the agency's failure to negotiate with the firm on the basis of its superior proposal. Finally, we note that the agency has advised this Office of its intention to take appropriate measures to preclude a recurrence of the defect found in the subject solicitation. We support the agency's objective in this regard.

The protesters also object to the selection of Kirschner for several reasons. First, it is argued that a cutback in the prior year's services will occur under Kirschner's contract. The protesters state that the award document deleted material requirements of the solicitation (page 25) and that if EPI had known of this change in requirements its estimated costs would have been reduced significantly. Moreover,

it is argued that under Kirschner's centralized approach, trainees will not be issued valid academic credit and counseling at the same level obtained during the previous year. In this connection, EPI states it would be willing to remove itself as the proposed contractor, if the agency was willing to reinstate the separate contracts with the individual educational institutions. The protesters also point out that Kirschner has received a number of contracts in Region V creating a "Kirschner concentration of power and control over the delivering agencies in the Region that almost rivals that of the Regional Office itself." Finally it is argued that the award to Kirschner created a conflict of interest because the firm holds a contract requiring it to evaluate the effectiveness of the CDA program on a national scale.

As to the deletion of the material requirements on page 25 of the solicitation, we have been advised that this was due to a typographical error and by contract amendment the page has been reinstated with a minor exception and, instead, page 35, dealing with the format of the cost proposal, has been deleted. In addition, the objections concerning the extent of valid academic credit and counseling provided under the Kirschner proposal does not appear to involve a question of the acceptability of the proposal under the specification. We note that Kirschner proposed to provide academic credit for CDA training and has persuaded the agency that it can do so. Even though services to Head Start trainees in fact may have been cut back from previous levels, we are not aware of any material deviation in Kirschner's proposal to the solicitation requirements. Rather, the objection essentially is directed to the agency's specifications which have resulted in a reduction of training provided in the past. In this connection, we note that we have received numerous letters from institutions and Head Start trainees in support of the EPI proposal, which essentially retains past levels and types of training and counseling. While the protesters have requested that we evaluate the effectiveness of the Government's requirements, it would not be appropriate for us to do so pursuant to our bid protest function. We consistently have held that the determination of the Government's minimum needs is primarily the responsibility of the contracting agency which will not be disturbed absent a clear abuse of discretion. *Data 100 Corporation*, B–182397, February 12, 1975, 75–1 CPD 89. It seems to us that the specifications regarding the quantity and levels of training to be furnished Head Start trainees is a decision for contracting agency rather than this Office. Moreover, this objection to the Government's specifications raised after submission of proposals is untimely. 4 C.F.R. § 20.2(b) (1976).

As to the objections concerning the large number of Office of Child Development contracts held by Kirschner, we are aware of no legal basis for objection in this regard.

As stated by the protesters, and as confirmed by HEW, Kirschner is to perform a 2-year nationwide assessment of the effectiveness of CDA competency training, *i.e.*, the same type of training which Kirschner is to perform in HEW Region V. This would result in Kirschner evaluating its own work, and any conclusions reached by Kirschner in its evaluation should be challenged for lack of objectivity. Notwithstanding the obvious competing relationships of Kirschner and although the usefulness of the assessment contract may be impaired, there has been no suggestion that Kirschner's assessment contract will adversely affect its performance under the training contract which is the subject of this protest. In any case, HEW has concluded that this situation does create an apparent conflict of interest, even though it is not directly violative of any Federal or HEW procurement regulation. In order to ensure that HEW gets what it bargained for in the assessment contract, HEW's Deputy Assistant Secretary for Grants and Procurement Managament has recommended to the contracting office that Kirschner's national assessment contract be amended to delete the requirement for Region V CDA assessment and that assessment for that Region be performed either in-house or under contract with a firm other than Kirschner. We agree with this remedial action. *See generally 701st Personnel Services Company*, B-186049, November 11, 1976, 76-2 CPD 400; *Cf.* Armed Services Procurement Regulation, Appendix G, *Avoidance of Organizational Conflict of Interest.*

Accordingly, the protest is denied.

[B-187177]

Contracts—Negotiation—Changes, etc.—Oral *v.* Written

Where agency did not issue amendment to request for proposals (RFP), but met with each offeror individually to advise of change in RFP evaluation criteria, but one offeror denies even being advised of change, it is clear that misunderstanding could have resulted from agency's failure to verify its oral advice by prompt issuance of RFP amendment in accordance with regulations.

Contracts—Negotiation—Evaluation Factors—Cost Analysis—Benchmark Costs

Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate.

General Accounting Office—Recommendations—Contracts—Resolicitation Under Revised Evaluation Criteria—Termination of Awarded Contract If Necessary

In view of deficiencies in procurement, General Accounting Office recommends resolicitation of proposals and, if advantageous to Government, that new contract be awarded and that present contract be terminated.

In the matter of Informatics, Inc., American Management Systems, Inc., and National CSS, Inc., March 1, 1977:

Informatics, Inc. (Informatics), American Management Systems, Inc. (AMS) and National CSS, Inc. (NCSS) have protested the award of a fixed unit price contract to Boeing Computer Services, Inc. (Boeing) under request for proposals (RFP) 76–24 issued by ACTION on May 3, 1976. In addition, Computer Network Corporation (Comnet) has submitted comments as an interested party to the various protests.

The solicitation invited proposals to provide computer time and concomitant support services to ACTION for its automatic data processing systems. Each potential offeror was provided with a System Management Facility (SMF) tape for the month of April 1976 to use as a base against which to estimate costs. The RFP listed detailed evaluation criteria and the points associated with each item and provided that the most advantageous proposal was to be determined based on a "value per point" formula. The RFP further provided that "should negotiations be deemed necessary such negotiations will be conducted with all firms in the negotiation range" based on the value per point formula.

The maximum point score obtainable under the evaluation criteria was 334. Thirty of the points were assigned to a benchmark or live test demonstration, with 15 of the points allocated to benchmark cost and 15 to benchmark time. The benchmark was designated as an optional criterion which ACTION might elect to conduct "if deemed necessary by evaluation officials." A note following the benchmark criteria stated:

NOTE: Vendor must fully and completely execute benchmark in an acceptable manner to be considered for award. Test must be run as furnished. Vendor must request prior written approval of any proposed JCL [job computer language] changes.

ACTION received eight proposals by May 24, 1976. The proposals were evaluated by a technical evaluation panel (Panel). The benchmark had not been conducted so each offeror was assigned no score under that criterion. The Panel applied the other RFP evaluation criteria, and the estimated costs of the technically qualified proposals were then determined and factored in accordance with the "value per

point" formula. A determination was thereafter made to exclude from the competitive range offerors proposing more than $500,000. As a result of this evaluation, Boeing, AMS, Informatics and Comnet were determined to be within the competitive range, and the other offerors were eliminated from the competition, including NCSS.

At this point, the contracting officer concluded that while the estimated costs quoted by the offerors based on the SMF tape were valid for determining the competitive range, the SMF-based costs were not adequate for making an award decision because it appeared that each offeror had to compute its estimated costs on a set of assumptions. He states that "a review of these assumptions clearly indicated that while some assumptions were used" by more than one firm these officer decided to call for the benchmark test and to use the benchmark prices as the basis of award selection since the "conditions prevalent for the benchmark were clearly evident and the * * * [the benchmark] would provide consistency between the proposers."

ACTION initiated the benchmark by letter dated June 23, 1976, to AMS, Informatics, Boeing and Comnet. The letter included the benchmark test, which consisted of ACTION's bi-weekly payroll. Benchmark tests were then concluded, and cost proposals were received based on the benchmarks.

ACTION notes that at this point in the procurement process, the contracting officer left the office for a two-week vacation, and management of the procurement was turned over to his contract negotiator. Apparently, the contract negotiator was unaware of the contracting officer's determination that cost proposals were to be based on the benchmark rather than the SMF tape. Thus, on July 14, 1976, the contract negotiator contacted the offerors by telephone and requested a best and final offer from each offeror to be submitted the same day. The following best and final offers were received on the basis of the SMF tape:

Offeror	Initial Best and Final Offer
Boeing	$14,700 month
AMS	$19,595 month*
Comnet	$21,681 month
Informatics	$29,000 month*

The contracting officer reports that on July 19, 1976, upon his return to the office, it became evident to him that the July 14 cost estimates based on the SMF tape were unsuitable for award determination. Therefore, he sought from each offeror a "confirmed" cost proposal expressed in terms of the benchmark, rather than the SMF tape. In this connection, the contracing officer states that on July 20, 1976, he

(*ACTION reports that these figures exclude "discounts and other pricing gimmicks such as free time, free floats, etc. * * * which were considered unstable for purposes of award.")

had separate meetings with Informatics, Boeing, AMS and Comnet. The contracting officer reports that he told each offeror at these meetings that award would be made solely on the basis of benchmark price. In the contracting officer's words:

> * * * I called each offeror into my office with the clear purpose of having each convert his offer to the benchmark or confirm his offer if already expressed in benchmark.

The contracting officer reports the following offers resulting from the July 20 meetings:

Offeror	Final Benchmark Price
AMS	$544.95
Boeing	$755.34
Informatics	$794.69
Comnet	$853.49

The contracing officer then evaluated the benchmark results. He found that AMS had failed to "execute the benchmark in an acceptable manner." A contract was awarded to Boeing, the next low offeror, on July 29, 1976.

Thereafter, AMS, Informatics and NCSS protested. However, for the reasons discussed below, we need only consider the Informatics protest.

The main thrust of the Informatics protest is that he award evaluation based solely on benchmark costs was "illegal" since these costs do not reflect the Government's true costs and the RFP did not provide for such an evaluation. Moreover, Informatics states its belief that "its price is less than Boeing's and that applying the criteria set forth in the RFP for evaluation, Informatics is entitled to award."

We find there is merit to the protest. Federal Procurement Regulations (FPR) 1-3.805-1(d) (1964 ed.) requires that when, during negotiations, a substantial change occurs in the Government's requirements, the change or modification should be made in writing as an amendment to the RFP, and a copy shall be furnished to each prospective contractor. Oral advice of changes or modifications may be given if (1) the changes involved are not complex in nature, (2) all prospective contractors are notified simultaneously (preferably by a meeting with the contracting officer), and (3) a record is made of the oral advice given. In such instances, however, the regulation goes on to provide that "the oral advice should be promptly followed by a written amendment verifying such oral advice previously given" and that the dissemination of oral advice of modifications separately to each prospective contractor during individual negotiation sessions should be avoided unless "preceeded, accompanied, or immediately followed by a written amendment to the request for proposals * * *." *See also Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76-1 CPD 134. In our opinion, a change in the RFP evaluation scheme falls within the

reach of this regulation. *See Minjares Building Maintenance Company*, B–184263, March 10, 1976, 76–1 CPD 168. Therefore, when the contracting officer decided in late June (after the competitive range was determined) to abandon the RFP evaluation criteria in favor of the benchmark costs as the basis for award, he should have notified the remaining offerors in writing of the change.

We recognize that the RFP did not specifically state that the final award determination would be based on the so-called "value per point" formula. The RFP simply stated that should negotiations be deemed necessary such negotiations would be conducted with all firms in the negotiation range based on the value per point formula. However, an offeror reading the RFP would logically conclude, as do we, that the value per point formula as described in the RFP would determine not only the competitive range, but also the eventual awardee.

If the contracting officer had advised the offerors in writing that the benchmark would be controlling in making the award, we suspect that his contract negotiator would not have made the mistake during the contracting officer's absence of calling for the July 14 best and final offers based on the SMF tape. Once this mistake was discovered by the contracting officer, the contracting officer should have met simultaneously with the four offerors, not individually, to advise them of the change. Furthermore, in accordance with FPR 1–3.805–1(d), the contracting officer then should have promptly issued a written amendment verifying the oral advice previously given. As we stated in a case concerned Armed Services Procurement Regulation 3–805.1(a) (1969 ed.), the counterpart of FPR 1–3.805(d):

> * * * The benefits to be derived from issuance of a written amendment are evident. The procurement officials of the agency are assured that notice of the complete change is in fact communicated to the proper officials of all competing offerors and that all the aspects of the change referenced to the applicable RFP provisions are included in the notice. The possibility of charges of fraud or favoritism is thereby eliminated or reduced. Also, the written amendment and acknowledgement of its receipt provide a firm basis for reviewing and justifying a challenged procurement action. 49 Comp. Gen. 156, 162 (1969); *see also Chrysler Motors Corporation*, B–186600, September 29, 1976, 76–2 CPD 294.

The importance of adhering to the regulatory provision is pointed up by Informatics' statements in support of its protest. Informatics "categorically denies that it was ever told by ACTION that the evaluation would be made solely on the basis of the benchmark," and states that it did not understand from what it was told that new best and final offers were being solicited after July 14. It contends that it was prejudiced as a result, and that award therefore should be made on the basis of the July 14 offers. Informatics has submitted its own evaluation of Boeing's monthly prices (based on the July 14 offer) and concludes that Informatics' prices were lower.

Although ACTION insists that each offeror was advised of the change on July 20, and that no offeror objected to the change,

obviously, we are not in a position to resolve this factual dispute. What is clear, however, is that Informatics was not advised in writing of the change and could have misunderstood the purpose of the July 20 meeting. In this regard, even the contracting officer acknowledges that a "misunderstanding could have ensued." *See Chrysler Motors Corporation, supra.*

Furthermore, while we cannot disagree with ACTION's position that Informatics' evaluation of the July 14 proposals appears to be based on the SMF tape, which could not be utilized effectively as a basis for award, we nevertheless agree with Informatics' contention that evaluation of only benchmark cost was not an adequate substitute since it did not permit consideration of all potential costs involved. For example, Informatics states that tape storage is "an item for which Boeing charges $4,455 per month and Informatics charges $450 per month assuming 1,000 tapes per month" (which it believes to be a realistic estimate because ACTION raised the figure from 500 tapes to 1000 during negotiations with it), but that the benchmark evaluation did not reflect these costs. Under these circumstances, we think it is questionable whether the proposal most advantageous to the Government could have been determined by the evaluation conducted here.

CONCLUSION

In view of the inadequate cost evaluation and the procedural defects which occurred during the course of the procurement, we recommend that the procurement be resolicited under revised evaluation criteria. If, after resolicitation, it is determined that it would be advantageous to the Government to accept one of the proposals received in lieu of the existing contract, then the contract should be terminated for the convenience of the Government.

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

[B–127474]

Compensation—Holidays—Leave Without Pay Status—Before and After Holiday

Employee in a pay status for the day either immediately preceding or succeeding a holiday is entitled to regular pay for the holiday regardless of whether he is in an authorized leave-without-pay status or in an absent-without-leave status for the corresponding day immediately succeeding or preceding the holiday. 13 Comp.

Gen. 207 (1934) overruled. 13 Comp. Gen. 206 (1934), 16 *id.* 807 (1937), 18 *id.* 206 (1938), and 45 *id.* 291 (1965) modified.

In the matter of non-pay status—pay for holiday not worked, March 2, 1977:

The Chairman of the Civil Service Commission, by letter dated March 31, 1976, has requested a clarification of our holdings in 16 Comp. Gen. 806 (1937) and in 45 Comp. Gen. 291 (1965) insofar as those decisions pertain to the entitlement to compensation of regular employees who are absent without leave or on authorized leave without pay either the day before or the day following a holiday. He suggests that inconsistencies between the two holdings may account for inconsistencies in the holiday pay administration of different agencies. Specifically, he points out that the Department of the Navy denies holiday pay to an employee who is absent without leave either the day before or the day after a holiday, while the Department of the Army denies holiday pay only when the unauthorized leave of absence occurs immediately prior to the holiday.

We are asked to address the question of whether an employee who is absent without leave on the workday immediately before the holiday (and who has not been ordered to work on that holiday), but who is in a pay status on the first workday after the holiday, is entitled to straight-time pay for the holiday. Conversely, the Chairman asks whether an employee who is absent without leave on the workday immediately after a holiday, but in a pay status on the workday immediately before a holiday, is entitled to straight-time pay for the holiday. He further inquires whether a different result would occur in either of the above situations if the employee is on authorized leave without pay instead of being absent without leave.

The language of 45 Comp. Gen. 291, *supra*, to which the Chairman refers is the statement at page 292 that "no authority exists for an administrative denial of pay for a holiday when in ordinary circumstances an employee has been in a pay status before or after the holiday." He suggests that that statement is at odds with the following language from 16 Comp. Gen. 807, *supra*:

> Where, however, the leave without pay is taken without obtaining appropriate authorization prior to the taking of such leave, the established rule is that, in the absence of a statute specifically providing otherwise, the employee is considered in a non-pay status for the entire period during which he absents himself from duty, and in such cases deduction of pay is required for all days coming within that period, including Sundays and holidays irrespective of whether occurring immediately prior to the day on which the employee reports for duty.

Unlike the above excerpt from 16 Comp. Gen. 807, the above-quoted statement from 45 Comp. Gen. 291 was intended to refer to employees in a pay status either immediately before or after a holiday and in an

authorized leave-without-pay status on corresponding days immediately after or before a holiday. Moreover, that statement is generally consistent with the following additional statement from 16 Comp. Gen. 807 in reference to employees in an authorized leave-without-pay status immediately before a holiday:

> Neither the uniform leave act of March 14, 1936, 49 Stat. 1161, nor the regulations issued in pursuance thereof (Executive Order No. 7409 dated July 9, 1936), prescribes any rule for applying in the case of leave without pay—whether or not such leave be authorized in advance. The general rule, however, is that employees absent on leave without pay granted in advance for a definite period and who report for duty at the beginning of the duty day next following the expiration of such definite period, are entitled to compensation for the Sundays and holidays occurring between the expiration of the leave granted and the day of actual reporting for duty, 13 Comp. Gen. 206 * * *.

We recognize that the further statement in 16 Comp. Gen. 807 that, notwithstanding the general rule quoted directly above, pay for holidays may be denied by administrative regulation under our holding in 13 Comp. Gen. 207 (1934), is inconsistent with our holding to the contrary in 45 Comp. Gen. 291. For this reason 13 Comp. Gen. 207 is hereby overruled.

While we do not view our decisions in 16 Comp. Gen. 807 and in 45 Comp. Gen. 291 as inconsistent, we are in agreement with the Chairman's suggestion that the subject of entitlement to pay for holidays immediately preceded or succeeded by a period of absence in a non-pay status is in need of clarification.

With regard to pay for holidays; 5 U.S.C. § 6104 (1970) provides:

> *§ 6104. Holidays: daily, hourly, and piece-work basis employees.*
>
> When a regular employee as defined by section 2105 of this title or an individual employed regularly by the government of the District of Columbia, whose pay is fixed at a daily or hourly rate, or on a piece-work basis, is relieved or prevented from working on a day—
>
> (1) on which agencies are closed by Executive order, or, for individuals employed by the government of the District of Columbia, by order of the Commissioner;
>
> (2) by administrative order under regulations issued by the President, or for individuals employed by the government of the District of Columbia, by the District of Columbia Council; or
>
> (3) solely because of the occurrence of a legal public holiday under section 6103 of this title, or a day declared a holiday by Federal statute, Executive order, or, for individuals employed by the government of the District of Columbia, by order of the Commissioner;
>
> he is entitled to the same pay for that day as for a day on which an ordinary day's work is performed.

This same concept has long been applied to monthly and per-annum employees. See 45 Comp. Gen. 291, 292.

Under the predecessor statute, as adopted in its earliest form by House Joint Resolution 551, June 29, 1938, we held that entitlement to pay for holidays is mandatory only where the employee is actually on the job immediately before and after the holiday in question. Only

in such situation is the presumption clear that the employee was "relieved or prevented" from working a holiday solely because of the occurrence of the holiday. See 18 Comp. Gen. 206 (1938).

Our decision in 45 Comp. Gen. 291, *supra*, established a further category of circumstances in which it is to be presumed that an employee is "relieved or prevented" from working on a holiday solely because of the occurrence of such holiday. In holding that there is no authority for denial of pay for a holiday when, in ordinary circumstances, an employee has been in a pay status before or after a holiday, we extended the presumption of 18 Comp. Gen. 206, *supra*, to employees on authorized leaves of absence either immediately before or immediately after a holiday.

Those two decisions left agencies the discretion to indulge what presumption they reasonably might with respect to whether an employee in an absent-without-leave status immediately before or after a holiday is "relieved or prevented" from working solely by the occurrence of that holiday. The result has been that different agencies have imposed different presumptions and, as in the cases of the Departments of the Army and Navy cited by the Chairman, have different instructions regarding pay entitlement for holidays.

Since our decisions permit these differing results, we have further considered the matter. We now believe that it is as valid to presume that an employee who was absent without leave the day before a holiday would have been present on the holiday as it is to presume that he would have been present on the holiday when he is absent without leave on the day after the holiday.

For this reason, and in the interest of uniformity and administrative convenience, we believe the rule stated in 45 Comp. Gen. 291, *supra*, should apply to employees in an absent-without-leave status immediately before or after a holiday as well as to employees on authorized leave without pay immediately before or after a holiday. Thus, an employee in a pay status for either the workday preceding a holiday or the workday succeeding a holiday is entitled to straight-time pay for the holiday, without regard to whether he is in an authorized leave-without-pay status or an absent-without-leave status for the corresponding day immediately succeeding or preceding such holiday. Our decisions in 13 Comp. Gen. 206, *supra;* 16 *id.* 807 *supra;* 18 Comp. Gen. 206, *supra;* and 45 Comp. Gen. 291, *supra*, are modified accordingly.

This holding is consistent with the following temporary instruction contained in the attachment to Federal Personnel Manual Bulletin 610–25, dated December 15, 1975, pertaining to Executive Order

11891 which excused employees from duty on Friday, December 26, 1975:

> When an employee is in a nonpay status either before *or* after his day off, as determined above, he is entitled to pay for the day off even though not worked, but if he is in a nonpay status before *and* after his day off, he is not entitled to pay for that day. (For example, an employee with a Monday through Friday workweek who is on leave without pay Wednesday afternoon, December 24, 1975, and is in a pay status at the beginning of work Monday morning, December 29, 1975, would be entitled to pay for both December 25, and December 26.)

As the above-quoted instruction fairly reflects the holding of this decision, we recommend the Civil Service Commission's amendment of its regulations to include a similar provision on a permanent basis.

[B-188043]

Contracts—Options—Exercisable At Sole Discretion of Government—Bid Protest Not for Consideration

Where record shows that under option provisions contract is renewable at sole discretion of Government, General Accounting Office will not consider incumbent contractor's contention that agency should have exercised contract option provision instead of issuing new solicitation. Prior decisions will no longer be followed to extent they are inconsistent with this determination.

In the matter of C. G. Ashe Enterprises, March 7, 1977:

C. G. Ashe Enterprises (Ashe) protests the Army's decision not to exercise the option under its contract No. DABT57-75-B-0078, for grasscutting services, beyond October 31, 1976, at Fort Eustis, Virginia. The contract was renewable under the option provision at the sole discretion of the Government.

Recently, this Office has considered similar protests on the merits. *A. C. Electronics, Inc.*, B-185553, May 3, 1976, 76-1 CPD 295 (we concluded, citing Armed Services Procurement Regulation §§ 1-1505 (c), (d) (1975 ed.) and B-173141, October 14, 1971, that a contracting officer had a reasonable basis for the decision not to exercise the option of the protester's contract); *Raven Industries, Inc.*, B-185052, February 11, 1976, 76-1 CPD 90 (we found no basis for legal objection to a contracting officer's determination to limit the exercise of the option clause to a specific number of units); *Fox International, Inc.*, B-181675, March 3, 1975, 75-1 CPD 126 (we found no basis to object to the refusal of an agency to exercise the protester's contract option). In prior cases, however, if the record showed that a contract's option clause could only be exercised at the sole discretion of the Government, then a protest was denied without examining the contracting officer's rationale. *See, e.g., The National Cash Register Company*, B-179045, March 5, 1974, 74-1 CPD 116; 36 Comp. Gen. 62 (1956). There, we believed it sufficient merely to point out that since

such options were purely for the interest and benefit of the Government, any determination that the exercise of such option would be contrary to the Government's interests manifestly may not be subject to legal objection by this Office. Compare *Inter-Alloys Corporation*, B-182890, February 4, 1975, 75-1 CPD 79, where protester's contention that agency should have exercised option in another firm's contract instead of issuing new solicitation was held to be matter of contract administration and not for consideration under our Bid Protest Procedures, 4 C.F.R. part 20 (1976).

In this case and in future cases where the record shows that the option provisions of a contract are exercisable at the sole discretion of the Government, this Office will not consider under our Bid Protest Procedures the incumbent contractor's contention that the agency should have exercised contract option provisions.

Accordingly, Ashe's protest is dismissed.

[B-164031]

Clothing and Personal Furnishings—Special Clothing and Equipment—Motorized Wheelchairs—Government Property Requirement

Social Security Administration (SSA) violated in the Southeastern Program Service Center the carpeting standards established under Architectural Barriers Act of 1968 and under Department of Health, Education, and Welfare (HEW) regulations. Prior to this violation, its employee had supplied his own nonmotorized wheelchair and was capable of performing his assigned duties. In order to make the best use of available personnel and in view of the fact that a powered vehicle became necessary only because of the violation of the Act's standards, we will not object to SSA's reimbursing its employee for the cost of acquiring the motorized wheelchair. The wheelchair will then become the Government's property for use solely in the subject building.

Social Security Administration—Noncompliance With Carpeting Standards Under Architectural Barriers Act—Rectification

Primary jurisdiction for assuring compliance with standards established under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 (1970), is placed by statute with the General Services Administration (GSA) 42 U.S.C. 4156, and with the Architectural and Transportation Compliance Board, 29 U.S.C. 792 (Supp. IV, 1974). SSA should determine from those entities the proper means of rectifying noncompliance with standards on carpeting, which noncompliance has resulted in handicapped persons requiring the use of powered wheelchairs. Section 236 of the Legislative Reorganization Act, 31 U.S.C. 1176 (1970) is applicable to this recommendation for corrective action.

Appropriations—Availability—Wheelchairs—Motorized

Should GSA, pursuant to 42 U.S.C. 4156 (1970), and/or the Architectural and Transportation Compliance Board, pursuant to 29 U.S.C. 792 (Supp. IV, 1974), order the SSA to purchase and have available motorized wheelchairs for other handicapped employees and members of general public to rectify the violation in the Southeastern Program Service Center of the carpeting standards established pursuant to the Architectural Barriers Act of 1968, it may use its appropriations for that purpose. If other action is prescribed, wheelchair purchases are not authorized, regardless of savings in cost.

In the matter of the purchase of wheelchair for use of Social Security Administration employee, March 11, 1977:

This decision is in response to a letter, with enclosures, dated November 10, 1976, from Mr. Fred Schutzman, Director, Office of Financial Management, Social Security Administration (SSA) of the Department of Health, Education, and Welfare (HEW) (his reference IAD–43), requesting a decision as to whether SSA is authorized to use its appropriations to reimburse a handicapped employee for a motorized wheelchair.

In his letter, the Director indicates that the employee in question is employed with the Southeastern Program Service Center. He performed his duties with the aid of a hand operated wheelchair until the Southeastern Program Center moved to a new building. The floors in that building are entirely covered with carpeting installed over a high density foam padding which makes the hand operated wheelchair very difficult to push. In order to carry out his duties, the employee found it necessary to purchase a motorized wheelchair at his own expense.

The Director reports that it would cost $68,250 to remove and replace the carpeting on the employee's floor and $624,000 to remove and replace the carpeting throughout the entire building. Because the wheelchair costs approximately $1,167, an amount far less than the cost of removing and replacing the carpeting, the Director has asked if it would be permissible for the SSA to reimburse its employee for the cost of the wheelchair. The wheelchair would then become the property of the Government and the employee would not be permitted to take it home. In addition, if we decide such reimbursement is allowable, he has requested our opinion concerning whether the SSA may purchase other wheelchairs should they hire more handicapped employees to work in the subject building.

On August 12, 1968, there was enacted the Architectural Barriers Act of 1968, Public Law 90–480, as amended, 82 Stat. 718, 42 U.S.C. §§ 4151 *et seq.* (1970), regarding the design and construction of public buildings to accommodate the physically handicapped. Section 2 thereof, 42 U.S.C. § 4152, provides:

> The Administrator of General Services, in consultation with the Secretary of Health, Education, and Welfare, is authorized to prescribe such standards for the design, construction, and alteration of buildings (other than residential structures subject to this chapter and buildings, structures, and facilities of the Department of Defense subject to this chapter) as may be necessary to insure that physically handicapped persons will have ready access to, and use of, such buildings.

Pursuant to that section the General Services Administration (GSA) has directed that every Government building be designed, con-

structed, or altered in accordance with the minimum standards in the "American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," Number A 117–R, 1971, FPMR 101–19.603, 41 C.F.R. § 101–19.6 (1976). The subject carpeting did not meet the standards set forth therein. GSA is also authorized to conduct such surveys and investigations as it deems necessary to assure compliance with those standards, 42 U.S.C. § 4156. In addition, the Architectural and Transportation Barriers Compliance Board, established by section 502 of Public Law 93–112, September 26, 1973, 87 Stat. 391, as amended, 29 U.S.C. § 792 (Supp. IV, 1974) is responsible for insuring compliance with the standards established by GSA under the Architectural Barriers Act of 1968. The Board may issue orders of compliance to Federal departments, agencies or instrumentalities which are final and binding and which may withhold or suspend Federal funds with respect to any building found not to be in compliance with those standards. 29 U.S.C. § 792(d).

Installation of the subject carpet also violated the provisions of section 4.12, ch. 3.3.5.2 of the Department of Health, Education, and Welfare's Technical Handbook for Facilities Engineering and Construction Manual, which provides:

> Carpeting in public or general areas should be heavy duty type with a tight weave and low pile, preferably installed without padding.

Chapter 3.3.5.3 of that manual provides:

> Floors of primary circulation paths should have a hard surface (such as vinyl asbestos tile) which permits easy movement of wheelchairs. Travel distance over carpeting required to reach such a path should not exceed 50 feet.

Generally, the cost of clothing and personal equipment to enable an employee to qualify himself to perform his official duties constitutes a personal expense of the employee, and, as such, is not payable from appropriated funds. 23 Comp. Gen. 831 (1944). As a guide in determining whether any particular equipment is to be considered personal to the employee, we stated in 3 Comp. Gen. 433 (1925) that:

> In the absence of specific statutory authority for the purchase of personal equipment, particularly wearing apparel or parts thereof, the first question for consideration in connection with a proposed purchase of such equipment is whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government's standpoint, without such equipment. If it be determined that use of the equipment is necessary in the accomplishment of the purposes of the appropriation, the next question to be considered is whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable him to perform the regular duties of the position to which he was appointed or for which his services were engaged. Unless the answer to both of these questions is in the negative, public funds cannot be used for the purchase. In determining the first of these questions there is for consideration whether the Government or the employee receives the principal benefit resulting from use of the equipment and whether an employee reasonably could be required to

perform the service without the equipment. In connection with the second question the points ordinarily involved are whether the equipment is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals and whether such equipment is assigned to an employee for individual use or is intended for and actually to be used by different employees.

See also 42 Comp. Gen. 626 at 627–628 (1963) and 45 *id.* 215 (1965).

Normally, a person needing a wheelchair to perform his duties would be required to provide that equipment himself. Such equipment is of a personal nature and could not be readily used by different employees or used only on an emergency basis or at infrequent intervals to accomplish a special agency purpose.

In the instant situation, however, the employee was providing his own nonpowered wheelchair and was satisfactorily performing his assigned duties. A powered wheelchair became necessary only because the agency, when it occupied new quarters, failed to comply with the standards established under the Architectural Barriers Act of 1968, *supra*. Because of this and since the wheelchair will enable the agency to obtain the best results from its available personnel under existing circumstances, 23 Comp. Gen. 821 (1944), we will not object to SSA's reimbursing the employee for the cost of the powered wheelchair, with the understanding that the wheelchair becomes the property of the Government. In this regard, the Director states that the wheelchair will not be removed from the Program Service Center.

It should be noted that the Architectural Barriers Act of 1968, *supra*, was not intended solely for protection of handicapped Government employees, but for the benefit of any handicapped person who is present in a Government building. Accordingly, although the submission asked only whether future purchases of wheelchairs were authorized for new employees who require them, we have considered the question as covering purchases of wheelchairs for disabled members of the general public as well.

The primary jurisdiction for assuring compliance with the standards established under the Architectural Barriers Act of 1968, *supra*, rests with the General Services Administration, 29 U.S.C. § 792 (Supp. IV, 1974), and not with his Office. (GSA is authorized by 42 U.S.C. § 4156, to exempt buildings from those standards on a case-by-case basis.) Accordingly, the Social Security Administration should contact those entities to determine what must be done to bring the Southeastern Program Service Center into compliance. Should GSA and the Board determine that the purchase of additional motorized wheelchairs by the SSA for the use of disabled employees in the course of their employment and for use by disabled members of the general public while visiting the building would be the appropriate means to

achieve compliance, we will not object to the use of appropriated funds for that purpose. However, if the Board issues an order of compliance requiring a different method for accommodating the building to the needs of handicapped individuals, *e.g.*, by removing the carpeting in question immediately, regardless of cost, then that order must be complied with, 29 U.S.C. § 792(d), *supra*, and appropriated funds may not be used to purchase other motorized wheelchairs.

However, in order to comply with the letter and spirit of statutory provisions such as section 501 of Public Law 93–122, September 26, 1973, 87 Stat. 390, 29 U.S.C. § 791(b) (Supp. IV, 1974), we will not object to the acquisition of motorized wheelchairs as a temporary expedient by the Social Security Administration for use of any handicapped individuals it wishes to hire while the matter of bringing the Southeastern Program Service Center into compliance with standards established under the Architectural Barriers Act of 1968 is being raised with GSA and the Board.

The recommendation for corrective action discussed herein is subject to the reporting requirements of section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

[B–187435]

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Unrealistic

Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. ....., (B–187435, June 2, 1977).

Contracts—Negotiation—Evaluation Factors—Testing Procedures

Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. ------, (B–187435, June 2, 1977).

In the matter of Informatics, Inc., March 15, 1977:

On May 28, 1976, the Department of Commerce (Commerce) issued request for proposals (RFP) No. 6–36995 for the preparation of patent data for patent full text data bases for the Patent and Trademark Office. On August 12, 1976, a contract was awarded to International Computaprint Corporation (ICC) for the requirement, which

award has been protested to our Office by Informatics, Inc. (Informatics).

For a clear understanding of the protest, a review of the history of the Patent and Trademark Office's requirement and prior solicitations for the service is necessary.

Under the contract, the contractor will be furnished a number of approved patents per week which are to be converted into machine language on magnetic computer tape. Several different types of tapes are to be produced for various uses. Master tapes are to be prepared containing the full text of the approved patents which will be available for distribution to industries desiring to store current patent information on computers. A second type of tape required will be used by the Government Printing Office (GPO) on its Linotron machine to print the official *Gazette* of the United States Patent and Trademark Office. Other types of tapes required are for reissues, defensive publications, designs and plants. An index to the official *Gazette* must also be prepared by the contractor.

ICC was awarded the initial competitive procurement in April 1970. Since 1970, ICC's contract has been extended during a series of attempted procurements which never resulted in the award of a new contract. Before the instant RFP was issued, Commerce sought to procure the services under invitation for bids No. 6–36976, which was canceled on May 14, 1976, following our recommendation in *International Computaprint Corporation*, 55 Comp. Gen. 1043 (1976), 76–1 CPD 289.

RFP 6–36995 requires the contractor to photocompose complex work units, including tables, equations and chemical diagrams, whereas under the earlier solicitations these items, mainly chemical diagrams, were omitted from the tapes and, instead, the diagrams were hand-pasted in the final print of the *Gazette*.

Informatics' first basis of protest is that the RFP contained inaccurate information and estimates which misled Informatics and any other offeror except the incumbent, ICC.

The RFP contained the following information with regard to the "Patent Application Suspense File" in the Scope of Work statement:

B. Patent Application Suspense File

Contractor must establish and maintain an automated system capable of storing a subsidiary file or full-text patent application data equivalent to an estimated 20,000 patent applications resident in the Series 4 Suspense Files. At the beginning of a contract year, and without cost to the government, the P & TM Office reserves the right to require the contractor to receive and implement an existing Suspense File (in the Version II format) which may not exceed 20,000 Series 4 patent applications. * * *

The Series 4 patents are patent applications made available to the contractor for data preparation prior to the patents being approved for

publication, usually because the necessary fee has not yet been paid. These Series 4 patents are processed by the contractor and put in a suspense file. When the fee is paid, the Patent Office advises the contractor of such payment and the Series 4 patent is removed from the suspense file and is published as a Series 3 patent in the *Gazette*. If the fee is not paid by the applicant within 3 months, the application is considered abandoned and the contractor is advised to delete the Series 4 patent from the suspense file.

Informatics argues that it based its proposal on establishing the capability of handling 20,000 Series 4 patents in the suspense file and upon having to assume the incumbent contractor's suspense file, which may contain up to 20,000 Series 4 patents. However, Informatics states that during a meeting with Commerce officials, following the award to ICC, it was advised that there were currently no Series 4 patents in the contractor's weekly workload. Thereafter, Informatics requested copies of the Patent Office records which reflected the suspense file activity under the ICC contract. These records show the number of Series 4 and Series 3 patents given to the contractor on a weekly basis from July 3, 1973, to December 14, 1976, and the total Series 4 patents resident in the suspense file each week. These figures show a steady decline in the number of Series 4 patents given to the contractor and a corresponding decrease in the size of the suspense file. As the number of Series 4 patents declined, the number of Series 3 patents increased, so that the total number of patents given to the contractor weekly stayed within the weekly workload estimate contained in the contract. The following chart summarizes the records of the Patent Office on a 6-month basis, showing the maximum and minimum number of each type of patent given to the contractor and the fluctuation in the suspense file during that 6-month period:

	SR–4	SR–3	Suspense File
7/3/73–12/25/73	1,400–860	790– 230	16,152–14,159
1/1/74– 6/28/74	1,240– 0	567– 283	15,677–12,447
7/2/74–12/31/74	1,166– 0	1,273– 232	13,206–10,076
1/7/75– 6/24/75	795– 0	962– 374	9,665– 5,025
7/1/75–12/30/75	364– 0	1,375– 905	5,653– 584
1/6/76– 6/29/76	0	1,845–1,316	572– 0
7/6/76–12/14/76	0	1,510–1,004	0

Informatics contends that the misleading information contained in the RFP caused it to overprice its proposal by substantially more than the $8,423.60 difference in the evaluated prices of ICC and Informatics. Informatics argues that the above-quoted portion of the statement of work caused Informatics to increase its overhead costs in its

proposal as neither the maintenance of the suspense file nor the assumption of the incumbent's suspense file is a reimbursable contract item, which was separately priced in the RFP. Further, as ICC was the incumbent, it knew the real state of the suspense file, and therefore was not misled by the RFP estimates of 20,000 files.

Commerce, in response to the above argument, states that the figures contained in the RFP were not firm figures of the size of the suspense file, which changes from week to week owing to the addition and deletion of Series 4 patents to the file. The figures were placed in the RFP to show the maximum that would be required of the contractor.

Before proceeding to the merits of this basis of the protest, the contention by Commerce that this ground of protest is untimely under our Bid Protest Procedures (4 C.F.R. part 20 (1976)) must be discussed.

Commerce contends that acceptance of Informatics' position that the information regarding the suspense file was crucial to the pricing of a proposal leads to the conclusion that the absence from the RFP of definite estimates for the suspense file was a defect apparent from the face of the solicitation, which should have been protested prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 20.2 (b) (1). Commerce also relies on a recent decision by our Office (*Data 100 Corporation*, B–185884, October 21, 1976, 76–2 CPD 354), which held that a protester alleging that a Government estimate omitted from the RFP was necessary to properly compute its price had to protest such omission prior to the closing date for receipt of proposals to be timely.

We believe *Data 100* is distinguishable from the instant protest. In *Data 100*, the solicitation contained no estimates or guidance with regard to a requirement of the solicitation. Therefore, we found that if the protester needed this information to compute his proposal price, it should have been apparent prior to the closing date for receipt of proposals and should have been protested at that time. Here, the RFP contained figures relating to the suspense file and based on what Informatics learned at the meeting, it now alleges it was misled by the figures in the RFP. Accordingly, we find this issue to be timely protested and will proceed to the merits.

It is clear that the disputed clause demands two distinct requirements of the contractor. First, he must establish and maintain a suspense file capable of storing data *equivalent to an estimated 20,000 patent files*. Secondly, he may be required to receive and implement an existing suspense file *which may not exceed 20,000* Series 4 files.

Commerce contends that under the first requirement the contractor

had to be able to maintain a suspense file equivalent to 20,000 patent applications. Unlike the second portion, which indicates the receipt of the suspense file at the beginning of the contract year, no time is indicated as to when that capability might be called upon. Commerce states that it used the 20,000 figure for the capability it needed based on the maximum size of the file. An application is normally abandoned in 90 days if the necessary fee has not been paid. Thirteen issues occur in a 90-day period, and the most files that can be sent the contractor with notice of an increase is 1,400 plus 15 percent, or 1,610 per week. Assuming no fees were paid and all the files sent the contractor were Series 4 files, the largest the suspense file could get before the oldest Series 4 files were deleted from the file would be 20,930 ($1,610 \times 13 = 20,930$). Commerce contends it still requires this capability.

Informatics states it was misled by the 20,000 figure and incorporated in its overhead a significant sum, which exceeded $8,423.60, to establish such a file, while ICC, which knew the present state of the suspense file, probably only priced it as a contingency in its overhead, if at all.

We find Commerce has justified its inclusion of the 20,000 file figure in the first portion of the clause and, under the terms of the solicitation, a contractor would be required to maintain a file that size at no extra charge to the Government. If ICC did price its proposal as alleged by Informatics, it did so at its own risk and, in the event the suspense file reversed its current trend, would suffer the financial consequences.

Whereas the first requirement related to a capability that could be called upon during the life of the contract, the second requirement must only be fulfilled once, at the beginning of the contract year. As noted below, we believe this distinction to be critical.

Commerce and Informatics disagree about the amount of control Commerce is capable of exerting on the Series 4 suspense file. Informatics argues that the number of Series 4 files in the suspense file is within the control of Commerce and, therefore, the use in the RFP of the 20,000 file figure was misleading because at the time the solicitation was issued there were no Series 4 files in suspense and only 1,247 Trial Voluntary Protest Program (TVPP) files. There is a dispute whether the TVPP applications are a part of the Series 4 suspense file, but it is not necessary to resolve that question in view of our position below.

Commerce responds that it cannot control the size of the suspense file for various reasons and, therefore, the second requirement only stated the maximum size file an offeror would have to assume. Commerce states that the "*may not exceed 20,000*" files means from 0 to 20,000 files and an offeror had not right to expect that the file at the beginning of the contract year would equal 20,000 files.

Regarding the factors beyond the control of Commerce which affect the size of the suspense file, Commerce cites productivity of the examining corps, personnel hiring freezes, new Patent Office programs and budgetary limitations.

According to Commerce high productivity by the examining corps increases the number of fee requests, which causes more fee–paid cases, and reduces the number of non–fee–paid cases that go into the suspense file. However, Commerce argues that this productivity is affected by hiring freezes, which are impossible to predict.

The new programs referred to by Commerce are the TVPP and the Proof Copy to Applicant Program, and it is contended both of these programs would cause more files to enter the suspense file.

Commerce states the most important unpredictable influence is budgetary limitations. Since the cost of keyboarding Series 4 files is almost half that of the complete publication process, the Patent Office can reduce expenditures by reducing the number of published patents per issue while increasing Series 4 keyboarding.

While our Office recognizes that certain of the above factors could have an effect on long-range estimating of the size of the suspense file, we believe that the Commerce Department could have more accurately predicted the size of the suspense file a new contractor would have to receive at the beginning of the contract year (4 months after issuance of the RFP).

Regarding the productivity of the examining corps, Commerce notes that there had been a hiring freeze for over 1½ years which was not lifted until after the award to ICC. However, Commerce states productivity would not be affected for 18 months after the freeze is lifted, the normal training period for an examiner. Therefore, even if the hiring freeze had been lifted the day after the RFP was issued, it would have had no effect on any estimate of the size of the suspense file at the beginning of the contract year.

Concerning the TVPP, the program had expired by its own terms prior to the issuance date of the RFP and would have had no subsequent effect on the size of the suspense file. The Proof Copy to Applicant Program was not to be implemented until after the new contract was awarded and also had no effect on the file size.

Commerce refers to a budget cut made *after* the award to ICC which will affect the size of the suspense file because more files will have to be sent to Series 4 files to conserve funds. However, no budget cut arose between the issuance of the RFP and the beginning of the contract year and, indeed, none was likely, because it was the last quarter of the fiscal year.

Based on the above and the historical data available to Commerce, we find a more accurate and greatly reduced estimate of the size of the suspense file at the beginning of the contract year should have been included in the RFP in order to permit offerors to compete on an equal basis. The absence of such information would operate to the competitive disadvantage of any offeror competing against the incumbent contractor. The historical data shows (disregarding TVPP's) that no Series 4 files were sent to the contractor after the middle of August 1975, or 9 months prior to the issuance of the RFP (except for 2 weeks which included 67 and 41 Series 4 files prior to October 1975). The suspense file reached zero for the issue for April 20, 1976, more than a month prior to the RFP issuance. These facts, coupled with the steady decline of the suspense file from 16,152 to 0 over a 3-year period, we believe show a trend which should have been conveyed to offerors.

We recognize that the RFP did not state any minimum number of applications in the suspense file which the contractor would have to receive and implement at the beginning of the contract year; it merely stated a maximum of 20,000. While the agency cannot predict the precise number, it has a duty to include a figure which is reasonably related to reality. Inclusion of a figure without regard to the circumstances, apparently because it had been used in earlier solicitations, is prejudicial to competitors other than the incumbent and prevents the maximization of competition contemplated by the procurement statutes and regulations.

There is a dispute in the record as to the cost impact on Informatics' proposal caused by the failure to state the actual number of files in the suspense file or a more realistic estimate. Commerce states the cost impact would be less than the difference in the Informatics and ICC proposals, and Informatics alleges that it allowed costs in its proposal which greatly exceeded this difference. We do not believe it is necessary to determine this amount exactly. Due to the closeness of the two proposals (Informatics—$10,891,829.60; ICC—$10,883,166.59), we find a reopening of negotiations to permit another round of best and final offers the only real means to determine the amount of such a cost impact. If ICC is not the low responsible offeror after this competition, its contract should then be terminated and award made to Informatics. If ICC is the low offeror and its price is less than the current contract, the contract should be modified to conform to the newly offered price. This manner of recompetition will permit Commerce to continue to receive its data preparation needs during the reopening of negotiations.

While the above result would normally render a discussion of the other issues raised by Informatics unnecessary, because of a collateral

request of Informatics in connection with another contention, namely, the addition of an evaluation factor to any ICC proposal submitted on a resolicitation, one additional issue must be discussed.

This basis of Informatics' protest is that ICC gained an unfair competitive advantage from an unauthorized research and development effort for which it was improperly compensated by the Government.

As noted above, the instant RFP required the contractor to photocompose chemical diagrams. The prior contract, under which ICC was performing since April 1970, did not require such photocomposition, as it was beyond the state of the art at that time. However, the contract sought the gradual introduction of complex work units, including chemical diagrams, into the data base as technological advances allowed. Informatics contends that ICC was improperly allowed by Commerce to photocompose chemical diagrams, which was not authorized by the then current contract. Informatics alleges such action permitted ICC to develop and refine its techniques in this area, while being compensated by the Government for such work and gave ICC a competitive advantage since Informatics had to develop such techniques using its own resources.

ICC and Commerce argue that the capability to photocompose chemical diagrams was developed by ICC at its own expense and independent of any Government assistance.

ICC states that it began to partially photocompose chemical diagrams in early 1975 by including letter symbols and horizontal single and double bonds. This limited photocomposition was done because of the lack of many special characters on the GPO Linotron machine necessary for chemical diagrams. In January 1976, ICC began to include vertical and diagonal bonds in the data base. Subsequently, ICC approached Commerce and advised that it possessed the ability to include benzene rings in the data base and requested a modification to the contract to allow such photocomposition. ICC states it developed this ability on its own Videocomp machine, which is more sophisticated and possesses more special characters than the Linotron machine. ICC's request to demonstrate its ability to convert from the Videocomp to the Linotron resulted in a test run on the Linotron machine on May 18, 1976. Commerce states that the results of the test run convinced it of ICC's ability to photocompose chemical diagrams. Informatics argues that chemical diagrams produced by ICC exceeded the error rate permitted by the RFP and, therefore, the test run did not prove ICC's photocomposition ability. Commerce states that the errors were due to human mistakes in keyboarding and not to deficiencies in ICC's software and, therefore, did not alter Commerce's belief in ICC's ability.

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Subsequently, ICC included photocomposition of chemical diagrams in the *Gazette* issues of August 3, 10, and 17, which work was actually performed in July 1976, due to the normal delay between a contractor processing the patents for an issue and the issue actually being produced by GPO. ICC states it included these items in the three issues in the expectation that a modification to the contract would be issued authorizing such work. However, Commerce decided not to issue the modification because ICC requested that the change in the scope of the work under the contract be gradually implemented at a buildup rate of 20–25 percent per month. Commerce determined that this delayed implementation would not produce the desired cost savings. Also, Commerce states that the Patent Office did not have a sufficient staff of proofreaders to check the chemical diagrams and, therefore, no modification was issued.

Regarding the use of the GPO Linotron machine for the May 18, 1976 test run, we find nothing improper in such use by ICC in attempting to convince Commerce as to its ability to photocompose chemical diagrams in order to have its then current contract modified. While Informatics argues that the conducting of the May 18 test run less than 2 weeks prior to the issuance of the instant RFP was improper because ICC's contract would end shortly and, therefore, a modification for such a short period of time would not give the Government any substantial benefit, we believe it is within the discretion of the contracting agency in the administration of the contract to determine when to modify an existing contract. Accordingly, we find nothing improper in connection with the May 18 test run. We have long recognized that firms may enjoy a competitive advantage by virtue of their incumbency or their particular circumstances. *Aerospace Engineering Services Corp.*, B–184850, March 9, 1976, 76–1 CPD 164.

Informatics also contends that the use of the GPO Linotron machine by ICC for the production of the three August issues of the *Gazette*, noted above, resulted in ICC getting a further competitive advantage, since such use for chemical diagrams was not authorized because no contract modification followed the May 18 test run. Upon our review of the entire record, we do not find that ICC gained any substantial competitive benefit from the three runs, as it had previously developed the capability to photocompose chemical diagrams by the May 18 test run.

Finally, in connection with the issue of ICC photocomposing chemical diagrams, Informatics contends that ICC billed the Government at an improper rate, which rate was to be used for billing equations under the contract, and therefore ICC received substantially higher payments than if it had hand-set the chemical diagrams instead of the unauthorized photocomposition. Commerce advises

that it has reviewed the invoices submitted by ICC and has found nothing improper in the billing method used by ICC. As the contracting agency is convinced of the correctness of its payments under the contract and such payments are in the realm of contract administration, which our Office does not review, the protest on the issue is denied. Further, as we find that ICC gained no unfair competitive advantage in this area, the request by Informatics that in any future solicitations an evaluation factor be added to ICC's price to balance such alleged unfair competitive advantage is denied.

As the decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

[B–187193]

General Accounting Office—Jurisdiction—Contracts—Small Business Matters

While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed.

Bidders—Qualifications—Prior Unsatisfactory Service—Administrative Determination—Time Limitation

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to serious deficiencies in *current or recent* contracts.

Contractors—Responsibility—Administrative Determination—Nonresponsibility Finding—Serious Deficiency Requirement

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to *serious* deficiencies.

Contractors—Responsibility—Administrative Determination—Nonresponsibility Finding—Based on Agency Audit Report

Contracting officer's determination of nonresponsibility for lack of tenacity and perserverance may properly be based on agency audit report even though (1) underlying data is not reviewed by contracting officer or protester, and (2) default of prior contracts based on those conclusions is presently under appeal.

In the matter of United Office Machines, March 16, 1977:

United Office Machines (UOM), the low bidder on certain items under invitations for bids (IFB's) Nos. GS–6FWR–7003 and GS–

6FWR–7006, issued by the General Services Administration (GSA) for repair and maintenance of office machines during the period October 1, 1976, through September 30, 1977, protests the contracting officer's determination that it lacked tenacity and perseverance because UOM was defaulted by GSA on two prior contracts for similar services and, therefore, was nonresponsible. The contracting officer, pursuant to Federal Procurement Regulations (FPR) § 1–1.708–2(a)(5) (1964 ed. amend. 71), notified the appropriate region of the Small Business Administration (SBA) of the determination. SBA timely notified the contracting officer that an appeal would be taken. In the interim, UOM filed a protest with our Office, and upon notice of the protest SBA suspended its action pending our decision. Subsequently, awards were made to firms other than UOM.

In the future, the SBA should not suspend an intended contest of the contracting officer's determination when a protest is filed here because, as a general rule, we will not review determinations of nonresponsibility based on alleged lack of integrity, tenacity or perseverance where SBA declines to contest that determination pursuant to applicable regulation unless there is a compelling reason to justify review, such as a showing of bad faith or fraud on the part of procurement officials. *Ekistics Design Group, Inc.*, B–187168, January 12, 1977. Since SBA indicated an interest in appealing the contracting officer's determination, although no appeal was taken, we will consider UOM's protest on the merits and consider it as we would where the SBA contested the contracting officer's determination, but the contracting officer's determination was followed by the contracting agency.

Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion, this Office will not disturb a determination of nonresponsibility based on lack of tenacity and perseverance when the record provides a reasonable basis for such determination. *Kennedy Van & Storage Company, Inc.*, B–180973, June 19, 1974, 74–1 CPD 334; *A. C. Ball Company*, B–187130, January 27, 1977.

Here, GSA's determination of nonresponsibility is based on the general minimum standards for responsible prospective contractors outlined in FPR § 1–1.1203–1 (1964 ed. amend. 95) as follows:

> Except as otherwise provided in this § 1–1.1203, a prospective contractor must:
>
> * * * * * * *
>
> (c) Have a satisfactory record of performance. Contractors who are or have been *seriously deficient in current or recent contract performance*, when the number of contracts and the extent of deficiency of each are considered, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, shall be presumed to be unable to meet this requirement. *Past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility* * * *. [Italic supplied.]

The primary basis for GSA's determination that UOM's past performance was unsatisfactory was GSA's termination of UOM's last two contracts for default. In addition, GSA has provided our Office with a comprehensive report, including about nine specific events, to support the determination of UOM's nonresponsibility, and UOM has responded in detail to GSA's conclusions. The first three events relied on by GSA concern matters occurring in 1970 and 1973, a period more than 3 years before the nonresponsibility determination was made.

A determination of nonresponsibility based on past unsatisfactory performance must, under the terms of FPR § 1-1.1203-1, be related to serious deficiencies in "current or recent" contracts. We do not believe that such events relate to "current or recent contracts" when there is an adequate record of more recent experience. Compare *Universal American Enterprises, Inc.*, B-185430, November 1, 1976, 76-2 CPD 373 (decision considered record of "recent" performance—1-year period ending approximately 3 months prior to contemplated award; and "current" performance—3 months prior to contemplated award); *Consolidated Airborne Systems, Inc.*, 55 Comp. Gen. 571 (1975), 75-2 CPD 395, *affirmed*, B-183293, June 3, 1976, 76-1 CPD 356 (decision considered record of "recent" performance—contracts completed within 1 year of the determination of nonresponsibility). Since the events did not relate to "recent or current" contracts, the contracting officer should not have relied upon them as a basis for the nonresponsibility determination.

The next two events relied on by GSA concern an overcharge for parts in the amount of $22.80 and a legitimate question of contract interpretation. In response, UOM refers to a letter dated November 6, 1975, in which the GSA Regional Administrator relates the question of contract interpretation and states that the two contracts in question were independent and a minimum service call fee could properly be charged under each contract for a single visit; however, the minimum service call fee under a single contract could only be charged once per visit, even though more than one piece of office equipment was repaired. The Regional Administrator concludes that "[UOM's] contracts are not presently in jeopardy, nor will they be, provided the contractor honors the terms and conditions of the contracts." We concur with the view of the Regional Administrator that a legitimate question of contract interpretation would not reasonably place UOM's contracts in jeopardy. Moreover, the $22.80 overcharge on parts, immediately admitted and corrected, cannot be considered as a basis for a finding of nonresponsibility. Accordingly, we do not believe that the above events are "serious" deficiencies reasonably permitting a determination of nonresponsibility.

Of the remaining events relied on by GSA, only one—consistent failure to meet time of delivery contractual requirements—provides a reasonable basis for a determination of lack of tenacity and perseverance. On this point, UOM argues that the deficiency occurred prior to the November 6, 1975, letter from the Regional Administrator indicating UOM's contracts were not in jeopardy. We find no support for UOM's argument because that letter concerned a pricing dispute and not late deliveries.

Secondly, UOM argues that GSA has refused to provide a list of the alleged late deliveries and absent such information UOM cannot effectively respond. This argument, in our view, is irrelevant to the question before us. We are reviewing the contracting officer's determination of nonresponsibility to ascertain whether it was reasonably based. The record shows that a report on the audit of UOM contracts dated March 17, 1976, from GSA's Office of Audits provided the basis for the contracting officer's belief that UOM consistently failed to meet time of delivery contractual requirements. Whether the data requested by UOM will ultimately be found to properly support the conclusion stated in the audit report is an issue for resolution by another forum on the appeal of the default terminations.

We find that the contracting officer's reliance on information contained in the GSA audit report was not unreasonable. *Western Ordnance, Inc.*, B–182038, December 23, 1974, 74–2 CPD 370 (contracting officer's determination of nonresponsibility based on negative preaward survey was not unreasonable); *Howard Ferriell & Sons, Inc.*, B–184692, March 31, 1976, 76–1 CPD 211 (determination of nonresponsibility because of lack of tenacity and perseverance based on prior default termination was proper even though termination was under appeal).

Accordingly, UOM's protest is denied.

[B–184782]

Compensation—Boards, Committees and Commissions—Land Commissioners—Subject to GS–18 Daily Rate Limitation

Appropriations for compensation of land commissioners are obligated only upon appointment of each commissioner *and* referral of particular condemnation action to commission of which he is a part, since no *bona fide* need for commissioner's services as to particular case arises until that time. Therefore, compensation for members of "continuous" land commission, established in 1969, is subject to GS–18 daily rate limitation under fiscal year 1976 or 1977 appropriations for payment of land commissioners with respect to cases referred to continuous commission after June 30, 1975. B–184782, February 26, 1976, amplified.

Appropriations—Obligation—Definite Commitment

Where members of "continuous" land commission are substituted or added after June 30, 1975, to hear cases referred prior to that time, obligation for compen-

sation to original commissioner (based on compensation rate prescribed in his order of appointment) ceases to exist, and new obligation as to substituted or added commissioner only is created based on compensation prescribed for new commissioner and anticipated length of service. Compensation would, therefore, be payable from appropriations current at time of substitution or addition, and would be subject to limitations contained in such appropriations, including GS–18 daily rate limitation contained in fiscal year 1976 and 1977 appropriation acts.

Courts—Judgments, Decrees, etc.—Amendment—Court Order Increasing Compensation Rate

Amended court order increasing previously fixed rate of compensation for land commissioners creates new obligation chargeable to appropriation current at time of amended order. Thus, increased compensation payable under such an amended order issued after June 30, 1975, is subject to, and limited by, any salary restrictions contained in appropriation charged.

In the matter of compensation of land commissioners, March 18, 1977:

This decision to the Attorney General of the United States responds to certain questions presented by the Assistant Attorney General for Administration concerning the applicable rates of compensation payable to land commissioners in land condemnation cases.

In *Department of Justice—Land Commissioners*, B–184782, February 26, 1976, we stated the basic rule governing the obligation of appropriations for the compensation of land commissioners as follows:

> * * * at the time of the court order appointing land commissioners, a valid obligation against appropriations then current has been created. Such obligation is in the nature of a contract for services within the meaning of 31 U.S.C. § 200(a)(1) * * * analogous to the court appointment of attorneys to represent defendants in Federal criminal cases considered in our decision at 50 Comp. Gen. 589 (1971).

Accordingly, we held that the costs of compensation to be paid to land commissioners should be charged to the appropriation current at the time of appointment, irrespective of when services are performed. Under this approach, we further concluded that the rate of compensation for commissioners appointed prior to July 1, 1975, was not subject to the provision in Public Law 94–121 (October 21, 1975), 89 Stat. 611, 618, which limited the compensation of land commissioners to the equivalent of the GS–18 daily salary rate.* The GS–18 rate limitation was continued in the fiscal year 1977 appropriation for payment of land commissioners. See Public Law 94–362 (July 14, 1976), 90 Stat. 937, 943.

In the United States District Court for the Western District of Missouri a land commission was appointed on July 29, 1969, to hear land condemnation cases relating to the anticipated acquisition of

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*Public Law 94–121 provided, in pertinent part:
> * * * no part of the sum herein appropriated shall be used for the payment of the compensation of land commissioners at a daily rate in excess of the equivalent daily rate of compensation paid a grade 18 on the General Schedule.

266,024 acres of land within the Kaysinger Bluff Dam and Reservoir Project (later renamed Harry S. Truman Dam and Reservoir Project), involving approximately 8,000 tracts, and affecting approximately 6,000 ownerships. All the civil actions actually encompassed by the 1969 court order have been disposed of, and final judgments have been entered by the court. However, subsequent cases arising out of the same land acquisition project were referred to the same land commission by later court orders. In addition, it appears that all land condemnation cases arising since July 29, 1969, in this District have been referred to this same "continuous" commission. The membership of the commission has been changed from time to time by court order. The Assistant Attorney General for Administration presents the following questions in this regard:

(1) In light of Comptroller General Decision B-184782 (February 26, 1976), may members of the sole land commission which was appointed in 1969, be compensated at a higher daily rate than permitted by Pub. L. No. 94-121 (October 21, 1975) for those cases referred to the Commission on or after July 1, 1975, or is the daily rate of compensation dictated by Title II of Pub. L. No. 94-121 controlling because the cases in question were referred to the Commission on or after July 1, 1975?

(2) Are commissioners who are substituted or added to the commission on or after July 1, 1975, limited to the daily rate of compensation set forth in Title II of Pub. L. No. 94-121?

The Assistant Attorney General also presents, without elaboration, a third question unrelated to the issues discussed above;

Can members of a commission who were appointed by court order prior to July 1, 1975, at a daily rate less than the GS-18 limitation, now be compensated above this figure by a later, amended court order raising the daily rate of compensation, effective July 1, 1975, or thereafter?

As to the first question, section 1311(a)(1) of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200(a)(1)(1970) provides:

* * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; * * *.

As noted in B-184782, *supra:*

* * * The general rule relative to the obligation of a fiscal year appropriation by contract is that the contract which imposes the obligation must be made within the fiscal year covered by the appropriation sought to be charged and must concern a *bona fide* need arising within that fiscal year. *See, e.g.*, 33 Comp. Gen. 57, 61 (1953). Determination of what constitutes a *bona fide* need of a particular fiscal year depends in large measure upon the circumstances of the particular case, there being no general rule for application to all situations which may arise. 44 Comp. Gen. 399, 401 (1965); 37 *id.* 155, 159 (1957). *However, in the instant case, the pendency of condemnation actions in fiscal year 1975 is sufficient to support the need for appointment of commissioners in that fiscal year.* [Italic supplied.]

Our decision was based on the assumption that land commissions are established, and commissioners appointed, in conjunction with the referral of specific cases, and that they cease to exist once those cases are completed. Thus the obligation described in our decision as arising at the time commissioners are appointed relates to the hearing of cases actually referred. The Government incurs no obligation and has no *bona fide* need for "work or services to be performed," within the meaning of 31 U.S.C. § 200(a)(1), merely by the appointment of the commissioners or the continued existence of the land commission without reference to specific cases. Both the appointment of the individual commissioners and the referral of a specific case to the commission as a whole is required before the obligation is created.

While the land commission for the Western District of Missouri has been in existence since July 29, 1969, no land condemnation case is actually placed before it except by appropriate court order; nor is there any *requirement* that subsequent land condemnation cases be referred to it. Moreover, even with regard to actions subsequently brought as a part of the anticipated land acquisition for the Harry S. Truman Dam and Reservoir Project, the Government's needs could conceivably change from year to year, necessitating the institution of either fewer or additional actions than originally anticipated. In light of the above, we are of the view that no obligation or *bona fide* need for the services of the land commissioners arises until a particular land condemnation action is instituted and referred to the commission. It follows that compensation payable to members of this continuous land commission for cases referred to it after June 30, 1975, are chargeable to the appropriation current at the time of referral and are thus subject to the GS–18 rate limitation.

We have been informally advised that in some instances involving large takings, because of the wording used in an order of appointment or referral, it is not absolutely clear as to what tracts or portions thereof have been referred to a land commission. The Department of Justice, of course, retains administrative discretion to obligate funds pursuant to our decision on the basis of its determination as to the precise ambit of a particular court order. Of course, no *bona fide* need for the services of land commissioners exists and no obligation can be created until a civil action has been filed, regardless of the breadth of a particular court order.

With regard to the second and third questions presented, as noted above, no obligation is created until individual commissioners are appointed *and* a specific case is referred to the land commission of which he is a part. Where either element is lacking, the obligation does not exist. Thus where a continuous land commission exists, no

obligation is created until a particular action is referred to it. See discussion, *supra*. Moreover, the total amount of the obligation is determined by the individual arrangements with each land commissioner, as reflected in their respective orders of appointment. We understand, in this regard, that commissioners sitting on a land commission and hearing a particular case are often appointed at different rates of compensation, depending on their personal qualifications, experience, or other factors. The total obligation, therefore, reflects a cumulation of the obligations for payments to the individual land commissioners, based on the anticipated length of service and the prescribed rate of compensation for each.

Therefore, where a commissioner is substituted for another commissioner on a continuous land commission, the obligation for the original commissioner ceases to exist and a new obligation for the anticipated compensation for that commissioner arises at that time, based on the terms of his appointment. Similarly, when a commissioner is added to a continuous land commission, the terms of his appointment govern the amount of the obligation incurred, regardless of the amount of compensation payable to his fellow commissioners under previous appointments.

In this regard, sections 200(d) and 712a of title 31, United States Code (1970), provide, respectively:

> No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law.
>
> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

As stated in 50 Comp. Gen. 589, 591 (1971)—

> * * * We have long held, consistent with the above-quoted statutes, that a claim against an annual appropriation when otherwise proper is chargeable to the appropriation for the fiscal year in which the obligation was incurred. This rule is applicable in all cases in which there is a definite determination as to the time the public funds became obligated for the payment of a given liability whether the amount is, or is not, certain at the time. 18 Comp. Gen. 363 (1938); 23 *id.* 370 (1943).

It follows, therefore, that compensation to a substituted or added commissioner would be chargeable to appropriations current at the time of his appointment, and would, therefore, be subject to the GS–18 rate limitation.

For the same reason, where the original court order of appointment is amended to provide for increased compensation for a particular land commissioner, a change occurs in the basic nature of the

obligation as to that commissioner beyond the contemplation of the original order, and thus cannot be related back to the original order. See 41 Comp. Gen. 134, 138 (1961); 37 *id.* 861 (1958). Accordingly, compensation for land commissioners to be paid pursuant to an amended court order which increases a pre-established fixed rate of compensation is chargeable in full to the appropriation current at the time of the amended order, and would be subject to, and limited by, salary restrictions, if any, contained therein.

[B-185544]

Bids—Late—Acceptance—Prejudicial to Other Bidders

By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Industries, Inc.* v. *United States*, 492 F.2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid.

Bids—Preparation—Costs—Recovery—Amount in Dispute

Since amount of compensation for bid preparation costs due claimant is in dispute and claimant has not submitted adequate substantiating documentation to establish quantum of claim, there is no basis at this time to determine proper amount of compensation. Therefore, it is requested that necessary documentation be submitted to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to General Accounting Office for further consideration.

In the matter of William F. Wilke, Inc., March 18, 1977:

William F. Wilke, Inc. (Wilke), claims bid preparation costs in the amount of $23,434 relative to bids submitted in response to invitations for bids (IFB's) for barracks rehabilitation at Fort George G. Meade, Maryland. Wilke did not protest the failure to receive any award under the IFB's here, but sought injunctive and declaratory relief in the Federal courts. *William F. Wilke, Inc.* v. *Department of the Army*, 357 F. Supp. 988 (D.Md. 1973) *affirmed*, 485 F.2d 180 (4th Cir. 1973). These court decisions and the submissions of the parties to our Office provide the record upon which this decision is based, and the facts are undisputed.

A threshold question is whether we will consider Wilke's claim, in view of our recent decision in *DWC Leasing Company*, B-186481, November 12, 1976, 76-2 CPD 404. There, we held that a claim for bid preparation costs filed by a party whose protest was not heard by the General Accounting Office—because the protester failed to file required submissions in a timely manner—would not be considered, since to do

so would in effect permit circumvention of our Bid Protest Procedures, 4 C.F.R. part 20 (1976). Unlike the situation in that decision, here, a court of competent jurisdiction considered and provided a record on the matter. Accordingly, we will consider Wilke's claim on the merits.

On December 4, 1972, IFB No. DACA 31-73-B-0040 was advertised for the barracks rehabilitation under which Wilke submitted a responsive bid and was determined to be a responsible bidder. However, because of certain ambiguities in the specifications contained in that invitation, it was canceled by the Department of the Army, Baltimore District, Corps of Engineers. Subsequently, on February 20, 1973, less than 1 month after the first bid opening, the Corps readvertised the barracks rehabilitation project as IFB No. DACA 31-73-B-0066. The invitation specified that:

> [S]ealed bids in DUPLICATE for the work described herein will be received until 3:00 p.m. local time at the place where bids are received on 73 Mar 13 at the Office of the District Engineer, U.S. Army Engineer District, Corps of Engineers, Federal Building, 31 Hopkins Plaza, Baltimore, Maryland; and at that time publicly opened. Hand carried bids must be deposited in bid depository provided therefor in Room 1225.

Attached to the invitation was "Instructions to Bidders, Standard Form 22," which, in paragraph 7 thereof, stated that bids received at the office designated in the IFB after the exact time set for opening of bids would not be considered unless they were subject to certain limited exceptions not here relevant.

On March 13, 1973, two representatives of Wilke met a representative of A. & M. Gregos, Inc. (Gregos), in room 1225, the location of the locked bid despository box, at approximately 1 hour before the time set for bid opening, 2 p.m. Thereafter, at 2:50 p.m., Wilke's representative submitted a bid in the amount of $2,941,349 by depositing the bid in the bid depository box.

At 2:56 p.m., a representative of the Corps of Engineers took the box to room 1208 (about 80 feet away), where the opening of the bids was to take place. The box arrived in room 1208 a moment or two before the scheduled opening time of 3 p.m.

On arrival, the Corps' representative placed the bid box on the table and left the room to request the attendance of an attorney from the Office of Counsel for the Corps of Engineers who entered the room at approximately 3 p.m. and agreed to serve as bid opening officer. At this time, the representative of Wilke, along with other bidders and industry representatives, including the representative of Gregos, was in the room.

The bid opening officer proceeded to unlock the bid box and remove the bids. At approximately 3:04 p.m., prior to any announcement that the time for bid opening had arrived, the representative of Gregos

rose from his seat, removed a bid from his inside coat pocket, and placed it on the table where the bids were.

The bid was accepted for consideration and the bid opening officer proceeded to make the bid opening announcement with the statement, "It is now 3 o'clock time to open bids on Invitation No. DACA 31–73–B–0066. Are all bids in?" The first bid was opened at approximately 3:05 p.m. There were five bidders. The low bidder was Gregos with a bid of $2,877,000. The second low bidder was Wilke.

Shortly thereafter, Wilke sought injunctive and declaratory relief in the Federal courts to prevent the consideration of the Gregos bid by the Corps. However, the Corps did award the contract to Gregos. The Federal district court denied injunctive relief, but stated that "the disappointed bidder, the Plaintiff William F. Wilke, Inc., is entitled to a judgment declaring that the successful bid of A. & M. Gregos, Inc. was not timely filed under the applicable statutes and regulations." In reaching that conclusion, the court relied on decisions of our Office involving similar facts and interpreted 10 U.S.C. § 2305(c) (1970) and then current Armed Services Procurement Regulation (ASPR) §§ 2–301(a), 2–302, 2–303.1, 2–303.5. And the court rejected the Army's position that ASPR § 2–402.1 served to create a flexible time limit for the submission of bids insofar as the bid opening officer determined the time for bid opening. Finally, the court rejected the Army's argument that the custom of making pre-bid-opening announcements was relied upon by bidders in prior years to enable them to timely submit bids in the bid opening room.

On motion to amend the judgment, the district court concluded that the acceptance of Gregos' late bid was not, as the Army argued, a mere irregularity without prejudice to the rights of any interested bidder because the purpose of the exact time requirement is not only to give all bidders an equal opportunity, to prevent fraud, and to preserve the integrity of the competitive bid system, but to provide a clear cutoff point after which bids will not be accepted. The district court's decision was affirmed on appeal.

ENTITLEMENT

In *T&H Company*, 54 Comp. Gen. 1021 (1975), 75–1 CPD 345, we held that a bidder-claimant would be entitled to bid preparation costs if a procuring agency's actions toward it were arbitrary and capricious. There, we recognized that the Court of Claims, in *The McCarty Corporation* v. *United States*, 499 F. 2d 633, 637 (1974), stated:

> * * * it is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (*Heyer Products Co.* v. *United States*, 140 F. Supp. 409,

412; 135 Ct. Cl. 63, 69 (1956)), and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to his bid preparation costs * * *. *Keco Industries, Inc.* v. *United States*, 428 F. 2d 1233, 1240; 192 Ct. Cl. 733 (1970) (hereinafter Keco I).

We also noted, however, that:

* * * if one thing is plain [in the area of bid preparation cost claims] it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process. *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II).

In Keco II, the Court of Claims outlined the standards for recovery. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious toward the bidder–claimant. *The McCarty Corporation* v. *United States*, *supra;* Keco I, *supra.* See *Excavation Construction, Inc.* v. *United States*, 494 F. 2d 1289, 1290 (Ct. Cl. 1974); *Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 1021, 196 Ct. Cl. 627 (1971).

As set out in Keco II, there are four subsidiary criteria, namely:

1. Subjective bad faith on the part of the contracting officials depriving the bidder of fair and honest consideration of his proposal. *Heyer Products Company, Inc.* v. *United States*, 140 F. Supp. 409 (Ct. Cl. 1956). The court did note that wholly unreasonable action is often equated with subjective bad faith. *Cf. Rudolph F. Matzer & Associates, Inc.* v. *Warner*, 348 F. Supp. 991, 995 (M.D.Fla. 1972);

2. That there was no reasonable basis for the agency's decision. *Excavation Construction, Inc.* v. *United States*, *supra; Continental Business Enterprises, Inc.* v. *United States*, *supra;*

3. That the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable regulations. *Continental Business Enterprises, Inc.* v. *United States*, *supra;* Keco I, *supra;* and

4. Violation of statute can, but need not, be a ground for recovery. *Cf.* Keco I, *supra.*

Finally, in Keco II, the Court of Claims stated that application of these criteria depends on the type of error or dereliction committed by the procurement officials and whether that action was directed toward the claimant's own bid or that of a competitor.

In view of the standard for recovery and four subsidiary criteria outlined above, the principal issue for our consideration is whether the Army's acceptance of Gregos' late bid, thus displacing the otherwise low, responsive, responsible bidder, constituted arbitrary and capricious agency action toward the displaced bidder, Wilke.

Wilke argues in summary that, by accepting the late bid, the Army violated ASPR §§ 2–301(a), 2–303.1, 2–404.2(a); the Army procurement officials exceeded the amount of discretion entrusted to them;

and the Army had no reasonable basis for that decision. Thus, Wilke contends that at least three of the subsidiary criteria outlined above are satisfied. Wilke's principal argument is that the bid opening officer had no authority or discretion to accept Gregos' late bid and the district court's finding, affirmed by the appellate court, that Gregos' bid was late is binding on our Office. Wilke concludes that, based on (3) above, contracting officials exceeded the amount of discretion entrusted to them by regulation.

The Army essentially contends that the bid opening officer, mindful of the fact that no overt act or statement had been made prior to the acceptance of the Gregos bid, was relying on our decision in B–157598, October 15, 1965, as controlling. Therefore, the Army concludes that the bid opening officer's actions had a reasonable basis and were taken in good faith; although the Army may have erred, its actions cannot be deemed so unreasonable as to be arbitrary and capricious.

In B–157598, the invitation provided that bids would be received until 2 p.m., on August 11, 1965, at a particular naval facility but no particular building or room number was specified. There, the bid box was located in the lobby of building 127 and the bid opening room was located approximately 170 feet across the compound in building 129. At approximately 1:55 p.m., on August 11, 1965, the bid opening officer arrived at the bid box and at about 2 p.m., the bid box was closed and locked; the bid opening officer then took the box across the compound to building 129. Between buildings, a representative of a bidder submitted a bid. After arrival at the bid opening room, the bid opening officer read a prepared statement announcing that no other bids would be accepted. The time was 2:02 p.m. We concluded that the bid in question was submitted before 2 p.m., because (1) the bid opening officer decides when the designated time for bid opening has arrived, and (2) some time elapsed between submission of the bid and the bid opening officer's announcement at 2:02 p.m.

Our decision is not reasonably applicable in the instant case because the basis for our decision was that the bid was submitted before 2 p.m., the time designated for bid opening, whereas the record here clearly shows that the Gregos bid was submitted at 4 minutes after the time set for bid opening and, therefore, was late. Accordingly, we must conclude that the Army's bid opening officer, in accepting the late bid, should not have reasonably relied on that decision and exceeded the authority and amount of discretion entrusted to her by statute and regulation. In this regard, we think the district court's views concerning the Army's position that what occurred here was a mere irregularity should be followed in this instance. The bid opening officer's acceptance of the late bid in effect displaced Wilke

as the low, responsive, responsible bidder, and can be considered no less than arbitrary and capricious, thus entitling Wilke to bid preparation costs.

We recognize that our conclusion that Wilke is entitled to bid preparation costs involves a situation where the Government action giving rise to entitlement favored another bidder rather than a misreading or misevaluation of the claimant's own bid. Under the guidance of Keco II, we believe our conclusion for entitlement is consistent with the court's discussion of this matter.

COMPENSATION

Wilke seeks to recover $23,434 representing a sum expended in the performance of the following functions in connection with preparing bids for the two IFB's:

(a) Researching the specifications;
(b) Reviewing and analyzing the bid forms;
(c) Searching catalogs and other sources of material for costs factors;
(d) Preparing bid forms in draft, review and preparing actual bid forms; and
(e) Mailing and other communication costs.

The amount claimed can be broken down according to Wilke, as follows, with approximately 50 percent of the total cost attributable to the preparation of each of the two bids:

(a) Drawing and reproductions (10 sets)	$950
(b) Long distance telephone calls	540
(c) Printing of invitations	559
SUBTOTAL	$2,049
(d) Total office payroll for those assigned to perform the aforesaid tasks	$18,436
(e) Allocated insurance and FICA taxes	2,949
	21,385
Total bid preparation costs	$23,434

Wilke contends that the above categories of expenses have been specifically held to be recoverable by our Office in *T&H Company*, *supra*.

The Army argues that since the project was advertised on two separate occasions under different solicitation numbers and all bids on the first solicitation were properly rejected, Wilke's entitlement, if any, is limited to actual costs in preparing its bid for the second IFB.

In response, Wilke argues that the costs incurred in both instances should be viewed as costs incurred in preparing for a single contract because (1) costs incurred in the first preparation did not have to be duplicated in the second preparation, and (2) fairness requires that Wilke be entitled to recover all costs when it was damaged solely by the Army's wrongful conduct.

In our view, the procurement action connected with the first IFB is entirely independent from the contested procurement action involving the second IFB. Wilke did not protest the cancellation of the first IFB and, in any event, no arbitrary and capricious Government action is evident such as to allow the recovery of bid preparation costs in connection with that IFB. Therefore, we agree with the Army's position that Wilke's entitlement is limited to actual costs in preparing a bid for the second IFB.

We note that Wilke was invited by the Army and our Office to submit adequate documentation to substantiate the quantum of its claim and to establish the proper allocation of costs to either the first or second preparation. To date, Wilke has provided merely general allegations and no supporting documentation. Accordingly, we have no basis to determine the proper amount of compensation. We therefore request that Wilke submit the necessary documentation to the Army in the hope that an agreement can be reached on the quantum issue. In the event that agreement is not reached, the matter should be returned here for further consideration.

[B-186770]

Subsistence—Per Diem—Rates—Reduction—Effective Date

Civilian employees of the Mare Island Naval Shipyard who performed temporary duty in Guam between September 16, 1975, and January 13, 1976, are only entitled to per diem at the $49 rate prescribed by Joint Travel Regulations, Change No. 57, dated September 16, 1975, and made effective that date, notwithstanding that notification of the reduction in per diem rate from $56 was not received at the Shipyard until January 13, 1976.

In the matter of Bruce Adams, et al.—change in per diem rate, March 18, 1977:

This is in response to a letter dated June 8, 1976, reference NCF—123 4600, from the Commander, Navy Accounting and Finance Center, requesting an advance decision in the case of Bruce Adams, *et al.* Transmitted with that letter is a request from the Commander, Mare Island Naval Shipyard, for a decision as to the propriety of authorizing payment of per diem allowances at a rate of $56 (the rate in effect prior to September 16, 1975), to certain civilian employees (a total of 227) of the Mare Island Naval Shipyard who performed tem-

porary duty at Guam, Marianas Islands, on or after September 16, 1975, but before January 13, 1976.

On September 16, 1975, Civilian Personnel Per Diem Bulletin No. 57 was issued by the Per Diem, Travel and Transportation Allowance Committee, reducing the maximum per diem rate for Guam from $56 to $49 effective as of that date. That bulletin was not received by the Navy Regional Finance Center, Treasure Island, San Francisco, until October 14, 1975. The Mare Island Naval Shipyard was not notified of the reduction in per diem rates until January 13, 1976, when it received Change No. 122 to the Joint Travel Regulations (JTR), Volume 2, dated December 1, 1975. Consequently, Mare Island Naval Shipyard employees assigned to temporary duty in Guam from September 16, 1975, to January 13, 1976, were erroneously authorized per diem at the previously effective rate of $56.

The Commander of the Mare Island Naval Shipyard suggests that two decisions of this Office, 32 Comp. Gen. 315 (1953) and B–163891, May 29, 1968, may be in conflict. As a result he is uncertain whether the $49 per diem rate became effective September 16, 1975, or at some later date in view of his installation's delayed receipt of notice of the change.

We have reviewed both of the cited decisions and do not find them to be in conflict. In 32 Comp. Gen. 315, *supra*, we held that it was improper to amend regulations to retroactively increase or decrease per diem rates. We there held that the Air Force could not issue regulations on January 1, 1952, reducing per diem rates as of November 1, 1951. This case is to be distinguished from the situation in which a regulation is amended to reflect an increase or reduction in rates which has otherwise become effective by regulation, as where the JTR is amended to reflect per diem rate changes for foreign areas prescribed in the Standardized Regulations (Government Civilians, Foreign Areas). B–173927, October 27, 1971.

Unlike 32 Comp. Gen. 315, *supra*, the circumstances in B–163891, *supra*, involved a prospective change in per diem rates. There we held that an employee who was not notified of a change in regulations decreasing the applicable per diem rate was nevertheless entitled to payment of per diem only at the lower rate. The rule that amendatory regulations changing per diem rates have the force and effect of law and are applicable from the stated effective date thereof is applicable not only to cases where the individual employee has not received notice of the increase or decrease in rate, but also to cases in which the installation responsible for the employee's temporary duty assignment is not on actual notice of the amendment. Thus, in B–183633, June 10, 1975, we held that an employee assigned to training beginning September 10, 1973, was not entitled to per

diem on a lodgings-plus basis not to exceed $25 per day, but was only entitled to $14 per diem in accordance with a regulatory change in rate issued effective September 1, 1973, notwithstanding the fact that the employing activity did not receive notice of the change to the regulations. In that case, the employee's travel orders authorized per diem in accordance with the JTR and stated no specific amount. The employee, however, had been advised that he would be reimbursed on a lodgings-plus basis, not to exceed $25 per day. A similar result was reached in B–173927, *supra*, and in B–182324, July 31, 1975.

In B–177417, February 12, 1973, we considered the effect of delayed notification of a change in per diem rates on an employee whose travel orders specified a per diem rate of $25 per day. The travel orders in question were issued September 11, 1970, and failed to reflect a reduction in per diem for long-term training to $18 effective July 1, 1970. The employee's installation had not received advance notice of the rate change disseminated to field offices, nor did it receive the JTR change until after the employee's training assignment had begun. We there held that there was no authority to prescribe a rate of per diem in excess of $18, regardless of the fact that neither the employee nor his installation had received notice of the change. This rule applies to both increases and decreases in per diem rates. B–177665, March 9, 1973, and B–184789, October 30, 1975.

In accordance with the foregoing authorities, employees of the Mare Island Naval Shipyard performing temporary duty in Guam during the period from September 16, 1975, to January 13, 1976, may be paid per diem only at the $49 rate, effective September 16, 1975.

[B–183086]

Compensation—Promotions—Temporary—Detailed Employees—Retroactive Application

Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976).

In the matter of a reconsideration of Everett Turner and David L. Caldwell—retroactive temporary promotions for extended details to higher grades, March 23, 1977:

This action involves a reconsideration of *In the Matter of Everett Turner and David L. Caldwell—Retroactive Temporary Promotions for Extended Details to Higher Grades*, 55 Comp. Gen. 539 (1975). That decision held that employees detailed to higher grade positions for more than 120 days, *without* Civil Service Commission (CSC)

approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The Civil Service Commission's Board of Appeals and Review (now Appeals Review Board), *In the Matter of David L. Caldwell and Everett Turner*, April 19, 1974, had similarly construed the provisions of subchapter 8, chapter 300 of the Federal Personnel Manual (FPM), as entitling the two employees to retroactive temporary promotions for extended details to higher grade positions where the agency had not obtained approval from the Civil Service Commission to extend the details beyond 120 days.

The facts are fully stated in the Board's decision and our earlier decision and are only briefly restated here. Mr. Turner's official position in the Bureau of Mines, Department of Interior, was that of Deputy Assessment Officer, grade GS–14. As required by his position description, he served as "Acting" Assessment Officer, grade GS–15, for more than 26 months while that position was vacant. Mr. Caldwell's official position was Assistant Assessment Officer, grade GS–13, and he served as "Acting" Deputy Assessment Officer (GS–14) for more than 15 months. Both of these assignments were reflected in internal memoranda of the Bureau of Mines, but neither was formalized in an official personnel record. When another employee was designated as "Acting" Assessment Officer, Turner and Caldwell resumed their official positions and filed a grievance alleging a reduction in rank.

On appeal by the two employees from a dismissal by the Commission's Appeals Examining Office, the Board of Appeals and Review found that the agency had no discretion to continue the two details beyond 120 days without CSC's approval and, consequently, had violated the Civil Service Commission's Federal Personnel Manual requirements for such details. It, therefore, ordered the agency to grant temporary retroactive promotions to Turner and Caldwell for the periods of their details lasting beyond 120 days. The two employees filed claims with this Office for backpay. We adopted the Board's interpretation and allowed the claims, overruling 52 Comp. Gen. 920 (1973). 55 *id.* 539, *supra.*

Subsequently, in *Marie Grant*, 55 Comp. Gen. 785 (1976), we ruled that the *Turner-Caldwell* decision applied retroactively to extended details to higher grade positions, subject only to the time limitation on filing claims imposed by 31 U.S. Code § 71a.

The General Counsel of the Civil Service Commission has now urged us to reverse our decision. In a letter to this Office dated November 2, 1976, the General Counsel stated as follows:

* * * The award of back pay to Turner and Caldwell was presumably premised upon the assumption that the employing agency (Department of the Interior, Bureau of Mines) was absolutely required temporarily to promote them on the 121st day of their details. That is, the premise set forth by the

Board decision and adopted by the Comptroller General is that the agency has a nondiscretionary duty to promote on the 121st day and the failure to do so amounts to an unwarranted and unjustified personnel action.

We have thoroughly reviewed this matter with the pertinent Commission offices and bureaus, however, and have concluded that the Board incorrectly interpreted subparagraphs 8–4(e) and 8–4(f) of subchapter 8, chapter 300 of the FPM. It simply is not Commission policy to mandate temporary promotions in cases of agencies extending details beyond 120 days without Commission approval. Rather, the Commission's interpretation of the pertinent provisions is, as it has been for many years, that the granting of temporary promotions even in overlong detail situations is essentially left to the discretion of the agency.

To be sure, agencies may abuse that discretion by continuing employees in details to higher graded positions for too long a period. And, in some such cases a proper corrective action could be a temporary promotion for the employees involved; that promotion, however, would be prospective only. In short, the Board action in ordering *retroactive* temporary promotions for Turner and Caldwell incorrectly departed from the Commission's view of the meaning of chapter 300 of the FPM. (Italic in original).

Notwithstanding the above, in our judgment, the fact that more than two years has elapsed since the decision in the Turner/Caldwell cases, would make it inappropriate to ask the Civil Service Commissioners to reopen that particular decision under the procedures set forth at 5 C.F.R. § 772.312(a). * * *

The Executive Director of the Civil Service Commission, in a letter dated March 8, 1977, has also expressed the concern of the Commission over the back pay issue, particularly where super grades are involved and where the Whitten amendment would come into play. The Executive Director also raises questions concerning certain practical problems which may result from requiring agencies to pay the extra costs of the higher grades where employees are performing the duties of higher grade positions without complying with the provisions of the Federal Personnel Manual.

In light of these comments, we have reexamined the matter. While we recognize that a basis exists for the views stated on behalf of the Commission, those views do not affect our reading of subchapter 8, chapter 300, of the Federal Personnel Manual to the effect that, for purposes of backpay, it imposes a nondiscretionary duty upon an agency either to seek the Commission's approval to extend a detail to a higher grade position beyond 120 days, or to promote the detailed employee for a temporary period after the first 120 days. Paragraph 8–3b(2) of the subchapter flatly limits all details to 120 days *unless* prior approval of CSC is obtained, and it states that higher grade details *will be* confined to the initial 120 days, plus one extension for a maximum of 120 more days. Paragraph 8–4f(1) states that for a detail of over 120 days an agency *must* obtain prior CSC approval. Under paragraph 8–4f(4), "if the detail is to a higher grade position, the Commission will approve only one extension of up to 120 days, for a total of 240 days." Also, paragraph 4–1e(2) of FPM chapter 335, subchapter 4 "Promotion Procedures," reaffirms that employees should not be detailed to higher grade work, except for brief periods, and that

normally an employee should be given a temporary promotion instead. In summary, detailing employees for extensive periods without Commission approval or temporary promotions circumvents the checks and balances of the system and is not conducive to sound personnel management.

Indeed, we find additional support for this construction of the Federal Personnel Manual in 5 U.S.C. § 3341 (1970), which governs employee details within Executive and military departments. This statute clearly indicates the intent of the Congress to limit agency discretion in detailing employees to brief periods of time by providing that: "Details * * * may be made only by written order of the head of the department, and may be for not more than 120 days." In particular cases, as an exception to the stated time restriction, the statute permits details to be extended for periods not exceeding 120 days, but only upon written order of the head of the department, which insures review of each detail and its justification. There is no discretion beyond that authorized by the statute.

We do not believe that the statutory provision and the provisions in the FPM covering details, which specifically state certain procedures which are to be followed to protect employees, should be construed to leave the employee without a remedy in the event the agency decides to ignore, or inadvertently does not follow, the requirements of the statute or the FPM.

Subsequent to our ruling in *Turner-Caldwell*, the U.S. Supreme Court on March 2, 1976, decided *United States* v. *Testan*, 424 U.S. 392 (1976). The *Testan* case involved the issue of entitlement of backpay for errors in position classification levels. The Supreme Court held that "* * * neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications." 424 U.S. at 407.

The decisions of this Office are consistent with the *Testan* holding that classification actions upgrading a position may not be made retroactive so as to entitle the incumbents to backpay. Despite *dictum* to the effect that entitlement to backpay can be founded only upon wrongful withdrawal of pay, we view the *Testan* case as limited to the issue of improper classification.

We have previously held that *Testan* does not preclude retroactive correction of unjustified and unwarranted personnel actions, whether they be acts of commission or failures to act, where the agency has failed to carry out a nondiscretionary regulation or policy. See, for example, 55 Comp. Gen. 1311 (1976); B–180010, August 30, 1976, and 55 Comp. Gen. 1443 (1976).

We are aware that our decision in *Turner-Caldwell* differs with the rationale expressed in *Peters* v. *United States*, 208 Ct. Cl. 373, decided on December 17, 1975, 12 days after our decision was issued on December 5, 1975. Although the factual situation in the *Peters* case is somewhat similar to the situation in *Turner-Caldwell*, it is apparent from the *Peters* decision that the Court of Claims was not informed that the Board of Appeals and Review had interpreted the Civil Service Commission's employee detail provisions as requiring mandatory temporary promotions under certain conditions and that this Office had concurred in that interpretation. Hence we do not feel compelled to follow *Peters*. See *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); 20 Am. Jur. 2d Courts § 193 (1965); 21 C.J.S. Courts § 186(c) (1940).

Accordingly, we adhere to the view that under the detail provisions of the FPM, an agency head's discretion to make a detail to a higher grade position lasts no longer than 120 days, unless proper administrative procedures for extending the detail are followed. We further affirm that a violation of these provisions is an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1970), for which the corrective action is a retroactive temporary promotion and backpay, as set forth in our decision 55 Comp. Gen. 539, *supra*. It is necessary, however, that the employee satisfy the requirements for a retroactive temporary promotion. In this connection, certain statutory and regulatory requirements could affect the entitlements of an employee otherwise qualified for corrective action as a result of an improper extended detail. For example, an employee improperly detailed for an extended period, who fails to meet the time in grade requirements of the "Whitten Amendment," 5 U.S.C. § 3101 note, would not become entitled to a retroactive temporary promotion until such time in grade requirements were satisfied. See 55 Comp. Gen. 539, 543. Similarly, an employee improperly detailed to a grade GS–16, 17 or 18 position for an extended period would not be entitled to a retroactive temporary promotion unless the provisions of 5 U.S.C. § 3324 governing appointments to such supergrade positions had been complied with. See our decision of today, 56 Comp. Gen. 432 (1977).

This decision only provides an entitlement to a temporary promotion to employees improperly detailed for extended periods and should not be construed as providing an entitlement to a permanent promotion.

Accordingly, on reconsideration, we affirm our holdings in *Turner-Caldwell* and *Marie Grant*.

[B-186064]

Officers and Employees—Supergrades—Promotions—Temporary—Detailed Employees

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a).

In the matter of William Rankin, Jr.—detail to supergrade position, March 23, 1977:

This action concerns a request for an advance decision from Mr. Billy J. Brown, Director, Personnel Division, Internal Revenue Service (IRS), dated March 3, 1976, as to whether Mr. William Rankin, Jr., an employee of the IRS, is entitled to a retroactive temporary promotion incident to his detail to the position of Acting Director, Internal Audit Division, for approximately 11 months.

Mr. Brown states that on May 10, 1972, Mr. Rankin was detailed from his permanent position as Chief, Data Processing Activities Branch, a GS–15 position, to be the Acting Director, Internal Audit Division, a GS–17 position in the Office of the Assistant Commissioner (Inspection). Mr. Rankin remained in this detail (without prior approval from the Civil Service Commission for the period beyond 120 days) until April 6, 1973, at which time he was officially selected as permanent Director and promoted to GS–17, with the approval of the Civil Service Commission. The delay in promoting Mr. Rankin was due to the fact that a great number of changes were occurring in the organization and no permanent Assistant Commissioner was appointed until December 1972. As soon as the Assistant Commissioner was appointed, action was taken to fill the Director's position.

In view of our decision in the *Turner-Caldwell* case, 55 Comp. Gen. 539 (1975), Mr. Brown asks whether Mr. Rankin is entitled to a retroactive temporary promotion for having been detailed to a higher grade position for more than 120 days. In that decision, we granted backpay to two employees who had served extended details in higher grade positions. Our decision was based on an interpretation by the Board of Appeals and Review that, under the Commission's regulations, if an agency detailed an employee to a higher grade position for more than 120 days without seeking prior approval from the

Commission, the employee would be entitled to a retroactive temporary promotion from the 121st day of his detail until the detail terminated.

In the instant case, Mr. Rankin was detailed to a higher grade position for approximately 11 months, and the IRS failed to apply to the Commission for approval to extend the detail.

As Mr. Brown points out, however, 55 Comp. Gen. 539, *supra*, did not address the situation in which the employee was detailed to a supergrade (GS–16, GS–17, or GS–18) position. That decision involved only the entitlement of employees to retroactive temporary promotions to positions not subject to the limitations found in 5 U.S.C. §§ 3324(a) and 5108(a) (1970).

Section 3324(a), *supra*, states in pertinent part:

> An appointment to a position in GS–16, 17, or 18 may be made only on approval of the qualifications of the proposed appointee by the Civil Service Commission. * * *

The relevant part of section 5108(a) is as follows:

> * * * A position may be placed in GS–16, 17, or 18 only by action of, or after prior approval by, a majority of the Civil Service Commissioners.

Pursuant to the authority of 5 U.S.C. § 3324(b) (1970), the Commission has issued regulations concerning promotions to the GS–16, GS–17, and GS–18 levels. Section 305.505(b) of title 5, Code of Federal Regulations, states:

> *Promotion.* Subject to § 305.502 and to prior approval by the Commission of the qualifications of the employee, an agency may promote a career or career-conditional employee to an initial career executive assignment, or from one career executive assignment to another.

Federal Personnel Manual, chapter 305, subchapter 3–3(f), states the following with respect to such promotions to the GS–16, GS–17, or GS–18 levels:

> *Qualifications approval.* The appointing officer reports his selection to the Civil Service Commission. However, as required by law, he may not effect the assignment until the Commission specifically approves the qualifications of the person selected.

By decision of today, 56 Comp. Gen. 427 (1977), we have reaffirmed our decision in the *Turner-Caldwell* case, 55 Comp. Gen. 539, *supra*. However, in today's decision we have qualified *Turner-Caldwell* as follows:

> * * * It is necessary, however, that the employee satisfy the requirements for a retroactive temporary promotion. In this connection, certain statutory and regulatory requirements could affect the entitlements of an employee otherwise qualified for corrective action as a result of an improper extended detail. For example, an employee improperly detailed for an extended period, who fails to meet the time in grade requirements of the "Whitten Amendment," 5 U.S.C. § 3101 note, would not become entitled to a retroactive temporary promotion until such time in grade requirements were satisfied. See 55 Comp. Gen. 539, 543.

Similarly, an employee improperly detailed to a grade GS–16, 17 or 18 position for an extended period would not be entitled to a retroactive temporary promotion unless the provisions of 5 U.S.C. § 3324 governing appointments to such supergrade positions had been complied with.

We have been informally advised that there was no position in the normal line of promotion in the grade immediately below that of the GS–17 position to which Mr. Rankin was detailed, and we understand he was in the GS–15 position for 1 year prior to his detail. Thus, the prohibitions in the "Whitten Amendment" do not appear to apply in this case. However, as to whether Mr. Rankin may be entitled to a retroactive temporary promotion to a supergrade position in light of 5 U.S.C. § 3324(a), we note that Civil Service Commission approval of Mr. Rankin's qualifications for a temporary promotion to the GS–17 level was neither sought nor granted while he was on detail. The Commission did eventually approve Mr. Rankin's qualifications for a permanent promotion to the GS–17 level. However, this Office cannot accept the subsequent approval of Mr. Rankin's qualifications for a permanent GS–17 promotion as an endorsement of his qualifiations for a retroactive temporary promotion for the period of his detail. It is solely within the purview of the Civil Service Commission to approve qualifications of an appointee for a supergrade position, and we are without authority to make judgments of this kind.

Moreover, the above-cited regulations are quite clear that Commission approval of the appointee's qualifications must be granted prior to promoting the appointee to a supergrade position. An agency cannot unilaterally place an employee in a supergrade position and at some later date request Commission approval of his qualifications for the purpose of granting him a retroactive appointment.

Accordingly, Mr. Rankin may not receive a retroactive temporary promotion with back pay for his services as Acting Director in a grade GS–17 position.

[B–187624]

Advertising—Advertising *v.* Negotiation—Maintenance and Repair Services

Agency's determination that it was unable to locate qualified sources to perform elevator, escalator, and dumbwaiter maintenance and repair services other than manufacturers of the equipment, does not constitute rational basis for sole source procurement from manufacturers where agency did not make its requirements known to the public and where agency's determination does not appear to have a factual basis.

Contracts—Negotiation—Sole Source Basis—Parts, etc.

Sole source procurement of repair and maintenance service from item's manufacturer is not justified merely because manufacturer can supply replacement parts on a priority basis. Agency has not shown that replacement parts cannot readily be obtained other than by award to the manufacturer.

Contracts—Negotiation—Sole Source Basis—Justification—Inadequate

While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply.

In the matter of the Consolidated Elevator Company, Inc., March 24, 1977:

Consolidated Elevator Company, Inc. (Consolidated) has protested the October 7, 1976 award of sole-source maintenance and repair contracts by the Smithsonian Institution to Otis Elevator Company (Otis), Armor Elevator Company (Armor), Horner Elevator Company (Horner), and Haughton Elevator Company (Haughton). Consolidated's position is that the Smithsonian has insufficient justification for concluding that the elevator manufacturers are the only firms capable of maintaining the Smithsonian's 81 elevators, escalators, and dumbwaiters. The contracts are to be financed with appropriated funds.

In the case of each of the four contractors, the following findings were advanced in support of the determination that competition was not feasible:

2. The equipment and machinery involved are of the type which embody intricate patented electronic control systems and which, to the best of my knowledge, only the manufacturer can maintain.
3. The standardization of inspection, maintenance, testing, repair techniques, and genuine manufacturer approved replacement parts is essential for assurance of safety, quality, and other mechanical evaluations and for protection against obsolescence. Only the manufacturer of the equipment is in a position to maintain an uninterrupted supply of genuine service parts to maintain proper operation of the equipment and to limit the "out-of-service" period to the absolute minimum.

We note, however, that the contracting officer concluded that only the Horner Elevator Company could perform the maintenance and repair work on:

* * * equipment and machinery * * * of the type which embod[ies] intricate patented electronic control systems and with built in safety factors which only the manufacturer can maintain.

The one elevator in question was a standard hydraulic freight elevator without an intricate electronic control system, and it is undisputed that Horner was not, and is not, a manufacturer. Under these circumstances, we question the adequacy of the factual basis for the contracting officer's determination. Moreover, our experience indicates that other agencies, e.g., the Veterans Administration and GSA, have recently solicited offers from other than manufacturers for elevator, escalator, and dumbwaiter maintenance and repair services on relatively

sophisticated equipment. See e.g., *Haughton Elevator Division, Reliance Electric Company*, 55 Comp. Gen. 1051, 76–1 CPD 294.

Based on the record we do not believe that the Smithsonian has shown that only manufacturers are qualified to meet the Smithsonian's minimum needs for the maintenance and repair services. This is in line with our holding that the conclusions or opinions of the contracting officer on the availability of qualified or responsible offerors may not be accepted as controlling prior to public solicitation of offers. 52 Comp. Gen. 987, 993 (1973), and cases cited therein.

The Smithsonian has also advanced a reason for justifying sole-source contracts with the manufacturers grounded on other than the manufacturer's qualifications. That argument concerns the availability of what are characterized as "durable" replacement parts which can be obtained only from the manufacturers. Basically, the Smithsonian has asserted that it cannot afford to be "last" priority for such parts because of its heavy responsibility to the visiting public. We are unable to determine from the present record the validity of this rationale. In our view, however, in order to use it as a basis for a sole-source justification, the Smithsonian should show (1) what "last" priority means in terms of equipment out-of-service time, as opposed to some higher priority; (2) that down time solely attributable to such "last" priority would interfere in a material way with the Smithsonian's obligations to its visitors; and (3) that there is no other reasonable way to attain the necessary supply priority.

The Smithsonian also argues that these sole-source procurements may be authorized for additional reasons. It contends that sole-source procurements are justified where:

> (1) the contemplated procurement is for technical non-personal services in connection with the assembly, installation, or servicing * * * of equipment of a highly technical or specialized nature, or;
> (2) the contemplated procurement involves maintenance, repair, alteration, or inspection and the exact nature or amount of the work to be done is not known.

While under the proper circumstances the first reason will justify negotiating rather than formally advertising for the Government's minimum needs, it does not preclude competition among qualified firms. 52 Comp. Gen. 346, 349 (1972). The second reason merely justifies negotiation where the circumstances do not lend themselves to the price competition envisioned in formally advertised procurements. See 40 Comp. Gen. 508 (1961). Neither set of circumstances justifies a sole-source award absent an additional determination that the agency's needs can be met by only one supplier. See Federal Procurement Regulations (FPR) § 1–3.210(a)(i) (1964).

Finally, the Smithsonian cites our decisions B–172958, September 27, 1971, and *NORTEC-Corporation*, B–180429, May 23, 1974, 74–1

CPD 283. In those cases we held that where an agency properly awarded a sole-source contract, no prejudice accrued to those who were not aware of the procurement or who could not have provided an acceptable article in a timely manner. Those cases are inappropriate here because sole-source awards have not been justified.

Therefore, we recommend that the Smithsonian (1) reevaluate its minimum needs in light of this decision and the preference for competitive procurement; (2) at such time as is practicable, and if appropriate, hold a competitive procurement for the services in question; and (3) after such procurement process has been executed, terminate the existing contracts for the convenience of the Government, if award under the competitive procurement would be more advantageous to the Government.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referred to in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). That section requires the Smithsonian to submit written statements concerning the action taken with respect to our recommendation to the House and Senate Committees on Appropriations, the House Committee on Government Operations, and the Senate Committee on Governmental Affairs.

[B-187278]

Contracts—Term—Continuing Contracts—Army Corps of Engineers

33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled.

Appropriations—Obligation—Contracts—Continuing—Army Corps of Engineers

Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures.

In the matter of the Army Corps of Engineers' continuing contracts, March 28, 1977:

The Chief of Engineers, Department of the Army, has requested our opinion as to the legality of proposed revisions to the Corps of Engi-

neers' standard "Funds Available for Payments" clause used in "continuing contracts" for the prosecution of public works projects.

The "continuing contracts" here involved are authorized by section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621 (1970), which provides as follows:

> Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by *continuing contracts*, or by both direct appropriations and continuing contracts. [Italic supplied.]

The use of continuing contracts permits large multi-year civil works projects to be accomplished in a comprehensive manner, rather than through a series of yearly work units. Under the Corps' long-standing continuing contract practices, a multi-year contract is entered into for the completion of certain construction work. However, appropriations are sought each year only to cover contract payments to be made in that year. The current Funds Available for Payments clause limits the Government's obligation under the continuing contract to the amounts actually appropriated from time to time for contract payments. As discussed hereafter, the basic effect of the Corps' proposed revisions to the Funds Available for Payments clause would be to permit obligation of the full amount of a continuing contract in advance of appropriations adequate for its fulfillment.

In order to examine these proposed revisions in the proper context, a brief review of the origin and background of continuing contracts is necessary. Prior to enactment of section 10 of the River and Harbor Act of 1922, it had been the practice of the Corps to seek appropriations covering the entire cost of civil works projects at the outset. The Congress would adopt and fund these projects by enacting for each specific project a line-item appropriation in the annual River and Harbor appropriation acts. See, *e.g.*, the River and Harbor Act of 1912, approved July 25, 1912, ch. 253, 37 Stat. 201.

The Corps was required to obtain full funding in advance for its civil works projects, including appropriations covering the full amounts of construction contracts, by virtue of the "Antideficiency Act," section 3679 of the Revised Statutes, now 31 U.S.C. § 665 (1970 & Supp. V. 1975), and related statutes—41 U.S.C. §§ 11(a) and 12 (1970)—which prohibit obligations in excess of, or in advance of, appropriations unless authorized by law. The applicability of these statutory prohibitions to river and harbor projects was specifically confirmed by the United States Supreme Court in *Sutton* v. *United States*, 256 U.S. 575 (1921), which held that work performed under a river and harbor contract in excess of the amount appropriated did not create a valid obligation against the Government.

The full funding practice described above resulted in the Corps holding large balances of unexpended appropriations during the initial

stages of multi-year projects. However, starting with the River and Harbor Act of 1892, 27 Stat. 88, and continuing intermittently through the River and Harbor Act of 1916, 39 Stat. 391, statutory language was included which authorized the Corps to enter into contracts for completion of a limited number of specific public works projects in advance of appropriations necessary to cover the work. This language was usually worded in the following manner:

* * * *Provided*, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, *to be paid for as appropriations may from time to time be made by law*, not to exceed in the aggregate one million nine hundred and fifty-three thousand dollars, exclusive of the amount herein and heretofore appropriated. *E.g.*, 27 Stat. 91 (improvement of Charleston Harbor). [Italic supplied.]

In the years following 1892, increasing numbers of specific projects were funded in this manner. These contracts were commonly referred to as "continuing contracts." In an 1896 opinion, 21 Ops. Atty. Gen. 379, the Attorney General recognized that such "continuing contract" authority constituted an exception to the Antideficiency Act:

Under the present [river and harbor] statute, authority is expressly given to the head of the War Department to contract for the construction of public works in certain cases which may require many years to complete, and under the contracts so made the Government will be involved for the future payment of money largely in excess of the amount already appropriated. *Id.* at 380.

Of course, the opinion went on to point out that the contractor must be content to remain a creditor of the Government until funds were appropriated to pay the full contract price. Also a 1905 decision of the Comptroller of the Treasury, 12 Comp. Dec. 11, implicitly recognized that these contracts were exempt from the Antideficiency Act in holding that the Secretary of War had authority to require contractors under "continuing contracts" to do work beyond the amount of appropriations available at the time.

In 1922 the Corps requested from Congress permanent authority to enter into "continuing contracts," whereby Congress would initially authorize a project to its completion and each year thereafter appropriate enough funds to pay for the work planned for that year. The Congress responded by enacting section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621, *supra*.

Shortly after the enactment of section 10, the Corps requested our decision on whether it could lawfully enter into a contract, pursuant to section 10, where the contract price was in excess of the current year appropriation. We held in 2 Comp. Gen. 477 (1923) that such authority existed under section 10 so long as the contract contained a "funds available for payments" clause (as proposed by the Corps) which contained language to preclude Government liability for any work done in excess of available funds:

If this paragraph [the funds available for payments clause] be made a part of the contract and it be specifically provided that the Government is not bound

for the payment of any sum in excess of that now available from the allotment by the Secretary of War nor liable in any manner for the failure of Congress from time to time to appropriate funds for so much of the work done in excess of available funds, or to appropriate funds to continue or complete the work, there would appear to be authority for entering into such contract under the authority of the act of September 22, 1922. *Id.* at 479.

The current "Funds Available for Payment" clause used for continuing contracts is similar to the original version proposed by the Corps in 1923 and contains the exculpatory language referred to in our 1923 decision. Pertinent excerpts from the current clause are as follows:

(a) Such work as may be done under this contract in excess of the amount for which funds are available for payment as herein set forth, will be continued with funds hereafter appropriated and allotted for this work.

(b) From funds heretofore appropriated by the Act of_____ (____ Stat. ____) for_____ the sum of $_____ is available for payments to the contractor for work performed under this contract.

* * * * * * *

(d) If the rate of progress of the work is such that it becomes apparent to the contracting officer that the balance of this allocation and any allocation for this and any subsequent fiscal years during the period of this contract is less than that required to meet all payments due and to become due the contractor because of work performed or to be performed under this contract, the contracting officer may provide additional funds for such payments if there be funds available for such purpose. The contractor will be notified in writing of any additional funds so made available. *However, it is distinctly understood and agreed that the amount of funds stated in (b) above is the maximum amount which it is certain will be available during the current fiscal year. The Government is in no case liable for payments to the contractor beyond this amount or such additional amount as may subsequently be made available by the contracting officer pursuant to this paragraph (d).*

(e) *It is expected that, during subsequent fiscal years over the period of this contract, Congress will make additional appropriations for expenditure on work under this contract.* The contracting officer will notify the contractor of any additional allocation of funds to this contract when such funds become available. *It is understood and agreed that the Government is in no case liable for damages in connection with this contract on account of delay in payments to the contractor due to lack of available funds.* Should it become apparent to the contracting officer that the available funds will be exhausted before additional funds can be made available, the contracting officer will give at least 30 days written notice to the contractor that the work may be suspended. If the contractor so elects, after receipt of such notice, he may continue work under the conditions and restrictions under the specifications, so long as there are funds for inspection and superintendence, *with the understanding, however, that no payment will be made for such work unless additional funds shall become available in sufficient amount.* When funds again become available, the contractor will be notified accordingly. Should work be thus suspended, additional time for completion will be allowed equal to the period during which work is necessarily so suspended, as determined by the dates specified in the above-mentioned notices.

* * * * * * *

(h) *Should Congress fail to provide additional funds the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him or liability to the Government, at any time subsequent to 30 days after payments are discontinued, or at any time subsequent to 30 days after the passage of the Act which would have but did not carry an appropriation for continuing the work or after the adjournment of the Congress which failed to make the necessary appropriations.* However, if the funds cited in the contract are enough to extend the work beyond the end of the fiscal year and no new funds are allocated to this contract for the ensuing fiscal year, the contractor must first exhaust all the cited funds and thereafter he

may, at his option, exercise the rights provided in this paragraph any time after payments are discontinued. [Italic supplied.]

It appears that the basic nature of the Funds Available clause and the rationale for its inclusion in continuing contracts have remained essentially the same since 1923. Recently, however, the Corps has been experiencing problems in administering the Funds Available clause. The Corps submission to us points out that in *C. H. Leavell and Company* v. *United States*, 530 F. 2d 878 (1976), the Court of Claims allowed an equitable adjustment to a contractor under a continuing contract who had suspended work due to delays in the enactment of appropriations necessary to meet his contract payments. This equitable adjustment was permitted under the "Suspension of Work" clause notwithstanding the Corps' argument that the Funds Available clause, *supra*, precluded any Government liability caused by delay in obtaining appropriations.

The Corps' submission outlines its problems with the current Funds Available clause—resulting from the *Leavell* decision and other considerations—and its proposed contract changes as follows:

> The *Leavell* decision recognizes that a payment delay due to exhaustion of funds does not breach a "continuing contract." However, the decision holds the Government liable for extra costs to the contractor arising from the contractor's own decision to suspend work after progress payments were stopped. A significant factor in this decision was the risk to the contractor that, even if he had been able and decided to finance the work himself, he may never have been paid for the work or even for the interest on money borrowed to continue the work.
>
> As a result of the *Leavell* decision, the Corps proposes a substantial revision of the "Funds Available for Payments" clause. The principal changes are: (1) to pay interest on delayed payments, (2) to allow contractors to treat a contract as terminated for the convenience of the Government if payments are delayed for an inordinate period, (3) to assure contractors of eventual payment for all contract earnings, and (4) to bar claims for costs of suspension or delay of work due to delayed payments.
>
> The proposed new approach will not affect the way the work has generally been done in the past. It seeks to assure equitable treatment and to clarify the lack of actual risk that has generally prevailed. The Corps has always ultimately made all payments earned under these continuing contracts, and nearly always has made these payments as soon as they were earned. The new approach is expected to result in lower bids and contract costs. It is also expected to result in more efficient construction operations and earlier availability of project benefits."*

Since the submission did not include the actual language of the proposed contract changes, our analysis is necessarily limited to the purposes of the changes as stated. Of the proposed contract changes listed above, item (3) is the most significant, and it is the key to the other proposed changes. Proposed change (3) would "assure con-

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*We note that the *Leavell* decision did not question the validity of the Funds Available clause but merely held that this clause was not intended to preempt an equitable adjustment under the Suspension of Work clause, even where the suspension is caused by a lack of funds. Since the decision thus rests solely on matters of contract interpretation, it could be overcome by amending the exculpatory language of the Funds Available clause to expressly preclude remedies under the Suspension of Work clause. However, as indicated in the above-quoted excerpt from the submission, the Corps seems to have practical problems with the current Funds Available clause which transcend the holding in *Leavell*.

tractors of eventual payment for all contract earnings." Obviously the Corps cannot "assure" in an absolute sense any payments beyond the amount of appropriations available at the time the contract is made. Instead, it appears that the basic effect of this proposed change would be to treat the full contract price as a legal obligation, recordable under 31 U.S.C. § 200(a)(1) (1970), even though appropriations sufficient to liquidate the full obligation are not available at that time. While it is conceivable in theory that Congress might still refuse to appropriate for the liquidation of such obligations, failure to appropriate would under the revised contract provisions leave the contractor with legal rights to recover for his contract earnings. See, *e.g.*, *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50–52 (1949); *Seatrain Lines, Inc.* v. *United States*, 99 Ct. Cl. 272, 316 (1943).

This is in contrast to the current Funds Available clause which purports (subject to the exception recognized in *Leavell*) to limit the Government's legal obligation and the contractor's right of recovery to amounts actually appropriated from time to time. In other words, proposed change (3) would alter the Government's obligation under a continuing contract from one limited by appropriations actually made to one based on the contract as written independent of the existence of liquidating appropriations. This dichotomy in the theories of Government obligations was explained as follows in *Shipman* v. *United States*, 18 Ct. Cl. 138, 146–147 (1883):

> The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.
>
> In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the government to pay for it, and if a written contract be made and work be done in excess of the contract specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.
>
> We have frequently held that where there is a liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it. (*Collins's Case*, 15 C. Cls. R., 35.)
>
> But where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress. (*McCullom* v. *United States*, 17 C. Cls. R., 103; *Trenton Co.* v. *United States*, 12 *ibid.* 157.)

Similarly proposed contract changes (1) and (2), above, would afford contractors remedies which do not now exist, premised on the theory that the contractor has a legal entitlement based on his full contract earnings. Proposed change (4) would eliminate the contractor's right to an equitable adjustment under the Suspension of Work clause, which the *Leavell* decision recognized. This is pre-

sumably based on the theory that in view of the other changes, a contractor would have no occasion to suspend work.

The question presented by the Corps is whether the foregoing proposed contract changes would contravene the Antideficiency Act or our decision in 2 Comp. Gen. 477.

The Antideficiency Act, *supra*, provides in subsection (a), 31 U.S.C. § 665(a) (1970):

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

Since the very purpose of the Corps' proposed contract changes is to create contractual obligations in excess of existing appropriations, the basic issue is whether the continuing contract authority of 33 U.S.C. § 621 satisfies the "unless * * * authorized by law" exception to the prohibitions of the Antideficiency Act.

As noted previously, even prior to the enactment of 33 U.S.C. § 621 in 1922, Congress had authorized certain projects to be undertaken on a "continuing contract" basis, and it was recognized that this authority represented an exception to the Antideficiency Act. The legislative history of section 10 of the River and Harbor Act of 1922, which enacted 33 U.S.C. § 621, indicates that the purpose of this section was to provide a general statutory authorization for the same type of "continuing contracts."

The proposal for general continuing contract authority was explored in some detail in the Hearings before the House Committee on Rivers and Harbors on H.R. 10766, 67th Cong., 2d Sess. (1922). General Harry Taylor, Assistant Chief of Engineers, explained the proposal as follows:

> * * * The idea is to give us authority to enter into contracts for completion. That is, for exceeding the amount of money that has been appropriated. That would be exceedingly advantageous in a project, for instance, like this lock and dam project on the Ohio River, or the East River, covering a long term. A lock and dam on the Ohio River, for instance, will take four years or more to complete, and we well know that we cannot spend $2,000,000 for its construction the first year, as that is the whole amount it would cost. But unless we have money or authorization for it we cannot make a contract for the completion of that dam.
>
> If we have $500,000 and an authorization we can then make a contract for the entire dam, depending upon future appropriations to get the money; but if we do not have that authorization we must allot the full $2,000,000 to that dam and that remains unused from three to four years—the main part of it. That is one of the troubles we have had with our very large unexpended balances. Whenever we come to the Committee for further appropriations they say, "you have a large unexpended balance." It is true we did have a large unexpended balance but a large part of it was tied up in these contracts. *Id.* at 10.

At a later stage in the hearings, General Taylor stated:

> I think it would be a very excellent scheme if we could get a continuing contract authorization for work on a number of projects * * *. In order to make a

contract, a suitable contract for the construction of a lock and dam, we have got to make a contract for the completion of the whole thing. In other words, you cannot make a contract for the construction of half a dam.

* * * * * * *

* * * If we do not have a continuing contract authorization we must have the full amount of money to meet the payments under a contract at the time the contract is made.

* * * * * * *

* * * Now if we had a continuing contract authorization, all the money that we would allot to that would be the money to meet the payments of the first year. We would not have that big balance on hand. Then the next year we could come to Congress and say, "We have a contract for this dam, and this contract obligation next year will be $300,000," or $400,000, which ever it may be, and get the money to meet those obligations as they come due * * * *Id.* at 93.

Finally, the hearings disclose the following colloquy:

The Chairman. * * * the [contractor] would know that he had that work ahead, and he would bid lower on that piece of work than he would on a small piece of work?

Gen. Taylor. There is much more active competition for the large work: Yes, sir.

The Chairman. * * * you do not tie up any funds at all; you simply, from year to year, report to Congress the sums needed for continuing contracts?

Gen. Taylor. Yes, sir.

* * * * * * *

The Chairman. Now if you had a continuous contract there you would not have any money tied up: you would simply, from year to year, come to Congress and say: "Here is our contract for which so much money is needed. We are going to use this year $200,000 or $300,000 on this section." And, so, you would report your aggregate cost on the entire Ohio River, and that is all you would use and you would only use it as you needed it, and as the work was done, and as the amounts became due under the contracts.

Mr. McDuffie: But, Mr. Chairman, what do you think about passing a bill or presenting a bill to Congress authorizing these continuing contracts?

The Chairman. I do not think there is any question but what it ought to be done. *Id.* at 94.

While the House bill did not include a continuing contract authorization, such a provision was added to the Senate version of the bill. The Senate report explained the provision as follows:

Another amendment seeks to authorize continuing contracts in particular cases where it is shown to be economical and wise. This will tend to the more expeditious and economical prosecution of adopted projects for which appropriations are made. S. Rept. No. 813, 67th Cong., 2d Sess., 7 (1922).

The conferees adopted the Senate language, with an amendment making the continuing contract authority applicable generally to future projects, and this provision was enacted as section 10 of the 1922 Act.

In view of its language and legislative history, we are satisfied that 33 U.S.C. § 621 permits the full contract price for continuing contracts to be obligated at the outset in a manner that would otherwise be prohibited by the Antideficiency Act. This being the case, our decision at 2 Comp. Gen. 477, *supra*, is overruled insofar as it holds that such contracts must contain a funds available clause which limits the Government's obligation to amounts appropriated from time to time. In

fact, our Office has implicitly recognized, subsequent to the decision at 2 Comp. Gen. 477, that the funds available clause is not required as a matter of law. Thus in a letter to former Senator Len B. Jordan dated December 3, 1969, B–163310, commenting on proposals to eliminate the funds available clause, we stated:

> As to whether in the future the Army should, as a matter of policy, omit from its contracts the "Funds Available for Payments" clause and specifically provide in the contract that in case of lack of funds the Army would order the suspension of work or termination of the contract at its own expense or would reimburse the contractor for interest if—in such case—he continues the project with his own funds, is a matter for administrative determination by the Department of the Army. It would be our view, however, that before adopting such a policy in connection with continuing contracts, the Department of the Army should bring the matter to the attention of the appropriate committees of Congress, advising the committees of the possible results thereof insofar as costs to the Government are concerned, since this apparently would be a departure from a policy long followed by the Corps.

It follows that we have no legal objection, in principle, to the contract changes here proposed by the Corps.

However, the foregoing conclusions as to the Corps' continuing contract authority under 33 U.S.C. § 621 raise additional issues concerning the proper budgetary treatment of this authority.

The Congressional Budget and Impoundment Control Act of 1974, Public Law 93–344 (July 12, 1974), 88 Stat. 297, established a comprehensive system to govern the budgetary process in which the concept of "budget authority" is a central element. For example, both the President's budget and the first concurrent resolution on the budget for each fiscal year must include new budget authority in total and by each major functional category. See 31 U.S.C. §§ 1322(a)(1)–(2), 11(d) (Supp. V, 1975). Section 3(a)(2) of Public Law 93–344, 31 U.S.C. § 1302(a)(2) (Supp. V, 1975), defines "budget authority" to mean:

> * * * authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

Closely related to the concept of budget authority are the following provisions concerning "new spending authority" in section 401 of Public Law 93–344, 31 U.S.C. § 1351 (Supp. V, 1975):

> (a) LEGISLATION PROVIDING CONTRACT OR BORROWING AUTHORITY—It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(A) or (B) (or any amendment which provides such new spending authority), unless that bill, resolution, or amendment also provides that such new spending authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.
>
> * * * * * * *
>
> (c) DEFINITIONS.—
> (1) For purposes of this section, the term "new spending authority" means spending authority not provided by law on the effective date of this section, in-

cluding any increase in or addition to spending authority provided by law on such date.

(2) For purposes of paragraph (1), the term "spending authority" means authority (whether temporary or permanent)—

(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts * * *.

Under the current budgetary practices applicable to the Corps' continuing contracts, budget authority for such contracts derives from a two-stage congressional authorization and appropriation process. The continuing contract authority of 33 U.S.C. § 621 does not of itself provide budget authority since it is expressly limited to projects "adopted by Congress * * * ." Such public works projects are subject to specific statutory authorization on a project-by-project basis. See, *e.g.*, section 2 of the Water Resources Development Act of 1974, Public Law 93–251 (March 7, 1974), 88 Stat. 14; section 101 of the River and Harbor Act of 1970, Public Law 91–611 (December 31, 1970), 84 Stat. 1818.* The language of such statutory authorizations is illustrated in section 101 of the River and Harbor Act of 1970, *supra*, as follows:

The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted by the Secretary of the Army, acting through the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. * * *

Section 101 goes on to list the projects authorized, together with the Corps report and the estimated cost of each project.

Even after authorization, a project is not undertaken until appropriations have been requested and enacted to provide funding for at least a portion of the total project cost. Such appropriations are made to the Corps on a lump-sum basis, and are available until expended, under the heading "Construction, General." See *e.g.*, the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Public Law 94–355 (July 12, 1976), 90 Stat. 889, 891, which provides in part in the appropriation for Construction, General:

For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by laws; * * * $1,436,745,000, to remain available until expended: *Provided*, That no part of this appropriation shall be used for projects not authorized by law or which are authorized by law limiting the amount to be appropriated therefore, except as may be within the limits of the amount now or hereafter authorized to be appropriated * * *.

The specific projects intended to be funded are listed in the accompanying committee reports. There may be a substantial time lag between congressional authorization of a project and the initial funding for

*Some projects may be undertaken by the Corps without individual congressional authorization. See 33 C.F.R. part 263 (1976) for a description of the applicable general statutory authorizations. However, these projects would not be prosecuted under continuing contracts.

the project. In fact, procedures have been enacted for the deauthorization of projects for which appropriations have not been made within 8 years. See 33 U.S.C. § 579 (Supp. V, 1975).

Authorizations and appropriations are enacted with reference to each project as a whole, rather than its constituent elements such as individual construction contracts within a project. Moreover, the project costs contemplated by the authorization and appropriation include items other than construction contracts. It is our understanding that the method of prosecuting construction for a project, *i.e.*, by continuing contract or otherwise, is not determined at the authorization stage. However, when and to the extent it is later determined that certain construction will be prosecuted by continuing contract, we understand that the Corps annually requests only such funding as is necessary to cover payments for each year's work under the contract.

The current budgetary practices, as described above, are consistent with the theory of continuing contracts reflected in our 1923 decision and the Corps' use of the present Funds Available clause. Since the Government's legal obligation under this theory is limited to amounts appropriated, budget authority would come into being only as the appropriations are enacted from time to time. However, under the theory that the Corps may invoke 33 U.S.C. § 621 to obligate the full amount of continuing contracts in advance of appropriations, the requisite budget authority for purposes of Public Law 93–344 is complete as a matter of law once a project subject to 33 U.S.C. § 621 has been authorized by Congress.

In this regard, we have on several occasions expressed the view that the concept of budget authority should be liberally applied so as to effectutae the purposes of Public Law 93–344. Thus we observed in B–159687, March 16, 1976:

> * * * the fundamental objective of the Congressional Budget Act of 1974 was to establish a process through which the Congress could systematically consider the total Federal budget and determine priorities for the allocation of budget resources. We believe this process achieves its maximum effectiveness when the Budget represents as complete as possible a picture of the financial activities of Federal agencies. We further believe it is vital to maximizing the effectiveness of the process that Federal financial resources be measured as accurately as possible because priorities are actually established through decisions on the conferring of this authority. From this standpoint, therefore, the concept of "budget authority" should (a) encompass all actions which confer authority to spend money, (b) reflect as accurately as possible the amount of such authority which is conferred and (c) be recognized at the point at which control over the spending of money passes from the Congress to the administering agency.

Consistent with the last point noted above, we have emphasized that the benchmark of budget authority is the legal authority to incur obligations, even where administrative discretion exists concerning obligational levels or where the use of the authority is contingent upon administrative findings. See B–171630, August 14, 1975; B–114828, January 31, 1977.

Applying these considerations to the instant matter, we believe that the new theory of continuing contracts will require significant changes in the presentation of budget authority for projects subject to 33 U.S.C. § 621, although we recognize that a number of issues will arise concerning precisely how this should be done. Accordingly, we urge the Corps to take up these issues with the cognizant congressional committees. We will, of course, be pleased to provide any assistance that the committees or the Corps may desire.

[B-187489]

Contracts—Options—Not To Be Exercised—Requirements To Be Resolicited

Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

General Accounting Office (GAO) will consider question of protester's entitlement to proposal preparation costs, notwithstanding GAO recommendation that contract option not be exercised; prior decisions (55 Comp. Gen. 859 and B-186311, August 26, 1976) are overruled to extent they are inconsistent with this determination.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Improper—Prejudicial to Low Offeror

Agencys' evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs.

Claims—Evidence To Support—Claimant's Responsibility

Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration.

In the matter of Amram Nowak Associates, Inc., March 29, 1977:

Amram Nowak Associates, Inc. (Nowak), protests the award of contract No. 68-01-4230 by the United States Environmental Protection Agency (EPA) to Richter McBride Productions, Inc. (McBride), for a documentary film and supplemental material concerning aviation noise, resulting from request for proposals (RFP) No. WA 76 E303.

The RFP, a total small business set-aside, was issued on June 15, 1976, and required that initial proposals be submitted by July 19, 1976. Enclosure III of the RFP stated that proposals would be evaluated on the following bases:

The evaluation process designed for this procurement will be of a two-phased nature. Initially, the offeror's technical proposals will be evaluated for tech-

nical acceptability. The 100 point scale shown herein will be used and the contractors will be rated in the technical categories listed. Secondly, the offeror's proposed costs will be considered independently of the technical criteria. If there are no significant technical or financial and management differences, cost alone may be the determining factor. However, significant technical advantages or disadavantages as well as financial or management differences may offset cost differentials. Determination of award will be made pursuant to Chapter 1, Subsection 1-3.805 of the Federal Procurement Regulations.

The technical evaluation categories and their point allocations included 40 points for documentary film production achievements, 20 points for individual personnel production achievements, 40 points for proposed creative approach to the film, and 10 points for a proposal for a separate technical film. The latter technical category provided as follows:

4. Proposal of approximately 100 words for the follow-on technical film (separate from original film proposal), assuming without reiteration the concepts inherent in the original proposal, with references to that proposal where applicable, a simple creative proposal on the approach to the follow-on technical film.

Of the 28 proposals received, 4 were deemed to be technically acceptable. We note that 13 offerors, including Nowak, did not submit initial price proposals for the follow-on technical film. EPA determined that McBride, Nowak, and Charlie/Papa Productions were in the competitve range. On August 25, 1976, EPA requested, telephonically and by followup letters of the same date, that best and final offers be submitted by September 7, 1976. In requesting best and final offers, EPA's negotiator told Nowak that EPA "would need a price for the second film because the Government had to know what the film would cost if the option was exercised, even though award would be made on the first film only." Nowak asked whether both films would be made concurrently because that would make a difference in its price for the second film and was informed that the films would *not* be done concurrently.

By letter dated August 30, 1976, Nowak submitted its best and final offer, which only contained a price for the documentary film. EPA's negotiator requested that the offer be amended to include a price for the second film. Nowak complied with EPA's request, and submitted an amended best and final offer by letter of September 1, 1976. The best and final offers for the documentary film, the technical film, and the total offered prices submitted by the firms in the competitive range were as follows:

Offeror	Documentary film proposal	Technical film proposal	Total of proposals
McBride	$44,130	$10,496	$54,626
Charlie/Papa	45,730	16,467	62,197
Nowak	41,089	35,000	76,089

McBride was selected as the successful offeror on September 13, 1976, and a formal contract was forwarded on that date for signature. On September 16, 1976, Nowak telephonically ascertained from EPA's contracting officer that award to another company was contemplated on the basis of the combined price for both films. Nowak objected to the proposed award, stating that had it known the cost of both films would be evaluated, this would have made a difference in the prices submitted. The firm also stated that it was going to protest the award on the basis of previous telephone conversations with the agency's negotiator. EPA undertook to review the procurement file, and the contracting officer advised Nowak on the following day that award had not been made and would not be made before September 20, 1976. The record contains mailgrams from Nowak to EPA dated September 16 and September 17, 1976, acknowledging that Nowak was withholding formal protest of the award pending EPA's reconsideration. McBride returned the endorsed contract to EPA on September 17, 1976. On September 20, 1976, EPA's contracting officer telephonically advised Nowak that EPA would make the award as previously discussed, that review of the file did not indicate an award other than the one contemplated, and that the officer did not know when the award would be made. Award was made to McBride on September 21, 1976. Nowak filed its protest with our Office within 2 working days of the award.

Nowak essentially contends that the award was improper because McBride's offered price for the documentary film was higher than Nowak's price. Nowak asserts the following grounds in support of its protest:

1. The RFP clearly implied that the contract would be awarded on the basis of the first film only.
2. The contract negotiator stated that the award was to be made on the basis of the bid for the first film only.
3. The contracting officer deliberately misled the protester into delaying the protest until after the award was made.

In addition, Nowak has claimed $5,000 for the costs involved in preparing its proposal.

EPA takes the position that because the RFP called for an initial 14-minute film with an option to order a sequel similar to the first film, the Government's interests required evaluation of the prices offered for both films. EPA asserts that Nowak was, or should have been, on notice of the dual price evaluation from three provisions of the RFP. Initially, subparagraph C of the RFP letter provides:

> The proposal for the option film shall be submitted separately from the proposal for the other requirements, both in the technical creative proposal and in the cost proposal.

Secondly, Article V, subparagraph (iii) of the Draft Sample Contract, Enclosure I of the RFP, states:

> The total fixed price specified in Article VI will be increased by a fixed price of $——.

Finally, the technical evaluation criteria allocated 10 points for creativity in approach to the second film.

We have long recognized that options, due to their inherently uncertain and contingent nature, pose certain dangers to the integrity of competitive procurements. For this reason, we believe that options should be evaluated only in exceptional circumstances under appropriate criteria, and where the solicitation so provides. See, for example, Armed Services Procurement Regulation § 1–1500 (1976 ed.). However, we have traditionally held it improper to accept a high offer on the basis that it will become the low offer upon the occurrence of a contingency (i.e., exercise of an option) which may or may not arise. B–162839, December 19, 1967; 41 Comp. Gen. 203, 205 (1961); 15 *id.* 1136 (1936). McBride's price proposal for the documentary film was higher than Nowak's price proposal; the solicitation did not provide for evaluation of the option; and McBride's price proposal will become the low price proposal only upon EPA's exercise of the option for the technical film.

Therefore, we are unable to conclude from the record that appropriate circumstances and criteria were present in the instant procurement to justify evaluation of the option proposals. According to the evaluation criteria, a superlative optional film proposal was accorded a maximum of only 10 percent of the total technical evaluation points. As stated above, 13 of the 28 offerors did not include price proposals for the optional film in their initial proposals. Notwithstanding the fact that Nowak's initial proposal did not include a price proposal for the option film, EPA determined that Nowak was in the competitive range. The RFP did not indicate how the option film would impact upon the second phase of the evaluation process. Neither the requirement for submission of separate proposals for base and option items nor the provision for increased contract price upon the exercise of an option suffices to inform offerors that award will be made on the basis of the combined price for both films. If the offerors knew that the propsals were to be evaluated on a combined-price basis, it may be that their price proposals would have been adjusted to accommodate for this method of evaluation. EPA's RFP casts doubt on the evaluation process and the agency's action has subjected the integrity of the competitive procurement process to question.

In view of the above, award to McBride on the basis of the combined prices for both films was improper. We note, however, that more

than 60 percent of the work on the documentary film has already been completed. Consequently, termination of this portion of the contract would not, therefore, be in the Government's best interests. EPA has not, however, exercised the option for the follow-on technical film. In light of these circumstances, we recommend that the option not be exercised and that any requirement for a follow-on technical film be resolicited.

It is our opinion that our recommendation that the option not be exercised is not a sufficient remedy in the circumstances of this case. To the extent the decisions in *Dynalectron Corporation*, 55 Comp. Gen. 859, 864 (1976), 76-1 CPD 167, and in *University Research Corporation*, B-186311, August 26, 1976, 76-2 CPD 188, are inconsistent herewith they are overruled. We therefore feel it necessary to consider the question of entitlement to proposal preparation costs raised by Nowak.

A protester's entitlement to the costs of preparing his bid or offer arises from the Government's responsibility in considering bids or proposals submitted in response to a solicitation. The nature of the Government's obligation, wtih regard to advertised procurements, was characterized by the Court of Claims in *The McCarty Corporation* v. *United States*, 499 F.2d 633, 637 (Ct. Cl. 1974) (per curiam), as follows:

> * * * It is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (*Heyer Products Co.* v. *United States*, 140 F.Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956)); and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to recover his bid preparation costs in a suit against the Government (*Keco Industries, Inc.* v. *United States, supra*, 428 F.2d at 1240, 192 Ct. Cl. at 785).

Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses which he incurred in preparing his bid or proposal. *Keco Industries, Inc.* v. *United States*, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The Court in *Keco II* set forth the following standard and subsidiary criteria for recovery of preparation costs:

> The ultimate standard is, as we said in *Keco Industries I, supra*, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal normally warrants recovery of bid preparation costs. *Heyer Products Co.* v. *United States*, 140 F.Supp. 409, 135 Ct. Cl. 63 (1956). A second is that proof that there was "no reasonable basis" for the administrative decision will also suffice, at least in many situations. *Continental Business Enterprises* v. *United States*, 452 F.2d 1016, 1021, 196 Ct. Cl. 627, 637-638 (1971). The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. *Continental Business Enter-*

prises v. *United States*, *supra*, 452 F.2d at 1021, 196 Ct. Cl. at 637 (1971); *Keco Industries, Inc.* v. *United States*, *supra*, 428 F.2d at 1240, 192 Ct. Cl. at 784. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. *Cf. Keco Industries I*, *supra*, 428 F.2d at 1240, 192 Ct. Cl. at 784. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor. Keco II at 1203–04.

On the basis of these criteria, the principal issue for our consideration is whether EPA's evaluation of Nowak's proposal, based upon the combined price proposals for both films and the award to McBride displacing the otherwise low, responsive, responsible offeror, constituted failure to give the fair and honest treatment required by law to the displaced offeror, Nowak.

The terms of the RFP in question did not indicate the effect of the option film on the second phase of EPA's evaluation, nor did they advise offerors that their proposals were to be evaluated on a combined-price basis. In evaluating the proposals on the basis of the combined prices offered for both films, EPA did not perform the evaluations in accordance with the RFP. EPA's evaluation on this basis was improper, and the agency's action in awarding the contract to McBride was without a reasonable basis. Furthermore, EPA's determination to reject Nowak's proposal was arbitrary and capricious and constituted failure to give the requisite fair and honest consideration to the proposal, thus entitling Nowak to proposal preparation costs. See *T & H Company*, 54 Comp. Gen. 1021, 1025 (1975), 75–1 CPD 345.

Nowak seeks to recover $5,000 allegedly expended in preparing its proposal. The protester states that this sum represents costs involved in hiring a free lance researcher and writer, two weeks of supervisory work by two company personnel, secretarial services and delivery costs. To date, Nowak has provided no supporting documentation with regard to its preparation costs. Consequently, we have no basis upon which to determine the proper amount of compensation. We, therefore, suggest that Nowak submit the necessary documentation to EPA in the hope that an agreement can be reached on the quantum issue. In the event that agreement is not reached, the matter should be returned here for further consideration.

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

[B-187805]

Contracts—Negotiation—Two-Step Procurement—First Step—Change in Minimum Needs

Procuring activity's approval in first step of two-step procurement of the low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs.

Contracts—Protests—Procedures—Bid Protest Procedures—Improprieties and Timeliness

Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety.

In the matter of the Standard Conveyor Company and Rohr Industrial Systems, Inc., March 29, 1977:

Standard Conveyor Company (Standard) and Rohr Industrial Systems, Inc. (Rohr) (now RISI Industries, Inc.), protest any award under invitation for bids (IFB) No. DSA700-76-B-2279 issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio, to the apparent low bidder, Rapistan, Inc. The IFB is the second step of a two-step formally advertised procurement for warehouse mechanization and modernization equipment. Standard and Rohr essentially contend that DCSC's approval of Rapistan's step one technical proposal responding to request for technical proposals (RFTP) No. 76-1 and offering rollers of 16-gage steel in lieu of 14-gage is improper because the specifications require, as a minimum, 14-gage. Gage is a measure of thickneess—as gage decreases, thickness increases.

Pertinent provisions of the RFTP follow:

2. *EXPLANATION TO OFFERORS:* ANY EXPLANATION DESIRED BY AN OFFEROR REGARDING THE MEANING OR INTERPRETATION OF THE SOLICITATION, DRAWINGS, SPECIFICATIONS, ETC., MUST BE REQUESTED IN WRITING AND WITH SUFFICIENT TIME ALLOWED FOR A REPLY TO REACH OFFERORS BEFORE THE SUBMISSION OF THEIR OFFERS. ORAL EXPLANATIONS OR INSTRUCTIONS GIVEN BEFORE THE AWARD OF THE CONTRACT WILL NOT BE BINDING. ANY INFORMATION GIVEN TO A PROSPECTIVE OFFEROR CONCERNING A SOLICITATION WILL BE FURNISHED TO ALL PROSPECTIVE OFFERORS AS AN AMENDMENT OF THE SOLICITATION, IF SUCH INFORMATION IS NECESSARY TO OFFERORS IN SUBMITTING OFFERS ON THE SOLICITATION OR IF THE LACK OF SUCH INFORMATION WOULD BE PREJUDICIAL TO UNINFORMED OFFERORS.

* * * * * * *

7. *MULTIPLE TECHNICAL PROPOSALS:*
A. MULTIPLE TECHNICAL PROPOSALS (1974 APR). IN THE FIRST STEP OF THIS TWO STEP PROCUREMENT, OFFERORS ARE AUTHORIZED AND ENCOURAGED TO SUBMIT MULTIPLE TECHNICAL PROPOSALS PRESENTING DIFFERENT BASIC APPROACHES. EACH TECHNICAL PROPOSAL SUBMITTED WILL BE SEPARATELY EVALUATED AND THE OFFEROR WILL BE NOTIFIED AS TO ITS ACCEPTABILITY.
B. ANY MULTIPLE OR ALTERNATE APPROACH PRESENTED MUST MEET THE OPERATION REQUIREMENTS AND PERFORMANCE REQUIREMENTS OF THE GOVERNMENT PURCHASE DESCRIPTION, REFERENCED IN PARAGRAPH 4, ABOVE. DEVIATIONS TO THE LAYOUT AND MECHANICS MAY BE PROPOSED, PROVIDING SUGGESTED PROPOSALS ENHANCE PRODUCTION, REDUCE STAFFING, IMPROVE SAFETY, INCREASE DEPENDABILITY OR EXTEND CAPABILITY. ALL MULTIPLE OR ALTERNATE APPROACHES MUST BE SPECIFICALLY IDENTIFIED AND SEPARATELY NUMBERED IN THE TECHNICAL PROPOSAL.

* * * * * * *

11. *EVALUATION OF TECHNICAL PROPOSALS:*
TECHNICAL PROPOSALS WILL BE EVALUATED UTILIZING THE FOLLOWING CRITERIA:
A. THE SYSTEM PROPOSED MUST BE COMPLETE AND ITS DESIGN MUST DEMONSTRABLY MEET ALL TERMS, CONDITIONS, PURPOSES AND REQUIREMENTS OF THIS REQUEST AND ITS APPLICABLE SPECIFICATIONS.

Pertinent provisions of the specifications follow:

SECTION 2—GENERAL REQUIREMENTS

* * * * * * *

2.3—Unless otherwise specifically stated, all materials shall be new and of the most suitable grade for the purpose intended. *Where applicable, the equipment shall conform to the minimum requirements set forth in Sections 6 and 7 of this specification.*

* * * * * * *

SECTION 5—PERFORMANCE REQUIREMENTS

5.1 General

The installed mechanized materials handling system will be capable of accomplishing the performance requirements specified in this section. The process description of this system provided in Section 4 of the specification must be complied with when these performance requirements are accomplished. The requirements of this section are considered mandatory. * * *

* * * * * * *

SECTION 6—EQUIPMENT AND CONTROLS

6.1—Equipment and Material: Dimensions specified herein are considered nominal. *When any of the types of equipment specified herein are to be used in the proposed system, the bidder shall adhere to the following minimum requirements.* Different types of equipment may be submitted provided the design capacity requirements are met and equipment is approved by the Contracting Officer.
6.1.1—Gravity Roller Conveyor, 24

* * * * * * *

6.1.1.3—Rollers: Shall have a rating of 150 pounds per roller and 1.9" diameter, of *14-gage or thicker steel* and be not less than 21" overall length, and will be spaced on 3" centers. * * * [Italic supplied.]

Rollers of 14-gage or thicker steel are also specified in eight other sections of the RFTP for the 30-inch gravity roller conveyor, the 24-inch and 30-inch line roller conveyors, and the 30-inch accumulation line roller conveyor.

Eight timely technical proposals were received and evaluated. Seven offerors, including Rapistan, Standard, and Rohr, were advised that their technical proposals were acceptable. Rapistan proposed to substitute 16-gage steel in lieu of 14-gage steel rollers. To verify that 16-gage steel rollers were acceptable, Rapistan contacted two DCSC officials and was again assured that the thinner rollers were acceptable. Bids in response to the second step of the procurement revealed the following prices, including the data and training options, on CLIN 0001—the complete system—and CLIN 0002—the complete system less a receiving function:

Bidder	CLIN 0001	CLIN 0002
Rapistan	$2, 194, 138	$1, 616, 963
Rohr	2, 223, 069	1, 682, 569
Standard	2, 238, 178	1, 847, 296
Shiffer	2, 353, 790	1, 769, 316
Jervis Webb	2, 487, 327	1, 767, 381

Although the Defense Logistics Agency's (DLA) report on the protest recognizes that sections 2.3 and 6.1 lend some support to the conclusion that section 6 reflected mandatory minimum requirements, DLA contends that the RFTP, when reasonably interpreted as a whole, required only that technical proposals meet the performance requirements of section 5. DLA's rationale is that: (1) sections 7A and 7B authorized and encouraged offerors to submit multiple technical proposals utilizing different basic approaches meeting operation and performance requirements; (2) sections 2.2 and 5.1 of the specifications, as well as the first-step negotiations, and the evaluation criteria of section 11 emphasized the performance requirements of section 5 of the specifications rather than the design requirements of section 6, and (3) in two-step procurements, it has long been recognized that technical proposals need not comply with all the details of the specifications, citing 51 Comp. Gen. 85 (1971); 50 *id.* 337 (1970); 46 *id.* 34 (1966); and B–168138, February 17, 1970.

In addition, DLA states that the following portion of our decision, B–178192, October 29, 1973, which affirmed, on reconsideration, our decision at 53 Comp. Gen. 47 (1973), supports its position:

> * * * In making this determination [specifications should be amended to reflect integral ladder as part of a tower], we necessarily considered not only whether, from a technical point of view, the ladder requirement was actually a "basic" one with respect to the procurement of the overall antenna system,

but also whether the solicitation reasonably indicated to offerors that they were free to deviate from this particular requirement. * * *

It is DLA's position that not only did the RFTP advise offerors that they could deviate from the requirements of section 6 of the specifications but the change in gage was not a "basic" change from a technical standpoint. Further, DLA contends that the difference in cost between 16-gage and 14-gage steel rollers, and the possible resultant difference in Standard's or Rohr's proposed prices, is speculative. DLA concludes that since Rapistan did not take exception to the performance requirements and since other offerors were encouraged to utilize different approaches, the acceptance of Rapistan's proposal without amending the RFTP did not prejudice other offerors.

Rapistan concurs with DLA's position and in addition contends that Standard's protest is untimely under our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(1) (1976), because Standard should have requested written clarification of the possible substitution of 16-gage for 14-gage steel rollers before the closing date for receipt of technical proposals. The same argument could be made with respect to Rohr's protest. This additional contention is without merit since the RFTP clearly required 14-gage or thicker steel rollers and contained no apparent impropriety which should have been questioned before bid opening.

While DLA is correct in saying that technical proposals need not comply with all the details of the specifications, the issue here is not the responsiveness of Rapistan's offer, but whether the approval of thinner steel for certain rollers constituted a basic change in requirements which should have been communicated to all offerors. Armed Services Procurement Regulation § 3-805.4(a) (1976 ed.) provides as follows:

When, either before or after receipt of proposals, changes occur in the Government's requirements of a decision is made to relax, increase or otherwise modify the scope of the work or statement or requirements, such change or modification shall be made in writing as an amendment to the solicitation. * * *

While it is primarily for the procuring agency to make the technical determination as to whether a stated requirement is an "essential" one in view of its overall technical needs, it is clearly within the competence of our Office to consider what meanings may be reasonably attributed to solicitation provisions. We have also recognized that there is a limit to the extent to which a competition may be permitted to deviate from the stated specifications. The underlying principle is that the proposed change in specification requirements is of a substantial nature, and all offerors should be given the opportunity to submit a proposal on the changed requirements in order to permit competition on an equal basis. In determining the nature of a deviation from stated solicitation requirements, we have looked to the

mandatory character of language, the specificity of design detail and the general thrust of the provision from which deviation is to be permitted. See B–178192, *supra.*

Since (1) section 2.3 of the specifications states that "the equipment *shall conform* to the minimum requirements set forth in sections 6 and 7"; (2) section 6.1 of the specifications states that "the bidder *shall adhere* to the following minimum requirements"; and (3) since nine other specification sections state that rollers "[s]hall have a rating of 150 pounds per roller and 1.9″ diameter, of 14-gage or thicker steel," we believe that 14-gage or thicker steel was clearly a mandatory Government requirement of the RFTP. We also believe that DCSC's decision to relax the requirement for 14-gage or thicker steel was a basic change in Government requirements that should have been communicated to all offerors.

In arriving at this decision we take note of the cost impact data provided by Standard and essentially not disputed by DLA. Standard states that the cost saving between the roller it offered and the 16-gage roller offered by Rapistan is approximately $1 each. Standard also points out that about 30,000 rollers were required. We note that while this may have resulted in about a $30,000 reduction in Standard's bid price, Rapistan would still have been substantially lower on both CLIN 0001 and CLIN 0002. However, using Standard's data, Rohr may reasonably have been the low bidder on CLIN 0001. Furthermore, we do not agree with DLA's argument that the RFTP emphasized performance requirements, thereby constructively notifying all offerors of the nonmandatory nature of the roller steel thickness requirement. In this regard, we note that in a similar procurement before this one, DLA deemed it appropriate to amend a solicitation to reflect that 16-gage steel rollers might be offered in lieu of 14-gage rollers.

Since DLA intended to satisfy the Government's minimum requirements by substituting 16-gage steel in lieu of 14-gage rollers which constituted a basic change in the RFTP's mandatory requirements, by letter of today, we are recommending that the Director of the Defense Logistics Agency cancel the IFB and reopen the step one phase of the procurement based on the Government's current minimum needs. See 53 Comp. Gen. 47, *supra.*

Protests sustained.

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

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Under State Department instructions, alternate rest and recuperation (R&R) point is to be regarded as the employee's primary R&R point for purposes of 49 U.S.C. 1517. Since certificated U.S. air carrier service is unavailable between the employee's duty station, Kinshasa, and his alternate R&R point, Amsterdam, employee's action in extending his ticket to include personal round-trip travel aboard a foreign air carrier to Los Angeles at a reduced through fare was not improper since his additional travel did not diminish receipt of Government revenues by certificated U.S. air carriers 209

In view of State Department's instruction that alternate R&R point is to be regarded as employee's primary R&R point for purposes of 49 U.S.C. 1517 and application of the Fly America guidelines, employee's choice of alternate R&R location not serviced by certificated U.S. air carriers will be scrutinized to assure that it meets the purpose of rest and recuperation and was not selected for the purpose of avoiding the requirement for use of certificated U.S. air carriers 209

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable .. 219

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Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures .. 437

Definite commitment

Where members of "continuous" land commission are substituted or added after June 30, 1975, to hear cases referred prior to that time, obligation for compensation to original commissioner (based on compensation rate prescribed in his order of appointment) ceases to exist, and new obligation as to substituted or added commissioner only is created based on compensation prescribed for new commissioner and anticipated length of service. Compensation would, therefore, be payable from appropriations current at time of substitution or addition, and would be subject to limitations contained in such appropriations, including GS-18 daily rate limitation contained in fiscal year 1976 and 1977 appropriation acts 414

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Rivers and Harbors projects
Continuing contracts
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437
AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems)**
AWARDS
Contract awards. (*See* **CONTRACTS, Awards)**
BANKRUPTCY
Government claims
Settlement
Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly 279

BIDDERS
Qualifications
Integrity, etc.
Small business concerns Page

While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed 411

Prior unsatisfactory service
Administrative determination
Time limitation

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to serious deficiencies in *current or recent* contracts 411

Tenacity and perseverance
Small business concerns

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to *serious* deficiencies 411

Responsibility *v.* bid responsiveness
Bidder ability to perform

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 369

BIDS
Acceptance
Unbalanced bids
Improper

Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs 271

BIDS—Continued
All or none
Qualified. *(See* **BIDS, Qualified, All or none)**
Alternative
Acceptability Page
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 328
Ambiguous
Bid modification
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 346
Qualified bids. *(See* **BIDS, Qualified, Ambiguous)**
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 378
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. 378
Bidders
Generally. *(See* **BIDDERS)**
Competitive system
Specifications
Defective
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 reads 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 378
Two-step procurement
Discarding all bids
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 369

BIDS—Continued
Conformability of articles to specifications. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered)
Contracts
Generally. (*See* CONTRACTS)
Correction
Approval. (*See* BIDS, Modification)
Discarding all bids
Low bid nonresponsive
Two-step procurement
Resolicitation of second-step Page
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 369
Readvertisement justification
Changed conditions, etc.
Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs 271
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 364
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 369
Specifications
Ambiguous. (*See* BIDS, Discarding all bids, Specifications, Defective, Ambiguous)
Errors. (*See* BIDS, Mistakes)
Evaluation
Conformability of equipment, etc. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered)

BIDS—Continued
Invitation for bids
Bids nonresponsive to invitation
Bid qualified Page
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 346
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 364
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 364
Two-step procurement
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 369
Unbalanced bids
Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs 271
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 346
Responsiveness
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 334

BIDS—Continued
Late
Acceptance
Prejudicial to other bidders Page
By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Indwstries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid 419
Mistakes
Verification
Adequacy
Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies Armed Services Procurement Regulation 2–406.3, and acceptance creates valid contract 239
Nonresponsive to invitation
Conformability of equipment. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Failure to acknowledge amendment
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 378
Preparation
Costs
Recovery
Amount in dispute
Since amount of compensation for bid preparation costs due claimant is in dispute and claimant has not submitted adequate substantiating documentation to establish quantum of claim, there is no basis at this time to determine proper amount of compensation. Therefore, it is requested that necessary documentation be submitted to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to General Accounting Office for further consideration 419
Prices
Reduction by low bidder
After bid opening
Low responsive bid may be reduced after bid opening 328
Protests. (*See* **CONTRACTS, Protests**)

BIDS—Continued
Qualified
All or none
Bid nonresponsive Page
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 346
Definite quantities
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 346
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 334
Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Small business concerns
Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole source basis**)
Two-step procurement
Discarding all bids
Competition sufficiency (*See* **BIDS, Competitive system, Two-step procurement, Discarding all bids**)
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 369
Low bid nonresponsive. (*See* **BIDS, Discarding all bids, Low bid nonresponsive, Two-step procurement**)

BIDS—Continued
Two-step procurement—Continued
Second-step
Invitation canceled
Resolicitation Page

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 369

Technical proposals
Deviations
Time for correction

Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs 454

BOARDS, COMMITTEES AND COMMISSIONS
Compensation. (*See* **COMPENSATION, Boards, committees and commissions**)

BUREAU OF CENSUS (*See* **COMMERCE DEPARTMENT, Bureau of Census**)

CIVIL SERVICE COMMISSION
Board of Appeals and Review
Remedies

Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant,* 55 Comp. Gen. 785 (1976) 427

Jurisdiction
Approval of supergrade positions

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade psoitions covered by 5 U.S.C. 3324(a) 432

CLAIMS
Evidence to support
Claimant's responsibility Page
Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration 448
Mobile home insurance
Set-off
Past due *v.* future premiums
As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified 279
Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly 279
Set-off. (*See* **SET-OFF**)
CLOTHING AND PERSONAL FURNISHINGS
Special clothing and equipment
Motorized wheelchairs
Government property requirement
Social Security Administration (SSA) violated in the Southeastern Program Service Center the carpeting standards established under Architectural Barriers Act of 1968 and under Department of Health, Education, and Welfare (HEW) regulations. Prior to this violation, its employee had supplied his own nonmotorized wheelchair and was capable of performing his assigned duties. In order to make the best use of available personnel and in view of the fact that a powered vehicle became necessary only because of the violation of the Act's standards, we will not object to SSA's reimbursing its employee for the cost of acquiring the motorized wheelchair. The wheelchair will then become the Government's property for use solely in the subject building 398

COMMERCE DEPARTMENT
Bureau of Census
Classification of entities
Political subdivisions Page
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 353
Services for other agencies
Collections
Special account *v.* miscellaneous receipts
Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation 275
COMMISSIONS (*See* **BOARDS, COMMITTEES AND COMMISSIONS**)
COMPENSATION
Boards, committees and commissions
Land commissioners
Subject to GS–18 daily rate limitation
Appropriations for compensation of land commissioners are obligated only upon appointment of each commissioner *and* referral of particular condemnation action to commission of which he is a part, since no *bona fide* need for commissioner's services as to particular case arises until that time. Therefore, compensation for members of "continuous" land commission, established in 1969, is subject to GS–18 daily rate limitation under fiscal year 1976 or 1977 appropriations for payment of land commissioners with respect to cases referred to continuous commission after June 30, 1975. B–184782, February 26, 1976, amplified 414
Deputy Governors
Farm Credit Administration
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 375
Holidays
Leave without pay status
Before and after holiday
Employee in a pay status for the day either immediately preceding or succeeding a holiday is entitled to regular pay for the holiday regardless of whether he is in an authorized leave-without-pay status or in an absent-without-leave status for the corresponding day immediately succeeding or preceding the holiday. 13 Comp. Gen. 207 (1934) overruled. 13 Comp. Gen. 206 (1934), 16 *id.* 807 (1937), 18 *id.* 206 (1938), and 45 *id.* (1965) modified 393

COMPENSATION—Continued
Increases. (*See* **COMPENSATION, Promotions**)
Night work
Customs employees
O'Rourke **case distinguished** Page
Customs employee claims overtime pay under Customs overtime laws, 19 U.S.C. 267 and 1451 (1970), for work performed in addition to regular tour of duty and between the hours of 5 p.m. and 8 a.m. Employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in *O'Rourke* v. *United States*, 109 Ct. Cl. 33 (1947), will not be followed 310
Prevailing rate employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)
Promotions
Temporary
Detailed employees
Retroactive application
Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976) 427
Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a) 432
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. 360
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 360

CONFLICT OF INTEREST STATUTES
Violation determinations
Contract award Page
Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship ---- 381

CONTRACTING OFFICERS
Authority
Exceeded
Arbitrary and capricious action
By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Industries, Inc.* v. *United States*, 492 F.2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid ---- 419

CONTRACTORS
Responsibility
Administrative determination
Nonresponsibility finding
Based on agency audit report
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may properly be based on agency audit report even though (1) underlying data is not reviewed by contracting officer or protester, and (2) default of prior contracts based on those conclusions is presently under appeal ---- 411
Serious deficiency requirement
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR 1-1.1203-1 provides that such unsatisfactory performance must be related to *serious* deficiencies ---- 411
Determination
Current information
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR 1-1.1203-1 provides that such unsatisfactory performance must be related to serious deficiencies in *current or recent* contracts ---- 411

CONTRACTS

Advertising *v.* negotiation (*See* **ADVERTISING, Advertising *v.* negotiation**)

Awards

Not prejudicial to other bidders Page

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 346

Numerous contracts to same contractor

No legal basis for objection to award

Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection 381

Small business concerns

Administrative determination

Nonresponsibility of contractor

Notice to SBA

While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed 411

Bid procedures. (*See* **BIDS**)

Bids

Generally. (*See* **BIDS**)

Cancellation

No longer feasible

Prior recommendation withdrawn

Detective agencies

Decision of September 23, 1976, 55 Comp. Gen. 1472, holding that contract for guard services at Navy installation violated 5 U.S.C. 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of the time element involved, however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license 225

Clauses

"Funds available for payments"

Continuing contracts

33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437

CONTRACTS—Continued
Clauses—Continued
Interpretation Page
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 340
Continuing. (*See* **CONTRACTS, Term, Continuing contracts**)
Damages
Unliquidated
Claim submission to GAO for approval
Not required
It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquidated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified 289
Discounts
Based on ASPR provision
Not offered or accepted by contractor
Government cannot properly claim discounts based upon ASPR provision which contractor neither offered nor accepted 307
Computation of time period
Inconsistent provisions
Negotiated terms and ASPR provisions
When contract includes inconsistent provisions for computing discount period, specifically negotiated terms prevail over general Armed Services Procurement Regulation (ASPR) provision incorporated by reference 307
Inconsistent provisions
Computation of time period. (*See* **CONTRACTS, Discounts, Computation of time period, Inconsistent provisions**)
Disputes
Procedures
Available remedies
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 340
Evaluation of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

CONTRACTS—Continued
Increased costs
Taxes
Federal excise taxes Page

No basis is seen to reform contract to reimburse contractor for general and administrative expenses 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 340

Mistakes
Allegation after award
No basis for relief

Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies Armed Services Procurement Regulation 2-406.3, and acceptance creates valid contract 239

Unconscionable to take advantage
Claim not supported by evidence

Where vice president, now president, of contracting firm attended but did not actively participate in meeting to discuss suspected mistake, he cannot later be heard to say contract is unconscionable 239

Negotiated. (*See* CONTRACTS, Negotiation)
Negotiation
Advertising *v.* negotiation. (*See* ADVERTISING, Advertising *v.* negotiation)
Awards
Allegation of bias
Evidence lacking

Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. _____, (B-187435, June 2, 1977) 402

Cancellation
Generally. (*See* CONTRACTS, Cancellation)
Changes, etc.
Oral *v.* written

Where agency did not issue amendment to request for proposals (RFP), but met with each offeror individually to advise of change in RFP evaluation criteria, but one offeror denies even being advised of change, it is clear that misunderstanding could have resulted from agency's failure to verify its oral advice by prompt issuance of RFP amendment in accordance with regulations 388

CONTRACTS—Continued
Negotiation—Continued
Competition
Competitive range formula
Technical acceptability Page

Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained 291

Discussion with all offerors requirement
Equal opportunity to compete

Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have affected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs 312

Proposals not within competitive range

Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing 291

Evaluation factors
Administrative determination

Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement for interchangeability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations 300

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

Cost
Changed

Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000 245

Cost analysis
Benchmark costs

Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate 388

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Cost realism Page

Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. ——, (B–187435, June 2, 1977) 402

Discount terms

To extent that protest against Navy's cost reevaluation—which found that award was erroneously made to other than lowest cost offeror—implicitly calls into question sufficiency of request for proposals (RFP) evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts 245

Evaluators
Conflict of interest alleged

Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship 381

Method of evaluation
Improper
Prejudicial to low offeror

Agency's evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs 448

Options
No provision for evaluation in solicitation

Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited 448

Superior product offered

Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent 381

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Testing procedures Page

Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. ——, (B–187435, June 2, 1977) 402

Late proposals and quotations
Sole-source solicitation
Amend or cancel RFP

Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition 300

Offers or proposals
Best and final
Certification omitted

Where agency required certification in best and final offers that equipment configuration proposed was that which had passed computer benchmark and had been determined to be technically acceptable, successful offeror's responses are viewed as meeting intent of requirement though certification as such was not provided 312

Deviations

Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs 454

Hardware requirements *v.* firmware proposals

Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs 312

Evaluation
Allegation of bias not sustained

Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained 291

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Negotiation—Continued
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Offeror
Equal treatment requirement Page

Despite agency's view that RFP provision requiring successful completion of computer benchmark in 8 hours was established as matter of Government's convenience and was not necessarily inflexible, in case where agency found it appropriate to allow one offeror almost 15 total hours in two benchmark sessions more than 3 months apart, GAO believes that RFP should have been amended to indicate that 8-hour requirement was flexible, and second offeror should have been allowed to revise proposal and have been accorded similar flexible treatment in benchmark of revised proposal's equipment configuration 312

Post-award debriefing

Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing 291

Preparation
Costs

General Accounting Office (GAO) will consider question of protester's entitlement to proposal preparation costs, notwithstanding GAO recommendation that contract option not be exercised; prior decisions (55 Comp. Gen. 859 and B–186311, August 26, 1976) are overruled to extent they are inconsistent with this determination 448

Agency's evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs 448

Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration 448

Prices
Reduction *v.* modification

Agency properly declined to consider contractor's reduction in contract price in reaching decision to terminate contract for convenience of Government and reaward to offeror which was actually lowest in overall cost, because in prevailing circumstances price reduction amounted to late modification of unsuccessful proposal 245

Time sharing computer services

Proposal for computer time sharing services which reserved offeror's right to revise computer algorithm failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices 245

Options
Generally. (*See* **CONTRACTS, Options**)

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Requests for proposals
Amendment
Protest Page

Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment 300

Required for changes in RFP

Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition 300

Computer time sharing services
Ambiguous
Allegations not substantiated

To extent that protest against Navy's cost reevaluation—which found that award was erroneously made to other than lowest cost offeror—implicitly calls into question sufficiency of request for proposals (RFP) evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts 245

Requirements
Benchmark

Where RFP for computer time sharing services established benchmark requirements which related primarily to technical acceptability of proposals, and Navy regarded offeror's several performance discrepancies (time exceeded on 3 of 135 tasks, degradation factor exceeded on 1 of 3 benchmark runs) as minor, Navy's acceptance of proposal is not clearly shown to be without reasonable basis insofar as protestor's numerous objections concerning benchmark performance, memory allocation feature and 30-day contractor phase-in requirement are concerned 245

Fixed prices

Since protester's proposal was unacceptable due to failure to offer fixed prices as required by RFP, primary remedy requested in its protest—reinstatement of its contract which Navy terminated for convenience—is precluded 245

Memory allocation

Where RFP for computer time sharing services required that main memory protection must ensure integrity of user's area during operations, Navy's acceptance of proposal lacked reasonable basis because, upon technical review, proposal does not demonstrate that approach proposed by offeror meets requirement 24

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Negotiation—Continued
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Protests under
Timeliness Page

Protest which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor, as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals 245

Wording

Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures 300

Requirements
Security

Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and General Accounting Office recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protestor (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror) 245

Specification requirements

Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs 312

Benchmark equipment

Waiving certain computer benchmark requirements and allowing substitutions of equipment in successful offeror's benchmark performance is not found to be objectionable in circumstances where waivers and substitutions (1) were believed necessary to maintain competition in procurement, (2) involved incidental, lower-performance equipment, and (3) did not affect offeror's obligation to furnish higher-performance equipment it had proposed and which agency had found to be technically acceptable 312

Benchmark periods

Despite agency's view that RFF provision requiring successful completion of computer benchmark in 8 hours was established as matter of Government's convenience and was not necessarily inflexible, in case where agency found it appropriate to allow one offeror almost 15 total hours in two benchmark sessions more than 3 months apart, GAO believes that RFP should have been amended to indicate that 8-hour requirement was flexible, and second offeror should have been allowed to revise proposal and have been accorded similar flexible treatment in benchmark of revised proposal's equipment configuration 312

CONTRACTS—Continued
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Specification requirements—Continued
Level of effort Page

Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO)---- 381

Level of training services

Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake---- 381

Unrealistic

Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. ——, (B–187435, June 2, 1977)---- 402

Submission date
Late receipt

Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment---- 300

Responsiveness
Concept not applicable to negotiated procurements

"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations---- 300

Sole source basis
Cancellation *v.* amendment of sole-source RFP

Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition---- 300

CONTRACTS—Continued
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Factual basis Page

Agency's determination that it was unable to locate qualified sources to perform elevator, escalator, and dumbwaiter maintenance and repair services other than manufacturers of the equipment does not constitute rational basis for sole source procurement from manufacturers where agency did not make its requirements known to the public and where agency's determination does not appear to have a factual basis..... 434

Justification
Inadequate

While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply..... 434

Parts, etc.

Sole source procurement of repair and maintenance service from item's manufacturer is not justified merely because manufacturer can supply replacement parts on a priority basis. Agency has not shown that replacement parts cannot readily be obtained other than by award to the manufacturer..... 434

Specifications. (*See* **CONTRACTS, Specifications**)
Specifications conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Technical acceptability of equipment, etc., offered. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Termination. (*See* **CONTRACTS, Termination**)
Two-step procurement
First step
Change in minimum needs

Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs..... 454

Negotiation *v.* advertising. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Options
Exercisable at sole discretion of Government
Bid protest not for consideration

Where record shows that under option provisions contract is renewable at sole discretion of Government, General Accounting Office will not consider incumbent contractor's contention that agency should have exercised contract option provision instead of issuing new solicitation. Prior decisions will no longer be followed to extent they are inconsistent with this determination..... 397

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Exercised
Real property purchases
Appropriation chargeable
Page
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 351
Not to be exercised
Requirements to be resolicited
Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited 448
Price adjustment
Taxes
Federal excise tax
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 340
Protests
Allegation of improper rescission
Not supported by record
Claim based on alleged improper rescission is denied since acts of assigning contract number and requesting payment and performance bonds at least 7 weeks prior to commencement of contract period is not action a reasonable bidder would act on without obtaining confirmation in writing. Actions taken by Air Force were merely preparatory to contract and, without confirmation in writing, claimant acted at its own peril 271
Favoritism alleged
Not established
Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection 381
Persons, etc., qualified to protest
Protester who was listed as subcontractor in rejected proposal submitted under agency solicitation is interested party for filing protest. Moreover, subsequent untimely protest by offeror does not require that offeror be excluded from protest action because firm is interested party concerning subcontractor's timely protest 381

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Procedures
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Improprieties and timeliness Page

Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety 454

Requests for information *v.* protest

Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures 300

Timeliness
Negotiated contracts

Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment .. 300

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 328

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Small business concern awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)
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 378

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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 ---- 364
Conformability of equipment, etc., offered
Ability to meet requirements
"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations ---- 300
Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement for interchangeability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations ---- 300
Administrative determination
Negotiated procurement
Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent ---- 381
Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO) ---- 381
Evaluation and technical acceptability
Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake ---- 381
Technical deficiencies
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Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained ---- 291
Where request for proposals (RFP) established computer hardware requirement and successful offeror proposed "firmware," after technical review of issue, General Accounting Office (GAO) does not believe protester has substantiated its view that firmware is always classified as software, nor has protester clearly shown that agency's acceptance of firmware as being sufficient to fulfill hardware requirement lacks reasonable basis ---- 312

CONTRACTS—Continued
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Definiteness requirement Page
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 346
Descriptive data
Voluntary submission
Acceptability
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 334
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 334
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies**)
Tests
Benchmark
Computers
Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000 245
Where agency states that computer benchmark output was examined and found to be acceptable, protester's contradictory assertion that successful offeror's benchmark results were partially unacceptable does not establish that agency's account of facts is inaccurate 312
Where agency required certification in best and final offers that equipment configuration proposed was that which had passed computer benchmark and had been determined to be technically acceptable, successful offeror's responses are viewed as meeting intent of requirement though certification as such was not provided 312
Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate 388

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No basis is seen to reform contract to reimburse contractor for general and administrative expenses 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 340
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33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437
Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures 437
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Protest which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor, as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals 245

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Where General Accounting Office (GAO) recommended that agency examine feasibility of terminating improperly awarded contract for convenience of Government, agency's response establishes grounds for position that award should not be disturbed due to urgency of supply situation. Therefore, notwithstanding doubts concerning methodology used by contracting officer in arriving at termination for convenience cost estimate, considering all circumstances of case GAO cannot conclude that recommending termination for convenience would be in best interests of Government. 55 Comp. Gen. 1412, modified---------- 296

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Where agency states that computer benchmark output was examined and found to be acceptable, protester's contradictory assertion that successful offeror's benchmark results were partially unacceptable does not establish that agency's account of facts is inaccurate---- 312
Computer service
Benchmarking
Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000---- 245

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Where request for proposals (RFP) established computer hardware requirement and successful offeror proposed "firmware," after technical review of issue, General Accounting Office (GAO) does not believe protester has substantiated its view that firmware is always classified as software, nor has protester clearly shown that agency's acceptance of firmware as being sufficient to fulfill hardware requirement lacks reasonable basis 312
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Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate 388
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Decision of September 23, 1976, 55 Comp. Gen. 1472, holding that contract for guard services at Navy installation violated 5 U.S.C. 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of the time element involved, however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license---------- 225
Jurisdiction
Contracts
Breach of contract
It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquidated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified---------- 289
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---------- 340
Protests generally. (*See* **CONTRACTS, Protests**)
Small business matters
While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed---------- 411
Recommendations
Contracts
Agency review of feasibility of contract termination
Justification for not terminating
Where General Accounting Office (GAO) recommended that agency examine feasibility of terminating improperly awarded contract for convenience of Government, agency's response establishes grounds for position that award should not be disturbed due to urgency of supply situation. Therefore, notwithstanding doubts concerning methodology used by contracting officer in arriving at termination for convenience cost estimate, considering all circumstances of case GAO cannot conclude that recommending termination for convenience would be in best interests of Government. 55 Comp. Gen. 1412, modified---------- 296

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Reevaluation of best and final offers Page
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. ——, (B–187435, June 2, 1977)---------- 402
Reevaluation of minimum needs, etc.
Termination of awarded contract if necessary
While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply-------- 434
Reopen negotiations
Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and General Accounting Office recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protester (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror)----- 245
Resolicitation under revised evaluation criteria
Termination of awarded contract if necessary
In view of deficiencies in procurement, General Accounting Office recommends resolicitation of proposals and, if advantageous to Government, that new contract be awarded and that present contract be terminated---------- 388
Two-step procurement
Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs---------- 454

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HANDICAPPED PERSONS

Facilities, etc.

Architectural Barriers Act

Compliance with standards established under Act Page

Primary jurisdiction for assuring compliance with standards established under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 (1970), is placed by statute with the General Services Administration (GSA), 42 U.S.C. 4156, and with the Architectural and Transportation Compliance Board, 29 U.S.C. 792 (Supp. IV, 1974). SSA should determine from those entities the proper means of rectifying noncompliance with standards on carpeting, which noncompliance has resulted in handicapped persons requiring the use of powered wheelcharis. Section 236 of the Legislative Reorganization Act, 31 U.S.C. 1176 (1970) is applicable to this recommendation for corrective action---------- 398

Wheelchairs

Motorized

Social Security Administration (SSA) violated in the Southeastern Program Service Center the carpeting standards established under Architectural Barriers Act of 1968 and under Department of Health, Education, and Welfare (HEW) regulations. Prior to this violation, its employee had supplied his own nonmotorized wheelchair and was capable of performing his assigned duties. In order to make the best use of available personnel and in view of the fact that a powered vehicle became necessary only because of the violation of the Act's standards, we will not object to SSA's reimbursing its employee for the cost of acquiring the motorized wheelchair. The wheelchair will then become the Government's property for use solely in the subject building---------- 398

Should GSA, pursuant to 42 U.S.C. 4156 (1970), and/or the Architectural and Transportation Compliance Board, pursuant to 29 U.S.C. 792 (Supp. IV, 1974), order the SSA to purchase and have available motorized wheelchairs for other handicapped employees and members of general public to rectify the violation in the Southeastern Program Service Center of the carpeting standards established pursuant to the Architectural Barriers Act of 1968, it may use its appropriations for that purpose. If other action is prescribed, wheelchair purchases are not authorized, regardless of savings in cost---------- 398

HEALTH, EDUCATION AND WELFARE DEPARTMENT

Social Security Administration. (*See* **SOCIAL SECURITY ADMINISTRATION**)

HOLIDAYS

Annual leave charge. (*See* **LEAVES OF ABSENCE, Holidays**)

Compensation. (*See* **COMPENSATION, Holidays**)

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Loans and grants
Mobile home loan insurance
"In advance" premiums Page

Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly 279

INSURANCE
Premiums
Mobile home loan insurance

As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified 279

INTEREST
Federal grants, etc. to States and their subdivisions
Retention of interest earned
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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 353

INTERIOR DEPARTMENT
Fish and Wildlife Service
Real property acquisition
Procedures

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 351

LEAVES OF ABSENCE
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Employee in a pay status for the day either immediately preceding or succeeding a holiday is entitled to regular pay for the holiday regardless of whether he is in an authorized leave-without-pay status or in an absent-without-leave status for the corresponding day immediately succeeding or preceding the holiday. 13 Comp. Gen. 207 (1934) overruled. 13 Comp. Gen. 206 (1934), 16 *id.* 807 (1937), 18 *id.* 206 (1938), and 45 *id.* 291 (1965) modified ---------- 393
LOANS
Government insured
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Small business investment companies (SBICs) are not eligible to participate as guanranteed 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 ---------- 323
MARITIME ADMINISTRATION
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MARITIME MATTERS
Vessels
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Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price ---------- 230
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In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will apply a mileage proration formula calculating the traveler's liability based on certificated U.S. air carriers' loss of revenues ---------- 209

MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Collections

Commerce Department services Page

Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation 275

MOBILE HOMES

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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 357

OFFICERS AND EMPLOYEES

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Details. (*See* **DETAILS**)

Executive schedule rate employees

Governor and Deputy Governors

Farm Credit Administration

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 375

Moving expenses

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

Overtime. (*See* **COMPENSATION, Overtime**)

Prevailing rate employees

Compensation. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)

Promotions

Temporary

Detailed employees

Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976) 427

Relocation expenses

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

Retirement. (*See* **RETIREMENT, Civilian**)

OFFICERS AND EMPLOYEES—Continued
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem**)
Supergrades
Promotions
Temporary
Detailed employees Page

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a)---- 432

Transfers
Relocation expenses
House purchase
Closing charges
Documentation required for reimbursement

Employee who purchased residence incident to transfer of duty station claims closing costs paid by seller but included in purchase price. Since closing costs are clearly discernible and separable from price allocable to realty and both buyer and seller regarded costs as having been paid by buyer, claim may be paid for full amount of closing costs upon proper documentation itemizing the costs, the amount of each item claimed, and claimant's liability therefor. 52 Comp. Gen. 11, modified---- 298

Travel expenses. (*See* **TRAVEL EXPENSES**)
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The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier---- 219

Sleeping time

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable---- 219

OFFICERS AND EMPLOYEES—Continued
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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 357
"Inherent vice"
Definition of "inherent vice" indicates that loss is caused in commodity without outside influence, and courts have so held 357
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 357
Rejection of shipment
Partial damage
Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability, carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper, and that it was free of negligence 264
Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims, Transportation**)
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REAL PROPERTY
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Appropriation chargeable
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 351

REGULATIONS
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Effective date Page
Civilian employees of the Mare Island Naval Shipyard who performed temporary duty in Guam between September 16, 1975, and January 13, 1976, are only entitled to per diem at the $49 rate prescribed by Joint Travel Regulations, Change No. 57, dated September 16, 1975, and made effective that date, notwithstanding that notification of the reduction in per diem rate from $56 was not received at the Shipyard until January 13, 1976 ---- 425

RETIREMENT
Civilian
Benefits
Not subject to negotiation
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 ---- 360

RIVERS AND HARBORS
Rivers and Harbors Act
Funding provisions for continuing contracts
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled ---- 437
Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures ---- 437

SALES
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Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price ---- 230

SALES—Continued
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The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges 264
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As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified 279
Transportation
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Government agency may exercise its common law right of setoff if prima facie case of carrier liability is established. Setoff may be exercised by the Government before liability is judicially established. A review of a setoff by the United States is within jurisdiction of the Court of Claims, 28 U.S.C. 1503 (1970) 264
SMALL BUSINESS ADMINISTRATION
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Award to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
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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 323

SOCIAL SECURITY ADMINISTRATION
Noncompliance with carpeting standards under Architectural Barriers Act
Rectification Page
Primary jurisdiction for assuring compliance with standards established under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 (1970), is placed by statute with the General Services Administration (GSA), 42 U.S.C. 4156, and with the Architectural and Transportation Compliance Board, 29 U.S.C. 792 (Supp. IV, 1974). SSA should determine from those entities the proper means of rectifying noncompliance with standards on carpeting, which noncompliance has resulted in handicapped persons requiring the use of powered wheelchairs. Section 236 of the Legislative Reorganization Act, 31 U.S.C. 1176 (1970) is applicable to this recommendation for corrective action 398

STATUTES OF LIMITATION
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Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted 264

SUBSISTENCE
Per diem
Military personnel
Rates
Staying with friends, relatives, etc.
Military member who stayed with friends in lieu of staying in commercial lodging while on temporary duty assignment may not have cost of taking hosts to dinner included as actual lodging cost in computing his per diem allowance under paragraph M4205, Volume 1, Joint Travel Regulations, since payment for such expense was in the nature of a gift or gratuity and was not an actual cost of lodging 321
Overseas employees
Delays
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Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable 216

SUBSISTENCE—Continued
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Effective date Page

Civilian employees of the Mare Island Naval Shipyard who performed temporary duty in Guam between September 16, 1975, and January 13, 1976, are only entitled to per diem at the $49 rate prescribed by Joint Travel Regulations, Change No. 57, dated September 16, 1975, and made effective that date, notwithstanding that notification of the reduction in per diem rate from $56 was not received at the Shipyard until January 13, 1976 425

Temporary duty
At place of family residence

Emp'oyee who stayed at family residence while performing temporary duty may not be reimbursed lodging expenses based on average mortgage, utility, and maintenance expenses because such expenses are costs of acquisition of private property and are not incurred by reason of official travel or in addition to travel expenses. 35 Comp. Gen. 554, and other prior decisions, should no longer be followed 223

TAXES
Contract matters. (*See* **CONTRACTS, Tax matters**)
Federal
Excise
Contract price adjustment

No basis is seen to reform contract to reimburse contractor for general and administrative expenses 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 340

TRANSPORTATION
Air carriers
Certificated *v.* noncertificated air carrier service
Hours of travel

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable 219

TRANSPORTATION—Continued
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Foreign
"Certificated air carriers" Page

Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formulas at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers 209

The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier 219

Bills of lading
Government
Report of loss, damage or shrinkage
Condition 7

Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted 264

Carriers
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Damage, loss, etc., of public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)
Mobile homes. (*See* **MOBILE HOMES, Transportation**)
Ocean carriers
Liability
Damage, loss, etc., of cargo
Evidence

Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability, carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper, and that it was free of negligence 264

Overcharges
Set-off

The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges 264

Property damage, loss, etc.
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)

TRANSPORTATION DEPARTMENT
Urban Mass Transportation Administration
Transit authorities
Status
State agencies or instrumentalities
Entitlement to interest earned on Federal grants Page

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 353

TRAVEL EXPENSES
Air travel
Fly America Act
Applicability

In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will apply a mileage proration formula calculating the traveler's liability based on certificated U.S. air carrier's loss of revenues 209

Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable 216

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable 219

The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier 219

TRAVEL EXPENSES—Continued
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Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formulas at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers---------- 209

Rest and recuperation
Alternate point

In view of State Department's instruction that alternate R&R point is to be regarded as employee's primary R&R point for purposes of 49 U.S.C. 1517 and application of the Fly America guidelines, employee's choice of alternate R&R location not serviced by certificated U.S. air carriers will be scrutinized to assure that it meets the purpose of rest and recuperation and was not selected for the purpose of avoiding the requirement for use of certificated U.S. air carriers---------- 209

Primary point

Under State Department instructions, alternate rest and recuperation (R&R) point is to be regarded as the employee's primary R&R point for purposes of 49 U.S.C. 1517. Since certificated U.S. air carrier service is unavailable between the employee's duty station, Kinshasa, and his alternate R&R point, Amsterdam, employee's action in extending his ticket to include personal round-trip travel aboard a foreign air carrier to Los Angeles at a reduced through fare was not improper since his additional travel did not diminish receipt of Government revenues by certificated U.S. air carriers---------- 209

Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation 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---------- 345

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

UNITED STATES INFORMATION AGENCY
Employees
Prevailing rate employees
Entitlement to negotiate wages Page
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. 360

VESSELS
Sales
Price determination
Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price 230
Requirement that minimum acceptable price be determined on "current" basis and that evaluation of bids not be based on speculative factors does not preclude consideration of changing and projected market conditions in establishing minimum acceptable price 230

WORDS AND PHRASES
"Funds available for payments" clause of continuing contracts
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled
"Inherent vice" 437
Definition of "inherent vice" indicates that loss is caused in commodity without outside influence, and courts have so held 357
Level of effort
Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO) 381