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TABLE OF DECISION NUMBERS

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Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-185827]

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous—Dental Contract Loss

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

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous—Pollution Control Devices—Installed in Automobiles

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

In the matter of Joseph T. Grills—miscellaneous expense, November 1, 1976:

This action is in response to a request by the Chief, Accounting Section, Office of Controller, Drug Enforcement Administration (DEA), for a determination by this Office of the propriety of payment of the claim of Mr. Joseph T. Grills, an employee of DEA, for the reimbursement of certain miscellaneous expenses incident to a transfer.

The record shows that in 1974 Mr. Grills was transferred by the DEA from Baltimore, Maryland, to San Diego, California. Prior to the transfer, Mr. Grills paid for orthodontistry services for his two sons under a contract which would have provided for their complete treatment had they remained in the Baltimore area. However, as a result of the relocation, it was necessary for the employee to obtain an orthodontic contract in San Diego at a cost of $250 for completion of orthodontic work for one of his sons. Mr. Grills also had a pollution control device installed on his car at a cost of $113.75 as a prerequisite to registration of his automobile in California. The agency denied payment of these items and authorized reimbursement of miscellaneous expenses in the amount of $200, the maximum allowable without itemization. The employee has now reclaimed $363.75 for the expense of installation of the pollution control device and the completion contract for orthodontic services, less the $200 already reimbursed.

Section 5724a(b) of title 5, United States Code (1970), provides for the reimbursement to an employee of the miscellaneous expenses necessarily incurred incident to a transfer. The regulations issued under authority of this section are contained in section 2-3.1, *et seq.*, of the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973). Paragraph 2-3.1(b) of the regulations lists the types of costs covered and provides in pertinent part as follows:

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

* * * * * * *

(5) Forfeiture losses on medical, dental and food locker contracts that are not transferrable; and

(6) Costs of automobile registration, driver's license and use taxes imposed when bringing automobiles into certain jurisdictions.

In this case, it is clear that the employee's forfeiture under a fully paid contract for orthodontic services and the obtaining of a new contract was necessitated by his relocation to San Diego. The record contains a letter from the employee's first orthodontist attesting to the fact that treatment of the employee's dependents could have been completed under the forfeited contract had the employee's family remained in the Baltimore area. In these circumstances, we are of the opinion that the amount forfeited under the original contract may be reimbursed as a miscellaneous expense. However, the cost incurred by Mr. Grills for a completion orthodontic contract may not be used as a measure of that forfeiture. Computation of the amount allowable should be in accordance with our decision of today, B-185048, copy enclosed, wherein we state that we will not object to computation on a percentage completion basis.

Regarding Mr. Grill's claim for the expense of installation of a motor vehicle pollution control device as a cost of automobile registration, we generally have distinguished vehicle registration and inspection fees from costs incurred for parts replacement or repairs for the purpose of preparing an employee's automobile for inspection. See B-168582, January 19, 1970. We have stated that costs incurred for repairs and parts are not allowable since they relate to the operation of the vehicle rather than to its registration. B-168582, *supra*. We also have held nonreimbursable as a cost of preparing the vehicle for inspection the expense of replacing an automobile muffler which did not satisfy state requirements at a transferred employee's new duty station. B-163107, May 18, 1973. However, we have held reimbursable the analogous expense of attendance at a drivers' training course for an employee's minor dependent, previously licensed in Ohio, as an expense of obtaining a driver's license where the Commonwealth of Virginia would only issue a license to a minor after completion of a Virginia-approved training course. B-178070, April 6, 1973.

The State of California has implemented more stringent automotive emission standards than most other jurisdictions. Under California state law certification that a vehicle previously registered in another

state is equipped with an acceptable pollution control device is a mandatory prerequisite to registration in California. Ca. Veh. Code, § 4000.2 (1972), as amended. In these circumstances the cost of installation of a pollution control device is not, *per se*, a cost of replacement of parts or repairs related to operation of the vehicle or its preparation for registration. In fact the requirement for installation of such a device is such an integral part of the registration process that to distinguish its costs from other costs associated with registration would require an overly technical analysis. Therefore, while we still adhere to the rule that the cost of repairs and replacement parts for the purpose of meeting general state inspection requirements is not reimbursable, the expense of complying with the requirement imposed by the State of California for the installation of a pollution control device meeting standards unique to California as a precondition of vehicle registration may be reimbursed as a miscellaneous expense.

We note also that the employee's original claim was accompanied by documentation indicating that he incurred additional miscellaneous expenses in the aggregate amount of $46.25 for installation of telephone ($29), dog license ($7.50), and drivers' licenses ($9.75). Accordingly, since the employee has documented reimbursable miscellaneous expenses in the total amount of $160, and insofar as additional information may be furnished indicating that those expenses plus the amount forfeited under the original orthodontic contract exceed $200, he may be reimbursed that amount, less the $200 already reimbursed.

[B–186771]

Interest—Payments on Retroactive Rate Increases—Air Carriers—Overseas

Payment of interest by the Government on retroactive increases in rates granted to overseas air carriers by the Civil Aeronautics Board is limited by the contract provisions and by the dates the increases are announced.

In the matter of payment of retroactive interest, November 3, 1976:

The Department of the Air Force has requested an advance decision on the payment of interest on retroactive increases in rates and fares granted to several American overseas air carriers by the Civil Aeronautics Board (CAB) under Economic Regulations (ER) 819, amendment 16, and Economic Regulations (ER) 861, amendment 22. The Military Air Command (MAC) of the Department of the Air Force advises that the air carriers will accept 75 percent of the accrued interest providing the air carriers are not required to submit billings for the interest. We understand that the General Services Administration examined the claims for the increase in rates and certified the amounts

for payment to the air carriers for the fiscal years beginning on July 1, 1972 and July 1, 1973.

Under part 288 of the CAB Regulations, entitled "Exemption of Air Carriers for Military Transportation," 14 C.F.R. 288, the CAB prescribes minimum rates and fares which apply for the transportation of MAC cargo and passengers. Although MAC and the airlines may contract for higher charges, in actual practice the minimum rates prescribed by CAB generally become the contract rates. In December 1970 informal proceedings were initiated by the CAB to review the rates.

Then on May 11, 1971, several air carriers requested the CAB for an increase in the minimum rates for MAC transportation. On December 29, 1972, the CAB issued ER-786, which provided for an increase in the minimum rates, and made those increases retroactive to July 1, 1971. On February 16 and 23, 1973, the air carriers requested reconsideration of CAB's findings and alleged that errors had been made which required further adjustment in the minimum rates. The Department of Defense (DOD) filed a petition in opposition to the carriers' contentions.

Thereafter, and on August 28, 1973, the CAB issued ER-819, which increased the rates and made the increases retroactive to July 1, 1972, except for a short period when the rates were frozen at existing levels. Then on June 11, 1974, the CAB issued ER-861 which authorized application of the increased rates for the transportation rendered during the price freeze period of June 13 to August 12, 1973.

Prior to the issuance of ER-861, and on March 12, 1974, the DOD brought formal proceedings in the United States District Court for the District of Columbia Circuit and requested review of ER-819. The sole issue was whether the CAB had statutory authority to increase charges retroactively. The Court found that the CAB had authority to reopen proceedings to correct factual errors made in the initial proceedings. See *United States* v. *Civil Aeronautics Board*, 510 F. 2d 769 (Ct. App. DC Cir. 1975). This judgment became final on May 1, 1975.

Following that decision, the air carriers claimed the additional amounts due and asked for payment of interest on the retroactive payments. The interest claims apparently are based upon paragraph 55 (page L-14) of the contracts. Contracts F-11626-73-C-0023 and F-11626-73-C-0032 with Northwest Airlines, Inc., are representative of the contracts involved. The interest provision in paragraph 55 provides that interest shall accrue from the time a claim is denied to the date a judgment by a court of competent jurisdiction becomes final. With regard to the payment of interest pursuant to contract, see 51 Comp. Gen. 251 (1971).

Prior to the CAB announcements on August 28, 1973, and June 11, 1974, the increases did not factually exist and no claims could be presented to the Government. Since the Government was not responsible for the delay in implementing the increase, there can be no obligation to pay interest for the periods prior to the dates the increases were announced.

Accordingly, interest on the increases is properly payable under the contract from the date of the CAB announcement on August 28, 1973.

[B–180010.01]

Arbitration—Award—Special Achievement Award Payment—Implementation by Agency—Contrary to Agency Procedure

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

In the matter of John H. Brown—arbitrator's award of special achievement award, November 5, 1976:

This matter involves a request dated August 11, 1975, from the Federal Labor Relations Council for a decision on the propriety of a payment ordered by a labor relations arbitrator in *Department of Transportation, Federal Aviation Administration (FAA), Montgomery RAPCON/Tower, Montgomery, Alabama, and Professional Air Traffic Controllers Organization (PATCO)* (Amis, Arbitrator) FLRC No. 75A–32.

The facts in the case as found by the arbitrator are as follows: Mr. John H. Brown, an Air Traffic Control Specialist, grade GS-12, employed by the Federal Aviation Administration in Montgomery, Alabama, filed a grievance on May 31, 1974, alleging that his supervisor improperly had failed to recommend him for a Special Achievement Award in violation of section 1, article 50, Recognition and Awards Program, of the PATCO/FAA collective bargaining agreement effective April 4, 1973, which provides as follows:

Section 1. The Employer agrees that quality step increases, special achievement awards, or other awards based entirely upon job performance, shall be used exclusively for rewarding employees for the performance of assigned duties. This program shall not be used to discriminate among employees or to effect favoritism.

The arbitrator's opinion indicates that John Brown was a model employee. His former supervisor, who retired as a result of sudden illness in February 1973, intended to recommend Mr. Brown for a Special

Achievement Award. Prior to his retirement he advised his replacement that Mr. Brown was eligible for the award and suggested that he prepare a recommendation. Mr. Brown's present supervisor did not submit a recommendation but subsequently stated that he would have done so except that Mr. Brown used extraneous language in giving control instructions. The extraneous language consisted of amenities such as "thank you" and "please" which were not a hindrance to safety. The supervisor had rated Mr. Brown on all other phases of his work as "exceeds requirements" except for this phase, on which he rated him as "meets requirements."

In addition, the arbitrator found that Mr. Brown's performance evaluations for a 2-year period, from September 1, 1972, to September 1, 1974, satisfied the criteria for a Special Achievement Award as set forth in the agency's official eligibility requirements.

The arbitrator further found that the supervisor has exhibited a deep-seated negative bias toward employees receiving dual compensation from the Federal Government and that this bias had caused the supervisor to discriminate against Mr. Brown, who was receiving additional compensation for a service-connected disability, by not recommending him for a Special Achievement Award despite his obvious eligibility for consideration. The arbitrator concluded that such discrimination was a violation of the collective bargaining agreement. Accordingly, he made the following award:

> AWARD: Grievance sustained. John H. Brown shall be given a Special Achievement Award effective May 31, 1974, and shall be provided the maximum cash benefit permitted under the regulations.

The Department of Transportation appealed the arbitrator's award to the Federal Labor Relations Council, and the Council has requested our decision as to whether the expenditure of appropriated funds as ordered by the arbitrator may legally be made.

We must look to the Incentive Awards Act, 5 U.S.C. §§ 4501–06 (1970), to determine the legality of the payment. Section 4503 of title 5 provides as follows:

> The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—
>
> (1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or
>
> (2) performs a special act or service in the public interest in connection with or related to his official employment.

Section 4506 of title 5 of the United States Code grants authority to the Civil Service Commission to prescribe regulations and instructions governing agency awards programs.

The Commission has exercised this authority and issued regulations governing the awards program in 5 C.F.R. Part 451. The regulations read in pertinent part as follows:

451.102 *Policy.*

The policy of the Commission in administering chapter 45 of title 5, United States Code, is to:

(a) Establish broad principles and standards for the administration of the Incentive Awards Program

(b) Delegate to heads of agencies authority to establish and operate incentive awards plans consistent with these principles and standards * * *.

The awards statute and implementing regulations vest discretion in heads of agencies to make or not to make awards and to tailor the awards as they see fit in accordance with the regulations, and the courts will not upset agency determinations except for a clear showing of abuse of discretion. *Shaller* v. *United States*, 202 Ct. Cl. 571 (1973), *cert denied*, 414 U.S. 1092. See also *Serbin and Stedman* v. *United States*, 168 Ct. Cl. 934 (1964); *Kempinski* v. *United States*, 164 Ct. Cl. 451 (1964), *cert. denied*, 377 U.S. 981; *Martilla* v. *United States*, 118 Ct. Cl. 177 (1950). Thus, an agency would normally be free to accept or reject a recommendation in regard to a performance award, and to do so without a review by this Office or the courts of that exercise of discretion, provided it acts in good faith and not in abuse of its discretion. See 46 Comp. Gen. 730, 735 (1967).

In recent decisions this Office has attempted to give meaningful effect to the labor-management program established under Executive Order 11491 and to arbitration awards rendered thereunder if such awards are consistent with laws, regulations and our decisions. 54 Comp. Gen. 312, 320 (1974). We have held that provisions in collective bargaining agreements under the Executive Order may become nondiscretionary agency policies and, if the agency has agreed to binding arbitration, that the arbitrator's decision is entitled to the same weight as the agency head's decision would be given. *Id.* at 316. But we further stated therein that our decision "should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy," and we added that "[w]hen there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought." *Id.* at 319, 320.

The issue to be resolved, therefore, is whether the PATCO–FAA agreement makes the grant of a performance award mandatory where, as here, there has been a finding that an employee has been discriminated against by his immediate supervisor in violation of section 1, Article 50, of the agreement. The FAA order which implements the awards program (FAA Order 3450.7B)—which the FAA–PATCO agreement is made subject to by section 12(a) of Executive Order 11491—specifically provides that, although an employee's immediate supervisor is responsible for initiating a Special Achievement Award recommendation (paragraph 32.d.(1) and 33.b.), there must be at least

two levels of supervision involved in the initiation and approval process for such awards, except for those approved by the Administrator, Deputy Administrator, and officials reporting to the Administrator. Thus, a supervisor's recommendation does not necessarily mean that an award will be granted since approval at a higher level is required.

We find nothing in the negotiated agreement that changes the procedure for making incentive awards established in FAA Order 3450.7B or that creates any vested right in employees to receive awards. Section 1 of Article 50 requires that awards are to be based upon performance of assigned duties and may not be used to discriminate or to effect favoritism. However, that provision does not purport to eliminate the procedures set up by the FAA order or to take away the agency's discretion to select eligible employees for awards. In other words, the agreement did not change the granting of awards into a mandatory agency policy, even where discrimination is found. Therefore, notwithstanding the arbitrator's finding of discrimination in the failure of the grievant's supervisor to recommend him for a Special Achievement Award, the grievant would not necessarily have been granted an award if he had been so recommended, since a single supervisor's recommendation is not by itself the decisive act in the awards process.

Accordingly, since the granting of a Special Achievement Award remained discretionary with the FAA, the expenditure of appropriated funds for the cash award to John H. Brown ordered by the arbitrator may not legally be required. However, we would not object to a remedy which requires that an award recommendation be prepared and considered for Mr. Brown pursuant to agency regulations.

[B–186830]

Compensation—Rates—Highest Previous Rate—Tropical Differential

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

In the matter of Richard S. Day—tropical differential, November 5, 1976:

This action is in response to the letter of Mr. Richard S. Day, dated June 22, 1976, in which a ruling is requested as to whether the tropical

differential authorized by section 7(a)(2) of the Act of July 25, 1958, Public Law 85–550, 72 Stat 407, is included in the term "rate of basic pay" for the purpose of applying the "highest previous rate" rule, 5 U.S.C. § 5334 (1970).

The information furnished shows that following separation from his position in the Canal Zone due to a reduction in force, Mr. Day was placed in a position in the United States. However, in establishing the rate of basic pay for the purpose of the "highest previous rate" rule, the administrative agency involved excluded the tropical differential on the basis that it does not come within the scope of the definition of "rate of basic pay" found at 5 C.F.R. § 531.202(i) (1975). That provision, which serves to define the term "rate of basic pay" for the purpose of the highest previous rate rule, is as follows:

"Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

The problem presented is whether the above-quoted provision requires inclusion of the tropical differential in establishing a rate of basic pay for the "highest previous rate" rule. The tropical differential was authorized for employees in Canal Zone by section 7(a)(2) of Public Law 85–550, *supra*. That section authorized in part:

an overseas (tropical) differential not in excess of an amount equal to 25 per centum of the aggregate amount of the rate of basic compensation established under Section 5 of this Act * * *.

Furthermore, section 9 of the above-cited Act requires that the rate of basic compensation established under section 5 and the differential determined under section 7 of the Act are to be included as basic compensation of employees who are citizens of the United States for certain stated benefits, not relevant here, and for "any other benefits which are related to basic compensation."

Mr. Day argues that the effect of this provision is to require that the tropical differential be included in his rate of basic pay for the purpose of establishing his compensation under the "highest previous rate" rule.

This issue has been previously determined in our decision 39 Comp. Gen. 409 (1959). In that decision we stated:

Concerning the tropical differential, we held in 24 Comp. Gen. 181, deciding a question which arose under laws and practices in effect prior to the enactment of Public Law 85–550, that the differential paid in a classified position in the Canal Zone was not saved upon transfer to a similar position within the United States, even though the differential was regarded as basic compensation for the Canal Zone position. In other words, the rules allowing previous rates of compensation to be used in fixing initial salary rates upon transfer, reinstatement, promotion, demotion, and the like, have been applied in terms of rates prevailing in the United States. We find nothing in Public Law 85–550, its legislative history, or its purpose to require a departure from the rule of the decision just cited. We view the phrase "any other benefits which are related to basic com-

pensation" appearing in section 9(6) of Public Law 85-550 as referring to emoluments and perquisites flowing directly from employment in the Canal Zone in the same manner as those specifically enumerated in section 9; and *our opinion is that such phrase is not to be construed as conferring benefits in connection with subsequent employment elsewhere.* [Italic supplied.]

We are unaware of any compelling reasons requiring a different result.

Mr. Day also requests rulings concerning whether tropical differential is subject to Federal income tax and whether it constitutes "basic pay" for the purpose of retirement deductions. A determination as to the taxable status of all income, including a tropical differential, is a matter primarily within the jurisdiction of the Internal Revenue Service. Also, the determination as to what is basic pay under the Civil Service Retirement Act is for determination by the Civil Service Commission. Therefore, these questions should be addressed to the Internal Revenue Service and the Civil Service Commission, respectively.

[B-186315]

Contracts—Negotiation—Evaluation Factors—Point Rating—Disclosure of Evaluation Base

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

Contracts — Negotiation — Evaluation Factors — Criteria — Subcriteria

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

Contracts—Specifications—Conformability of Equipment, etc., Offered—Technical Deficiencies—Negotiated Procurement

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

Contracts—Negotiation—Evaluation Factors—Preference—Prejudice Alleged

Protester contends that procuring agency had strong preference for disk-type pallet over printed circuit board (PCB) type pallet and that agency's failure to

notify all competitors of such preference had prejudicial effect on competition. Where competing offerors' proposals were acceptable and satisfied RFP requirement using two distinct state-of-the-art approaches, agency had no duty to amend RFP to specify particular approach.

Contracts—Negotiation—Lowest Offer—Price and Other Factors Considered

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

Contracts—Negotiation—Evaluation Factors—Technical—Erroneous Computation—Not Prejudicial

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

Contracts—Negotiation—Offers or Proposals—Evaluation—Errors—Not Prejudicial

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

Contracts—Negotiation—Evaluation Factors—Propriety of Evaluation

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

Contracts—Negotiation—Evaluation Factors—Evaluators—Allegations of Bias, Unfairness, etc.

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

Contracts—Negotiation—Evaluation Factors—Criteria

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

Contracts—Negotiation—Evaluation Factors—Areas of Evaluation

Protester contends that pallet storage characteristics and field-reprogramming capability should not have been considered by agency Procurement Review Board

because such features were not scored by technical evaluators. Since such features were within listed evaluation criteria and technical point scores are merely useful guides to agency source selection, it was entirely proper for Board to consider such features as explained to it by evaluators even though such features were not scored.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Technical Proposals

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

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

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

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

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

In the matter of Tracor, Inc., November 8, 1976:

Tracor, Inc., protests the award of a contract to Motorola, Inc., under request for proposals (RFP) M00027-76-R-0006 for 50 modified teleprinters and technical data with options for stock repair parts and factory training.

The RFP, issued by the United States Marine Corps on September 5, 1975, contained a statement of work which stated that the contractor would be required to provide a teleprinter of his own manufacture, modified to receive and print messages transmitted under any one of 25 codes. Further, the teleprinter construction was to permit rapid changes in code or language format and the device (referred to as a "pallet") employed by the contractor to provide necessary modification was to be of a type selected by the contractor. The RFP required both technical and price proposals. The RFP outlined the requirements and criteria which were to be met by a proposal in order for it to be considered acceptable.

Offers were received from Motorola, Tracor and Teletype Corporation. After evaluation it was determined that the offer of Teletype

was unacceptable and it was so advised. Discussions were conducted with Tracor and Motorola between January 28, 1976, and February 4, 1976. Best and final offers were received from both parties and technical ratings were announced as follows:

	MOTOROLA	TRACOR
Technical Rating	93.45 percent	88.35 percent
Total Offer (including freight costs)	$1, 224, 063	$1, 162, 687

Although the Motorola evaluated price was $61,376 more than Tracor's price, the Marine Corps believed that the value of the Motorola technical approach outweighed the price difference. Tracor was advised by the Marine Corps by letter dated April 5, 1976, that the technical advantage in the ease of operation and maintenance of the Motorola teleprinter was the basis for its selection.

Tracor requested and was granted a debriefing on April 12, 1976. At the debriefing, the Marine Corps explained that "ease of operation and maintenance" was worth 8 of 46 total points for Technical Approach and that Motorola's proposal scored 86.25 percent and Tracor's proposal scored 60 percent in that category. Specifically, the Marine Corps' reasons were as follows: (1) the Motorola pallet, a coding disk, could be changed faster than the Tracor pallet, a printed circuit board (PCB); (2) Motorola's printhead design was more electrical than mechanical; (3) Tracor's pallet replacement cost was substantially higher than Motorola's; (4) Motorola's pallet could be reestablished by field reprogramming a new disk; (5) additional codes could be established on the Motorola disk in the field; (6) the life-cycle cost of the Motorola disk was less than that of the Tracor PCB; and (7) the Motorola equipment had no ribbon and would require less first and second echelon maintenance.

By letter dated April 12, 1976, Tracor protested the award to Motorola, indicating that Motorola's equipment was not technically more advantageous than its equipment and that the award was based on technical evaluation factors not set forth in the solicitation.

After Tracor's protest, it appears that the Marine Corps noticed that the original award was based on several factors not mentioned as evaluation criteria in the RFP. The Marine Corps then reevaluated the proposals and again concluded that the technical advantages of Motorola's equipment outweighed the price differential. The basis for its decision was outlined in its administrative report dated May 28, 1976, as follows: (1) the Motorola pallet could be changed faster than the Tracor pallet; (2) the Motorola pallet could be more easily stored in quantity, thus making it more accessible to the user; (3) the Motorola printhead had fewer moving parts resulting in less lower echelon maintenance; (4) the Motorola pallet could be reestablished in the

field; and (5) the Motorola unit required no ribbon. Pallet replacement cost and pallet life-cycle cost were not considered in the evaluation, but the capability of the Motorola pallet to have additional codes established on it in the field, while not scored as a technical evaluation factor, was considered in the Procurement Review Board's decision to award to Motorola.

In response to the Marine Corps' report, Tracor contended that (1) its pallet could be changed just as fast as the Motorola pallet; (2) there was no pallet storage requirement specified in the RFP; (3) Motorola's printhead may have fewer moving parts, but Tracor's equipment has fewer total parts resulting in lower cost maintenance; (4) there was no field reprogramming requirement in the RFP; and (5) the Tracor teleprinter may be operated with or without a ribbon.

In an effort to resolve the factual disputes and clarify the issues, a conference was held in our Office on July 1, 1976. The Marine Corps was represented by counsel, the contracting officer, its technical advisor, and two members of the four-member technical evaluation team. Motorola and Tracor were also represented. Three areas were discussed. First, the Marine Corps expressed its technical judgment that the Tracor pallet, a PCB, could be put in upside down in a stressful situation, whereas the Motorola pallet, a disk, could not. As such, the Motorola design would insure a quicker change consistently, even though the Tracor pallet might be changed just as fast as the Motorola pallet in any given test. The Marine Corps also indicated that it had obtained a Motorola disk from the Army and examined it during the technical evaluation but no PCB was examined since the evaluators were familiar with PCB's.

Secondly, the Marine Corps explained that the Motorola pallet's capability to be reestablished in the field was not scored in the technical evaluation; however, this advantage could not be ignored in the source selection. The Marine Corps considered this capability to be within the concept of "ease of operation and maintenance" mentioned in the RFP. Thirdly, the Marine Corps agreed that both the Tracor and Motorola equipment could be operated without a ribbon.

After the conference, the Marine Corps commented by letter dated July 9, 1976, that the deletion of Motorola's advantage of ribbonless operation would not substantially affect its source-selection decision. The Marine Corps' July 9, 1976 report also included the technical evaluation plan and guidelines and the four evaluators' score sheets. With the permission of the Marine Corps, copies of all material accompanying its report were given to counsel for Tracor.

Also by letter dated July 9, 1976, counsel for Tracor summarized its contentions. First, Tracor contended that there was no valid basis in the eight identified technical reasons to justify award at a higher

cost to Motorola. With regard to the time required to change pallets, Tracor stated that the Marine Corps had based its judgment on generalized information and not concrete facts (such as time studies) and that Tracor was placed at a competitive and unfair disadvantage, due to the fact that the evaluators asked for and received a Motorola disk during the evaluation. Tracor also stated that any difference in the approach to the printhead was described by the Marine Corps as a very "minor item." Tracor further argued that the "field-reprogramming" feature, the capability to establish additional codes in the field and the pallet storage requirement were technical evaluation factors not listed in the RFP and, therefore, they should not have been considered in making the award. Finally, Tracor contended that its equipment's capability to operate without a ribbon, using impact paper, and to operate using a ribbon offered greater flexibility than the Motorola equipment, which offered just ribbonless operation; and, therefore, Tracor's score in "ease of operation and maintenance" should be adjusted upward and Motorola's score should be decreased.

Secondly, Tracor contended that the Marine Corps was required to advise all competitors of its distinct preference for disks over PCB's.

Thirdly, Tracor contended that the evaluation factors as listed in the RFP were misleading, in that it reasonably believed that the factors would be weighed in a manner considerably different than they were.

Subsequent to filing its July 9, 1976, document, Tracor received the enclosures to the Marine Corps' July 9, 1976 submission, which included the technical evaluation and source-selection documents mentioned above. Based on its analysis of that information by letter dated July 30, 1976, Tracor argued that: (1) the Marine Corps failed to weigh the evaluation factors in accordance with preestablished weights; (2) the Marine Corps failed to disclose its preference for a disk over a PCB; (3) the Marine Corps used improper factors in its evaluation of equipment in the area of "ease of operation and maintenance"; and (4) the Marine Corps' post-protest reconsideration did not validate this otherwise invalid procurement. Based on other information, Tracor additionally argued that Motorola's technical proposal did not meet the Marine Corps' specifications.

The Marine Corps responded, by letter dated August 16, 1976, and concluded that the Motorola equipment was technically superior to the Tracor equipment and that such superiority justified the award to Motorola at the higher cost.

By letter dated September 3, 1976, the Marine Corps informed our Office that it was in the process of making a determination that it was necessary to proceed with performance of the contract. By letter of

the same date, Tracor was advised that Motorola was authorized to proceed with contract performance.

For the reasons that follow, under four principal areas of consideration, the protest is denied.

I. MISLEADING EVALUATION FACTORS

A. Relative Importance of Nonprice Considerations

On pages 18 and 19 of the RFP, it was stated as follows:

EVALUATION FACTORS

Award will be made to that technically acceptable offeror whose technical and price proposal will be the most advantageous to the Government, price and other factors considered. In order to be considered acceptable, technical proposals must meet the requirements and criteria for technical proposals set forth in Section C herein, particularly as they relate to the following:

1. *Technical Approach*

a. The ability of the teleprinter to provide the symbol repertoire identified by Appendix 1 of the Statement of Work.

b. The ability of the teleprinter to meet the requirements of paragraphs 3.2 and 3.10 * * * [thru] 3.14 the Statement of Work.

c. The ability of the teleprinter to operate over the Input Power requirement as specified.

d. The ability of the teleprinter to meet or exceed the reliability specified.

e. The ease with which the teleprinter can be operated and maintained.

f. The ease with which the teleprinter and associated installation kit can be installed in the AN/TSQ-88 and AN/TSQ-89.

2. *Organizational, Personnel and Facilities Approach*

a. Previous experience in developing this particular type of equipment.

b. Qualification of personnel.

3. *Completeness and thoroughness of the technical proposal.*

Tracor contends that it reasonably assumed that the various factors in the RFP were listed in descending order of importance; that is, point 1 would be more important than points 2 and 3, and point 2 would be more important than point 3. Similarly, Tracor contends that each of the subfactors within each point was listed in descending order of importance. The record shows that point 1, Technical Approach, was worth 46 points and both points 2 and 3, Organization, Personnel and Facilities Approach, and Completeness and Thoroughness of the Technical Proposal, respectively, were worth 15 points each. Also, the subfactors of each point were not listed in descending order of importance.

Tracor contends that our Office has held that the failure of an RFP to inform offerors of the relative importance of the evaluation factors is contrary to the dictates of sound procurement policy. Further, Tracor contends that it was prejudiced because the subfactor "ease of operation and maintenance," where it lost the competition, was much more important than the RFP led Tracor to believe.

On the other hand, the Marine Corps contends that the RFP set forth the evaluation factors in their relative order of importance, in that point 1 was worth 46 points and points 2 and 3 were each worth 15 points.

We have consistently recognized that offerors should be advised of the evaluation factors to be used in evaluating the proposals and the relative weight of those factors, since competition is not served if offerors are not given any idea of the relative value of technical excellence and price. *AEL Service Corp.*, 53 Comp. Gen. 800 (1974), 74-1 CPD 217; *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 386; *PRC Computer Center, Inc.*, 55 Comp. Gen. 60 (1975), 75-2 CPD 35; *Group Operations, Incorporated*, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79. Similarly, paragraph 3-501(b) Sec. D(i) of the Armed Services Procurement Regulation (ASPR) (1975 ed.) provides that when an award is based on technical and other factors, in addition to price or cost, the RFP shall clearly inform offerors of the significant evaluation factors and the relative order of importance that the Government attaches to price and all such other factors.

Although it is clear that the language of the RFP does not meet the "relative importance of evaluation factors" disclosure requirement of our decisions and the ASPR, since Tracor assumed correctly that point 1, Technical Approach, was the most significant factor, and since Tracor's and Motorola's proposals were essentially equal and both scored near the maximum number of points on points 2 and 3, we do not believe that Tracor was prejudiced by the RFP's failure to disclose the relative importance of the evaluation factors.

Tracor also contends that it was prejudiced because the subfactor "ease of operation and maintenance," where it lost the competition, was, in its view, much more important than the RFP indicated. We note that Tracor assumed that the evaluation subfactors were listed in descending order of importance; however, there was nothing in the RFP to provide a basis for Tracor's assumption. In addition, we have held that there is no obligation to advise offerors of the relative importance of evaluation subfactors, or to list such subfactors in descending order of importance, if they are to be considered of equal, or approximately equal, importance. 51 Comp. Gen. 272, 281 (1971), *modified on other grounds, AEL Service Corp., supra.* Since the category, "ease of operation and maintenance," within point 1, Technical Approach, was worth only 8 of 46 points for Technical Approach, and since each of the subfactors was approximately equal in importance, we believe that the RFP properly advised prospective offerors of the evaluation criteria to be applied, insofar as the technical evaluation factors are concerned. Therefore, it is our view that Tracor has no basis to assume that the subfactors were listed in descending order of importance.

B. Relative Importance of the Price

The RFP provided that the award will be made to that technically acceptable offeror whose technical and price proposal will be most

advantageous to the Government, "price and other factors considered." Tracor contends the RFP is defective in that it totally failed to advise offerors of the relative importance of price to the technical evaluation factors of the procurement. Tracor relies on our decision in *Signatron, Inc., supra*, in which our Office stated that we believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Tracor concludes that obviously cost was secondary to technical scoring in this procurement and that it was prejudiced by not being so advised in the RFP.

We believe that Tracor's contention concerning the adequacy of disclosure of the relative importance of price to the technical evaluation factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976), since the alleged impropriety was apparent prior to the closing date for receipt of initial proposals. *BDM Services Company*, B-180245, May 9, 1974, 74-1 CPD 237; *Honeywell Inc.*, B-184245, November 24, 1975, 75-2 CPD 346; *Marine Management Systems, Inc.*, B-185860, September 14, 1976.

C. The Alleged Undisclosed Preference for Disk-Type "Pallet"

The RFP provided that the teleprinter construction shall permit rapid changes in code or language format such that the decoding circuitry necessary to change the signaling alphabet to the printing alphabet can be readily changed by the operator. For the purpose of common identifiction among competing offerors, the device employed to modify standard teleprinters in order to meet the code-changing requirement was referred to as a "pallet." Offerors were required to provide for 25 different pallets. Offerors were permitted to select the type of pallet provided their choice met the requirements of the RFP.

Tracor contends that the Marine Corps had a strong preference for the use of the disk-type pallet (offered by Motorola) over the PCB-type pallet (offered by Tracor). Tracor bases its contention on a note to the category of "ease of operation and maintenance" contained on the tabulation sheet provided to each technical evaluator:

NOTE: Scoring should be based primarily on the ease with which the operator can change operating "pallets."

Tracor argues that the Marine Corps' emphasis on ease of pallet change in the "ease of operation and maintenance" category would clearly have a material effect on scoring in this category and such scoring would favor a disk over a PCB. Further, Tracor contends that the failure of the Marine Corps to notify all competitors of this important technical preference in the RFP had a prejudicial effect on the competing offerors; if the Marine Corps did not determine its preference until after the RFP had been issued, the RFP

should have been amended so that offerors could revise their proposals to negotiate on a meaningful basis. In support of this contention, Tracor cites our decision in *Signatron, Inc., supra*, and our decision at 50 Comp. Gen. 117 (1970).

The Marine Corps states the emphasis on changing pallets with ease is logical in view of the purpose of the equipment. The Marine Corps also states that it had no preconceived preference for a disk-type pallet. It had a requirement for teleprinters to monitor codes, and each offeror was expected to use available technology to meet the requirement.

Our decision at 50 Comp. Gen. 117, *supra*, cited by Tracor concerned an RFP issued by the Office of Economic Opportunity (OEO) for a survey of minority manufacturing firms. There, the RFP did not indicate that on-site observations were either expected or desired or that such a procedure would be a factor for consideration in the evaluation. One firm initially offered on-site interviews and observation. OEO believed that such information would be beneficial in accomplishing its needs and it was willing to make additional payment for the extra effort involved, but OEO did not advise the other offerors of this preference during the negotiations. We concluded that the RFP should have been amended so that all procedures and information deemed essential to proper performance of the contract would have been shown, in order that the proposals and their evaluation could have been based on uniform requirements and criteria. We also stated that:

> When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. We have stated that discussions of this nature should be conducted whenever it is essential to obtain information necessary to evaluate a proposal or to enable the offeror to upgrade the proposal. * * * 50 Comp. Gen. at 123.

Tracor also relies on our decision in *Signatron, Inc., supra*, which concerned an RFP issued by the Defense Communications Agency (DCA) for a simulation system to operate "simplex" but designed to later provide for "duplex" operation. Signatron offered such a system. Another firm offered a system with both "simplex" and "duplex" operation. During the evaluation of proposals, it was determined that "duplex" capability was immediately required. Since this requirement was not communicated to the other offerors, we concluded that such requirement should have been communicated to all offerors.

Our situation is unlike the case in 50 Comp. Gen. 117, *supra*, where the Government changed its requirements during the negotiations,

and the case in *Signatron*, where the Government changed its requirements during the evaluation of proposals. Here, the Marine Corps' requirement was unchanged. Both proposals were acceptable and satisfied that requirement, using two distinct state-of-the-art approaches. Both proposals were evaluated against the factors stated in the RFP. We can only conclude that the fundamental principle of competitive negotiation that the agency treat all offerors equally was not violated by the Marine Corps in this procurement. Accordingly, we must conclude that the Marine Corps had no duty to amend the RFP to specify a disk-type pallet.

II. BASIS OF AWARD

Tracor argues that the award must go to the firm making the lowest offer, regardless of the difference in technical scoring, as long as the proposals are acceptable. Tracor relies on the following language in Part I, Section C, "INSTRUCTION, CONDITIONS AND NOTICES TO OFFERORS," of the RFP:

SINGLE AWARD

It is the Government's intention to make one award, as a lot, to the firm submitting the lowest evaluated acceptable offer.

Tracor concludes that since both proposals were acceptable, it, as the lowest offeror, was entitled to the award.

The Marine Corps contends that the purpose of the above-quoted language was to notify offerors that only one award would be made. The Marine Corps further contends that the following language from Part II, Section D, "EVALUATION AND AWARD FACTORS," clearly informed offerors of the basis for award and evaluation:

EVALUATION FACTORS

Award will be made to that technically acceptable offeror whose technical and price proposal will be the most advantageous to the Government, price and other factors considered. * * *

Also, the Marine Corps notes that the REP contains an Order of Precendence clause which renders first priority to the Schedule in the resolution of solicitation inconsistencies.

We believe that the single award section ("the lowest evaluated acceptable offer") is inconsistent with the evaluation factors section ("most advantageous to the Government, price and other factors considered"). Under the provisions of the Order of Precedence clause of the RFP such inconsistency should have been resolved in favor of the evaluation factors section because it is in the schedule of the RFP, which had first priority. Therefore, we agree with the Marine Corps' position on this issue.

III. ERRORS IN EVALUATION

A. Failure to Weigh Factors as Intended

After the conference at our Office, the Marine Corps released information concerning its intended method of scoring the technical evaluation factors and the results of such scoring.

Tracor contends that the Marine Corps averaged each evaluator's score without considering relative importance of factors and then averaged the four evaluators' unweighed averages to arrive at the technical score of 88.35 for Tracor and 93.45 for Motorola. Tracor thus argues that this erroneous computation of scores resulted in the Marine Corps believing that the technical differnce between proposals was approximately 5.1 percent. Based upon our calculations, the proper computation should have resulted in scores of 87.98 for Tracor and 93.13 for Motorola, which we note results in a difference between proposals of 5.15 percent or approximately the same amount as the computation used by the Marine Corps. Accordingly, we cannot perceive that Tracor was prejudiced by the erroneous computation of scores.

B. Failure to Recognize Ribbonless Operation Capability of Tracor Unit in Scoring

During the evaluation of proposals, the Marine Corps' evaluators mistakenly believed that the Tracor's teleprinter did not have ribbonless operation capability. When the Marine Corps recognized this capability after award, it reevaluated the Tracor proposal and concluded that such capability did not substantially affect its source selection decision because of the other advantages of the Motorola proposal in this area. The evaluators scored the ribbonless operation capability within the "ease of operation and maintenance" category, which was scored before award as follows:

	Motorola	Tracor
Evaluator M	50	70
Evaluator B	100	95
Evaluator J	100	25
Evaluator C	95	50
Total	345	240
Average	86.25	60.00

The record does not indicate the precise relative weight of ribbonless operation to other factors within this category. Neither is there any indication that additional scoring was performed by the Marine Corps after award.

Tracor contends that an accurate scoring of this factor should result in an upward adjustment of Tracor's score and a downward adjustment of Motorola's score because the Tracor unit can print with a ribbon or without a ribbon on ribbonless impact paper, whereas the Motorola unit cannot print with a ribbon.

While it may be that consideration of the Tracor unit's ribbonless operation capability would have improved its relative standing in the technical evaluation, it is not the function of our Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation. Accordingly, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. *System Innovation & Development Corp.*, B-185933, June 30, 1976, 76-1 CPD 426, and decisions cited therein.

Here, the Marine Corps has acknowledged that Tracor's relative standing in the technical evaluation has improved but because the ribbonless operation capability was only one of several advantages originally thought to favor the Motorola proposal, the Marine Corps concluded that Tracor's improved technical position was not sufficient to overcome Motorola's position in the "ease of operation and maintenance" category. We have examined the RFP's evaluation factors, the instructions to the evaluators, and the evaluators' score sheets, and on that basis we cannot conclude that the Marine Corps acted arbitrarily.

C. No Valid Basis To Justify Award At Higher Cost

Our Office has upheld awards to concerns submitting technically superior proposals, although the awards were made at costs higher than those proposed in technically inferior proposals. See, e.g., 52 Comp. Gen. 358 (1972); *Tracor Jitco, Inc.*, 54 Comp. Gen. 896 (1975), 75-1 CPD 253. The Marine Corps believes that the award to Motorola at a higher cost is justified because the following advantages of the Motorola technical approach substantially outweigh the price difference:

(1) Operational Advantages:
(a) The Motorola teleprinter uses a coding disk to change from one code reception to another where the proposed Tracor teleprinter uses a printed circuit board (PCB). The simplicity of changing a disk provides ease of operation not provided by the PCB. Such ease of operation insures that the code can be changed quickly in tactical scenarios where the equipment will be utilized and the operator will be subjected to stress.

(b) The teleprinters will be utilized in mobile shelters in a tactical environment. Due to relative size, the disk will be easier to store in quantity than the PCB making it easier to have available assets near the user.
(2) Maintenance Advantages:
(a) The Motorola teleprinter has fewer moving parts in the print head than the Tracor teleprinter resulting in less maintenance at the user level as well as at higher levels of maintenance.
(b) A damaged Motorola disk can be re-established in the field whereas a damaged Tracor PCB would have to be evacuated to a maintenance facility or the manufacturer.

(i) Simplicity of Pallet Change

Tracor contends that the Marine Corps' conclusion that a disk can be changed more simply than a PCB is based on generalized information and not on concrete facts. Further, Tracor contends that it was placed at a competitive and unfair disadvantage, due to the fact that the evaluators asked for and received a Motorola disk from the Army during the evaluation.

As noted above, we have consistently held that procuring officials enjoy a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award. *Field Management Services Corp.*, B-185339, May 28, 1976, 76-1 CPD 350, and the decisions cited therein. Here, it appears that the Marine Corps bases its conclusion on its judgment that an operator may *attempt* to insert a PCB upside down whereas such error is not possible with a disk; therefore, on the whole, the Motorola approach was believed to be more simple. We must conclude that the Marine Corps' evaluation is based on the reasoned judgment of its source-selection personnel in accordance with the established evaluation factors.

Furthermore, we do not believe that Tracor was prejudiced by the evaluators examining a Motorola disk. Clearly, there was no need for the evaluators to request a Tractor PCB because PCB's have been very common for many years.

(ii) Pallet Storage Characteristics and Field Reprogramming Capability

With regard to relative pallet storage characteristics and the Motorola disk's field reprogramming capability, Tracor contends that neither of these criteria was listed in the RFP as an evaluation factor and it is improper to use unstated evaluation criteria in determining acceptability or ranking of proposals.

The Marine Corps states that both of these considerations are within the purview of the subfactor, "ease of operation and maintenance."

As stated earlier, an RFP must advise offerors of all the evaluation factors and the relative importance of each. Further, in our decision, *AEL Service Corp.*, *supra*, it was held that while offerors should be informed of the relative weights of main categories of evaluation

factors, the relative weights of subcriteria, if "definitive" of main criteria, need not be disclosed. We have not held that *elements* of subcriteria need to be disclosed. In the circumstances, it is our view that the pallet storage characteristics and disk field reprogramming capability are within the purview of the subfactor, "ease of operation and maintenance." Accordingly, we must conclude that the evaluation factors listed in the RFP by the Marine Corps were reasonably sufficient to advise offerors of the technical basis for award.

The Marine Corps indicates that neither of these features was scored by the evaluators but both features were considered by the Procurement Review Board. Tracor contends that the Board should not have been permitted to consider a technical feature which was not scored by the technical evaluators.

We have held that technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD 325, and the decisions cited therein. We have also held that technical evaluation narratives may well be indicative of whether one proposal is technically superior to another and should be considered by source-selection officials. *EPSCO, Incorporated*, B-183816, November 21, 1975, 75-2 CPD 338. We have further held that selection officials are not bound by the recommendations made by evaluation groups, even though such groups would have the technical expertise relevant to the technical evaluation of proposals. *Bell Aerospace Co.*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; 52 Comp. Gen. 686 (1973). Accordingly, it was proper for the Procurement Review Board to consider technical features of proposals even though such features were not scored by the technical evaluators. *Marine Management Systems, Inc., supra.*

(iii) Printhead Design

The Marine Corps indicates that the Motorola printhead has fewer moving parts than the Tracor unit and in its judgment the Motorola design will result in less maintenance at the user level. Tracor contends that its teleprinter has fewer total parts and that its design will result in easy maintenance at lower cost. Additionally, the Marine Corps concluded that the Tracor printhead, which receives printing impulses through a "flying" cable, was not as rugged as the Motorola approach. Tracor contends that the printhead design was a very minor item and no portion of the point score differential should be attributed to this feature.

It is clear that the Marine Corps made its source selection based in part on its view that the Motorola printhead design was technically superior to the Tracor design in the area of ease of maintenance. It is also clear that the Marine Corps was justified in using that criteria in its evaluation since all offerors were advised that ease of maintenance was an evaluation factor. Although Tracor does not agree with the Marine Corps' technical judgment on this point, we have reviewed the record and we cannot say that the Marine Corps acted arbitrarily or unreasonably in its evaluation of this point.

Accordingly, we believe that the award at higher cost was justified.

D. Motorola Proposal Does not Meet Security Requirement of RFP

Tracor states in its letter dated July 30, 1976, that the Motorola approach to code security—which leaves some of the classified code in the printer when the disk is removed—as described in the GAO conference on July 1, 1976, does not comply with the requirements of item 4, block 12 of amendment 0003, dated September 5, 1976, of the RFP. The Marine Corps states that the Motorola approach complies with the Statement of Work requirements of the RFP and, in its technical judgment, no information on classified codes can be obtained from the printer without an appropriate disk.

We believe that Tracor's contention is untimely under subsection 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1976), since it appears that the basis for protest was known on July 1, 1976, and was not filed in our Office until August 4, 1976, more than 10 working days after the basis for protest was known.

IV. INITIAL IMPROPER EVALUATION

After Tracor's protest, the Marine Corps noticed that the initial award to Motorola was based on factors not mentioned as evaluation criteria in the RFP. The Marine Corps then reevaluated the proposals based on the evaluation criteria in the RFP and again concluded that the technical advantages of Motorola's proposal outweighed the price differential. The rationale for again selecting Motorola was outlined in the Marine Corps' report to our Office dated May 28, 1976.

Tracor contends that the reconsideration does not validate the otherwise invalid procurement, and that: (1) the Marine Corps has offered no evidence regarding the reconsideration; (2) the reconsideration could not possibly have cured all the defects; and (3) the Marine Corps is asking the GAO to rely on the propriety of its reconsideration, based on verbal assurances, although no contemporaneous documents are presented to record and support the reconsideration.

With regard to Tracor's contentions (1) and (3) concerning the necessity for contemporaneous documentation to record and support

an evaluation or reconsideration, our decision in *Automated Systems Corp.*, B–184835, February 23, 1976, 76–1 CPD 124, relied on by the Marine Corps, held that the time of preparation of the report to justify acceptance of a higher-priced, higher-scored offer does not affect the substance of the justification. We also stated that the requirement is procedural in nature and does not affect the validity of an award if a proper basis for the award existed.

Tracor also argues in (2) that the reconsideration in May 1976 could not have cured all the errors because it was not until July 1976 that the Marine Corps first recognized the ribbonless operation capability of Tracor's proposal and Tracor first pointed out at that time that the technical scores were improperly computed. The Marine Corps indicates that a third reconsideration took place after it learned of the Tracor unit's ribbonless operation capability and that this resulted in a determination that award to Motorola was again justified. The rationale for this decision was expressed in the Marine Corps' letter dated July 9, 1976. Since, as discussed above, we conclude that the erroneous computation of technical evaluation scores and the failure to initially recognize the ribbonless operation feature did not result in material prejudice to Tracor, it is our view that the Marine Corps' reports of May 28, July 9, and August 16, 1976, provide adequate documentation to record and support award to Motorola.

While we have denied Tracor's protest, we are bringing to the attention of the Marine Corps the various deficiencies noted in its handling of this procurement for corrective action in future procurements of this nature.

[B–182337]

Contracts—Negotiation—Requests for Proposals—Master Agreements—Use of List

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

In the matter of Department of Agriculture's use of master agreements, November 9, 1976:

The Department of Agriculture has requested an advance decision concerning the propriety of its proposed procedure for prequalifying offerors in connection with the procurement of consulting services. The current proposal reflects a modification of a previously proposed system which was adjudged by this Office to be unduly restrictive of competition in *Department of Agriculture's Use of Master Agreement*, 54 Comp. Gen. 606 (1975), 75–1 CPD 40.

Under the Department's original proposal, 1-year "master agreements" for consulting requirements would be entered into with the 10 firms which, based on their proposals, were found to be the most qualified in each of eight subject matter areas. Each agreement awarded would not obligate a firm to provide any particular services, but only firms having such agreements would be eligible to submit proposals to fulfill the Department's consulting needs in the particular subject matter areas. Since other firms would be ineligible to compete, the Department would be assured of receiving no more than 10 proposals for any requirement from offerors possessing the capability to perform satisfactorily. We found that the Department's "sole justification for use of the Master Agreement was administrative expediency," and that this was not a legitimate basis for restricting competition by prequalification.

The Department now proposes to modify its previous proposal in the following fashion:

1. *all* qualified firms in each of the desired skill areas will receive an award of a master agreement.
2. procedures will be issued which will stipulate that solicitations to qualified firms will request proposals containing only:
    a. the plan for conduct of the study
    b. the specific staff to be assigned
    c. the price and delivery terms
3. annual evaluation to assure that the procedure is accomplishing the objectives.

The Department notes that it could enter into a requirements-type contract with one or a few firms to meet all consulting needs for a period of a year. However, while competition would be maximized for the award of this contract, there would be no subsequent competition for individual project requirements. In addition, the Department states that under the present system contracting officers are under constant pressure from the program managers to take "irregular shortcuts," such as sending out a limited number of requests for proposals and allowing a very short time for return of proposals, in order to "get a job started." Although the Department says that its contracting officers are withstanding those pressures, it believes a change in the present burdensome system would enhance competition.

In this regard, the Department notes that in *Department of Health, Education and Welfare's use of basic ordering type agreement procedure*, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392, we tentatively approved the limited use of a procedure similar to that proposed here where, based on the exigencies of the procurement situation, award might otherwise be made without any competition because we thought it likely that competition would be enhanced.

As indicated in our earlier decision in this matter, the procurement statutes and regulations require procuring agencies to obtain maximum competition consistent with the nature and extent of the services or items being procured. *See* 54 Comp. Gen. 606, 608, *supra*. However, the procuring agencies "are vested with a reasonable degree of discretion to determine the extent of competition which may be required consistent with the needs of the agency," 50 Comp. Gen. 542, 544 (1971), and we have upheld a variety of restrictions upon competition, including prequalification procedures when their use was adequately justified so as not to impose any undue restrictions on competition. *See*, e.g., 36 Comp. Gen. 809 (1957); B–135504, May 2, 1958; 50 Comp. Gen. 542, *supra;* 54 Comp. Gen. 1096, *supra*. In objecting to the Department's proposal to use master agreements, we found that it would be unduly restrictive because, for reasons of administrative expediency, it "would exclude a potential offeror upon a general finding as to the relative qualification of that firm to perform," while under legitimate prequalification procedures (such as Qualified Products List and Qualified Manufacturers List) "disqualification * * * is based on a determination as to a potential offeror's ability to furnish the particular item needed by the Government * * *." 54 Comp. Gen. 606, *supra*, at 609.

Under the Department's proposed revised procedure, however, master agreements will be entered into with *all* qualified firms, not only with the 10 best qualified as originally intended. Furthermore, it appears that under the revised procedure competition will be enhanced since (1) we understand that small firms that could not compete for a large requirements-type contract would be able to compete for the individual project requirements arising during the year; (2) the costs of responding to subsequent solicitations for particular projects will be reduced; and (3) the pressures for curtailing competition because of the delays inherent in soliciting and evaluating a large number of proposals for each project will be eliminated.

We believe this revised approach would not be unduly restrictive of competition. In approving the Department of Health, Education and Welfare's (HEW) proposed prequalification procedure, we noted that HEW proposed to limit the use of the procedure "to an area where in all likelihood award on a sole source basis would otherwise be made" and held that "[i]n this context HEW's prequalification procedure which will assure a source of competent offerors from whom proposals can be elicited in a short timeframe should in fact enhance competition." 54 Comp. Gen. at 1099–1100. Similarly, we believe that Agriculture's revised proposal, which appears to be fair and reasonable and, if properly administered, should enable responsible firms to qualify for master agreements without any undue difficulty, should also enhance competition.

We point out that before the proposed use of master agreements is implemented, detailed regulations and/or procedures governing the prequalification system should be developed. *See* 53 Comp. Gen. 209 (1973). Moreover, because the Small Business Administration (SBA) has the statutory authority to determine the capacity and credit of small business concerns to perform a Government contract, 15 U.S.C. 637(b)(7) (1970), the procedures should provide for referral to SBA of any case involving a small business firm found not to qualify for a master agreement by reason of its lack of capacity or credit. *See* B-152757, July 15, 1964.

For the foregoing reasons, we will interpose no objection to the Department of Agriculture's implementation of the master agreement procedures at this time. We do, however, reserve the right to reconsider its propriety based upon review of the Department's experience.

[B-186998]

Appropriations—Availability—Invitations—Change of Command Ceremonies—Coast Guard

Government payment of expense of printing invitations to Coast Guard change of command ceremony is proper since ceremony is traditional and appropriate observance, and printing of invitations may be considered necessary and proper expense incident to ceremony.

In the matter of the availability of funds for printing invitations to Coast Guard change of command ceremony, November 9, 1976:

Mr. K. A. Mill, an authorized certifying officer of the United States Coast Guard, Department of Transportation, has requested our advance decision concerning the propriety of certifying for payment a voucher in the amount of $61, for printing by a commercial printer of invitations to a change of command ceremony for a Coast Guard vessel, the USCGC Confidence. The printing was authorized by the Commanding Officer of the USCGC Confidence. Payment would be made from appropriations authorized for U.S. Coast Guard operating expenses.

Printing of any document or matter by any agency or establishment of the Government is not allowed unless it is authorized by law and necessary to the public business. 44 U.S.C. § 1102 (1970). Printing meeting these requirements may be purchased directly from commercial establishments, rather than from the Government Printing Office (GPO), if commercial printing is more economical, or if the GPO is not able to execute the order. Usually, the agency desiring commercial printing must secure authorization from the GPO. 44 U.S.C. § 504 (1970). However, commercial printing may be procured without such authorization if: (1) it is not of a continuing repetitive

nature; (2) it is not conducive to the establishment of an open-ended indefinite quantity contract; (3) it cannot be ordered against existing GPO contracts; and (4) it costs less than $250 per line item. Government Printing and Binding Regulations, 48–2 (1974).

The printing of invitations in this case appears to meet these regulatory requirements for using a commercial establishment without GPO authorization. The crucial issue, then, is whether the printing of invitations is authorized by law and necessary to the public business of the Coast Guard, as required by 44 U.S.C. § 1102 (1970).

In B–122515, February 23, 1955, we allowed invitations to official State Department functions overseas to be paid for with appropriated funds. However, the appropriation charged in that case was for representation expenses, specifically including costs of official entertaining. We did not allow the cost of printing similar invitations to be paid from appropriations for representation expenses in 42 Comp. Gen. 19 (1962). The decision in that case turned on a specific State Department regulation prohibiting the use of representation allowances for printing or engraving. The special circumstances in both these cases prevent generalization of either result to the present case.

In B–11884, August 26, 1940, we allowed payment for the printing of invitations to a Government cornerstone ceremony, as an expense necessarily incident to the ceremony. Payment of expenses for cornerstone ceremonies and for building dedication ceremonies is allowed because such ceremonies are traditional practices associated with the construction of public buildings. See 53 Comp. Gen. 119 (1973).

Changes in command occur within the Armed Forces, including the Coast Guard, when a commander is transferred or retired, and a new officer takes command. We have been advised informally that ceremonies in observance of changes in command are a Coast Guard tradition of long standing, although they are not specifically authorized by statute or regulation. Just as building dedication ceremonies are considered to be a proper way of commemorating the completion of public buildings, so a ceremony may be a proper way of observing a change in command in the Armed Forces. Since our Office has allowed appropriated funds to be used to pay for the printing of invitations as an expense necessarily incident to cornerstone ceremonies, it appears proper to allow appropriated funds to be used to pay for the printing of invitations to change in command ceremonies.

Mr. Mill noted, in his letter to us, that several of our decisions had not allowed the printing of greeting cards or calling cards at Government expense, and that these decisions might preclude payment in the instant case. The prohibition against printing greeting cards and calling cards at Government expense is well settled. 47 Comp. Gen. 314 (1967); 41 *id.* 529 (1962); 10 Comp. Dec. 506 (1904); B–156724,

July 7, 1965; decisions cited in those cases; and Government Printing and Binding Regulations, Para. 20 (1974). These decisions are based on the rationale that greeting cards and calling cards are inherently personal in nature. For example, 10 Comp. Dec. 506, 507 (1904), which denied payment for calling cards stated:

> An officer's appointment or commission is the legal evidence that he holds such office or place. If for convenience he desires other evidence of such fact, this is not a legal necessity, but a matter of mere personal convenience, for which he should personally pay * * *.

In our view, invitations intended to procure the attendance of appropriate people at an official Government ceremony are not inherently personal, as are greeting cards and calling cards. B–11884, *supra*. Therefore, the voucher may be certified for payment if it is otherwise correct.

[B–187288]

Bids—Mistakes—Nonresponsive Bids—Correction Improper

Mistake-in-bid procedures are not applicable to correct a nonresponsive or ambiguous bid in order to make it responsive.

Bids—Omissions—Failure to Bid on All Items

Notation "N/A" next to invitation for bids item for which price is required can reasonably be interpreted that bid price is not applicable or that bid price does not include item. Under circumstances bid must be rejected because bidder could not be contractually bound to deliver item.

In the matter of the Bayshore Systems Corporation, November 9, 1976:

Bayshore Systems Corporation (Bayshore) protests the rejection of its bid under IFB LGM–6–8136–1 which was issued by the Federal Aviation Administration (FAA), Department of Transportation. The solicitation was for the acquisition of portable instrument landing system receivers and ancillary items. Of the nine bids received, Bayshore was the apparent low bidder, but its bid was rejected as nonresponsive to the requirements of the IFB.

The IFB stated that award would be made on the basis of the lowest aggregate bid for all items and to be considered responsive, the bid must contain prices for all items except for two items which are not relevant here. Bayshore inserted a "N/A" for item 3(e) and did not otherwise quote a price or indicate there would be no charge for this item. Bayshore contends that its "N/A" was a clerical error and it intended to insert "N/C" to indicate no charge for the item. Bayshore states that the contracting officer, upon being informed of the mistake prior to award, should have obtained verification and permitted correction. It further contends that the failure to price

the item or indicate no charge is a minor informality because its significance as to price, quantity, quality or delivery is trivial (less than .002 percent of its bid price) when contrasted to the total of the supplies being procured.

The mistake-in-bid procedures are not applicable to correct a nonresponsive bid in order to make it responsive. *General Electric Company*, B–184873, May 4, 1976; 76–1 CPD 298. The responsiveness of Bayshore's bid must be determined from the bid itself without reference to extraneous aids or explanations regarding Bayshore's intentions. *Pauli & Griffin Company, Inc.*, B–183797, March 16, 1976, 76-1 CPD 178.

In 45 Comp. Gen. 221 (1965) this Office held that the notation "N/A" meaning "not applicable" was reasonably susceptible to two meanings—either that a bid price is not applicable or that the bid price does not include the item notated with a "N/A." That case involved a two-step procurement where the second step solicitation stated that if the bidder failed to price or enter a specific response to a data item, it would be considered that the data would be furnished as part of the total consideration. The technical proposal submitted for the first step made it clear that the bidder intended to deliver the data item next to which in the second step he had inserted a "N/A." This Office concluded that under these circumstances, the bidder was contractually bound to deliver the data and that, therefore, his notation "N/A" could be waived as a minor irregularity not affecting price, quantity or quality.

However, the facts of the instant case are quite different. Although the IFB required a price for item 3(e), it provided for no presumptions in the case of a failure to insert a price or specific response for the item. There was no previous technical proposal making it clear that the item would be delivered as part of the total consideration. In our opinion, acceptance of Bayshore's bid as submitted would not have contractually bound Bayshore to provide the master patterns required by item 3(e). It was, therefore, an ambiguous bid, at best, and its rejection was required. 51 Comp. Gen. 543 (1972).

To have permitted Bayshore to correct its bid after bid opening and the exposure of all bid prices would have been prejudicial to the fully responsive and responsible bidders and would compromise the integrity of the competitive bidding system despite the immediate economic advantage which might accrue to the Government. While it may be that an error was made in Bayshore's bid, such error was in no way induced by the Government, and the responsibility for the preparation and submission of its bid rested solely upon Bayshore.

Accordingly, the protest is denied.

[B-186218]

Officers and Employees—Training—Expenses—Travel and Transportation

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

In the matter of William J. Elder and Stephen M. Owen—relocation expenses—transfers for training, November 10, 1976:

This matter arises from a request for reconsideration of our Transportation and Claims Division letter, DWZ-2616543-DRM 3, of January 6, 1976, denying relief from the overpayment of relocation expenses to Mr. William J. Elder.

In August 1974, Mr. Elder entered the Civilian Logistics Intern Program, as a Safety Specialist. His initial duty station was Portsmouth, Virginia, and his organization was the Navy Fleet Material Support Office, Logistics Intern Development Center, Mechanicsburg, Pennsylvania. On September 25, 1974, Mr. Elder was issued a travel authorization authorizing his transfer from Portsmouth, Virginia, to the Naval Sea Systems Command Safety School, Bloomington, Indiana, for training, with a reporting date of December 2, 1974. On this travel order Mr. Elder was authorized reimbursement of the following expenses:

a house-hunting trip;
temporary quarters allowance for 10 days;
miscellaneous expenses;
dependents travel expenses; and
shipment of household goods.

Mr. Elder was given a $1,700 travel advance.

On January 26, 1975, Mr. Elder's travel claim was settled, and he was allowed reimbursement, *inter alia*, for the following items:

temporary quarters	$218.75
miscellaneous expenses	200.00
dependents per diem	78.12
house-hunting per diem	251.56
house-hunting transportation	394.94

By letter of September 13, 1975, from Mr. Larry A. Webb, Director, Logistics Intern Development Center, Mr. Elder was advised that un-

der the provisions of paragraphs C3052 and C4102 of Volume 2 of the Joint Travel Regulations (2 JTR) he should not have been reimbursed for temporary quarters, miscellaneous expenses, dependents per diem, and house-hunting expenses, and that he was indebted to the Government in the total amount of $1,143.37.

During approximately the same period of time, Mr. Stephen M. Owen, now deceased, was also a participant in the Civilian Logistics Intern Program, and was also transferred to Bloomington, Indiana, for training. He was also authorized, by a travel authorization issued July 24, 1974, the full range of reimbursement granted to Mr. Elder. When his travel claim was settled on November 18, 1974, he was reimbursed, *inter alia*, for the following expenses:

temporary quarters	$131.25
miscellaneous expenses	100.00

By letter of September 13, 1975, from Mr. Larry A. Webb, Mr. Owen was also told, for the same reasons given Mr. Elder, that he should not have been paid the above listed expenses, and that he was indebted to the Government in the total amount of $231.25. We have been informally advised by Mr. Webb that Mr. Elder and Mr. Owen were the only participants in the Civilian Logistics Intern Program to be first authorized and paid these expenses, then advised that the authorizations were improper, and that they were indebted to the Government.

By letter of November 14, 1975, Mr. Elder applied to our Claims Division for relief from the debt stated above. Relief was denied in the January 6, 1976 letter cited earlier. By letter of February 5, 1976, from John M. Irvine, Esquire, Director of the Student Legal Services, Indiana University, Mr. Elder requested reconsideration of the January 6 letter. By letter of November 14, 1975, Mr. Owen sought relief from our Claims Division. His request was still pending when it was combined with Mr. Elder's case for decision and further action.

There does not seem to be any question that Mr. Elder's and Mr. Owen's assignments to Bloomington, Indiana, were primarily for the purpose of training. Payment of travel and transportation expenses relating to extended periods of training is governed by 5 U.S.C. § 4109 (1970), which provides in pertinent part that:

> (a) The head of an agency * * * may—
>
> * * * * * * *
>
> (2) pay, or reimburse the employee for, all or a part of the necessary expenses of the training * * * including among the expenses the necessary costs of—
>
> (A) travel and per diem instead of subsistence under subchapter I of chapter 57 of this title * * *;
>
> (B) transportation of immediate family, household goods and personal effects, packing, crating, temporarily storing, draying, and unpacking under section 5724 of this title * * * when the estimated costs of transportation and related services are less than the estimated aggregate per diem payments for the period of training * * *

The statutory provisions were implemented by paragraphs C4102 and C3052 of Volume 2 JTR. Those sections provide, in pertinent part, that:

C4102 MOVEMENT INCIDENT TO TRAINING OR INSTRUCTION

1. GENERAL. A permanent change of station may be authorized for employees who are assigned for training in Government or non-Government facilities (see par. C3052). This authority may be used only when the estimated costs of round trip transportation for dependents and household goods are less than the estimated aggregated per diem amount payable during the period of assignment at the training location. * * *

2. INTERNS AND TRAINEES. In cases involving the permanent change-of-station movement of an "intern" or "trainee," it is necessary to determine whether the purpose of the move is primarily for "training" or primarily for the "performance of work." * * * If the assignment is determined to be primarily for training, the provisions of par. C3052 apply. * * * (Change 75, December 1, 1971)

C3052 ATTENDANCE AT TRAINING COURSES

* * * * * * *

2. OTHER THAN TEMPORARY DUTY ASSIGNMENT

a. *General.* To the extent of the authority provided in 5 U.S. Code 4109, which allows transportation of an employee's family and household goods in lieu of per diem payments, the conditions in subpars. b and c will apply. The provisions of this paragraph do not authorize the following:

1. payment of per diem to employee's dependents for travel incident to training assignments under par. C4102;

2. round trip travel to seek permanent residence quarters incident to permanent duty travel;

3. payment of temporary quarters subsistence expenses incident to occupancy of temporary quarters in connection with permanent duty travel;

4. reimbursement of miscellaneous expenses associated with discontinuing residence at one location and establishing residence incident to permanent duty travel;

5. reimbursement for expenses incurred in connection with real estate transactions and unexpired lease.

b. *Transportation of an Employee's Family and Household Goods.* If the estimated cost of round trip transportation of an employee's immediate family and household goods between the employee's official duty station and the training location is less than the aggregate per diem payments that the employee would receive while at the training location, such round trip transportation at Government expense may be authorized in lieu of per diem payments. Such transportation will be in accordance with the provisions in this volume relating to permanent change-of-station movement (see par. C4102).

c. *Employee's Election of Type of Movement.* Consideration may be given an election of the employee concerned to be authorized a temporary duty assignment or a permanent change-of-station movement if allowable upon comparison of costs indicated in subpar. a. An initial determination to authorize a permanent change-of-station movement may be changed to a temporary duty assignment any time prior to the beginning of transportation. After transportation begins, the entitlement of the employee and obligations of the Government become fixed and cannot be changed thereafter (39 Comp. Gen. 140). (Change 78, April 1, 1972)

Prior to the entry of Mr. Elder and Mr. Owen into the Civilian Logistics Intern Program, Mr. Webb and the Logistics Career Management Steering Committee discussed the applicability of the above sections to transfers of logistics interns. They did not believe that there would be any transfers primarily for training purposes, nor did they believe that interns would be returned to former duty stations after

transfers that involved some training. On that basis they were advised that the restrictions in the above sections of the JTR would not apply to transfers of logistics interns.

Throughout the spring and early summer of 1975, logistics interns were assured that the restrictions of 2 JTR paragraphs C3052 and C4102 did not apply to their transfers, so that they should request payment of all possible relocation benefits. In mid-July 1975, Mr. Webb learned that the assignments of logistics interns to Bloomington, Indiana, were primarily for training purposes, that the restrictions of paragraphs C3052 and C4102 applied and that the interns would frequently be returned to their prior duty stations. No logistics interns other than Mr. Elder and Mr. Owen were paid travel benefits beyond those authorized by 5 U.S.C. § 4109 (1970). Mr. Elder and Mr. Owen were advised of the overpayments and took the steps previously outlined.

From the statute and regulations it is clear that when an employee is transferred primarily for the purposes of training, relocation benefits are limited. Mr. Elder and Mr. Owen were transferred to Bloomington, Indiana, primarily for the purposes of training. They should not have been authorized the full range of relocation allowances that were listed in their travel orders.

Counsel for Mr. Elder argues that the doctrine of equitable estoppel applies. Essentially it is argued that the Federal Government may be estopped when it enters into ordinary contractual relations with its citizens, when the conditions required for the creation of an equitable estoppel are met. It is contended that when the Government deals with its employees it is acting in its proprietary, not sovereign capacity, making the application of equitable estappel proper. Finally, that the Government is not here trying to enforce a public right, only regulations not even published in the Code of Federal Regulations, and that an employee cannot be presumed to have knowledge of such regulations.

This analysis, while appealing, falls short on several points. First, the relationship between the Federal Government and its employees is not a simple contractual relationship. Since Federal employees are appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law do not apply. *Hopkins* v. *United States*, 513 F. 2d 1360 (Ct. Cl. 1975). Even if the Federal Government is acting in its proprietary capacity when it deals with its own employees, in seeking to recover the money that was improperly paid to Mr. Elder and Mr. Owen, the Government is enforcing a public right. The basis for the collection action is not the regulations found in the Joint Travel Regulations, but the literal

terms of 5 U.S.C. § 4109(a) (1970). That section explicitly limits the benefits payable to an employee who has been transferred primarily for the purposes of training. There is no doubt that Federal employees, and ordinary citizens, are presumed to know the contents of the United States Code. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947).

We believe the rule stated by the Supreme Court in *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917), is still correct:

> * * * that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. (243 U.S. at 409)

This position was restated and followed in *Montilla* v. *United States*, 457 F. 2d 978 (Ct. Cl. 1972). In that case, the plaintiff was seeking retired pay for service in the Army Reserves. He contended that the Government was estopped to deny him benefits based upon insufficient years of service in the active reserves, because he had relied on statements and letters from Army officials stating, or at least inferring, that he had enough service in the active reserves. In holding that the statutory service requirements must be strictly fulfilled, the court stated that:

> It is true that the government may be estopped by the acts and conduct of its agents where they are duly authorized and are acting within the scope of their authority and in accordance with the power vested in them, as, for instance, in certain cases involving contractual dealings with the government. But we know of no case where an officer or agent of the government, such as Colonel Powell of the Army in the case before us, has estopped the government from enforcing a law passed by Congress. Unless a law has been repealed or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agent can by his actions or conduct waive its provisions or nullify its enforcement. (457 F. 2d at 986–987)

Just as the requirement for service in the active reserves could not be ignored in Dr. Montilla's case, the restrictions on relocation benefits payable for transfers for training purposes cannot be waived in the instant case. The following statement of the District Court in an unreported opinion in *Koss* v. *United States*, United States District Court for the District of South Carolina, Civil Action No. 73–1121, decided June 3, 1974, in declining to find an estoppel against the Government in a suit brought by a Federal employee, expresses our reaction to the present state of the law:

> Reluctantly, this court has concluded that the only answer to prevent repetition of the injustice done to the plaintiff here, and to others who may later be similarly situated, must come from legislative and not judicial action. In the final analysis, this court is compelled to decree a result which it feels is legally correct but which, in fact, is absolutely contrary to all precepts of equity, fair play, and justice. (at page 10)

Accordingly, we have no choice but to affirm the denial of relief to Mr. Elder and Mr. Owen.

[B-177617]

Government Printing Office—Publications—Credit Sales

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

In the matter of credit sales by Government Printing Office, November 16, 1976:

In response to many inquiries about the use of credit cards by purchasers of Government publications, the General Counsel of the United States Government Printing Office (GPO) has requested our opinion on the following questions:

> * * * whether the Government Printing Office may extend credit to private parties, government officials, and members of Congress who wish to purchase Government documents from the Superintendent of Documents. May the GPO sell government publications to purchasers who tender credit cards in lieu of cash? Are any special terms or conditions required in the agreement between the Government Printing Office and such credit card companies?

The General Counsel states that, under certain (unspecified) conditions, the practice of making credit card sales would facilitate sales of documents, would not result in increased prices to the public, and would not increase administrative costs.

The Superintendent of Documents, GPO, has the authority to sell through mail orders and Government bookstores all public documents subject to distribution that are not otherwise required by law to be printed and distributed for the official use of the Executive departments and those printed and distributed for the two Houses of Congress. In this regard, 44 U.S.C. § 1702 (1970) states in pertinent part:

> When an officer of the Government having in his charge documents published for sale desires to be relieved of them, he may turn them over to the Superintendent of Documents, who shall receive and sell them under this section. Moneys received from the sale of documents shall be returned to the Public Printer on the first day of each month and be covered into the Treasury monthly.
>
> The Superintendent of Documents shall also report monthly to the Public Printer the number of documents received by him and the disposition made of them. He shall have general supervision of the distribution of all public documents, and to his custody shall be committed all documents subject to distribution, excepting those printed for the special official use of the executive departments, which shall be delivered to the departments, and those printed for the use of the two Houses of Congress, which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service and distributed or delivered ready for distribution to Members upon their order by the superintendents of the Senate Service Department and House Publications Distribution Service, respectively.

Several statutory provisions preclude GPO from making credit sales with respect to certain transactions, as follows:

—44 U.S.C. § 722 (1970) prohibits credit sales of the Congressional Directory.

—44 U.S.C. § 733 (Supp. V, 1975) requires prepayment by Members of Congress for special order reprints of specified congressional committee materials.

—44 U.S.C. § 910(b) (Supp. V, 1975) requires advance payment for subscriptions to the Congressional Record.

—44 U.S.C. § 1706 (1970) requires advance payment for the printing of extra copies of certain congressional materials.

We have found no statutory provisions which specify the method of payment for other materials sold by GPO.

It appears that GPO is considering (1) extending credit on sales through its own facilities and/or (2) arranging with a credit card company for acceptance of its credit cards.

As to the first alternative, while the Government does not ordinarily provide goods or services on credit, there is no general statutory prohibition against credit sales. See 52 Comp. Gen. 764, 765 (1973), discussed hereafter. The four statutory provisions cited above do clearly prevent the extension of credit by GPO for the particular transactions covered. On the other hand, we know of no statute or other authority which would preclude GPO from making credit sales in transactions not covered by the four provisions. In fact, the very existence of these limited specific prohibitions tends to support the view that GPO has discretion in the manner of payment for other sales.

Accordingly, it is our opinion that GPO may make credit sales except to the extent prohibited by the four statutory provisions. Our conclusion is premised on the GPO General Counsel's representation that this practice would facilitate sales without increasing administrative costs or prices charged to customers.

As to the second alternative, in 52 Comp. Gen. 764, *supra*, we confirmed the legal authority of the National Technical Information Service (NTIS), Department of Commerce, to contract with a credit card company for the acceptance of its cards in sales of NTIS publications under the following explanation:

> The proposed credit card plan is not to result in increased prices to the public nor is it expected to escalate the administrative costs of NTIS above the level experienced under existing procedures. Payment of all authorized charges will be guaranteed by the credit card company. *Id.* at 765.

As noted previously, our decision pointed out that there is no statutory prohibition against credit sales by the Government. We also empha-

sized that the proposed arrangement would permit more rapid and convenient service, thereby furthering NTIS's statutory mandate to make the results of technological research readily available to industry, business, and the general public.

We believe that the reasoning of our 1973 decision applies as well to GPO. While the sale of Government publications is not GPO's only role, it certainly forms an important part of the agency's work as provided for by law. Thus, if the acceptance of credit cards enables sales to be made more efficiently and conveniently, performance of GPO's statutory functions would likewise be enhanced. Therefore, we have no legal objection to an arrangement between GPO and a credit card company for acceptance of credit cards.

Moreover, acceptance of payment by a company credit card may, in our view, include those transactions for which GPO could not itself extend credit by virtue of the four statutory provisions discussed above. As indicated in our 1973 decision, and confirmed by other authorities, the arrangement between a vendor and a credit card company typically guarantees to the vendor payment for purchases made by credit cards duly accepted. See 50 Am. Jur. 2d, Letters of Credit, § 38; *Williams* v. *United States*, 192 F. Supp. 97, 99–100 (S.D. Cal. 1961). It has been observed that such credit card transactions are at least equivalent to cash sales from the vendor's perspective:

> Merchants also benefit from the acceptance of charge cards and are willing to treat a charge card transaction as a replacement for cash payment. They are typically protected by the terms of their merchant agreements from risks associated with accepting payment in a noncash form. For instance, they avoid certain risks associated with the acceptance of a check in payment, such as the risk of forgery or lack of funds in the purchaser's checking account. The acceptance of a bank charge card may be even safer than acceptance of cash itself in that the merchant is also protected from the risk of counterfeit. A merchant knows that he will receive an immediate credit in his demand deposit account when he deposits a sales slip, just as he would if he deposited cash. * * *
>
> Finally, in those instances in which the cardholder purchases goods or services and then decides to exercise his option to repay in installments, the extension of credit is accomplished more economically than if the merchant had operated his own charge program or if the bank had extended a series of separate loans to cover the cost of the goods or services purchased. Such lower costs probably benefit the consumer in the form of lower prices for the products and services he purchases. Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 Mich. L. Rev. 1033, 1040 (1971).

We conclude that sales by GPO to holders of company credit cards would not violate the four statutory provisions which prohibit credit sales by GPO provided that the company guarantees payment of charges. As indicated above, such credit card sales are essentially the same as cash sales in terms of protecting the Government's interests as vendor. Under this arrangement, credit is extended by the credit card company rather than by GPO as vendor.

[B-187128]

Contracts—Negotiation—Requests for Quotations—Firm Offer Confirmation—Mistake Alleged

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

Regulations—Armed Services Procurement Regulation—Mistake Procedures—Applicable to Advertised and Negotiated Procurements

Although procedures applicable to mistakes are set forth in regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurement to extent that they are not inconsistent with negotiation procedures.

In the matter of Applied Materials, Inc., November 16, 1976:

Applied Materials, Inc. (Applied) protests the award of a contract under request for quotations (RFQ) 8-1-6-EC-04560 issued by the Marshall Space Flight Center of the National Aeronautics and Space Administration (NASA). The procurement is for the fabrication and delivery of one expitaxial silicon deposition system.

Applied alleges that pursuant to an oral request from NASA, it submitted an oral price revision and that this revised price, although accurately recorded by NASA, was the result of the offeror's mistake. Applied states that it did not, in fact, intend to change its original price and contends that NASA erred in not permitting the correction of this mistake before award but after notice of selection was mailed.

The RFQ was issued on January 21, 1976 requesting proposals and firm fixed price quotations by February 23 which date was later extended to March 5. The proposal from Tempress Microelectronics (Tempress) was the only proposal received on time but its price substantially exceeded the funds available to NASA for this procurement. A proposal from Applied was received on March 8 and was accepted as being in the best interest of the Government under NASA's late proposal procedures. NASA PR 3.802-4(c). Because both proposals contained technical exceptions and contingencies, oral discussions were held separately with each of the offerors, after which each was orally requested to confirm in writing its presentation of the alternatives and optional items discussed. Both agreed to make such submittals during the week of May 2 and Tempress submitted its confirmation on May 3. After four follow-up telephone calls to Applied, a portion of its submittal was received on June 1. A NASA telegram established June 11 as the date for the receipt of the remainder and Applied met this deadline.

Because of the alternatives and optional equipment still offered by the proposals, neither provided a total firm fixed price. Therefore, NASA restructured the work statement and by letter of June 25, requested from each offeror a firm fixed price quotation by July 9 with no changes, contingencies or reservations with respect to the revised work statement. The Tempress proposal, unconditionally quoting a firm fixed price of $184,870, was received on July 7. A telegram from Applied, received on July 12, promised its proposal by July 13, and it was received on July 14. The proposal made no reference to price and the technical proposal was in the form of amendment to Applied's proposal of June 9. In response to NASA's request, Applied telephoned NASA on July 19 and quoted its price as $195,630.

On July 30, Tempress was selected for award and the notification to Applied that it was not the successful offeror was mailed. Later in the same day, Applied telephoned to advise that the $195,630 price was in error and that its correct price was $178,175. This information was confirmed by letter received on August 2. NASA refused to stop the award process to permit the correction and award was formally made to Tempress on August 6. Applied made a timely protest to this Office stating that its July 14 proposal revision did not alter the price of its original proposal and the price in the original proposal should have been accepted by NASA for evaluation purposes.

The record indicates that at no time prior to its telephone call of July 19 did Applied ever submit a total firm fixed price for the specific items to be delivered. Its prior submissions had been in the nature of shopping lists from which NASA could choose and then add up the fixed unit prices for each selected item to arrive at the total price. The obvious intent of the revised work statement and NASA's letter of July 9 was to obtain an unconditional firm total price from each offeror. That such a clarification was necessary is illustrated by the fact that when Applied totaled its own prices for its verbal submittal, it apparently and unilaterally made a mistake. It is well settled that an offeror must demonstrate affirmatively the merits of his proposal and that he runs the risk of proposal rejection if he fails to do so clearly. *Kinton Corporation*, B–183105, June 16, 1975, 75–1 CPD 365. It is clear that Applied's submittal did not affirmatively demonstrate either that the $178,175 was the firm fixed price for its original proposal or for the final proposal.

Further, the Applied proposal of June 9 was based on several conditions which were not acceptable to NASA or consistent with the requirements of the RFQ. For example, the RFQ called for delivery of the entire system FOB, Huntsville, Alabama, whereas Applied's pro-

posal provided for delivery of a power unit FOB, Sykesville, Maryland. The RFQ required a two-week operator training program, whereas Applied proposed a one-week program, with the advice that additional training would be at additional cost. The work statement was therefore revised and each offeror requested to submit its final firm fixed price. Under these circumstances, it would have been improper for NASA to have assumed that the June 9 price prevailed with regard to the July 14 proposal in the absence of a specific confirmation, and especially after the oral transmittal of a new price on July 19.

Until Applied's telephone notification after the rejection of its proposal had been mailed, the contracting officer had no reason to suspect that an error had been made. The price of $195,630 was in line with NASA's estimate and the other offer and not out of line with Applied's previous unit prices. There was, therefore, no requirement that the contracting officer seek verification of the price prior to Applied's allegation of mistake, although sound procurement practices would require that he seek written confirmation of the verbal quotation.

There remains for resolution the question whether Applied should have been permitted to correct its price to below that of Tempress in view of the fact its notification of mistake arrived at NASA before award but after the formal rejection of Applied's proposal had been mailed. We think not.

This Office has stated that although the specific procedures applicable to mistakes are set forth in those sections of the regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurements to the extent that they are not inconsistent with the negotiation procedures. *Autoclave Engineers, Inc.*, B–182895, May 29, 1975, 75–1 CPD 325. In this regard, NASA PR 3.805(c), which prohibits advising one offeror before award as to the relation of his price to those of his competitors, must be considered in the light of the fact that the official notice of proposal rejection had already been mailed by the time Applied telephoned NASA about its mistake. Further, NASA PR 2.406–3(a) states that a determination permitting a bidder to correct his bid so as to displace a lower acceptable bid shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. We do not believe that the mistake alleged in this instance and the price actually intended can be clearly and convincingly ascertained from the amended RFQ and the proposal and its revision.

Accordingly, the protest is denied.

[B-186129]

Travel Expenses—Leaves of Absence—Temporary Duty—After Departure on Leave—Payment Basis

Agency believes that it would be unreasonable for employee to assume expenses of returning to his permanent duty station via a temporary duty station after his annual leave was interrupted by directions that he testify before a Federal district court. Such expenses may not be allowed since purpose of employee's vacation was in large part accomplished and vacation was interrupted only a day before it would have otherwise ended.

In the matter of F. A. Calabrese—travel expenses while on leave, November 17, 1976:

This action is in response to a request from Fred L. Hayes, a certifying officer of the National Park Service, Department of the Interior, received in our Office on March 15, 1976, concerning the propriety of certifying for payment a travel voucher submitted by Dr. F. A. Calabrese. The travel voucher covers expenses Dr. Calabrese incurred while traveling from Waterbury, Connecticut, where he was on annual leave, to Billings, Montana, and then to Lincoln, Nebraska, his permanent duty station.

The circumstances surrounding Dr. Calabrese's travel, as reported in the National Park Service submission letter, are as follows. Dr. Calabrese departed Lincoln, Nebraska, for Waterbury, Connecticut, on December 24, 1975, on annual leave and had arranged to be on annual leave through December 29, 1975. While en route to Waterbury he received notification at St. Louis, Missouri, that he was to testify before a Federal district court in Billings, Montana, on December 29, 1975. Dr. Calabrese left Waterbury on December 28, arrived in Billings on December 29, and returned to Lincoln on December 30. The trip to Waterbury was in large part planned so that Dr. Calabrese could attend the wedding and reception of a member of his immediate family, but it was necessary for him to leave for Billings before the reception had ended. Upon his return to Lincoln Dr. Calabrese submitted a voucher in the amount of $92.50 for certain travel expenses, which had not been covered by Government transportation requests, and for applicable per diem.

The general rule is that when an employee proceeds to a point away from his official duty station on annual leave he assumes the obligation of returning at his own expense. 11 Comp. Gen. 336 (1932), 39 Comp. Gen. 611 (1960). But if an employee during such leave is required to perform temporary duty and he is required or chooses to return to his permanent duty station after completion of the temporary duty, he may be reimbursed only for the difference between what it cost him

to return to his permanent duty station via such temporary place of duty and what it would have cost him to return to his permanent duty station directly from the place where he was on leave. 11 Comp. Gen. 336 (1932); 16 *id.* 481 (1936); 30 *id.* 443 (1951); B–185070, April 13, 1976.

The National Park Service believes that it would be unreasonable to require Dr. Calabrese to assume any return travel expenses because he had been called away due to urgent and unforeseen circumstances and because his vacation was ruined in large part when he was required to leave the wedding reception before it had ended.

The certifying officer has requested a determination because of the restrictive criteria in 39 Comp. Gen. 611 (1960). In that decision we considered a proposed Air Force regulation which provided for payment of return travel expenses when, due to unforeseen circumstances, an employee was recalled to his permanent duty station very shortly after arriving at his point of leave. We felt that the proposal was subject to a variety of interpretations. To ensure uniformity of application, we proposed that it contain language providing that the Government would assume the travel expense when an employee, on a period of authorized leave of 5 days or more, was recalled within 24 hours after his arrival at his point of leave. This language is now incorporated into paragraph C4555–4, Volume 2 of the Joint Travel Regulations.

Despite our approval of such restrictive conditions, we recognize that other factors than time of recall may be for consideration in making a determination that it would be unreasonable to require the employee to assume the expenses of his return travel. We agree with the National Park Service that one factor which could be relevant to such a determination is whether the purpose of an employee's trip has been defeated by a recall to duty.

In the present case, the most significant purpose of Dr. Calabrese's trip was to attend a wedding and reception. The record shows that Dr. Calabrese was able to attend the wedding ceremony and part of the reception. In addition, his total vacation time was shortened by only a day.

Another factor which militates against a finding for Dr. Calabrese is that, although the circumstances requiring him to travel to Billings were urgent, they were not entirely unforeseen. He received notification that he would be required to testify before he reached his leave point and could have made the decision at that time not to travel to Connecticut.

In the circumstances, we hold that the general rule is for application. Thus, Dr. Calabrese is entitled only to the extra costs attributable to the temporary duty at Billings.

We suggest that the agency consider promulgating an appropriate regulation applicable to its employees to ensure uniformity of application.

The voucher, which is returned, may not be certified for payment. Because part of Dr. Calabrese's travel was by Government transportation requests, collection should be made of that portion attributable to the expense Dr. Calabrese would have otherwise incurred in returning from Waterbury to Lincoln.

[B-186334]

Pay—Retired—Disability—Computation—Method

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

Pay—Retired—Disability—Effective Date—Delay

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

In the matter of Cmdr. Henry S. Morton, USN, Retired, November 17, 1976:

This action is in response to a letter dated March 18, 1976, from Commander Henry S. Morton, 220-09-2852, USN, Retired, in which he appeals a settlement from our Claims Division, dated February 9, 1976, which disallowed his claim for increased disability retired pay based on the basic pay rates in effect on July 1, 1969, instead of those in effect on June 30, 1969.

The member asserts that although his retirement orders were dated June 30, 1969, with an effective date of July 1, 1969, he should be entitled to use the July 1, 1969 basic pay rates, since he did not actually receive his retirement orders until July 9, 1969, and did not

detach until that date. In support of that position, he cites our decision B–183625, August 20, 1975.

The record in the member's case shows that by BUPERS letter, Pers–B84/meg 126058/1310, dated June 30, 1969, he was retired for physical disability in the grade of commander with over 28 years of service that date and placed on the Temporary Disability Retired List (TDRL), effective July 1, 1969, under the provisions of 10 U.S.C. 1202, with a 50 percent disability rating, with retired pay computed under the provisions of 10 U.S.C. 1401, Formula 2. Effective July 1, 1974, his disability was medically determined to have stabilized at 80 percent. As a result, the member's name was removed from the TDRL by authority of 10 U.S.C. 1201(c), and he was permanently retired for disability under 10 U.S.C. 1201, with retired pay to be computed under 10 U.S.C. 1401, Formula 1.

Section 1401 of Title 10, United States Code, provides in part:

> The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. * * * However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him. * * *

Formula 2 of that section authorizes the computation of retired pay on the basis of the percentage of disability (Method A) or the years of service computed under the provisions of 10 U.S.C. 1208 (Method B), multiplied by the monthly basic pay of his grade while on active duty. Formula 1 provides the same computation methods.

When a member is retired for disability without the Secretary concerned having designated an earlier date of retirement under the provisions of 10 U.S.C. 1221, such retirement is subject to the provisions of the Uniform Retirement Date Act, 5 U.S.C. 8301. Those provisions require that such retirements take effect on the first day of the month following the month in which the retirement would otherwise be effective, but that the rate of retired pay must be computed as of the date retirement would have occurred had that act not been enacted. See 43 Comp. Gen 425 (1963).

Therefore, under the options available to the member under Formula 2 of 10 U.S.C. 1401, when he was placed on the TDRL, the rates of basic pay required to be used in the computation of his retired pay were those in effect on his last day of active duty, June 30, 1969. Under the percentage of disability computation (Method A), the member was entitled to receive $571.86 and under years of service computation (Method B), $800.61. Since Method B provided him the greater benefit, that method was initially used to compute his retired pay effective July 1, 1969.

Subsequent to the member's transfer to the TDRL, this Office ruled in 49 Comp. Gen. 80 (1969) that when a member is retired for disability, and he is otherwise eligible for voluntary retirement based on years of service, such retirement for disability does not defeat his right to also compute retired pay on a voluntary retirement basis under the "any other provision of law" provision of 10 U.S.C. 1401. Since the records show that the member was eligible to voluntarily retire for years of service (28 years) under the provisions of 10 U.S.C. 6323, at the time of his actual retirement, it provided him with a third computation option.

Effective July 1, 1969, the military pay rates were increased by Executive Order No. 11,475, dated June 16, 1969. Since voluntary retirements are not subject to the limitations of the Uniform Retirement Date Act, *supra*, retired pay entitlements thereunder would be based on the monthly pay rates in effect on the first day that a member is on the retired roll. See 48 Comp. Gen. 239 (1968).

Therefore, for the purpose of the phrase "any other provision of law," as used in 10 U.S.C. 1401, the member's retired pay was computable as though his retirement was voluntary, using the increased basic pay rates which became effective July 1, 1969. This produced a retired pay entitlement of $882.84. Since this method of computing retired pay provided the member with the greatest benefit, such method was used to determine his retired pay during the period that his name was carried on the TDRL.

On July 1, 1974, the member was permanently retired for disability under the provisions of 10 U.S.C. 1201, with his retired pay recomputed under Formula 1 of 10 U.S.C. 1401. While that formula provides for computation on the same basis as Formula 2, it permits recomputation of retired pay to account for changes in disability percentage which in this case had increased from 50 percent to 80 percent. This permitted the member to receive the maximum possible retired pay (75 percent of basic pay) on permanent retirement. Thus, the member retained the same three options available to him when placed on the TDRL; however, on recomputation for the period on and after July 1, 1974, it was determined that the member would receive a greater amount of retired pay by using one of the other methods of computation. Under Method A (percentage of disability), that entitlement became $1,244.10; Method B (years of service) computation produced $1,161.16; and under the computation associated with voluntary retirement, $1,226.94. It, therefore, became advantageous to the member to receive retired pay under the Method A computation, effective July 1, 1974, even though the basic pay rate used for that method was

limited by the Uniform Retirement Date Act, *supra*, to the rates in effect on June 30, 1969, rather than those in effect on July 1, 1969, as in the case of computation under the voluntary retirement method.

In decision B–183625, August 20, 1975, referred to by the member, we held that a member who is in an awaiting orders status pending action as to whether he will be placed on the TDRL is entitled to active duty pay and allowances for the period he is in such status until delivery of orders notifying him of his retirement or of official advice that he has been retired.

In that connection, and also cited in B–183625 with approval, was decision 39 Comp. Gen. 312 (1959), in which it was held that where a member has notice that retirement orders have been issued prior to their effective date, he is retired on the effective date of those orders even though they have not been delivered to him. In such a case, if the member actually performs active duty subsequent to the effective date of retirement until delivery of those orders, he may continue to receive pay for such service under the *de facto* rule, but it does not in any way add to a member's retirement rights. Compare 38 Comp. Gen. 5 (1958) and 43 *id.* 742 (1964).

The file shows that by letter dated December 11, 1968, from the Chief of Naval Personnel, the member was advised that pursuant to the provisions of 10 U.S.C. 6379, he was to be mandatorily retired on June 30, 1969, and transferred to the retired list effective July 1, 1969. In response to that notification, the member, by letter dated December 17, 1968, requested that he be retired voluntarily, effective July 1, 1969. On February 11, 1969, orders were issued retiring him under the provisions of 10 U.S.C. 6323 (voluntary retirement), effective July 1, 1969, with relief from active duty on June 30, 1969. The file indicates that as a result of the member's retirement physical examination, a condition was discovered which apparently was of such a nature to have provided grounds for the member to be retired for physical disability. The member, by letter dated March 28, 1969, requested that his retirement for disability be deferred to permit him to remain on active duty until his scheduled voluntary retirement date of July 1, 1969, as established by the February orders. Following complete evaluation of his condition, the February orders were cancelled by orders dated June 30, 1969, which retired the member that date and placed him on the TDRL effective July 1, 1969. Thus, it is clearly evident from the record that he not only had personal knowledge of his retirement date before the fact, but that had he not requested the delay, he probably would have been retired well before June 30. Also, in this

connection, we understand that he participated as a retiree in retirement ceremonies with others on June 30, 1969.

There is no indication in the record or from the member's submission that active duty orders were issued for the period July 1-9, 1969, or that he performed any such duty during that period. Although the member may have occupied Government quarters until July 9, 1969, there is no indication that this was anything more than as a courtesy and accommodation to him.

Based on the foregoing, it is our view that there is no legal basis upon which to allow the member's claim for active duty pay and allowances for any of the period July 1–9, 1969, or for computaton of his Formula 1 or 2 disability retired pay entitlement under 10 U.S.C. 1401 on any basic pay rates other than those in effect on June 30, 1969.

Accordingly, the action taken by the Claims Division in this case is sustained.

With regard to the request for information pertaining to appeal procedures available to the member should the disallowance be sustained, the United States District Court and the United States Court of Claims have jurisdiction to consider certain claims against the Government if appropriate action is filed within 6 years following the date the claim first arose. See 28 U.S.C. 1346, 1491 (1970).

[B-184785]

Buy American Act—Applicability—Contractors' Purchases From Foreign Sources—Computer Tapes

A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country.

In the matter of the MRI Systems Corporation, November 19, 1976:

MRI Systems Corporation (MRI) protests a determination by the General Services Administration (GSA) in connection with the award of ADP Schedule Contract No. GS-00C-00631 to software ag of North America, Inc. (Software-America). The gravamen of MRI's complaint is that GSA has permitted Software-America's product, ADABAS, to be listed as a domestic source end product, when in MRI's view the product is actually a foreign end product within the meaning of the Buy American Act.

Software-America markets ADABAS, a software package which provides the functions of a data base management system when used

in programming any of a number of central data processing machines. A data base management system controls and organizes information storage in an automatic data processing system. The system also controls access to data. Software-America is a United States affiliate of software ag of Darmstadt, Federal Republic of Germany (Software-Germany).

It is admitted that the original design and coding of ADABAS was developed by Software-Germany. According to GSA,

> * * * It was forwarded to the United States on magnetic tape along with a list of approximately 100,000 instructions. In 1972, the original documentation was translated in the United States from German to English and a new document was produced which bore little resemblance to the original. We have been advised that documentation standards in Germany are quite different from accepted practices in the United States and therefore, the new document contained a considerable amount of writing over and above that required by translation. Since 1972, the ADABAS manuals have been completely rewritten in the United States to include changes to the program and to bring about better understanding of the documentation.

GSA also reports that the documentation (user's manuals) are printed and assembled in the United States, and that the magnetic tapes are copied in the United States from a master tape of the program. GSA is of the opinion that what is delivered to the Government as an end product is a "software system" consisting of a magnetic tape and associated documentation (the user's manuals). What is procured in this instance is a standard, commercially available computer program, as opposed to programming services required to meet the specific needs of a specific customer.

Although the creation of the program involves essentially intellectual processes, as would the creation of a manuscript for a book, once created, the process of duplicating the result for sale or lease is, in our opinion, a manufacturing process.

In *Blodgett Keypunching Co.*, 56 Comp. Gen. 18 (1976), 76-2 CPD 331, we held that a contract for the conversion of data to machine readable form was not the purchase of a manufactured product, even though a magnetic tape was delivered to the Government, because the primary purpose of the procurement was the conversion of information from one form to another. In this case, what is to be purchased is not a service as in *Blodgett*, but rather a product consisting of a copy of the program on magnetic tape and the user's manuals (each useless without the other). Although both the program and the manuals result from the service required to create the computer program in the first instance, the object of the procurement is not the purchase of the service itself. Moreover, while the major cost of the end product may be attributable to the development effort, the process of developing the software system is a service not subject to the Buy American Act. We

therefore agree with the agency that the end product consists of the enhanced magnetic tape and the user's manuals, each being the components of the program or "software system." In 45 Comp. Gen. 658 (1966), we stated in pertinent part:

> Manufactured articles are domestic in origin under [the] act if they have been manufactured in the United States "substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States." In the case of manufactured products, the act is applied to the end product itself and to the components directly incorporated in the end product but is not applied to the supplies that are used in the manufacture of any such component.

Since we believe that the "end product" is the "software system" whose components are the enhanced magnetic tape and the user's manuals, both of which have been produced in the United States, it is not necessary to consider the source of the supplies that are used in the manufacture of the components. Consequently, we are of the opinion that the supplies were correctly certified to be a domestic source end product.

The protest is denied.

[B-187186]

Leaves of Absence—Recording Requirements—Hours of Departure and Return to Duty

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1-11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded.

Subsistence—Per Diem—Transferred Employees—Reimbursement Basis—Mileage Distance

Compliance with FTR para. 1-11.5a (May 1973), which specifies voucher requirements, is not waived by FTR para. 2-2.3d(2), which fixes maximum allowable per diem on basis of minimum driving distance of 300 miles per day, since latter provision is for application when it appears from properly executed and documented voucher that traveler failed to maintain prescribed minimum mileage.

Leaves of Absence—Annual—Charging—Travel Time Excessive

Because employing agency has discretion to charge transferred employee for excess time consumed by employee's failure to travel on any day, agency may require employee to submit accurate time and attendance reports for each day traveled.

In the matter of Kenneth G. Buss—per diem for relocation travel, November 23, 1976:

This action is in response to a request dated August 10, 1976 from Ms. Orris C. Huet, an authorized certifying officer of the Department

of Agriculture, for our decision concerning a voucher submitted by Mr. Kenneth G. Buss for per diem in lieu of actual subsistence for the period during which he and his family were traveling incident to a change of his official duty station.

The record indicates that Mr. Buss, an employee of the Forest Service, was authorized to travel by privately owned vehicle from Portland, Oregon to Elkins, West Virginia in connection with his transfer. In support of his claim for per diem, Mr. Buss has submitted a travel voucher which indicates that he left Portland at 9 a.m. on June 6, 1975 and arrived at Elkins, West Virginia at 2 p.m. on June 29, 1975. His claim for per diem is based on his claimed mileage divided by the minimum daily mileage of 300 miles required by para. 2–2.3d(2) of the Federal Travel Regulations (FPMR 101–7) (May 1973). This yields an "allowable travel time" of 9.6 days. He thereupon claims per diem for 9¾ days for himself and his family, and states that the balance of the travel period should be charged to annual leave. Mr. Buss has charged leave for 11 days en route: June 6, June 9–13, and June 16–20, 1975.

The Forest Service contends that the claim may not be certified for payment due to Mr. Buss' failure to submit a detailed voucher indicating the taking of leave and the exact hour of departure from and return to duty status, as required by FTR paragraphs 1–11.5a(2)–(3). The agency concludes that these specific requirements are not waived by FTR para. 2–2.3d(2), cited above by the claimant. We are therefore asked by the certifying officer whether the claimant may be paid per diem solely on the basis of dividing the total mileage between duty stations by 300 miles to calculate the allowable travel time, or whether the claimant must be required to state on the voucher the date and time that direct travel was interrupted and that leave began or ended.

Regulatory authority for reimbursing certain relocation expenses of Government employees is found in chapter 2 of the Federal Travel Regulations. Paragraph 2–2.1 thereof provides that allowances for per diem in lieu of subsistence shall be permitted in accordance with the provisions of 5 U.S.C. §§ 5701–5709 and chapter 1 of the FTR. To avoid any violation or apparent violation of the Federal Travel Regulations, FTR para. 1–11.1 requires the claims of travelers for reimbursement to accurately reflect the facts involved in every instance. For this reason, FTR para. 1–11.3a (May 1973) requires all claims to be itemized and stated in accordance with the regulations, unless for special reasons compliance has been waived or modified by the written determination of the Administrator of General Services. With respect

to the preparation of vouchers, FTR para. 1–11.5a (May 1973) provides as follows:

> (2) *Leave of absence.* When leave of absence of any kind is taken while an employee is in a travel status, the exact hour of departure from and return to duty status must be shown on the travel voucher.
> (3) *Indirect-route travel.* The travel voucher should set forth the details of the expenses actually incurred, the hour of departure from post of duty, and the hour of arrival at place of duty. Where leave has been taken while in travel status, the date and time that leave began and terminated should be shown.

Further, para. 1–11.5b(1) provides that the voucher must state the exact period for which per diem is claimed.

As noted above, Mr. Buss relies on the provisions of FTR para. 2–2.3d(2) which fix the maximum allowable per diem on the basis of a minimum driving distance of not less than an average of 300 miles per calendar day. We have previously interpreted these provisions as limiting the reimbursement for expenses incurred when traveling to a new station by privately owned automobile to the expenses to which the employee and members of his family would have been entitled had they traveled by a usually traveled route between the old and new stations at the specific distance per day. B-114826, May 7, 1974; B-175436, April 27, 1972. This rule is for application when it appears from a properly executed and documented travel voucher that the traveler failed to maintain the prescribed minimum of 300 miles per calendar day over a usually traveled route between the old and new duty station. The rule, therefore, does not create an exception to the requirements of FTR para. 1–11.5 with respect to vouchers. Accordingly, an employee seeking reimbursement must comply with the regulations requiring detailed and specific indications on the voucher of departure from travel status. The formula for computation of per diem suggested here by the claimant does not satisfy these requirements.

Since the voucher in question did not set forth the hours when Mr. Buss departed from travel status for the time during which he took leave enroute, as required by FTR para. 1–11.5, the travel voucher submitted does not comply with the Federal Travel Regulations. In this regard, FTR para. 1–11.7 (May 1973) provides that items in travel vouchers which are not stated in accordance with those regulations shall be suspended, and requires full itemization of all suspended items which are reclaimed. Accordingly, no amount of the claimed expenses may be reimbursed here until the requisite information is submitted on a properly executed voucher.

We have been further asked whether Mr. Buss should be required to submit a corrected time and attendance report to show the actual

dates and times on which leave was taken. In this connection, we have held that an employee is required to proceed without delay as expeditiously as he would if traveling on personal business, even though he may be required to travel on nonworkdays. 46 Comp. Gen. 425, 426 (1966); B–163654, June 22, 1971. Thus, an employee may not be paid per diem for any day, including nonworkdays, during which he did not travel, in the absence of justifiable delay. B–163654, *supra*. Further, we have held that although leave may not be charged for nonworkdays, an employing agency has the discretion to charge or not to charge an employee annual leave for excess time consumed in travel on workdays by failure to travel on the weekend. B–163654, June 22, 1971. Accordingly, the claimant here may be required to submit a corrected time and attendance report for each calendar day during which he traveled indicating the dates and time spent in leave status.

Accordingly, the voucher is returned herewith and may be processed only in accordance with this decision.

[B–186657]

Contracts—Protests—Timeliness—Significant Issue Exception

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

Contracts—Protests—Timeliness—Solicitation Improprieties

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

Bids—Acceptance—Unbalanced Bids—Improper

Invitation for bids (IFB) soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of Federal Procurement Regulations para. 1–3.409(b)(1) and contrary to 52 Comp. Gen. 732, 736.

Contracts—Requirements—Net Basis or Single Percentage Factor Effect

Requirement for submitting net or single percentage bid on requirements-type contract prevents deliberate unbalancing of prices by bidder, which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor.

In the matter of Michael O'Connor, Inc., November 30, 1976:

Invitation for bids (IFB) no. GS-03B-63045 was issued by the General Services Administration (GSA) on May 6, 1976. The IFB was for a requirements-type, 1-year term contract, which involved removing and installing various types of partitions and related tasks in Government buildings. The Government's requirements consisted of a schedule of 36 separate job descriptions so as to permit issuance of orders for the work actually to be done when the need arises. The IFB specified for each item a unit price which had been predetermined by GSA. No quantity estimates were specified. Bidders were to bid on a net basis or submit a single plus or minus percentage factor to be applied to the unit prices in the schedule which would then be applied to every work order. Award was to be made to the bidder offering the net or percentage factor which would produce the lowest unit prices for the line items.

On May 27, 1976, bids were opened. The following is a list of all bids (discounts) received:

Free State Builders, Inc.—38.3 percent
Kora & Williams Corporation—36 percent
Michael O'Connor, Inc.—35.65 percent
Edward B. Friel, Inc.—19.6 percent

On June 4, 1976, Michael O'Connor, Inc. (O'Connor) challenged the propriety of the IFB. O'Connor alleged that the IFB was defective because (1) there were ambiguities in the item descriptions; and (2) bidders were precluded from intelligently bidding due to the lack of estimated quantities and the requirement for a single percentage factor.

Section 20.2(b)(1) of the Bid Protest Procedures, 4 C.F.R. part 20 (1976), provides:

> Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. * * *

The alleged improprieties in the solicitation were apparent prior to bid opening. Since O'Connor's protest was not filed with either GSA or this Office until after bid opening, it is untimely. However, the Comptroller General may consider an untimely protest which raises an issue significant to procurement practices or procedures. 4 C.F.R. § 20.2(c) (1976). "Issues significant to procurement practices or procedures" refers to the presence of a principle of widespread interest. *Fairchild Industries, Inc.*, B-184655, October 30, 1975, 75-2 CPD 264.

Although there have been a number of decisions involving procurements by the single percentage factor method, we have never addressed the specific issue of the propriety of the procedure. Since the inviting of bids on a requirements-type contract by submitting a single percentage factor to the priced items without the benefit of estimated quantities is continuing and increasing, the soliciting of bids by this method in the circumstances is deemed to be of widespread application to the procurement practices. Consequently, the issue will be considered. The other basis of protest, ambiguities in the item description, relates to an isolated procurement. Therefore, it is not considered to be of widespread interest and will not be reviewed.

GSA states the reason for adopting the method of bidding in the immediate IFB was the inherent unreliability of its quantity estimates. The use of erroneous quantity estimates in prior IFB's and the evaluation of bids thereunder led to unbalanced bidding and sometimes cancellation of the procurement action. See *Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 CPD 164. Additionally, GSA contends that the Government was not assured of determining which bid was most advantageous to the Government because the actual requirements vary substantially from the evaluation factors derived from prior year experience. *Edward B. Friel, supra.* GSA contends the method in the instant IFB precludes unbalanced bidding and assures the Government of awarding the contract to the lowest bidder.

Although GSA has indicated that it resorted to the immediate method of bidding because of the difficulty it had in determining the estimated quantities it will procure under the contract, the IFB is in violation of Federal Procurement Regulations (FPR) § 1-3.409 (b) (1) (1964 ed., circ. 1), which is specific that in a requirements contract—

> * * * An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. * * *

In 52 Comp. Gen. 732, 736 (1973), it was indicated that, where it was not administratively feasible to estimate future requirements, the listing in the solicitation of past orders was a reasonable alternative.

Since, in the immediate case, GSA was able to inform bidders in the IFB that the annual dollar volume of the prior contract was $400,000, it appears that it would have been a relatively simple task to advise bidders of the item quantities that produced the total. In

that event, all bidders would have had the same information as the incumbent. While we do not know the actual degree of importance bidders attach to the quantity estimates in a requirements-type contract, it may be helpful to the bidders in preparing a reasonable and intelligent bid.

The agency report indicates that actual experience will likely vary substantially from estimated quantities, no matter how carefully drawn, serving to "make the Government an involuntary participant in the gamble created by a successful bidder's unbalanced bid." A bidder who recognizes that the relative proportions of projected quantities used for bid evaluation are substantially wrong may achieve an unwarranted evaluation advantage by bidding high on the proportionately underestimated quantities and low on those overestimated. Therefore, GSA is reluctant to indicate relative quantities. However, this position ignores the fact that the method utilized in the present procurement indicating only a basic unit of measure itself establishes relative proportions. It is not the absence of projected quantities which prevents deliberate unbalancing, but the setting by the Government of unit prices with the bidder limited to a single overall percentage discount or surcharge. Under this method the presence or absence of projected quantities does not affect the opportunities for unbalancing.

With regard to the requirement for submitting a net or single percentage bid, we believe GSA's position is rationally founded. The system allows GSA to quickly evaluate bids and assures award to the low bidder under the IFB regardless of the quantities ordered during the contract term. Even assuming that the prices estimated by GSA are too low or too high, bidders can adjust the prices by their offered percentage factor (plus or minus) if they are informed of reasonably anticipated quantities. As noted, the system has the virtue of preventing the deliberate unbalancing of prices by a bidder where he has reason to believe that the proportion of item quantities projected is substantially wrong with the result that a bid evaluated low will in fact result in a higher cost to the Government than would have been the case under a bid evaluated higher.

As indicated above, the only objection our Office has to the immediate procurement method is the failure to include future quantities estimated or past quantities purchased. Since the protest in this regard was untimely, no corrective action is being recommended for the immediate procurement. However, by separate letter we are advising GSA of our objection.

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