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[B-148044]

Real Property—Acquisition—Relocation Costs—Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Person who owns or rents mobile home and who, respectively, rents or owns land on which the mobile home rests and is displaced due to a Federal or federally assisted program so as to be entitled to benefits pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 may not receive benefits under both sections 203 and 204 of that Act. Benefits under section 204 are limited to those for displaced persons who are not eligible to receive payment under section 203.

In the matter of maximum replacement housing entitlement of persons displaced from mobile homes, August 1, 1978:

The Associate General Counsel for Urban Development, Office of General Counsel, Department of Housing and Urban Development (HUD), has requested a decision on whether persons displaced from mobile homes acquired or deemed to be acquired in connection with programs, projects, and activities financially assisted by HUD, may be entitled under certain circumstances to relocation benefits under both sections 203 and 204 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Public Law No. 91-646, approved January 2, 1971, 42 U.S.C. §§ 4601-4655 (1970).

In his letter, the Associate General Counsel notes that section 203 of the Relocation Act, 42 U.S.C. § 4623, provides a maximum replacement housing payment of $15,000 to any homeowner who is displaced from a dwelling which he has occupied at least 180 days prior to the initiation of negotiations for the acquisition of the property. He also notes that those who are not eligible for such a payment may be entitled under section 204 of the Relocation Act, 42 U.S.C. § 4624, to either a rental assistance payment or to down payment assistance, not to exceed $4,000, if they have occupied the property in question for at least 90 days prior to the initiation of negotiations for its acquisition.

In connection with proposed changes in HUD's regulations in the area of relocation assistance, HUD's Office of General Counsel reconsidered the Department's position on the entitlements available under the Relocation Act to those who live in mobile homes. Upon review, the Office of General Counsel determined that a person who owns a mobile home and leases the real property on which it rests (or vice versa) has two separate property interests, which entitle that person to benefits under both section 203 and section 204 of the Relocation Act, with a potential maximum eligibility of $19,000.

Prior to this interpretation, HUD's position had been that the owner of a mobile home which is "acquired" within the meaning of the

Relocation Act is entitled to a replacement housing payment up to the $15,000 maximum provided by section 203 and a person who rents a mobile home is entitled to an assistance payment up to the $4,000 maximum provided by section 204 but not both kinds of assistance. See HUD Relocation Handbook 1371.1 REV., ch. 5, sec. 6. HUD requests that we review the propriety and legality of the proposed policy changes.

The purpose of Title II of the Relocation Act, concerning uniform relocation assistance, is set out in section 201 of the Act, 42 U.S.C. § 4621, which provides:

> The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

To carry out this policy, additional sums are paid, beyond the amounts paid for the actual acquisition of the property, which the displaced homeowner or tenant is to use as a means of relocating to comparable replacement housing. Thus, section 203 of the Relocation Act, 42 U.S.C. § 4623, provides in pertinent part:

> (a)(1) In addition to payments otherwise authorized by this subchapter, the head of the Federal agency shall make an additional payment not in excess of $15,000 to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of the property. * * *

Similarly, section 204 of the Relocation Act, 42 U.S.C. § 4624, provides:

> In addition to amounts otherwise authorized by this subchapter, the head of the Federal agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 4623 of this title which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling. Such payment shall be either—
>
> (1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed $4,000, or
>
> (2) the amount necessary to enable such person to make a downpayment (including incidental expenses described in section 4623(a)(1)(C) of this title) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed $4,000, except that if such amount exceeds $2,000, such person must equally match any such amount in excess of $2,000, in making the downpayment.

Under certain circumstances, mobile homes are also included in the type of dwelling covered by sections 203 and 204, and this is indicated in H.R. Rept. No. 91-1656, 91st Cong., 2d Sess. 10 (1970) where it is stated in part:

> The dwelling may be a single family building, a one-family unit in a multi-family building, a unit of a condominium or cooperative housing project, or

any other residential unit, *including a mobile home which either is considered to be real property under state law, cannot be moved without substantial damage or unreasonable cost, or is not a decent, safe and sanitary dwelling* * * *. [Italic supplied.] See also 24 CFR 42.20(e) (1977).

However, nothing in the Relocation Act or its legislative history indicates that a person who owns or rents a mobile home is entitled to greater benefits than the person who owns or rents some other type of dwelling.

The entitlements available under sections 203 and 204 of the Relocation Act depend upon one's actual occupancy and ownership or rental of a dwelling that is being acquired as part of a Federal or federally assisted program. The payments authorized under these sections supplement the individual's other entitlements and are intended to alleviate the expense of relocating to comparable, decent, safe and sanitary housing. Thus, the key factors in determining entitlements under sections 203 and 204 are the individual's relationship to the specific dwelling and his replacement housing expenses in excess of the amount he is entitled to receive as a result of acquisition of the property in question.

Therefore, since the benefits available under section 204 are explicitly limited to those for displaced persons who are "not eligible to receive a payment under section 203," it is not necessary to consider whether the mobile home dweller has a property interest in both the mobile home and the land on which it rests. The sum of $15,000, increased in committee from a recommended $5,000, was intended to be the maximum housing benefit available under the Relocation Act to any one displaced person. See H.R. Rept. No. 91-1656, 91st Cong., 2d Sess. 8-9 (1970).

Moreover, there is no rational basis to conclude that the person with a property interest in both a mobile home and the land on which it rests has any greater interest under the Relocation Act than the person who owns a dwelling which is attached to the land.

We conclude, therefore, that those who own or rent a mobile home and own or rent, respectively, land on which the mobile home rests and are subsequently displaced are not entitled to benefits under both sections 203 and 204 of the Relocation Act, but are limited to the benefits available under the specific section most appropriate to their individual situation.

[B-190203]

General Accounting Office—Decisions—Reconsideration—Errors Must Be Identified

Procuring agency filed timely request that General Accounting Office (GAO) reconsider prior decision but did not timely file required detailed statement con-

cerning factual or legal basis to modify or overturn prior decision. Since detailed statement was not timely filed as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider earlier decision.

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

Procuring agency untimely filed additional basis upon which reconsideration of merits of earlier decision is requested. Since additional basis was not filed timely as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider that aspect of earlier decision.

Contracts—Protests—Timeliness—Reconsideration—On Merits

Interested party timely requested that GAO reconsider earlier decision and, before expiration of time for filing reconsideration request, such party was expressly granted extension to file required detailed statement. Although Bid Protest Procedures do not permit waiver of section 20.9's time limit for filing reconsideration, in circumstances GAO will consider merits of reconsideration request. For future, reconsideration requests must be filed within prescribed time limit and there will be no exceptions.

Administrative Determinations — Conclusiveness — General Accounting Office — Contract Matters

Contention that "final" determinations and decisions made by procuring agencies pursuant to 41 U.S.C. chapter 4 (1970) are not subject to review by courts or GAO is without merit because similar language in other final determination statutes has been interpreted to limit only scope of review. Such determinations will not be questioned where reasonable basis exists.

General Accounting Office—Decisions—Reconsideration—Error of Law or Fact Basis—Not Established

Statement and contentions raised in support of position that agency's determination to negotiate was proper do not constitute submission of facts or legal arguments demonstrating that earlier decision was erroneous; accordingly, GAO declines to reconsider this aspect of earlier decision.

General Accounting Office — Decisions — Authority — Contract Matters

General Accounting Office rendering decisions on bid protests does not violate separation of powers doctrine.

General Accounting Office—Recommendations—Contracts—Prior Recommendation—Affirmed

Prior decision—with regard to recommendation that startup period be extended—is affirmed, since interested party failed to present any facts or legal arguments which were not thoroughly considered in earlier decision.

In the matter of Department of Commerce; International Computaprint Corporation, August 2, 1978:

The Department of Commerce and International Computaprint Corporation (ICC) request reconsideration of two portions of our

decision in the matter of *Informatics, Inc.*, B–190203, March 20, 1978, 78–1 CPD 215. Involved in the March 20, 1978, decision were 10 bases of protest raised by Informatics; all but two bases of protest—the subject of this decision—were resolved in favor of Commerce's position. The March 20, 1978, decision concluded in pertinent part that: (1) since the procurement was essentially being conducted as an advertised procurement, the solicitation should be so designated; and (2) since Commerce failed to establish a reasonable basis for the 2-month startup time limitation, the requirement is unduly restrictive of competition in the circumstances.

After receipt of the reconsideration requests, there was uncertainty as to the precise basis advanced by the parties and to clarify the matter in an expeditious manner, before the receipt of ICC's detailed statement, an informal conference was arranged and attended by all the parties. Comments based on issues clarified in the conference were submitted thereafter by all interested parties.

Before consideration of the substantive matters, consideration of the timeliness of Commerce's and ICC's reconsideration requests is necessary.

Timeliness of Commerce's Request for Reconsideration

On April 4, 1978—9 working days after Commerce received a copy of the decision—Commerce filed a request for reconsideration on the ground that formal advertising would be incompatible with the degree of specificity of the specifications and would inhibit competition. Commerce noted that details of the request for reconsideration would be forwarded later. On April 10, 1978, a complete statement of Commerce's grounds for reconsideration with regard to the formal advertising recommendation was filed. In addition, on April 10, Commerce—for the first time—requested reconsideration of our conclusion that the 2-month startup time limitation was unduly restrictive.

Requests for reconsideration are governed by the provisions of our Bid Protest Procedures at 4 C.F.R. § 20.9 (1977), which provides as follows:

> (a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
>
> (b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

Informatics argues, citing *Data Pathing, Inc.—Reconsideration*, B–188234, July 11, 1977, 77–2 CPD 14, that the April 4, 1978, letter

does not contain the required detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted and, therefore, we should decline to reconsider the advertising portion of the decision. Informatics also argues that Commerce's reconsideration request regarding the startup portion of the decision is untimely and not eligible for consideration because it was first raised on April 10, 1978—more than 10 working days after the basis for reconsideration was known. For the same reason, Informatics contends that the detailed statement regarding the advertising recommendation was also filed untimely and, therefore, is not eligible for consideration. Although Commerce had an opportunity to respond to Informatics' contentions, it did not do so.

Protests against the award of a Government contract are very serious matters, which deserve the immediate and timely attention of the protester, interested parties, and the contracting agency. Our Bid Protest Procedures establish an orderly process to insure equitable and prompt resolution of protests. Therefore, timeliness standards for the filing of protests and requests for reconsideration must be and are strictly construed by our Office. See, e.g., *Cessna Aircraft Company*, 54 Comp. Gen. 97, 111 (1974), 74-2 CPD 91; *Department of Commerce—Request for Reconsideration*, B-186939, July 14, 1977, 77-2 CPD 23; *American Air Filter Co.—DLA, Request for Reconsideration*, 57 Comp. Gen. 567 (1978). Timeliness standards for the filing of requests for reconsideration are purposefully more inflexible than those for filing protests or meeting intermediate case development or processing deadlines and, under our Procedures, there is no provision for waiving the time requirements applicable to requests for reconsideration. *Department of Commerce—Request for Reconsideration*, *supra; American Air Filter Co.—DLA*, *supra*. Moreover, we are unaware of any prior case since the adoption of our Procedures where the time limit applicable to reconsideration requests has been waived. *Id.*

Obviously, the requirement for a "detailed statement" of the factual and legal grounds for reversal or modification is the sum and substance of a request for reconsideration. Without the detailed statement, our Office has no basis upon which to reconsider the decision. For example, in *Data Pathing, Inc.—Reconsideration*, the protester believed that our conclusion "was not supported by a full examination of the facts." We held that such statements do not constitute the submission of facts or legal arguments demonstrating that our earlier decision was erroneous; accordingly, we declined to reconsider our decision.

When a protester, an interested party, or a contracting agency timely files a short note indicating general disagreement with an earlier decision and subsequently provides the required detailed statement after the expiration of the reconsideration period, an attempt to extend the time for filing the reconsideration request is evident. We cannot condone such action because to do so would open the door to potential protracted delays possibly resulting in circumstances negating recommended remedial action in the earlier decision.

In the instant situation, Commerce's timely request for reconsideration (filed April 4, 1978) states: "The Department of Commerce is hereby filing a motion for reconsideration in your decision that the data base requirement should be formally advertised, which method would, in our opinion, be incompatible with the degree of specificity of the specifications and would inhibit competition." Such request does not advance facts or legal arguments which show that our earlier decision was erroneous; therefore, we must decline to reconsider our March 20, 1978, decision on the merits at Commerce's request. See *Data Pathing, Inc.—Reconsideration, supra.* Moreover, Commerce's proper request for reconsideration including the detailed statement, filed April 10, 1978, is untimely and will not be considered. See *Department of Commerce—Request for Reconsideration, supra; American Air Filter Co.—DLA, supra.*

There have been situations where we have declined to reconsider the merits of an earlier decision but at the agency's request we have reconsidered the recommendation for remedial action. See, e.g., *Environmental Protection Agency—request for modification of GAO recommendation*, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50. That type of situation is not the case here because Commerce does not contend that the recommendations of the March 20, 1978, decision cannot or should not be executed. Instead, Commerce contends that the basis of the recommendations should be overturned as erroneous.

With regard to Commerce's untimely filed additional basis—startup time—upon which reconsideration is requested, since the matter was untimely filed, we must decline to reconsider it.

Accordingly, we decline to reconsider the recommendations in the earlier decision upon Commerce's request.

Timeliness of ICC'c Request for Reconsideration

On April 3 and 4, 1978, after a conversation with a member of GAO's Office of General Counsel, counsel for ICC filed letters requesting reconsideration on behalf of ICC and explained that because he was recently retained by ICC for such purpose he needed more time to

furnish the required detailed statement. Counsel stated that the detailed statement or withdrawal of the request would be furnished by April 18, 1978. Subsequently, ICC's counsel contacted another member of the Office of General Counsel at GAO and requested additional time. The detailed statement was finally filed on April 25, 1978, a date in excess of the 10 working days prescribed in section 20.9 of our Bid Protest Procedures.

Informatics argues that the request for reconsideration filed by ICC is also untimely because neither letter indicated what holdings of the March 20, 1978, decision would be contested or asserted any ground for the request whatsoever, and neither letter conformed to the requirements of section 20.9. Informatics also argues that by allowing ICC more than the time set forth in the Procedures would permit incumbent contractors (and Government agencies) to extend interminably the reconsideration process by the simple expedient of changing counsel. Finally, Informatics notes that ICC's requested extensions were granted by GAO before Informatics had an opportunity to learn of and oppose the extension request. Consequently, Informatics maintains that ICC's request for reconsideration is untimely and should be dismissed.

While ICC had an opportunity to reply to Informatics' contentions, it elected not to do so.

The instant case is similar to a situation which arose in *Lemmon Pharmacal Company, Inc.*, B-186124, December 3, 1976, 76-2 CPD 461, where the protester's corporate counsel communicated orally with the responsible attorney in this Office within the 10-day time limitation of section 20.9. The protester contended that the informal and cooperative attitude led to the belief that its informal, oral discussion of the initial decision did not require an immediate filing of a formal request for reconsideration. Two months later the protester filed its reconsideration request, which we did not consider because it was not timely filed. The rationale for that conclusion was in part as follows:

> * * * Even if Lemmon was inadvertently lulled into believing that a formal written request for reconsideration could be delayed we neither gave express prior approval of nor does sufficient justification exist for the 2-month delay in filing its request for reconsideration. * * *

A reasonable, but incorrect, interpretation of the above language may have led others to believe that, with express prior approval, reconsideration requests could be filed beyond the 10-day time limit. For the future, reconsideration requests must be filed within the time limit of section 20.9 and there will be no exceptions. In the circumstances of this case, however, fundamental fairness requires that we consider the merits of ICC's reconsideration request.

Substance of ICC's Reconsideration Request

1. *Finality of a Procuring Agency's Determination to Negotiate*

ICC contends—for the first time on reconsideration—that Commerce's determination to use the negotiation method rather than the formal advertising method to satisfy its needs is final and not subject to review by this Office or the courts. ICC refers to 41 U.S.C. § 257(a) (1970), which provides that:

> The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. * * *

ICC adds that House of Representatives and Senate reports forming the legislative history of that section stated:

> The determinations and decisions so made will not be made subject to invalidation or challenge by the Comptroller General or the courts. * * *

ICC concludes, therefore, that this Office is not entitled to review Commerce's determination to negotiate rather than to advertise.

Informatics argues, citing *Electric Company* v. *United States*, 189 Ct. Cl. 116, 416 F. 2d 1320 (1969), that this contention is raised too late to be a proper basis for reconsideration of a prior decision and that ICC ignores the longstanding practices and procedures of this Office. Informatics states that our Office, in the proper exercise of its power to resolve bid protests, has reviewed agency decisions to negotiate and has declared such decisions to be violative of the statutory preference for advertising when they lack a reasonable basis. In support, Informatics cites these decisions: *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976), 76-1 CPD 71; *Sorbus, Inc.*, B-183942, July 12, 1976, 76-2 CPD 31; *Cincinnati Electronics Corporation*, 55 Comp. Gen. 1479 (1976), 76-2 CPD 286.

In Informatics' view, the "finality" language of 41 U.S.C. § 257(a) affects only the scope of review of the agency decision and our Office has already taken this statutory language into account by limiting its review to the question of whether the determination to negotiate due to the impracticability of securing competition is supported by a reasonable ground. Informatics concludes, citing *Estep* v. *United States*, 327 U.S. 114 (1946), that the above test is appropriate when the applicable statute describes an administrative decision as "final."

ICC is essentially raising a new argument on reconsideration for the first time and generally we would not consider it since it does not show a legal error in the earlier decision. However, since the argument is basically an attack on GAO's authority to review the subject matter of the case, we believe that it is proper to consider this matter even

though it could have been and should have been raised during consideration of the earlier decision. *Cf. Wright & Miller*, 5 *Federal Practice and Procedure* § 1209 at 107 (1969 ed.).

While ICC has presented no court cases specifically interpreting the 41 U.S.C. § 257(a) "finality" and we are aware of none, we note that there are other statutes which established "final" administrative determinations. Those statutes have been interpreted as restricting only the scope of review. For example, in *Estep* v. *United States*, the Supreme Court held that the "final" decisions of local boards under the provisions of § 11 of the Selective Training and Service Act were not subject to the customary scope of judicial review which obtains under other statutes; local board decisions were to be overturned only if there was no reasonable basis for them. Similarly, that is the scope of judicial review in deportation cases where Congress made the orders of deportation "final." *Chin Yow* v. *United States*, 208 U.S. 8 (1908).

At least since 1962, we have concluded that the "final" determinations made pursuant to the current 10 U.S.C. § 2304 (1970)—which is identical in all pertinent respects to 41 U.S.C. § 257(a) with regard to finality—were subject to limited review for the purpose of ascertaining whether any reasonable basis exists to support it. 41 Comp. Gen. 484 (1962). As Informatics notes, the scope of review used by our Office—the reasonable basis test—is the same test which would be applied by the courts.

We believe that ICC's contention must fail for the above reasons and because the logical extension of ICC's argument is that no Federal civilian agency's procurement determinations made under 41 U.S.C. chapter 4—and virtually all are made under such authority—would be subject to judicial review. There is currently no judicial precedent supporting ICC's contention. In fact, the opposite conclusion is clearly the current view of the courts. See, e.g., *Scanwell Laboratories* v. *United States*, 424 F. 2d 859 (D.C. Cir. 1970); *Meriam* v. *Kunzig*, 476 F. 2d 1233 (3rd Cir. 1973), *cert. denied*, 414 U.S. 911 (1973).

2. *Commerce's Basis to Negotiate*

ICC notes that Commerce decided to negotiate this procurement based on the exception to the general rule of contracting for property and services by advertising when it is impracticable to secure competition by formal advertising. In ICC's view, specifications for an IFB could not be drawn so as to insure "full and free competition" because (1) specifications which would be certain to secure Commerce's procurement objectives would be so decisively slanted toward detailing the practices and procedures of the incumbent contractor that another contractor would have no practical chance of winning any resulting

competition with the incumbent contractor, thus nullifying the legitimacy of the advertised procurement; and (2) on the other hand, if the specifications were loosened in such a way so as not to favor the incumbent contractor, the interests of the procuring agency would thereby be inordinately depreciated.

ICC argues that past experience shows that formal advertising has failed to result in a contract for this service and that having already experienced the impracticability of contracting for the needed services through an IFB, Commerce's decision to rely on an RFP in the present procurement must be regarded as prudent procurement management. ICC concludes that all the facts of the case support the propriety of Commerce's proposed negotiation.

In our view, ICC's statements and contentions do not constitute the submission of facts or legal arguments demonstrating that our earlier decision was erroneous; since ICC's concerns were fully considered in our earlier decision, we must decline to reconsider our earlier decision with regard to this point. *Data Pathing, Inc.—Reconsideration*, *supra.*

3. "*Separation of Powers*"

ICC submits—for the first time on reconsideration—that the constitutional doctrine of separation of powers precludes an organization in the legislative branch, namely the GAO, from telling an agency in the Executive branch how to conduct its business.

Informatics states, in reply, that ICC's attack on the jurisdiction of this Office to consider and decide bid protests is not raised in the proper forum to resolve that question, nor is a request for reconsideration of an unfavorable decision of the Comptroller General an appropriate time to initiate it.

The purpose of our reconsideration procedure is to permit interested parties, including the procuring agency, to present factual or legal grounds demonstrating that our earlier decision was erroneous. Reconsideration is not the time to present the "complete" facts or to present legal arguments known or available to the parties during the consideration of the earlier decision. See *Decision Sciences Corp—Reconsideration*, B–188454, December 21, 1977, 77–2 CPD 485. Here, ICC fully participated in every aspect of the earlier decision and ICC failed to raise this argument at that time. However, since it questions our jurisdiction, we will consider its contention. See 1. *supra.*

ICC's contention does not specifically state how our earlier decision or our bid protest resolving function violates the Constitution nor does ICC provide any support for its contention. With no more than ICC's unsupported charge, we may only respond generally by stating that,

in our view, our rendering decisions on bid protests does not violate the separation of powers doctrine. In support, see "BID PROTESTS: ABA GROUP SEES 'SEPARATION OF POWERS' NO BAR TO GIVING GAO BINDING PROTEST AUTHORITY." Federal Contract Reporter, No. 696, p. A–1 (August 29, 1977).

4. *Startup*

The earlier decision states in pertinent part as follows:

> * * * Where (1) there is no need to have the next contractor begin immediately at full production capacity and some overlap of new contractor and incumbent is necessary and (2) where the history of a similar procurement shows that 2 months is not long enough to produce acceptable results, we must conclude that Commerce has failed to establish a reasonable basis (and we can perceive none) for the 2-month start-up time limitation and the requirement is unduly restrictive.

ICC contends that the first of two bases is nothing more than a gratuitous statement with a veneer of plausibility making it appear reasonable to someone who does not know the facts. ICC believes that our decision recommended splitting the work between two contractors and the thrust of its argument attacks that recommendation. It is sufficient to state the earlier decision made no such recommendation. The earlier decision is based on the uncontested facts. First, each issue takes 3 weeks to process. The work would proceed as follows:

Week	Commerce Action	Old Contractor	New Contractor
1	Transmits A	Works on A (and prior issues).	No work.
2	Transmits B	Works on A & B (and prior issue).	No work.
3	Transmits C	Works on A & B	Works on C.
4	Transmits D	Works on B	Works on C & D.
5	Transmits E	No work	Works on C, D & E.

During weeks three and four, both contractors are working, but each on separate issues. It is also clear from this example that, during an orderly transfer of work, a new contractor does not work at full capacity until the third week of actual performance.

Second, under Commerce's contemplated award and production scheme, award is made 60 days prior to week 1 in the above example. The earlier decision simply recommends that the 60-day period be extended.

The last ground is based on our Office's alleged incorrect reading of the history of a similar procurement. In ICC's view, our Office overlooked the fact that protester's complaint was made in the context of its preference and erroneous assumption that exhibit (1) which was due at proposal submission time need not be computer produced, but could be manually produced. ICC states that under protester's misconception, it would be required to produce the necessary software within the 60 days' startup time, and the time schedule might be an excessive burden.

Next ICC states that, in three previous solicitations, no firm which competed in the three procurements nor anyone else complained about the 60-day startup period and the differences between those procurements and the present procurement are meaningless insofar as the issue of the reasonableness of the startup time is concerned.

Finally, ICC concludes that Commerce's determination that the 60-day startup time is a reasonable requirement falls within the embrace of 41 U.S.C. § 257(a) and is not subject to review by this Office. With regard to the latter contention, we have concluded above that Commerce's determination is subject to review to ascertain whether there is a reasonable basis for it.

In response to ICC's remaining contentions, Informatics argues that ICC conveniently ignores the factors other than software development advanced by Informatics in demonstrating the unreasonable nature of the 2-month startup period. Informatics made a lengthy and detailed presentation, including a detailed chart summarizing the impractical nature of the 2-month startup, and software development was only one of the many production factors set forth on that chart.

Next, Informatics explains at length how the present procurement is substantially different from prior ones. In sum, Informatics states that (1) in the 1970 contract, the contractor was able to use composition software prepared by the Government Printing Office and the contractor was not required to process the difficult "complex work units," with the exception of single line mathematical and chemical expressions; and (2) the schedule required in the 1970 contract permitted a startup period of 38 weeks before full production was achieved. Further, Informatics notes that after the first 2 months of that period had elapsed, the contractor was required to process only 100 patents per week and that the solicitation gave offerors the opportunity to submit a shorter startup schedule, but ICC declined, stating:

> * * * ICC has been mindful principally of the need to recruit and train extra staff for the project A faster rate of recruitment might affect the accuracy of work in the early weeks, and especially in view of the stringent penalties attached, this is a risk which ICC would prefer not to take.

This contrasts with the current requirement of the protested RFP that offerors be able to achieve full production, i.e., 1,100-1,200 patents per week, in the same 2-month period. Informatics concludes that although Commerce granted, and ICC benefited from, the past generous startup period, both parties now would deny prospective contractors the opportunity to compete under realistic startup requirements.

It is our view that all of the facts presented on reconsideration were thoroughly considered by our Office in arriving at the conclusion of the earlier decision and, therefore, we affirm the conclusion reached in that decision with regard to the startup time.

Conclusion

ICC, the incumbent contractor for over 7 consecutive years, and Commerce both vigorously contend that negotiation rather than formal advertising is the best method to maximize competition on this procurement. Although it is most unusual for an incumbent contractor, which desires the follow-on contract, to favor maximum competition, we concur with both parties' desire for increased competition. After comprehensive development of this matter (this is our fifth decision in the 7-year history of the requirement), we must conclude that Commerce's selection of negotiation is essentially based on its fear that under the formalities of advertising a bid may have to be rejected because of an inadvertent mistake, whereas in negotiation that mistake may be allowed to be corrected during discussions; and, since there are perhaps as few as two firms willing to compete for this work, one rejected bid may be most unfortunate.

Our response to Commerce's concerns is (1) such fears in and of themselves do not constitute a valid basis for negotiation, (2) in view of the specific and thorough requirements of the solicitation, a mistake in the bid of one or both of these experienced competitors seems remote, and (3) in the event of a mistake requiring rejection of a bid, the remaining bid need not be accepted if the bidder is not responsible or the price is unreasonable. In the unlikely circumstance that formal advertising should fail, then negotiation may be appropriate.

We have difficulty in understanding why ICC and Commerce - both interested in increasing competition—would object to an extension of the 60-day startup period requested by Informatics—perhaps the only other competitor for a contract which may approach $15 million a year. Informatics felt so strongly about its inability to compete that it did not submit a response to the present solicitation. We expect that Commerce will reasonably extend the startup time in an effort to

increase the competition which it desired to do by issuing the original RFP.

Accordingly, our earlier decision is affirmed.

[B-190632]

Contracts—Negotiation—Offers or Proposals—Expiration—Revival—Protest Action

Disappointed offeror in negotiated procurement is interested party to file protest within meaning of section 20.1, General Accounting Office (GAO) Bid Protest Procedures, even though proposal had allegedly expired, since active pursuit of protest can revive proposal.

Contracts—Protests—Timeliness—Negotiated Contracts—Date Basis of Protest Made Known

Where agency ordering office's unconventional negotiated solicitation document required schedule contractors to furnish copies of already effective contract modifications by specific time, but did not warn that failure to comply would eliminate contractor from consideration for award of orders, protest by contractor following its elimination from procurement is not "based upon" any apparent solicitation impropriety. Rather, protest was timely filed within 10 working days after protester knew basis for protest—elimination from procurement for failure to furnish copy of contract modification.

Contracts—Protests—Procedures—Bid Protest Procedures—Furnishing Information on Protests—Rebuttal by Interested Parties

Contention by interested party (successful offeror) that its ability to respond to protest was hampered because protest correspondence was erroneously sent to branch officer rather than company headquarters is without merit where different representatives of company gave conflicting instructions as to where correspondence should be sent, and in any event company had more than normal 10 working days in which to prepare its comments.

Contracts—Offer and Acceptance—Communication of Offer Requirement—Compliance

In negotiated procurement where schedule contractors were competing for award of orders for particular project, circumstances indicate that protester adequately communicated its offer to perform work, though it did not timely submit copy of modification to its contract as required. Agency was obligated to exert reasonable efforts to verify existence and contents of contract modification.

Contracts—Negotiation—Late Proposals and Quotations—Best and Final Offer—Procedural Deficiencies in Communicating

Where schedule contractors were competing for award of orders and agency required that (1) relevant contract modifications be effected by September 19 and (2) copies of modifications be submitted to agency's ordering office by September 23, accepting late copy of modification or verifying modification was effective as of September 19 would not have amounted to acceptance of "late

proposal," because there was no opportunity for offeror to materially change its offer and thereby gain unfair competitive advantage. Copy requirement was matter of form and waiver by Government would not have prejudiced other offerors.

Contracts — Negotiation — Offers or Proposals — Rejection — Improper

Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations.

In the matter of Computer Sciences Corporation, August 4, 1978:

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This is our decision on a protest by Computer Sciences Corporation (CSC) concerning the General Services Administration's (GSA) selection of the General Electric Company (GE) to receive orders for certain services under a GSA–GE contract. CSC contends that it should have been selected to receive the orders under its contract with GSA. The principal issue involves the reasonableness of GSA's finding CSC technically unacceptable to perform the work as a result of CSC's failure to meet a requirement that contractors furnish copies of any relevant contract modifications to the GSA office conducting the procurement by September 23, 1977.

I. Background

A. MASC's and Ordering Procedure

The services involved in the present procurement are for the Department of the Army's Computer Assisted Map Maneuver System (CAMMS). GSA's Region 6 office in Kansas City, Missouri, selected GE for this work in October 1977, with the expected cost being $733,679 over a 3-year period. The first order ($110,000) for CAMMS services through September 30, 1978, was issued under GE's Multiple Award Schedule Contract (MASC) No. GS-00C-50250 in November 1977.

GE, CSC and other companies have entered into MASC's under GSA's Teleprocessing Services Program (TSP). As provided in Federal Property Management Regulations, Temporary Regulation E-47, August 3, 1976, as amended, TSP is the mandatory method whereby Federal agencies acquire teleprocessing services from the private sector. MASC's are one of the alternatives under TSP whereby agencies can do so.

The MASC's describe in some detail the procedures for selecting a source for services. Briefly, paragraph D.9 of the MASC's provides that the principal evaluation criterion is least systems life cost. Paragraph D.10 provides, among other things, that Government activities selecting a source for a particular order should prepare a description of the services needed, develop and apply technical and cost evaluation criteria, including running any necessary benchmarks, and eliminate from consideration sources which fail to meet the requirements. Selecting which contractor should receive an order, in short, is on the basis of the source which meets the user's requirements at the lowest overall cost to the Government.

B. Initial Phase of Procurement

By letter dated April 6, 1977, an Army procurement official invited CSC to attend a prebenchmark conference concerning the CAMMS project at Fort Leavenworth, Kansas, on April 18, 1977. The letter stated that "Failure to respond in writing (letter or telegraph) [by close of business April 15, 1977] will remove your company from further consideration." A total of 30 MASC vendors was contacted at this time to determine their interest in competing for and capability of satisfying the CAMMS requirement.

The record does not show whether CSC responded in writing to the April 6 letter. However, CSC and other vendors did express interest in competing for the award. CSC, GE, and three other vendors subsequently passed benchmark tests.

While this process was going on, the GSA Project Manager, by letter dated May 16, 1977, asked CSC how it would meet a CAMMS

requirement for 80-percent reliability at the individual user level. The letter pointed out that the reliability currently offered at that level in CSC's MASC was "none," requested a response by May 26, 1977, and warned that failure to respond would eliminate CSC from further consideration for the CAMMS project.

CSC responded to this inquiry and at a meeting with GSA-Kansas City personnel on May 27, 1977, indicated that it would take necessary action to amend its MASC to provide an adequate reliability level. Apparently in confirmation of this meeting, CSC's letter dated June 9, 1977, to the GSA Project Manager stated in part: "CSC INFONET agrees to maintain an available rate in excess of 90% reliability at the user level. INFONET will amend the schedule as agreed upon to meet the CAMMS user reliability requirement."

By letter to CSC dated July 25, 1977, the GSA Project Manager stated:

Re: Multiple Award Schedule Contract Amendment and/or Additional Offerings.

The purpose of this letter is to let you know the position that we must take with amendment to your MASC or additional offering under a MASC that could possibly effect the evaluation of CAMMS economically or technically.

If a vendor has an amendment and/or additional offering for its TSP/MASC filed or will be filed with GSA in Washington, D.C., and may affect the CAMMS evaluation and subsequent systems-life technically or economically, such change(s) must be agreed upon by the vendor and GSA and effective on or before September 19, 1977, 4:30 pm (CDT). A copy of the signed agreement must be sent by the vendor to me so that it is received on or before 4:30 pm (CDT) September 23, 1977.

If you have any questions regarding this information please call me * * * and I will discuss further with you.

GSA states that by letters of the same date, the same information was conveyed to the other competing vendors.

C. CSC Contract Modification

In a letter dated July 29, 1977, to GSA's ADP Procurement Division in Washington, D.C., a CSC representative stated:

Pursuant to a request from the GSA Regional ADP Coordinator in Kansas City, who is processing an MASC competitive selection for the U.S. Army, Computer Sciences Corporation hereby offers to improve its agreement on maintenance of Network Facilities Reliability. Specifically we offer to change our entry in subparagraph H.11.a.(2)(c) from "none" to "90 percent."

Since this change is clearly in the best interests of the Government, I request that we meet as soon as possible to complete the requisite contract modification. Please call me * * * when you can set a meeting.

The record indicates that modification No. 2 to CSC's MASC was signed by the GSA ADP Procurement Division contracting officer (in Washington, D.C.) on August 26, 1977. Aside from the "boilerplate" language of Standard Form 30, the modification reads in its entirety:

The above-numbered contract for teleprocessing Services, Industrial Group 737, Industrial 737, for the period December 17, 1976 through September 30, 1977, is hereby modified as follows:

The response to Subparagraph H.11.a.(2)(c) Network Facilities Reliability

is changed to offer a 90% availability rate for the communications network at the individual user level, in lieu of the original "none" percent availability rate in the current contract.

The record also reflects that at about this time there were a number of conversations between various CSC personnel and the GSA-Kansas City Project Manager. In an affidavit dated March 17, 1978, the same CSC employee who signed CSC's July 29, 1977, letter states that on August 17, 1977, he met briefly with the Project Director and that:

> On that occasion I remarked to him that my letter offer to GSA to change the contract entry in question from "none" to "90 percent" had been converted by GSA into an appropriate contract modification form, which I had signed the previous Friday or August 12, 1977.
>
> I went on to state that I had been advised by GSA that the modification would probably be signed by the Contracting Officer during the next business week.
>
> Mr. Linebaugh [the Project Manager] remarked that it was a load off his mind to know that this problem was out of the way and we didn't have to worry about it anymore.

Another CSC employee (M. Sollenberger) in an affidavit dated March 18, 1978, states that after August 26, 1977, and prior to September 19, 1977, he notified the GSA Project Manager at least once by telephone that CSC's MASC had been amended regarding user-level reliability, and that the Project Manager did not ask him to forward a copy of that amendment by mail. The record also contains a copy of an affidavit dated March 18, 1978, by another CSC employee (G. Bishop), who states he spoke to the Project Manager on several occasions:

> On at least one of these occasions, shortly after the August 26 amendment was signed, I called the Project Manager and informed him we had the approved amendment. He indicated that he had already been made aware of this fact by one of our regional personnel. During these conversations the fact that CSC was going to be disqualified, or was disqualified, from the competition was never brought out. During the week of September 12 * * * I asked the CAMMS Project Manager if there was anything else that we needed to do. His response was "no, you look in good shape." I had several other exchanges of this type, both before and after the cut-off dates. During most of these discussions, I asked "what else can I do?" or "is there anything else I need to do?" Never was a response made that we would be eliminated or were eliminated from the competition.

Another CSC employee (M. Seeb), in an affidavit dated March 8, 1978, states that subsequent to August 26, 1977, and prior to September 23, 1977, he "confirmed" with the Project Manager at least once on the phone and once in person that a CSC contract amendment changing its communications network reliability at the individual user level from none to 90 percent had previously been "approved."

In this regard, GSA's report received by our Office on March 8, 1978, states that while the Project Manager "had been notified of CSC's intent to amend its MASC in a timely manner, he had not, as of September 23, 1977, seen a copy of the executed amendment." The Project Manager, in a memorandum dated March 17, 1978, states

that during the CAMMS benchmark he had contact either by telephone or in person with six CSC employees, including the four who have furnished the above affidavits. The Project Manager states that "At no time during any of these situations did I exclude CSC from meeting the requirements of the 25 July 1977 letter. I did acknowledge their statements saying they had amended their contract. * * *"

As the dates of the foregoing documents indicate, none is contemporaneous with the conversations in question. In addition, the protester has not alleged any statements by any GSA officials explicitly waiving the requirement that a copy of any pertinent contract modification be filed with GSA-Kansas City not later than September 23, 1977. GSA denies that the Project Manager ever indicated to anyone that the September 23 filing requirement was waived and also asserts that one of the Project Manager's superiors who was involved in the procurement frequently reminded all vendors of the September 19 and 23 cutoff dates.

As far as the record shows, CSC did not mail or transmit in any other fashion a copy of its MASC modification No. 2 to the GSA Project Manager in Kansas City by September 23, 1977.

D. Other Contractor's Responses

GSA notes that, like CSC, several other contractors had stated during the procurement that proposed contract modifications had been submitted to the contracting officer in Washington, D.C., but copies of these purported modifications were not received in Kansas City by September 23, 1977. Two vendors, on the other hand, did effect certain contract modifications during the procurement and did furnish copies of the modifications to Kansas City by September 23, 1977.

In this connection, GSA reports that GSA–Kansas City officials met, at GE's request, with GE representatives on September 17, 1977. At the meeting GE asserted, among other things, that its MASC currently provided toll-free access to certain CAMMS sites. GSA states essentially that its officials did not agree with GE's interpretation of the contract, that they declined to negotiate on this subject, and that they refused a GE request to extend the cutoff dates. On September 20, 1977, GSA–Kansas City received a GE letter of the same date which stated in part:

> In order to clarify our communications costs for the CAMMS procurement, General Electric would like to withdraw all previous communications documents which stated costs to the Government.
>
> General Electric will provide toll-free access to all CAMMS exercise locations mentioned in your communications request of 9 May 1977.
>
> We believe that the language in our TSP Schedule Price List provides for extension of toll-free access to new locations, when by management decision,

it is required; the present usage of CAMMS does justify some extensions, and therefore toll-free access is being given where not covered. * * *

We are preparing an amendment to our TSP Schedule Contract to further clarify our position and this amendment will be submitted in sufficient time to be evaluated for the CAMMS procurement.

GSA-Kansas City apparently received a copy of the proposed contract modification mentioned by GE on September 23, 1977. The modification (No. 4 to GE's MASC) was not signed by the GSA contracting officer in Washington until September 29, 1977, and did not become effective until that date.

GSA–Kansas City states that it maintained an "open door" policy and that the September 17 meeting was similar to meetings held with other vendors. It appears that there were approximately 30–40 such meetings with vendors during the procurement.

E. Final Evaluation and Selection

After September 23, 1977, GSA–Kansas City went through a final evaluation and selection process. An initial "findings and determinations" (source selection) memorandum dated October 7, 1977, was later superseded by a selection memorandum dated October 25, 1977.

In arriving at his determination, the GSA official making the selection considered the fact that during the procurement several offerors had submitted letters which, if considered as part of their offers, could affect their eligibility for award or their costs. These included CSC's June 9, 1977, letter, *supra*, concerning reliability at the user level; GE's September 20, 1977, letter, *supra*, concerning toll-free access; a letter from a third vendor dated September 22, 1977; and a letter from a fourth vendor dated July 8, 1977. None of these letters were accompanied by copies of MASC modifications which had become effective not later than September 19, 1977, nor were copies of such effective contract modifications furnished to GSA–Kansas City by September 23, 1977.

The October 7 selection was on the basis that the various letters including CSC's and GE's could be considered either as price reductions under section D.19 of the MASC's or as "management decisions" resulting in reduced costs under section H.4.F. of the MASC's. On this basis, GE's system life cost for CAMMS ($733,679) was lower than any other vendor's.

However, after consulting with GSA-Washington, the selection official, as noted in his October 25 statement, decided that the various letters could not be accepted under either section D.19 or H.4.F. in the absence of contract modifications implementing their contents. Apparently, there was doubt that the offerings in the letters would be contractually enforceable absent contract modifications. On this basis, GE was the technically acceptable vendor with the lowest system life

cost ($1,445,872). Though CSC's cost was lower ($1,061,467) it was considered technically unacceptable because it had not submitted by September 23, 1977, a copy of a contract modification increasing its reliability at the user level as CSC's June 9 letter had indicated would be done.

The October 25, 1977, selection memorandum concluded:

> If all of the letters referred to above could be accepted by the Project Manager under MASC Sections D.19 and/or H.4.F, then the GE MASC should be selected for CAMMS support with an evaluated systems life cost of $733,679. If none of the letters referred to above can be accepted by the Project Manager (for reasons discussed above), then the GE MASC be selected for CAMMS support with an evaluated systems life cost of $1,445,872.
>
> As evident from the above, insofar as the selection of a MASC for CAMMS support is concerned, the question of acceptability of the various letters referred to above under MASC Section D.19 and/or H.4.F is mute; in that the GE MASC would be selected in any case. Further, because the GE MASC has in fact been amended (albeit subsequent to the 9/19/77 cutoff date) to provide the additional services at no additional cost (referred to in the GE letters dated 9/20/77), CAMMS support under the GE MASC would be provided at the lower systems life cost of $733,679 regardless of whether the selection is based on that figure or the higher "evaluation" figure of $1,445,872.

Both GSA and GE assert that the selection was actually based upon GE's system life cost of $1,445,872.

We note in this regard that if the source selection official had considered the fundamental "cutoff" for source selection purposes to be the actual contract modifications which had become effective not later than September 19, 1977, regardless of whether GSA-Kansas City had received copies of such modifications by September 23, 1977, CSC would have been technically acceptable and its evaluated systems life cost of $1,061,467 would have been lowest. GE's cost would have been $1,445,872, because it was not until GE's contract modification No. 4 became effective on September 29, 1977, that GE's cost was effectively reduced to $733,679.

Finally, the selection official has indicated that on September 22, 1977, he contacted GSA–Washington to explore the possibility of independently verifying which vendors had effected contract modifications by September 19, 1977. He was told essentially that such requests had a lower priority in relation to GSA–Washington's other work, but that higher priority could possibly be given if it was necessary to check only one modification to one vendor's MASC.

II. Procedural Issues

A. Is CSC an Interested Party to File Protest?

GE questions the "standing" of CSC to file a protest under our Bid Protest Procedures, 4 C.F.R. Part 20 (1977). GE alleges that the expiration of CSC's MASC on September 30, 1977, and its replacement

by a modified MASC on October 6, 1977, operated as a total revocation of CSC's offer to the Government, and that CSC was therefore legally ineligible for award at the time GSA selected a contractor for the CAMMS project (October 28, 1977).

4 C.F.R. § 20.1 provides that an "interested party" may protest to our Office the award of a contract by a Federal agency. The fact that a proposal has expired does not mean the offeror is not an interested party to protest, because by actively pursuing a protest the offeror can revive its proposal. *Riggins & Williamson Machine Company, Inc., et al.*, 54 Comp. Gen. 783, 789 (1975), 75–1 CPD 168. In any event, CSC points out that its fiscal year 1977 MASC was renewed by GSA effective October 1, 1977. CSC is sufficiently interested to file a protest with our Office.

B. Is CSC's Protest Timely?

GSA contends that the protest is untimely because section 20.2(b)(1) of our Bid Protest Procedures provides that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the bid opening or closing date for receipt of proposals must be filed prior to bid opening or the closing date for receipt of proposals. GSA interprets the protest as being based upon the establishment in GSA's July 25, 1977, letter of the requirement that copies of contract modifications be filed in GSA's Kansas City office by September 23, 1977. The agency believes that its July 25, 1977, letter was either an "adverse agency action," or established an apparent solicitation impropriety which CSC was required to protest prior to the time for filing the modifications.

By definition (4 C.F.R. § 20.0(b) (1977)), adverse agency action occurs only after a protest has been filed with an agency. GSA's July 25, 1977, letter cannot be an adverse agency action because CSC had not filed a protest with GSA prior to July 25.

Further, we do not think the protest is based upon any alleged impropriety in the solicitation which reasonably should have been apparent to CSC prior to September 23, 1977. GSA cites in this connection several cases where protesters, after submitting proposals, contended that the Government's requests for proposals (RFP's) had not allowed them sufficient time to prepare their proposals (e.g., *Unicare, Inc.*, B–181982, September 4, 1974, 74–2 CPD 146, and *United Terminals, Inc.*, B–186034, April 27, 1976, 76–1 CPD 286). Such protests are untimely because (1) the closing date for receipt of proposals is explicitly set out in the RFP and is well known to be a firm cutoff unless extended, and (2) an offeror at the time it is preparing its proposal is in a position to reach a decision whether it believes the RFP allows

sufficient time for proposal preparation or not. Thus, such protests are based upon alleged solicitation improprieties which were "apparent," and, as GSA correctly points out, an offeror cannot acquiesce in the ground rules of the procurement and protest those ground rules later when award has been made or is about to be made to another offeror. See *Kappa Systems, Inc.*, 56 Comp. Gen. 675, 687 (1977), 77-1 CPD 412.

However, it does not logically follow that every protest filed after submission of proposals concerning compliance with an RFP provision which was stated in mandatory terms is essentially based upon an apparent solicitation impropriety and is likewise untimely. A protest is "based upon" a solicitation impropriety only if, considering the nature of the solicitation provision, the impropriety reasonably should have been apparent to the offeror before it submitted its proposal. In other words, an offeror preparing its proposal cannot reasonably be expected to anticipate every conceivable way in which an agency might somehow misapply or misinterpret mandatory solicitation provisions. If RFP provisions are somewhat unclear or are subject to intepretation as to how they might be applied in any of a variety of concrete factual situations which might arise during a procurement, a protest after award challenging the way the provisions were applied during the evaluation and selection process may be considered timely. See, generally, *Computer Machinery Corporation*, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358; *Amram Nowak Associates, Inc.*, B-187253, November 29, 1976, 76-2 CPD 454; *Telos Computing Inc.*, 57 Comp. Gen. 370 (1978), 78-1 CPD 235.

It is noteworthy that the present procurement did not involve a conventional solicitation document such as an RFP. The pertinent solicitation document was GSA's July 25, 1977, letter which required that copies of contract modifications be filed in Kansas City by September 23, 1977. The letter did not warn that failure to do so would result in an offeror being eliminated from the competition. In these circumstances, we see no reason why an impropriety in the solicitation reasonably should have been apparent to CSC prior to September 19, 1977.

The applicable standard for determining the timeliness of CSC's protest is 4 C.F.R. § 20.2(b)(2), i.e., protests other than those based upon apparent solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. CSC timely filed its protest within 10 working days after it was advised by GSA in November 1977 why it had been eliminated from consideration.

C. Did GE Receive Opportunity to Comment?

GE has complained several times that its ability to respond to the protest was hampered because pertinent protest correspondence was erroneously forwarded to its Washington, D.C., sales office rather than to the cognizant GE headquarters office in Rockville, Maryland. In this regard, we do not know what instructions GE gave to GSA or to the protester about where to forward correspondence. However, our Office began forwarding protest correspondence to the GE Washington office on November 23, 1977, at the request of a GE representative in that office. We continued to send correspondence to that office until March 9, 1978 (approximately 1 month before the record in the case closed), when we were informed for the first time by a GE representative at Rockville that GE wanted all correspondence sent to its Rockville office.

In these circumstances, we see no merit in GE's complaint. It is up to GE to decide where it wants protest correspondence sent and to advise other parties accordingly. In addition, the record shows that GE had more time to prepare its comments in this case than the normal amount of time (10 working days) provided in our Bid Protest Procedures for commenting on an agency report (4 C.F.R. § 20.3(d)).

III. Substantive Issue

A. Protester's Position

CSC believes that the requirement established in the GSA Project Manager's July 25, 1977, letter that copies of any pertinent contract amendments be filed with GSA's Kansas City office by September 23, 1977, was, under the circumstances, a mere formality. The protester stresses there is no question that its MASC had been effectively amended before the cutoff date to provide the reliability level GSA had required and asserts that its contract could not be "unamended" for failure to send a copy to a particular GSA official.

Further, CSC believes it cannot be seriously contended that it was too great an administrative burden for GSA–Kansas City to check with GSA–Washington and confirm the existence of contract amendments effective as of September 19, 1977, particularly since only five vendors were competing in the procurement and CSC's amendment involved such a simple change to its contract. The protester believes that to eliminate a vendor from consideration for a million dollar award in these circumstances—where the GSA Project Manager had repeatedly received oral advice that CSC's contract amendment was being accomplished, and where the Project Manager's July 25, 1977, letter (contrary to two prior requests for information from the con-

tractors) had included no warning about the consequences of failure to submit a copy of a contract amendment—is a decision which exalts form over substance, and represents an abuse of the agency's procurement authority which cannot be allowed to stand.

B. Agency's Position

GSA believes this case is analogous to a late proposal situation. The agency points out that it is well established that to insure fairness to all offerors in a negotiated procurement, there must be a common cutoff date for submission of best and final offers, and that proposals not submitted on time must be rejected, citing 48 Comp. Gen. 583, 592 (1969), 50 *id.* 1 (1970), 50 *id.* 117 (1970), 52 *id.* 161 (1972) and other authorities. The agency states that "firm ground rules" therefore had to be established in the present procurement, and that GSA attempted to accomplish this by the Project Manager's July 25, 1977, letter which set common cutoff dates applicable to all vendors. GSA maintains that consistent with the ground rules, any contract amendments received after the cutoff dates were properly treated as late and were not considered. To do otherwise, the agency believes, would have been prejudicial to vendors which submitted copies of their amendments on time. The agency reasons that CSC's only effective offer was its MASC and amendments thereto which had been received by GSA-Kansas City prior to the September 23, 1977, cutoff date, which, however, did not satisfy the Army's technical requirements because it provided reliability at the user level of "none." Thus, in GSA's view CSC was necessarily rejected as technically unacceptable, and GE was properly selected as the technically acceptable vendor with the lowest cost.

GSA points out that the requirement for contractors to furnish pertinent MASC information to the local ordering office is not inconsistent with the MASC's, and that this requirement was established because it would be too great an administrative burden for the GSA Washington headquarters to distribute this information. GSA notes that there are 32 MASC's in existence, and that over 500 delegations of authority to use the Teleprocessing Services Program have been made.

Further, the agency maintains that GSA-Kansas City could not rely on oral notification of a contract modification (and subsequent documentary proof) because this would not have allowed proper analysis and evaluation within the very short amount of time allotted for the evaluation in this case (September 23–September 30, 1977). It was anticipated that the CAMMS services would begin on October 1, 1977. The agency points out that a contract modification might be complex or contain carefully worded stipulations or conditions.

GE, similarly, comments that under the MASC's selections must be made based upon the information made available by the contractors

to the ordering offices, as indicated by paragraphs D.17 and D.18 of the MASC's which obligate contractors to distribute their pricelists and amendments thereto to ordering offices.

C. Discussion

The essential facts in the case are reasonably clear. A GSA ordering office in Kansas City conducted a procurement which was to lead to the selection of one of several schedule contractors to receive orders for certain services. The ordering office required that the competing contractors (1) accomplish any contract modifications pertinent to the procurement not later than September 19, 1977, with the GSA office in Washington, D.C., responsible for processing such modifications, and (2) provide copies of such modifications to Kansas City not later than September 23, 1977.

The ordering office had told the protester that for the purposes of this procurement it was technically deficient in one respect (reliability at the user level). The protester replied in writing that it would modify its contract to correct this deficiency and did so well before September 19. There were oral statements by the protester to the GSA official conducting the procurement in Kansas City that the modification had been accomplished. However, the protester failed to furnish a copy of the modification to Kansas City by September 23.

Reasoning that the selection had to be based on the results as of the two "cutoff" dates, the ordering office decided that—due solely to the fact that a copy of the contract modification described by the protester had not been received—the protester was technically unacceptable, and selected GE as the technically acceptable vendor with the lowest cost. Subsequent to September 23, a GE contract modification had the effect of reducing its costs below the figure at which the agency states the selection was made.

We believe the basic issue in the present case is whether CSC made an offer prior to September 19, 1977, to perform the required services for the CAMMS project, including reliability at the user level of 80 percent or better. An offer to be effective must be communicated to the offeree. 37 Comp. Gen. 37 (1957). We think the offeree here was not the GSA Washington office which processed CSC's contract modification, but the GSA-Kansas City office which was conducting the CAMMS procurement.

In formally advertised procurements, as in 37 Comp. Gen. 37, there are rather strict rules as to how the communication of bids is to be accomplished. Negotiated procurements are characterized by greater flexibility, although it is required that proposals be submitted by a common cutoff date. In the present case, the Project Manager's July 25, 1977, letter amounted to a notification that "best and final"

offers had to be finalized by the cutoff date of September 19, 1977. The letter further required that any portion of those offers not already in the hands of the procuring office be furnished not later than September 23, 1977. There was no warning that failure to comply with this communication requirement might or would result in the rejection of an offer.

Considering CSC's participation in the procurement through its letters, satisfactory performance of the benchmark tests, execution of contract modification No. 2 and oral advice to GSA-Kansas City concerning the modification, there is no question that GSA-Kansas City was on notice of an offer by CSC to perform the CAMMS services. That CSC's failure to comply with the formalities of communication required by the agency was not a material defect in its offer is also clear. If GSA-Kansas City had issued an order to CSC on September 24, 1977, without having received a copy of CSC's contract modification No. 2, there is no question that CSC would have been obligated to furnish the CAMMS services with reliability at the individual user level of 90 percent because CSC in finalizing its offer prior to the September 19 cutoff date had contractually obligated itself to do so by modifying its contract.

In these circumstances, we believe it was incumbent upon the responsible GSA officials in Kansas City to make reasonable efforts to verify the contents of CSC's offer to the extent necessary. The principle involved is similar to cases where it has been held that reasonably available descriptive data on file with the Government before bid opening may properly be used to establish whether the product bid is equal to a brand name product (see *Cummins-Wagner Co., Inc., et al.*, B-188486, June 29, 1977, 77-1 CPD 462 and decisions cited), or a situation where reasonable efforts to examine prior contract drawings referenced in a bid may resolve a bid ambiguity (*Sentinel Electronics, Inc.*, B-185681, June 24, 1976, 76-1 CPD 405).

In this connection, the "late proposal" analogy advanced by GSA is inapposite. The rationale underlying strict application of the late proposal (and late bid) rules is to prevent even the slightest possibility of any offeror gaining an unfair competitive advantage by being able to make material changes in its offer after the cutoff date and time. As already indicated, the offers in this case consisted of the submissions made to GSA-Kansas City during the procurement along with the contract modifications implementing those submissions which had been made effective not later than September 19, 1977. For GSA-Kansas City to have verified the existence of a contract modification which had been made not later than September 19, 1977, or to have accepted a late copy of such a modification, would not have involved

any material change whatsoever in the offer; in other words, whether an offeror met the "copy requirement" could not affect the price, quality, or quantity of its offer. The copy requirement was a matter of form, established for the Government's convenience to expedite the evaluation of offers. For the Government to waive a solicitation requirement of this kind for an offeror which failed to comply works no prejudice to other offerors which did comply. See, in this regard, 40 Comp. Gen. 321, 324 (1960).

Further, we are not persuaded that GSA–Kansas City made reasonable efforts to verify the contents of CSC's offer. Initially, the argument that it was impracticable to verify the existence of contract modifications because the selection was to be made within a week after September 23, 1977, is completely undercut by the fact that GSA-Kansas City spent 5 weeks evaluating the offers and making a selection. During this time, GSA–Kansas City was in contact at least twice with GSA–Washington to obtain advice concerning the procurement. Further, the protester has obtained and submitted a copy of a memorandum dated October 17, 1977, by an Assistant Commissioner of GSA's Automated Data and Telecommunications Service in Washington, D.C. The memorandum shows that GSA–Washington examined the contracts of the five vendors competing in the CAMMS procurement to determine, among other things, what contract modifications were in effect by September 19, 1977.

There was a total of eight such modifications. Copies of some of these had been submitted to GSA–Kansas City by September 23, 1977. However, GSA states that in addition to CSC, three vendors had indicated that contract modifications relevant to the procurement were being processed, but had failed to submit copies of the modifications to Kansas City. In this regard, it seems clear from the record that the possible modifications spoken of by two vendors (GE and Control Data Corporation) could not have become effective by September 19, 1977. Also, it became clear at an early stage in the evaluation that regardless of possible modifications by a third vendor (United Computing Services, Inc.), its evaluated system life cost would not be lowest in any event. This left only one pre-September 19 modification needing verification—CSC's. Considering the extremely simple nature of this modification, we believe it is clear that with a reasonable effort its existence could have been verified by GSA–Kansas City.

For the foregoing reasons, we believe GSA's decision to reject CSC's offer as technically unacceptable clearly had no reasonable basis. It is apparent that but for the lack of reasonable efforts by GSA to verify the contents of CSC's offer, CSC would have been considered technically acceptable. It is also apparent that under GSA's own reason-

ing in making the selection, had CSC been technically acceptable it would have been the vendor selected, because its evaluated system life cost was lower than the cost figure which was the basis for selecting GE. The fact that a GE contract modification effective September 29, 1977, had the result of further reducing the costs the Government expected to pay for the CAMMS services is immaterial, as this modification was not accomplished prior to the September 19, 1977, cutoff date.

IV. Conclusion and Recommendation

The protest is sustained. In view of this conclusion, it is unnecessary to address other issues raised by the protester.

GSA has furnished an estimate that as of March 16, 1978, it would cost $290,657 to change from GE to CSC as the CAMMS vendor ($17,500 changeover costs plus $273,157 differential between GE and CSC estimated costs for the period April 1978– September 1980). The $290,657 figure does not include the amounts, if any, which GE might recover as a result of any claims against the Government.

GE suggests that any termination for convenience under the circumstances of this protest would be wrongful and would entitle it to recover damages in the form of its anticipated profits. In this regard, the law is clear that settlement of a termination for convenience does not include anticipated profits. See FPR § 1–8.303(a) (2d ed. amend. 103, March 1972) and *Nolan Brothers, Incorporated* v. *United States*, 405 F. 2d 1250 (Ct. Cl. 1969). Even in cases where the Court of Claims believed that the Government had wrongfully canceled contracts (*John Reiner & Co.* v. *United States*, 325 F. 2d 438, *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Ct. Cl. 1963)) recovery of anticipated profits was not allowed.

Further, we note that section D. 11 of the MASC's provides in pertinent part:

> e. *Termination of Orders by the GSA Contracting Officer.*
>
> The right is reserved by the GSA Contracting Officer to terminate orders for services under this contract. One basis for a termination of an order by the GSA Contracting Officer is the failure of the ordering agency to reimburse GSA for payments to the Contractor from the GSA ADP Fund. [Italic in original.]

We recommend that GSA either (1) expeditiously terminate any orders for CAMMS services issued under GE's MASC and order any further requirements for these services under CSC's MASC, or (2) reopen negotiations, establish a new common cutoff date, make a selection, and terminate any orders issued under GE's MASC in the event a contractor other than GE is selected. By letter of today, we are advising the GSA Administrator of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees

on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-191927]

Pay—Promotions—Temporary—Saved Pay—Items for Inclusion or Exclusion

A Navy enlisted member appointed as a temporary officer under 10 U.S.C. 5596 (1976) may not receive an Incentive Bonus authorized for officers under 37 U.S.C. 312c in addition to the "saved pay and allowances" of an enlisted member. Such bonus is only an item of pay of the temporary officer grade to which the member is appointed or promoted. However, if his pay and allowances entitlement in his officer status, including the bonus, exceeds his pay and allowances as an enlished member (under saved pay) he is entitled to be paid as an officer including the Nuclear Career Annual Incentive Bonus.

In the matter of Ensign Fredric F. Feldhaus, USN, August 4, 1978:

The question to be decided in this case is whether a Navy enlisted member serving as a temporary officer but receiving the "saved pay and allowances" of an enlisted member, may be paid the Nuclear Career Annual Incentive Bonus which is authorized only for officers.

The question was presented by letter dated April 12, 1978 (NFO-1), from the Officer in Charge, Navy Finance Office, New London, Connecticut, concerning a payment to be made to Ensign Fredric F. Feldhaus, USN, 277-34-5550, and has been assigned submission number DO-N-1290 by the Department of Defense Military Pay and Allowance Committee.

The member was appointed a temporary officer pursuant to 10 U.S.C. 5596 (1976), subsection (f) of which states in pertinent part:

* * * A person receiving a temporary appointment under this section may not suffer any reduction in the pay and allowances to which he was entitled because of his permanent status at the time of his temporary appointment, or any reduction in the pay and allowances to which he was entitled under a prior temporary appointment in a lower grade.

In implementation of 10 U.S.C. 5596(f), the Department of Defense Military Pay and Allowances Entitlements Manual, paragraph 10222 states in part that such a temporary officer may be paid at all times while serving the greater of:

(1) The pay and allowances of the grade to which appointed or promoted, or (2) The pay and allowances to which he was entitled at the time his appointment or promotion became effective * * *.

Under those provisions of law and regulations the member in this case is receiving the pay and allowances of his enlisted status presumably since that is a greater amount than the pay and allowances he could receive as an officer.

The question, in effect, is whether it is proper to construe the Nuclear Career Annual Incentive Bonus as an item of an officer's pay and allowances in determining saved pay, or whether an officer may draw the pay and allowances of an enlisted member (under saved pay) and also be entitled to receive the Nuclear Career Annual Incentive Bonus.

The Nuclear Career Annual Incentive Bonus is an item of "special pay," authorized under 37 U.S.C. 312c to be paid annually to certain *officers* of the naval service. It is not payable to enlisted members. Both 10 U.S.C. 101(27) and 37 U.S.C. 101(21) define the term "pay" to include special pay. We have held that special pay (proficiency pay) authorized an enlisted member may be paid to a temporary officer as part of the saved pay to which he was entitled in his enlisted status. 48 Comp. Gen. 12 (1968). Conversely, the special pay in this case authorized to the member in his officer status may not be paid to him in addition to his enlisted pay.

While the pay and allowances to which a member was entitled in his permanent grade at the time of his temporary appointment are not to be reduced by reason of the temporary appointment, the savings provision does not authorize a subsequent increase in the amount of the pay and allowances of the permanent grade so that the member would receive more than he was entitled to at the time of the temporary appointment and also more than the pay and allowances to which he would be entitled by reason of his temporary position. 47 Comp. Gen. 491, 493 (1968) and cases cited therein. Consequently, an officer may not draw the pay and allowances of an enlisted member under saved pay and be entitled to receive an officer's Nuclear Career Annual Incentive Bonus. Such bonus, if otherwise proper, is only an item of the pay and allowances of the temporary grade to which the member is appointed or promoted. However, if the member's entitlement to pay and allowances as an officer, including the bonus, exceeds his saved pay entitlement, he should be paid as an officer. 47 Comp. Gen. 491.

The question is answered accordingly.

[B-103315]

Transportation—Travel Agencies—Use Approved

Official passenger travel may be purchased from travel agents where American-flag carriers cannot furnish the transportation and it is administratively determined that substantially lower air fares are offered through the travel agents.

In the matter of procurement of official overseas air travel from travel agents in foreign countries, August 7, 1978:

The Agency for International Development (AID), Department of State, requests an exception from regulations which prohibit the use of travel agents in the procurement of official passenger travel except when the travel cannot be purchased from branch offices or general agents of American-flag carriers in foreign countries. See 4 C.F.R. 52.3 (1977); 6 Foreign Affairs Manual 128.2–1 (1970).

The Director of the AID office in Thailand reports that personnel of his office are involved in substantial foreign travel in Southeast Asia, the majority of which cannot be furnished by American-flag carriers. He points out that by adhering to a policy of purchasing this transporation from branch offices and general agents of American-flag carriers, the Government is paying fares published by the International Air Traffic Association (IATA) which he reports are approximately 30 percent higher than the fares available from a number of reputable travel agents for the regional travel furnished by foreign-flag carriers. AID requests that an exception be made in the regulation to authorize procurement of official passenger travel from the travel agents where American-flag carriers do not furnish any part of the transportation and lower air fares are available through the travel agents.

In 47 Comp. Gen. 204 (1967), the use of travel agents was authorized where it was administratively determined that the group travel arrangements available from travel agents offered substantial savings over regular air fares. Tickets for the transportation were to be purchased by the traveler, and appropriate travel advances to cover the cost of the procurement were authorized. Government transportation requests were not to be used.

Subsequent to that decision, however, Congress passed the International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93–623, 88 Stat. 2102 (1975), 49 U.S.C. 1517. Section 5 of that Act, known as the "Fly America Act," requires among other things, that all Government-financed air travel of passengers and property, between two places outside the United States, be on American-flag carriers to the extent service on those carriers is available. The Act further requires the Comptroller General to disallow any expenditure from appropriated funds for payment of air transportation to a foreign-flag carrier unless there is a showing of satisfactory proof of the necessity for the use of the foreign-flag carrier.

AID advises that American-flag carriers are and will continue to be used where those carriers can perform all or any part of the trans-

portation. AID further advises that it has been administratively determined that substantial savings will accrue to the Government if official passenger travel is purchased from reliable travel agents instead of from the branch offices and general agents of American-flag carriers which do not furnish any part of the actual transportation.

Based on the information that American-flag carriers do not furnish the transportation under consideration, and that it has been administratively determined that substantial savings accrue to the Government, the procurement of official passenger travel from the travel agents is approved.

[B-191351]

Compensation—Periodic Step-Increases—Waiting Period Commencement—Promotion and Demotion

The rules governing waiting periods for step increases on resumption of former grade and step following a temporary promotion are not for application where an employee is demoted under an adverse action from a permanent promotion position and returned to his former grade and step in which he performed satisfactorily.

Compensation—Periodic Step-Increases—Equivalent Increases—What Constitutes

Where an increase in pay on promotion constitutes an equivalent increase under 5 U.S.C. 5335(a)(3)(A) and Subchapter S4-8(b), FPM 990-1, the effective date of such promotion would be the inception date for a new waiting period, and the fact that employee was demoted and returned to his former grade and step would not negate the promotion date as the inception date of that new waiting period for a periodic step-increase in the lower grade.

In the matter of Robert L. Morton—periodic step-increase, August 7, 1978:

This action is in response to a letter dated February 16, 1978, reference 953, from Ms. Josephine Manzanares, Authorized Certifying Officer, Bureau of Reclamation, Department of the Interior, requesting an advance decision concerning the waiting period for a within-grade increase and the proper timing for the granting of such increase in the case of Mr. Robert L. Morton, a former Bureau of Reclamation employee who transferred to the Department of Energy, effective October 1, 1977.

The submission states that on September 29, 1974, the employee was granted a within-grade increase from the eighth to the ninth step of grade GS-11, in his position as power area dispatcher, 301 series. Under normal circumstances, his next within-grade increase would not have been due until September 25, 1977, to satisfy the 3-year waiting period requirement contained in 5 U.S.C. 5335(a)(3). However,

on November 9, 1975, the employee was promoted to grade GS–12 as Chief, Fort Peck Area Dispatching Field Branch, in the same series, with his salary set at the fifth step of that grade.

The submission states that the employee served in that capacity until July 19, 1977, when he was downgraded under an adverse action to his former position of grade GS–11. Based upon Department of Interior Regulation 370 DM 531.2.1, the employee was returned to and resumed the pay of the ninth step of grade GS–11 because it was determined that he had formerly held and satisfactorily performed the duties of that position during his continuous period of service. However, the question has been raised as to the correct timing of the granting of the employee's next within-grade increase to step 10.

According to the submission, the personnel office serving the employee is of the opinion that based on the last sentence of the beforecited provisions of the Department of Interior regulation, his promotion to grade GS–12 should be treated in the same manner as a temporary promotion, that is, for the purpose of the waiting period for the within-grade increase at the lower grade, treating the promotion as though it never occurred. This would permit the employee to be eligible for a within-grade increase to the tenth step of grade GS–11, effective September 25, 1977.

In contrast to that position, the payroll office of the Bureau of Reclamation expresses the view that the employee's promotion to grade GS–12 may not be disregarded and the rules governing temporary promotions are inapplicable since the position to which promoted and from which demoted was a permanent position. As a result, it is believed that under the equivalent increase rule the date of promotion would begin a new waiting period for his next within-grade increase at the lower grade. It is suggested, however, that two possible dates for the granting of his next within-grade increase exist: (1) two years from the effective date of his promotion to grade GS–12 (November 9, 1975), in recognition of the fact that he was promoted to and served in step 5 of that grade; or (2) 3 years from the effective date of his promotion to grade GS–12 because he was in the ninth step of grade GS–11 at that time.

The Department of Interior Regulation 370 DM 531.2.1, provides as follows:

Subchapter 2. *Determining Rate of Basic Compensation*

.1 *General Provisions*

A. If a change to a lower grade is the result of unsatisfactory performance, adjustment shall be made to the minimum rate of the lower grade, unless the employee is changed to a position formerly held during his current continuous period of service and he performed the duties of that position satisfactorily. In the latter case, pay may be adjusted to any rate which does not exceed the rate the employee would have attained in the position to which he is being changed had he remained therein.

The foregoing provisions are based on Subchapter S2-4a(2) of Book 531, Federal Personnel Manual (FPM) Supplement 990-1, which provides in part in subsection (c) thereof that:

(c) * * * when an employee is * * * demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate * * *.

It is clearly evident that the Department of Interior regulations reasonably establishes the rate of pay payable to an employee on demotion at a specific rate not to exceed his highest previous rate as authorized by the FPM. However, notwithstanding the language of the last sentence thereof, wherein it states that the rate will not exceed the rate the employee would have attained in the position to which changed had he remained therein, it is our view that such language does not create an entitlement in the employee to use all of the time since first attaining the ninth step of grade GS-11, as part of the waiting period for a periodic step-increase required under the provision of 5 U.S.C. 5335(a)(3).

With regard to the waiting period for periodic step increases, 5 U.S.C. 5335 provides in part that:

(a) An employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade in which his position is placed, shall be advanced in pay successively to the next higher rate within the grade * * * following the completion of—

* * * * * * *

(3) each 156 calendar weeks of service in pay rates 7, 8 and 9; subject to the following conditions:

(A) the employee did not receive an equivalent increase in pay from any cause during that period * * *.

Based on the foregoing Code provisions, Subchapter S4-7b of Book 531 of FPM Supplement 990-1 provides in part that:

(b) A waiting period begins:

* * * * * * *

(3) on receiving an equivalent increase.

Subchapter S4-8(b) of Book 531 of FPM Supplement 990-1 describes an equivalent increase as an increase or increases in an employee's rate of basic pay equal to or greater than the amount of the within-grade increase for the grade in which the employee is serving.

When the employee was promoted from grade GS-11, step 9 to GS-12, step 5 in November 1975, his increase in pay by that promotion constituted an equivalent increase and, thus, would be the inception date for a new waiting period. The fact that the employee was later demoted and returned to his former grade and step would not negate the new waiting period since at the time the promotion was proper and he received the benefits thereunder.

Therefore, Mr. Morton's new waiting period for a periodic step-increase to step 10 of grade GS-11 extends for 3 years from the effective date of his promotion to grade GS-12.

[B-190185]

Transportation—Bills of Lading—Description—Presumption of Correctness

Description on bill of lading is not necessarily controlling in determining applicable rate; important fact is what moved, not what was billed.

Transportation—Rates—Classification—Character at Time of Shipment

Nature and character of each shipment at time it is tendered to carrier determines its status for rate purposes.

Transportation—Rates—Classification—Factors for Consideration

Significant facts which weigh heavily in classifying shipment for rate purposes are producer's description of article for sales purposes, manner in which it is billed, its use and value, how it is regarded in the trade.

Transportation—Rates—Classification—More Than One Use for Article—Predominant Use Determinative

Where an article has more than one use, the predominant use determines its character for rate purposes.

Transportation—Rates—Classification—More Than One Applicable Description

Carrier is correct in its contention that commodity shipped is properly described as insulating material, NOI, and not as vermiculite, other than crude, where Federal Specification and sales pamphlets characterize it as such and where advertising pamphlets indicate that commodity is regarded in the trade as insulating material.

In the matter of Navajo Freight Lines, Inc., August 8, 1978:

Navajo Freight Lines, Inc. (Navajo), in a message dated January 13, 1978, requests that the Comptroller General of the United States review the General Services Administration's (GSA) action on two of its bills for transportation charges (Navajo Claims Nos. 107828 and 60437). See Section 201(3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b) (Supp. V, 1975). GSA, after auditing the bills, notified Navajo of overcharges of $4,318.14 and $885.30, for a total of $5,203.44. In the absence of refund, both overcharges were deducted from other monies due Navajo.

Under regulations implementing Section 201(3) of the Act, a deduction action constitutes a reviewable settlement action. 4 C.F.R.

53.1(b) (1), (2) and 53.2 (1977). Navajo's message complies with the criteria for requests for review of that action. 4 C.F.R. 53.3 (1977).

GSA reports that its action was taken on two shipments transported from the GSA Federal Supply Service, Fort Worth, Texas, to Lyoth, California, and to Stockton, California. The shipments moved on Government bills of lading (GBL) Nos. P-7191699 and D-7746350, respectively. The commodity transported is described on the GBLs as "INSULATING MATERIAL NOI; STOCK OR PART NO. 5640008014176" or "STOCK OR PART NO. 56401806623."

Navajo collected freight charges of $1,199.70 on the shipment moving under GBL No. D-7746350 based on the class rating applicable to "insulating material, NOI." Item 103300 of the National Motor Freight Classification (NMFC) lists several less-than-truckload ratings on insulating material, NOI, based on the density of the commodity as packed for shipment. GSA audit action was based on a class rating applying to a commodity described in item 48510 of the NMFC as "vermiculite, other than crude," which provides a lower rating than those on insulating material, NOI. Vermiculite is classified in the NMFC under the generic heading "Clay Group." This lower rating produced total transportation charges of $314.40 for an overcharge of $885.30, which was assessed against Navajo.

For the shipment moving under GBL No. P-7191699, Navajo collected freight charges of $4,833.97, also based on the class rating applying to "insulating material, NOI." GSA determined in its audit that lower transportation charges of $515.83 were available to the Government based on Item 7521 of Rocky Mountain Motor Tariff Bureau, Inc., Agent, U.S. Government Quotation ICC RMB Q17-B. Item 7521 applies to "FREIGHT ALL KINDS, EXCEPT THE FOLLOWING ARTICLES: * * * INSULATING MATERIAL AS DESCRIBED IN ITEMS 103300 THRU 103416 OF NMF [NMFC] 100. * * * *" Navajo contends that the commodity shipped was insulating material and that Item 7521 does not apply.

The issue here is whether the commodity described on both bills of lading is classified for rate purposes as vermiculite, other than crude, as contended by GSA, or as insulating material, NOI, as contended by Navajo.

The commodity shipped was described on both of the GBL's as "Insulating Material, NOI." And GSA correctly states a well-settled principle of transportation law that the description on the bill of lading is not necessarily controlling in determining the applicable rate to be applied. The important fact is what moved, not what was billed. *Mead Corp.* v. *Baltimore & Ohio R.R.*, 308 I.C.C. 790, 791 (1959); 57 Comp. Gen. 155 (1977); 53 *id.* 868 (1974); 52 *id.* 924 (1973).

GSA contends that vermiculite has many and varied characteristics and uses other than that of insulating material. GSA refers to *Webster's Third International Dictionary*, which describes expanded vermiculite as a "lightweight highly water-absorbent material that is used in seedbeds as a mulch, in plaster, mortar and concrete as a substitute for sand, and as an insulating material in walls, floors and ceilings."

GSA contacted the Traffic Manager for Strong-Lite Products (Strong-Lite), Pine Bluff, Arkansas, one of the contractors furnishing vermiculite to the Government. The Traffic Manager furnished GSA several sales pamphlets which illustrate the various uses for expanded vermiculite.

The nature and character of each shipment at the time it is tendered to the carrier determines its status for rate purposes. *Union Pacific R.R.* v. *Madison Foods, Inc.*, 432 F. Supp. 1033 (D. Neb. 1977); *Chicago, Burlington & Quincy R.R.* v. *Dahamel Broadcasting Co.*, 337 F. Supp. 481 (D. S.D. 1972); *Great Northern Ry.* v. *United States*, 178 Ct. Cl. 226 (1967); *Sonken-Galamba Corp.* v. *Union Pacific R.R.*, 145 F. 2d 808 (10th Cir. 1944). Significant facts which weigh heavily in making the determination are the producer's description of the article for sales purposes, the manner in which it is billed, its use and value, and how it is regarded in the trade. *Pacific Paper Products, Inc.* v. *Garrett Freight Lines, Inc.*, 351 I.C.C. 309, 316, 317 (1975); *Fibre Bond Corp.* v. *Canadian National Ry.*, 318 I.C.C. 549 (1962); *Merrimack Leather, Inc.* v. *Boston & Maine R.R.*, 306 I.C.C. 611, 613 (1959).

One of the advertising pamphlets furnished by Strong-Lite is published by the Vermiculite Association, Inc., and states that it meets Federal Specifications H–H–I 585b–Type II or III, Class 2 (the commodity shipped was Class I, but the same specification applies). The commodity is described as "VERMICULITE MASONRY INSULATION." The pamphlet states under the heading of "Features & Advantages," that "Vermiculite water repellant masonry insulation is specially manufactured to insulate brick cavity walls or walls built with concrete blocks. Vermiculite is both rot proof and vermin proof and provides an inorganic insulation for these type walls that will last for the life of the building." The pamphlet reads further under the heading of "Loose Fill Insulation" that:

> Vermiculite is an excellent general purpose pouring type insulation and is available from the same plants that manufacture vermiculite masonry insulation. Its characteristics of rot and vermin proof, inorganic and incombustibility make it an ideal material for the insulation of attics. It can also be easily poured over other types of old insulation that have settled and have become ineffective, flows readily around pipes and electrical wiring to provide a complete reinsulation job. * * *

Another advertising pamphlet furnished by the Government contractor described the commodity as "Strong-Lite Cavity Fill Vermiculite," and states that it meets Interim Federal Specifications HH-I-00595 2(GSA-FSS) Type II for structures designed for human occupancy in the temperature range of −60° to 180°F (00545 could be a typographical error as correct designation is 585, or this could refer to a later specification). The pamphlet states that:

Permanent insulation of concrete blocks and masonry walls with cavities is made easily and economically. Reduces the heat flow and noise transmission. * * * Save on heating and air-conditioning initial cost—save on operating cost throughout the life of the building.

According to the advertising pamphlets, Strong-Lite makes other vermiculite products such as concrete aggregate, plaster aggregate, and horticultural and house fill. However, those pamphlets stress the use of vermiculite as insulating material, and it is characterized as insulating material. The advertising pamphlets also indicate that it is regarded in the trade as insulating material.

The commodity shipped is described in the GSA supply catalog as:

INSULATION THERMAL

Vermiculite insulation. Dry, loose fill restricts flow of heat. Ltd. pack: 1. Class 1, Fed. Spec. HH-I-585. Coarse. 4-lb bag. Effective up to 2,000° F. Type II. 5640-00-801-4176.
Extra Coarse. Effective up to 180° F. 15-lb bag. Type I. 5640-00-180-6623.

Federal Specification HH-I-585C (referred to in the advertising pamphlets), effective October 17, 1974, describes the commodity as "INSULATION, THERMAL (VERMICULITE)." The following pertinent information is also shown in the Federal Specification:

1.1 *Scope.* This specification covers expanded or exfoliated vermiculite thermal insulating material in the dry loose condition for use as fill insulation to restrict the flow of heat.

* * * * * * *

Type I—Extra coarse.
Type II—Coarse

* * * * * * *

Class 1—Not treated for water repellency.

* * * * * * *

3. REQUIREMENTS

3.1.1 *Class 1.* Class 1 material shall be a loose fill insulation composed of expanded or exfoliated vermiculite.

* * * * * * *

6.1 *Intended use.*

6.1.1 *Type I.* Intended for the insulation of structures designed for human occupancy in the temperature range of −50° to +180° F.

6.1.2 *Type II.* Intended for the insulation of structures designed for human occupancy in the temperature range of −60° to +180° F, for structures intended for cold storage or low temperature testing, and for structures or equipment operated in the temperature range of −100° to +2000°F.

* * * * * * *

6.1.5 *Class 1.* Intended for insulation in areas where condensed moisture is not a factor. May also be used as an absorbent material for air shipment of dangerous liquids packaged in glass containers, paint, etc., for mailing through the U.S. Postal Service.

* * * * * * *

6.3 *Description of vermiculite.*
Vermiculite is a micaceous mineral containing a small amount of water. The crude vermiculite ore is mined, cleaned, and milled to a controlled size. It is then heated to a temperature of about 2000° F which causes each granule to expand about 12 times its original size. The expanded vermiculite contains thousands of entrapped air cells which account for its thermal insulation and light weight.

The use to which an article may be put is not controlling, but it is helpful in determining what the article is. *Pacific Paper Products, Inc., supra.* In *Fibre Bond Corp., supra,* at p. 554, the ICC held that "Although the use to which a commodity is put is not determinative of its tariff description, in the case of the description 'Insulating material' the question of use is implicit in the description."

GSA contends that the vermiculite as shown in the Federal Specification, paragraph 6.1.5, can also be used as absorbent material for air or mail shipments which it states is evidence of the fact that is has many characteristics. However, in our opinion, this use is incidental to its use as insulating material as described in the Federal Specification. See *Fibre Bond Corp.*, p. 554, *supra.* Furthermore, where the commodity is used as absorbent material for air or mail shipments, it can be characterized as insulating material against damage. And where an article has more than one use, the predominant use determines its character. *W. R. Grace & Co.* v. *Illinois Central R.R.*, 323 I.C.C. 102, 106 (1964).

In our opinion, the advertising pamphlets and the Federal Specification show clearly that the commodity shipped should be classified for rate purposes as insulating material, as described in Items 103300 thru 103416 of the NMFC. "NOI" is defined in the NMFC as "not more specifically described herein." Since the commodity shipped on GBL Nos. P–7191699 and D–7746350 is not more specifically described in the classification, the commodity description of "Insulating Material, NOI" applies. See *Federal Auto Products Co.* v. *Transport Motor Express, Inc.*, 302 I.C.C. 311 (1957); *Celotex Corp.* v. *Alabama Great Southern R.R.*, 292 I.C.C. 793 (1954).

Action should be taken by GSA in accordance with this decision.

[B–191159]

Contracts—Negotiation—Competition—Restrictions—Testing Requirements—Two-Step Procurement

Benchmark testing requirement under step one of two-step formally advertised procurement by Veterans Administration (VA) for uninterruptible power supply

(UPS) equipment is not, in itself, unduly restrictive of competition. Record reveals that benchmark was reasonable method for VA to use to ensure contractor had technical ability to provide required equipment. Contention of protester that VA should rely solely on preshipment testing of contractor's equipment is without merit. Evidence shows Government would incur high costs if preshipment testing indicated for first time that contractor's equipment did not meet necessary specifications.

Contracts—Negotiation—Two-Step Procurement—Technical Proposal Acceptability—Benchmark, etc., Requirements

Veterans Administration is allowed to set its own minimum needs for UPS equipment based on computer hardware to be supplied by such equipment, prevailing electrical environment at its computer site, and availability of back-up computer capacity. Consequently, VA can also conduct its own benchmarking to insure offeror has technical ability to fulfill VA's particular minimum needs. VA need not take into account fact that protester passed benchmark test for recent UPS procurement by General Services Administration.

Contracts—Negotiation—Two-Step Procurement—First Step—Technical Approaches—Evaluation Criteria

Fact that Bid Equalization Factor Clause gives offeror significant monetary reduction for purposes of bid evaluation under step two does not mean clause is prohibited by applicable procurement law or statute. General Accounting Office has consistently interpreted language of Federal Procurement Regulations (FPR) that award be based on price and other factors to mean that award will be on basis of most favorable cost to Government. Dollar amounts computed under formula set forth in Bid Equalization clause represent foreseeable energy cost savings because of increased efficiency of offering UPS equipment.

Bids—Invitation for Bids—Clauses—Bid Equalization Factor—Two-Step Procurement—Step-One Application Propriety

Bid evaluation factors normally should be set forth only in Invitation for Bids (IFB) issued under step two. Here, however, Bid Equalization Factor Clause so related to technical requirement in step one for benchmarking that it was necessary for VA to set it out in step one.

Contracts—Negotiation—Competition—Equality of Competition—Testing Requirements

Protester's actual objection is to provision in request for technical proposals reserving to VA the right to perform benchmark in no less than 10 days and no more than 90 days from date set for submission of offeror's technical proposal. Protester's involvement in prior procurement with VA for UPS equipment should have made protester aware that VA would be flexible in setting dates for benchmarking. Protester has no basis to object to maximum time by which benchmarking was to be performed because request for technical proposals contained no restrictions relating to schedule for benchmarking that favored any one offeror over other.

Contracts—Negotiation—Two-Step Procurement—First Step—Benchmark Testing—Time Limitations

Language concerning minimum time in which to schedule benchmarking should be eliminated from future solicitations. Agency merely needs to state that it has right to perform benchmark within reasonably practicable time not to exceed whatever time period required by circumstances of procurement.

Contracts — Negotiation — Two–Step Procurement — One Offer Acceptable

Record indicates only one step-one offeror was benchmarked. Since FPR provides for discontinuance of two-step method of procurement after evaluation of step-one technical proposals, VA should consider cancellation of IFB issued under step two and instead negotiate price with only offeror.

In the matter of Exide Power Systems Division, ESB Inc., August 9, 1978:

Exide Power Systems Division, ESB Inc. (Exide), protests the requirement for a benchmark evaluation test under request for technical proposals (RFTP) 101–2–78, step one of a two-step formally advertised procurement issued by the Veterans Administration (VA). This procurement is for an uninterruptible power supply (UPS) system for the VA's data processing center in Austin, Texas. Step one has been completed and an invitation for bids (IFB) under step two was issued on July 21, 1978. The IFB bid opening date is presently set for August 24, 1978.

Paragraph 13 of the RFTP's General Provisions reserved to the VA the right to perform a preaward benchmark in accordance with other mandatory solicitation requirements. The benchmark was to be done in no less than 10 days and no more than 90 days from the date of proposal submission. The VA further reserved the right to use an independent consultant to assist in this effort and to certify the benchmark. Performance of the benchmark was to be accomplished using calibrated and certified testing equipment provided by each offeror.

In connection with the benchmark, paragraph 6 of the General Provisions required the application of a "bid equalization factor" for purposes of evaluation of each offeror's price submission under step two. The minimum expected efficiency for an offeror's UPS was, as specified by the RFP, 90 percent. Efficiency ratings below 90 were to be considered nonresponsive. However, if the offeror's efficiency was above 90, its price would be evaluated at less than actually quoted. More specifically, amendment No. 1 to the RFP provided that an offeror's price would be evaluated at $19,253 less than the actual price if the offeror's efficiency was 91 percent and $38,087 less than the actual price if the offeror's efficiency was 92 percent. For any efficiency greater than 92 percent, a set formula was applied to determine the amount of price reduction for the step-two price evaluation.

In order to have the VA's bid equalization factor applied, an offeror had to include a proposed efficiency rating in its proposal. If no efficiency was stated, an offeror's efficiency was assumed to be 90 percent. In any event, an offeror was required to demonstrate at the time of the preaward benchmark that its UPS could function at the efficiency

stated. Thus, the RFP's preaward benchmark under step one was used not only to ascertain whether an offeror's technical proposal was acceptable but also to verify that the offeror's UPS could function at the efficiency stated for purposes of price evaluation under step two.

The VA's basic argument in support of the Bid Equalization Factor Clause is that in its experience the efficiency levels achieved by the various UPS manufacturers are quite close to each other and consequently these efficiency levels do not constitute a significant differentiator in the evaluation of offerors. As to the benchmark requirement itself, the VA's primary position is that such a test was necessary in order to assure the agency that an offeror could meet the minimum requirements set out in the specifications. These minimum requirements had been drawn up after consultation with major UPS manufacturers themselves. As such, they represented the minimum needs of the VA necessary to insure that there would be sufficient power at the Austin Center to support the data processing equipment there.

Exide states that the VA's benchmark would have been the fourth such test performed by a Federal agency on identically rated UPS modules in the past year. Further, Exide received a contract for 15 UPS modules from GSA on November 14, 1977. If these benchmark tests were merely to determine product acceptability, Exide contends that a standard production module of a vendor would have sufficed. However, the VA's demand for a very high level of system efficiency as a result of the RFTP's bid equalization clause required a vendor to use a custom built module for testing. Exide alleges that it can gain in efficiency only through the use of larger power transformers and other selected components. The production time for such a custom unit is 6 months according to Exide.

In connection with its allegation regarding the time necessary to build a high efficiency module for testing Exide points out that the RFP allowed the VA the right to perform a benchmark in a minimum of 10 days and a maximum of 90 days from the date of proposal submission. Even assuming that testing did not occur for 90 days, Exide argues that would still have been less than half the needed production time to obtain, install and proof test the special module components required in order to obtain optimum efficiency. Therefore, Exide contends that the VA's benchmarking requirement amounted to an undue restriction on competition.

Overall Exide urges that the VA should have dropped the benchmark test on the protested procurement and that it be dropped on all future procurements. Exide submits that preaward testing of UPS modules does not accomplish the VA's goal of obtaining the highest module efficiency in the final equipment to be delivered by the

successful offeror. In Exide's opinion, performance efficiency achieved during preshipment testing is much more important than that achieved by custom mode units in the benchmark. In this regard, Exide points out that the Bid Equalization Factor Clause also permits the Government to adjust the contract price if the contractor's modules do not produce the same efficiency at preshipment testing as they did at benchmark.

Concerning the issue whether the preaward benchmark test was necessary, our review here is limited to determining whether there was a reasonable basis for requiring the testing procedure. *Informatics, Inc.*, B–190203, March 20, 1978, 78–1 CPD 215. We believe the VA's need for a benchmark test had a reasonable basis. We have held that requirements such as a benchmark are generally a legitimate means to ensure a prospective contractor is responsible in that he has the technical capability, in whole or in part, to provide the Government with required goods or services. See *Informatics, supra.* We note that the VA has indicated that it has 10– to 12–year old computer circuitry at its Austin facility. Because of prior computer breakdowns at Austin and because of the high cost of all computer maintenance which must be borne by the Government, the VA established minimum requirements for any power supply equipment in order to protect its Austin computers. From the record, we conclude that benchmarking is the best way for the VA to ascertain a prospective contractor's technical capability to perform.

Since benchmarking is effective for determining a prospective contractor's technical ability, it can also be used to evaluate an offeror's technical proposal. The benchmark requirement in the present case was contained in the first step of a two-step formally advertised procurement. The first step procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held and revised proposals may be submitted by offerors. 51 Comp. Gen. 85, 88 (1971). It has been recognized that in negotiated procurements criteria traditionally associated with responsibility may be used in the technical evaluation of proposals. *ACCESS Corporation*, B–189661, February 3, 1978, 78–1 CPD 100.

Because the benchmark is a legitimate method for ensuring that a prospective contractor has the required technical capability, we find Exide's arguments that the VA should rely solely on preshipment testing to be without merit. The VA states that benchmarking of at least one of the two required UPS modules was necessary to assure the agency that each offeror's product had sufficient power to support the Austin computer equipment. In this regard, the VA emphasizes that waiting until after manufacture to test a UPS that must be

operational within 60 days after such testing would be too risky. If it was revealed at preshipment testing that the contractor's equipment did not meet specifications, the delay costs to the Government would be very high. In view of our decisions generally allowing the use of preaward tests, we believe that the benchmarking conducted by the VA under step one was appropriate for the purpose of determining the acceptability of an offeror's technical proposal.

Exide also questions whether the VA should have made some provision in the RFTP for the fact that Exide recently passed a benchmark test conducted by the General Services Administration (GSA) in a UPS procurement for modules similar to the ones being procured by the VA. Exide states that this was the largest procurement of UPS equipment ever made for a single site and was 25 percent larger than VA's. Consequently, Exide contends that there was nothing special about this VA procurement which required that it be subjected to still another benchmark test.

Although it did not obtain a detailed description of the GSA procurement procedures, the VA states that it did ascertain that Exide as well as all the other offerors were unable to pass the initial GSA benchmark. The Federal agency for which the GSA procurement was being made subsequently determined that it was possible to permit the loosening of requirements in order to have some competition. Furthermore, the VA contends that the requirements for Government acquisitions should remain the exclusive responsibility of the agency which must use the equipment being obtained. Therefore, regardless of the actions of GSA in its particular procurement, the VA had the right to determine its own UPS needs based on the computer equipment involved, the prevailing electrical environment at the computer site, and the availability of back-up computer capacity.

We agree with the VA. This Office has long recognized the broad discretion of procuring activities in drafting specifications reflective of their own minimum needs. See *Tele-Dynamics Division of Ambac Industries, Inc.*, B-187126, December 17, 1976, 76-2 CPD 503, and the cases cited therein. We will not substitute our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that such specifications are unduly restrictive of competition or violate statutes or regulations. *Galion Manufacturing Company, et al.*, B-181227, December 10, 1974, 74-2 CPD 319. Based on the record before us, we find that the VA has reasonably supported the RFTP requirement for benchmarking. The establishment of this testing procedure was to insure that offerors had the technical ability to fulfill the VA's own particular minimum needs. *Cf. Inflated Products Company, Inc.*, B-190877, March 21, 1978, 78-1 CPD 221.

Should we sustain the RFTP's benchmarking requirement, Exide asks that the VA eliminate the Bid Equalization Factor Clause so that the contract award can go to the "lowest compliant bidder." Exide states that based on its computations, the dollar reduction for a UPS vendor who could have gone from 92-percent efficiency to 94-percent efficiency was approximately $36,500. Exide further states that the VA informed it that approximately $400,000 had been budgeted for this procurement. Exide alleges that the UPS market is a "relatively mature" one, having three major vendors whose prices seldom differ by over 5 percent. The dollar reduction for increased efficiency was approximately 10 percent of the Government's anticipated cost in this procurement. Consequently, Exide contends that the UPS vendor which was prepared to benchmark to his optimum would win the award.

We agree with Exide's overall conclusion. Nevertheless, the fact that the dollar reduction for increased efficiency was a significant bid evaluation factor does not automatically mean that its use was prohibited by applicable procurement law or regulation. FPR § 1–2.503–2 (1964 ed. FPR circ. 1) requires that upon the completion of step one of a two-step procurement, step two will be conducted in accordance with the rules for formally advertised procurements. FPR § 1–2.407–1 (a) (1964 ed. amend. 110), concerning formally advertised procurements, states that award shall be made to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

Our Office has consistently interpreted the above language to require award on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. *D.E.W. Incorporated*, B–181835, December 5, 1974, 74–2 CPD 314.

The RFTP's Bid Equalization Factor Clause specifically stated that the dollar reductions for purposes of bid evaluation were being applied in order to comply with the Federal Government's position on energy conservation. Exide makes no contention that the formula chosen to calculate the cost of such energy savings was unreasonable. We believe, then, that the dollar amounts computed under the established formula represent certain foreseeable energy cost savings to the Government because of increased efficiency. These cost savings are analogous to transportation cost savings which are computed on the basis of differences in location of potential suppliers. Therefore, we conclude that the Bid Equalization Factor Clause was proper for the VA to use in determining the most favorable cost to the Government.

We do note that this clause was set out in the RFTP issued under step one. Generally, an RFTP contains only the technical require-

ments for a prospective offeror's proposal. See FPR §§ 1-503-1(a)(3) and (5) (1964 ed. FPR circ. 1). All bid evaluation factors are normally listed in step two. Here, however, the Bid Evaluation Factor Clause was so related to the RFTP's technical requirement for benchmarking that it was necessary for the VA to set it out in step one. Otherwise, prospective offerors would not have had adequate notice prior to the benchmark that the level of their equipment efficiency established by the benchmark would be taken into account during bid evaluation.

In our opinion, Exide is essentially objecting to the RFTP provision that gave the VA the right to perform the benchmark in no less than 10 days and no more than 90 days from the date set for the submission of technical proposals. In view of the bid evaluation incentives for equipment efficiency provided for under the Bid Equalization Factor Clause, Exide alleges that it needed 6 months to produce a custom unit that could be benchmarked at the maximum possible efficiency. Exide contends that even if the VA would have granted 90 days for it to prepare for benchmarking, that would still have been less than half the necessary production time.

We think that Exide had more than 90 days to prepare for benchmarking. The RFTP was issued on November 16, 1977, and received by Exide on November 29, 1977. It contained the basic requirements for benchmark testing as well as the notification of the timeframe for performing the benchmark. The original closing date for receipt of technical proposals was December 20, 1977. Amendment No. 1, issued on the original closing date, extended this date to January 4, 1978. Therefore, it is obvious that Exide had at least 21 days prior to the original closing date to also prepare for benchmarking.

With regard to the exact scheduling of the benchmark, the record reveals that the VA had in a prior UPS procurement for one of its hospitals made a reasonable effort to accommodate Exide in setting exact dates. The VA notified Exide in writing 3 weeks ahead of time of the scheduled benchmark dates. The notification also requested Exide to immediately inform the VA if there were any problems. Consequently, we believe that Exide had no basis at the time the RFTP for the instant procurement was issued for assuming that the VA would be inflexible in setting the dates for benchmarking. The record gives no indication that the VA would refuse to extend its testing dates if Exide had requested an extension within a reasonable period of time after notification by the VA.

In any event, all prospective offerors were operating under the exact same benchmark scheduling restraints as Exide. No restrictive conditions or limitations relating to the test schedule appear in the RFTP

which would favor any particular offeror. Thus, given the scheduling restrictions, every prospective offeror under the RFTP was faced with the possibility that it would not be able to produce UPS equipment that would at benchmarking test-out at its maximum efficiency.

Exide is arguing, in effect, that it was not facing the same odds as other UPS offerors who could possibly produce high efficiency equipment in a shorter period of time. However, the purpose of competitive procurement is not to insure that all offerors face the same odds in competing for Government contracts. Rather, the purpose is to insure that the Government obtains its minimum requirements at the most favorable price. See *IMBA, Incorporated*, B–188364, B–187404, November 9, 1977, 77–2 CPD 356. We do not think that having the maximum time for conducting the benchmark increased beyond 90 days would lead to this result. Moreover, Exide makes no contention that the RFTP test schedule limitations were inconsistent with the VA's need to have UPS equipment installed and operating within the time required by the circumstances existing at the Austin Data Processing Center. See *Emerson Electric Co.*, B–188013, May 6, 1977, 77–1 CPD 317.

Because the VA has established a maximum time by which benchmarking will be scheduled, we do question the necessity of stating a limitation as to the minimum time (here 10 days) in which benchmarking will be scheduled. Therefore, we suggest that in future soliciations the VA merely provide that the agency reserves the right to perform a benchmark within a reasonably practicable period of time after the RFTP closing date, not to exceed whatever number of days the circumstances of the procurement necessitate for benchmarking to be completed.

Finally, we note that the VA benchmarked only one offeror under step one of this procurement. While this offeror passed the benchmark, FPR § 1–2.503–1(d) (1964 ed. FPR circ. 1) provides for the discontinuance of the two-step method of procurement after the evaluation of technical proposals, if necessary. One of the reasons for discontinuance is where one of the conditions for use of the two-step procurement method is no longer present, e.g., only one technically qualified source. FPR § 1–2.502(c) (1964 ed. FPR circ. 1). We realize that the VA has already issued a step-two IFB. Nevertheless, since there will be only one bidder under step two, we suggest that the VA consider cancellation so that it can instead negotiate with the only acceptable offeror under step one. *Cf. E. C. Campbell, Inc.*, B–185191, November 20, 1975, 75–2 CPD 336. This would tend to preclude the possibility that award would be made at an unreasonable price.

In view of the foregoing, Exides' protest is denied.

[B-164031(1)]

Funds—Federal Grants, etc., to Other Than States—Propriety of Grant Award

Section 223 of the Higher Education Act of 1965, Title II, Part B, as amended, authorizes the Office of Library and Learning Resources, Office of Education, Department of Health, Education and Welfare, to make grants to and contracts with public and private agencies and institutions. Regulations define "public agency" to exclude Federal agencies. The National Commission on Library and Information Science is an independent agency in the Executive branch and therefore is not eligible to receive funds under section 223.

Regulations—Waivers—Regulations Pursuant to Statutes

The Commissioner of Education has no authority to make an exception from the statutory regulation (45 C.F.R. 100.1) which defines "public agency" as excluding Federal agencies for purposes of grant or contract awards under section 223 of the Higher Education Act of 1965.

In the matter of National Commission on Libraries and Information Science, August 11, 1978:

The Executive Director, National Commission on Libraries and Information Science (Commission) has asked for our opinion on the legality of a transfer of funds from the Office of Libraries and Learning Resources (OLLR) in the Office of Education (OE), Department of Health, Education and Welfare (HEW), to the Commission, under the Higher Education Act of 1965.

The Commission was established in 1970 as an independent agency within the Executive branch. 20 U.S.C. § 1502 (1976). The Commission has primary responsibility for developing or recommending overall plans, and advising appropriate Federal, State, or local Governments and agencies, to assure that library and information services are adequate to meet the needs of the people of the United States.

The Commission has planned a national conference, as authorized by Pub. L. No. 93-568, December 31, 1974 (88 Stat. 1855), to develop recommendations concerning national support for library and information networks. OLLR proposed to transfer funds to the Commission for the conference from those available under section 223 of the Higher Education Act of 1965, Title II, Part B, as amended. 20 U.S.C. § 1034 (1976). This section authorizes the Commissioner of Education to make grants or contracts for library research and demonstration projects. It provides:

(a) The Commissioner [of Education] is authorized to make grants to institutions of higher education and other public or private agencies, institutions, and organizations, for research and demonstration projects relating to the improvement of libraries or the improvement of training in librarianship, including the development of new techniques, systems, and equipment for processing, storing, and distributing information, and for the dissemination of information derived from such research and demonstrations, and, without regard to section

3709 of the Revised Statutes, to provide by contracts with them for the conduct of such activities; except that no such grant may be made to a private agency, organization, or institution other than a nonprofit one.

An opinion by the Adult and Vocational Education Branch, Office of General Counsel, HEW, that section 223 funds may not be transferred by grant or contract to the Commission, has prevented the transfer of funds. The Executive Director disagrees with this and asks for our opinion and views on whether OLLR can legally execute a contract or an interagency transfer of funds with the Commission, using Title II funds, for a Conference on National Networks.

The Executive Director argues that the term "public agency" includes Federal agencies. The statute does not define "public agencies," and the legislative history does not discuss the meaning of the term. However, in regulations applicable to the section 223 program (45 C.F.R. § 100.1 (1976)), "public agency" is defined as:

a legally constituted organization of government under public administrative control and direction, *but does not include agencies of the Federal Government.* [Italic supplied.]

The Commission, as an independent Federal agency, is therefore not eligible for assistance under section 223 of the Higher Education Act of 1965. Indeed, we have serious doubt whether a regulatory decision to define "public agency" to include Federal agencies would be a permissible interpretation of section 223. In any event, the interpretation adopted by OE is consistent with the statutory language and neither arbitrary nor unreasonable on its face; it will therefore not be questioned by this Office.

In this connection, the staff of the Commission has asked if there is any basis for the Commissioner of Education to make an exception to the exclusion of Federal agencies from eligibility for section 223 grants. Without express statutory authority to do so, an agency may not waive a statutory regulation. We are not aware of any authority vested in the Commissioner of Education to make such a waiver.

The Executive Director of the Commission says that OE has made transfers to other Federal agencies. In the interest of complying with the Commission's request that we answer as quickly as possible, we have not attempted to verify that allegation. However, our answer to this question would not be different if OE had made such transfers. Under 45 C.F.R. § 100.1, OE cannot properly transfer section 223 funds to any Federal agency.

Finally, in response to HEW's questioning of the legal authority of the Commission to accept funds from a Federal agency, the Executive Director points out that the Commission is authorized by 20 U.S.C. § 1505(b) to contract with Federal agencies to carry out any of its functions, and that it has not only let contracts to other Federal agen-

cies but has, since its inception, also accepted contracts from them. We do not question the right of OE, using funds other than those appropriated for purposes of section 223 of the Higher Education Act of 1965 to contract with the Commission, nor the right of the Commission to accept a contract from OE, for the performance by the Commission of a service for OE, under the Economy Act, 31 U.S.C. § 686 (1970). As HEW points out, OE may have some funds available for the same purposes to be served by the proposed Networks Conference and could therefore, under the Economy Act, enter into an agreement with the Commission for it to perform services for OE for such purposes (assuming the Commission were in a position to do so). In such circumstances, the services provided to OE by the Commission might incidentally further the purposes of the Commission.

With regard to 20 U.S.C. § 1505(b), while that section does give the Commission authority to contract with Federal agencies, such contracts must be to carry out *Commission* functions. That being the case, we do not see how OE could transfer funds or award a grant or contract to the Commission under section 1505(b), since OE funds would not be available to carry out Commission functions. For the Commission to receive funds from another agency to carry out functions for which it receives appropriations would be an improper augmentation of its appropriations.

In any event, neither the Economy Act nor 20 U.S.C. § 1505(b) gives OE authority to use section 223 funds to make a grant to or contract with the Commission because, as noted above, the Commission is not a "public agency" within the meaning of that section.

[B-189072]

Fraud—False Claims—Effect on Subsequent Claims

Department of the Air Force asks whether an employee who submits a fraudulent claim may be refused access to the General Accounting Office (GAO) for purpose of settling his claim. Since GAO has authority to settle and adjust claims by the Government or against it, employee may submit claim to GAO even though it is considered fraudulent by his agency. Agency should expedite adjudication by using agency channels to send claim to GAO with its report.

Fraud — False Claims — Fraudulent Items as Vitiating Entire Voucher

Where employee submits voucher for travel expenses and part of claim is believed to be based on fraud, only the separate items which are based on fraud may be denied. Moreover, as to subsistence expenses, only the expenses for those days for which the employee submits fraudulent information may be denied and claims for expenses on other days which are not based on fraud may be paid if otherwise proper. B-172915, September 27, 1971, modified.

Fraud—False Claims—Debt Collection

Where employee has been paid on voucher for travel expenses and fraud is then found to have been involved in a portion of claim, the recoupment of the improperly paid item should be made to the same extent and amount as if his claim were not yet paid and were to be denied because of fraud. Decision 41 Comp. Gen. 285 (1961) and 41 *id.* 206 (1961) are clarified.

Fraud—False Claims—Evidence—Substantial

Reasonable suspicion of fraud which would support denial of claim or recoupment action in case of paid voucher depends on facts of each case. Fraud must be proved by evidence sufficient to overcome existing presumption in favor of honesty and fair dealing. Generally, where discrepancies are minor, small in total dollar amounts, or where they are infrequently made, fraud would not be found absent the most convincing evidence to the contrary. Where discrepancies are glaring, large sums are involved, or they are frequently made, a finding of fraud is more readily made absent satisfactory explanation from claimant.

Fraud — False Claims — Fraudulent Items as Vitiating Entire Voucher

When an employee receives a travel advance and then submits a false final settlement voucher, the separable items on the voucher attributable to false statement are subject to being recouped. Any additional amount claimed by claimant should be denied only insofar as it is a separate item of entitlement based on fraud.

Fraud—False Claims—Debt Collection

No recoupment action appears necessary where a final and valid settlement voucher has eliminated an earlier false claim. This assumes that where there has been an earlier false claim for lodgings, for example, the final settlement voucher contains no claim for subsistence expenses for that day.

In the matter of Department of the Air Force—fraudulent claims, August 11, 1978:

This decision concerns the proper procedures to be followed in handling claims which are suspected of being fraudulent. It primarily involves the claims of civilian employees for reimbursement of expenses incurred while on temporary duty which have been supported by lodging costs that are inflated, nonexistent, or misrepresented in some manner. It was requested by Mr. John K. Scott, Director, Plans and Systems, Department of the Air Force.

Mr. Scott states that in addition to the current instructions concerning the treatment of fraudulent claims, which are contained in Air Force Manual 177–101, paragraph 20729, the Air Force has issued interim guidance to all major commands in letter form dated March 25, 1977. Mr. Scott asks whether this guidance, based on the Air Force's interpretation of 41 Comp. Gen. 206 (1961); 41 *id.* 285 (1961); 44 *id.* 110 (1964); and B–172915, September 27, 1971, con-

veys the intent of those decisions. He also specifically addresses certain issues as follows:

1. When an accounting and finance officer (AFO) either denies payment or recoups a claim, and such action is substantiated by an Office of Special Investigation report or other supportive facts that lead to a firm conclusion that a claimed item(s) is tainted or false, may the AFO deny the use of Air Force channels in processing a claim/reclaim to the General Accounting Office (GAO)? In such case, may the claimant be advised that he is left solely to his remedy in the Court of Claims? Alternatively, if you consider that the claimant nevertheless can submit his claim/reclaim directly to GAO, may he be advised that he can communicate directly with the GAO concerning the matter or seek remedy in the Court of Claims? It is emphasized that the use of Air Force channels in processing a claim/reclaim would be denied only when there is documented evidence that the claim involved a false statement.

2. Should the guidance in the aforementioned Comptroller General decisions with regard to amounts to be denied (in the case of unpaid claims) and recouped (in the case of paid claims) continue to be followed by AFOs? That is, should the total amount of an unpaid false or tainted claim, which claim includes per diem, transportation furnished in kind through use of a Government transportation request (GTR), and miscellaneous reimbursable expenses (taxi fares, porter tips, registration fees), be denied, or should denial be limited to the line item (e.g., per diem) believed to be tainted?

3. With regard to paid false or tainted claims, should recoupment continue to be limited to the tainted line item in the claim?

4. If either recoupment or denial is to be limited to the line item associated with a false statement, should per diem be divided into separate components - lodgings ($19) and subsistence and incidentials ($16)—for recoupment and/or denial purposes? In this regard it is noted that JTR, Volume 1, paragraph M4205, and JTR, Volume 2 paragraph C4552, prescribe a fixed amount for meals and incidental expenses and an additional amount based upon the average actual cost for lodging. Thus, under these policies, false statements would concern only the lodging portion of per diem.

5. What constitutes "reasonable suspicion" as that term is used in 41 Comp. Gen. 285 (1961) and 44 Comp. Gen. 110 (1964)? Is "reasonable suspicion" on the part of an AFO sufficient basis to support both recoupment and denial action?

6. In what manner should a travel advance be accounted for when a false final settlement voucher is involved? Should the total of the advance be recouped or only that part attributable to the false statement? Regardless how the advance is to be treated, should any additional amounts actually due the claimant based upon the final settlement voucher be denied?

7. What should be the disposition of a partial travel payment and a final settlement voucher in the following situation: An individual is paid a partial travel payment at a temporary duty station. It is subsequently determined that a false statement was submitted in support of the partial travel payment. Thereafter, before any recoupment is made, the individual at his permanent station submits a final settlement voucher that is valid because it has eliminated the earlier false claims.

Comments on the Air Force's submission were received from Mr. Kenneth T. Blaylock, President, American Federation of Government Employees. We have taken his views into account in our consideration of the questions submitted by the Air Force.

Concerning the first question, section 71 of title 31, United States Code, states that:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, *shall* be settled and adjusted in the General Accounting Office. [Italic supplied.]

There is no doubt that, if an employee wishes to contest his agency's denial of his claim, he may do so by filing his claim with the General Accounting Office (GAO). See B–51325, October 7, 1976. Thus, even though a claimant's agency may consider his claim to be fraudulent, the claimant has a right in the law to have his claim adjudicated at GAO. An agency may not foreclose a claimant's right to GAO adjudication of his claim by deciding that the claim is fraudulent. It would not be proper, therefore, to inform such claimant that his only recourse after his agency's denial of his claim would be in the courts. Accordingly, a claimant who wishes to contest the administrative denial of his claim believed by his agency to be fraudulent should be advised by his agency that he may do so by filing his claim with GAO. As to the use of agency channels, we point out that, if a claimant sent his allegedly fraudulent claim directly to GAO, our Claims Division would have to request a report on the claim from the agency so that the agency's views on the claim would be a part of the record upon which the claim would be adjudicated. See 4 GAO Manual § 8–2 (1967). In view of the above, in order to expedite the processing of such a claim which an employee wishes settled by GAO, his claim should be forwarded through agency channels, and the appropriate report and recommendation of the agency concerning the allegedly fraudulent claim may be forwarded therewith. 4 C.F.R. § 31.4 (1977).

With regard to whether all or part of a voucher may be denied because some portion of the claim is based on fraud (questions 2, 3, and 4) the following was stated in 41 Comp. Gen. 285, at 288.

> * * * each separate item of pay and allowances is to be viewed as a separate claim and we do not believe that the fact that several such items may be included in a single voucher for purposes of payment affords sufficient basis for concluding that they have lost their character as separate claims.

We do not view the rule in 44 Comp. Gen. 110, wherein the claim was for the amount due pursuant to a contract, to be applicable to the individual claims made on a travel voucher.

As to what constitutes a separate item for these purposes, such an item is one which the employee could claim independently of his other entitlements. Accordingly, a fraudulent claim for per diem would not necessitate the denial of the other separate items on the voucher, which are not fraudulently based. As to subsistence expenses, the voucher may be separated according to individual days whereby each day comprises a separate item of per diem or actual subsistence expense allowance. B–172915, September 27, 1971, is modified accordingly. A fraudulent statement for any subsistence item taints the entire subsistence claim for that day.

We have also held that where an item of pay and allowances is wrongfully obtained through fraud, misrepresentation or otherwise,

such payment is an erroneous payment and is for recoupment as such. 41 Comp. Gen. 285 (1961). The recoupment of the improperly paid item should be made to the same extent and amount as the denial of an unpaid claim based on fraud. 41 Comp. Gen. 285 (1961) and 41 *id.* 206 (1961) are clarified. Questions 2, 3, 4, and 7, relating to recoupments of payments on fraudulent claims, are answered accordingly.

With respect to question 5 as to what constitutes "reasonable suspicion" of fraud which would support the denial of a claim or recoupment action in the case of a paid voucher, we have held as follows that:

> * * * the burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. However, if, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. B-187975, July 28, 1977.

It is difficult to prescribe exact rules concerning fraud or misrepresentation since the question of whether fraud exists depends on the facts of each case. We believe that although it is the employee's responsibility to accurately complete a travel voucher to ensure proper payment, it may not be automatically assumed that an employee is making a fraudulent claim merely because he has not observed all the niceties and requirements of the Federal Travel Regulations in completing a voucher. It should be borne in mind that many innocent mistakes are made in the completion of vouchers and not every inaccuracy on a voucher should be equated with an intent to defraud the Government. Generally, where discrepancies are minor, small in total dollar amounts, or where they are infrequently made, a finding of fraud would not normally be warranted absent the most convincing evidence to the contrary. By the same token, where discrepancies are glaring, involve great sums of money, or they are frequently made, a finding of fraud could be more readily made absent a satisfactory explanation from the claimant.

In regard to question 6, when an employee has received a travel advance and he then submits a false final settlement voucher, the travel voucher submitted in liquidation of the advance shall be treated in the same manner as any other travel voucher in which fraud is found to be involved. As stated above, only the separate items attributed to the false statement should be disallowed. In accordance with the instructions above, any additional amount claimed should be denied insofar as it is tainted with fraud.

As to question 7, when an employee submits a final and valid settlement voucher from which there has been eliminated the false claim,

no recoupment action appears necessary under the rules set forth above. This assumes that where there has been a false claim for lodgings; for example, the final settlement voucher contains no claim for subsistence expenses for that day.

We also believe that it is necessary in one other point to clarify the role of the accounting officer in connection with fraudulent claims. Mr. Blaylock pointed out that recoupment or denial action has been taken on claims believed fraudulent even though the Department of Justice has not prosecuted the employees involved. We do not think that the Department of Justice's failure to prosecute an employee for submitting a fraudulent claim in any way estops the Government from taking denial or recoupment action against him. The Department of Justice, for various reasons, among which may be the economy of United States Attorney's time or lack of resources, may choose not to prosecute an employee for his submission of a fraudulent claim. The fact that Justice chooses not to prosecute, however, does not mean that the employee's claim must be paid or that recoupment action is not warranted.

The Air Force's instructions, where inconsistent with the guidance in this decision, should be modified accordingly.

[B-190750]

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—Restrictions on Reimbursement

Employee claimed reimbursement for attorney's fees paid incident to sale of old residence and purchase of new residence incident to transfer of station. Claim for attorney's fees for services in connection with closing on purchase of new residence is allowed only to extent such fee represents the attorney's work in conducting closing or preparing closing documents. Charges for conferences, correspondence and review of documents are advisory in nature and are not reimbursable.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—Preparing Conveyances, Other Instruments, and Contracts—Purchase and/or Sale of House Not Consummated

Legal fees for the preparation of a sales contract are not reimbursable where the sale is not consummated. Charges for title search, abstract of title, tax search and similar activities are reimbursable only if customarily paid by seller of old residence or purchaser of new residence in area where transactions take place.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—Restrictions on Reimbursement

All expenses arising from legal services related to items determined to be structural changes or capital improvements are not reimbursable as they are reflected in the purchase price of the residence and not provided for in the regulations.

In the matter of Douglas D. Walldorff—reimbursement of attorney's fees, August 11, 1978:

This action is in response to a request from Ms. Dorothy Wells, an authorized certifying officer of the National Labor Relations Board (NLRB), for a decision on the entitlement of Mr. Douglas D. Walldorff, an NLRB employee, to reimbursement of certain attorney's fees incurred in connection with the sale of his old residence and purchase of a new one incident to a permanent change of station. The original request for reimbursement of attorney fees was disallowed in part by the agency resulting in an appeal by the claimant.

The record indicates that by a travel authorization dated April 19, 1976, Mr. Walldorff was transferred from Buffalo, New York, to Atlanta, Georgia. On or about August 27, 1976, Mr. Walldorff sold his Buffalo residence and incurred legal expenses from the law firm of Hodgson, Russ, Andrews, Woods and Goodyear. On or about September 2, 1976, claimant purchased a residence in Atlanta and incurred legal expenses from the law firm of Laura Ruth McNeil.

Upon claiming reimbursement of the legal fees, Mr. Walldorff was administratively disallowed $900 from the sale of his old residence and $125 from the purchase of his new one. The grounds for the disallowance were that the services claimed were advisory in nature, properly incurred by the purchaser in the case of the claimant's sale of the Buffalo residence or were connected with the capital improvement to his prior residence and therefore properly recoverable in the sales price.

In reclaiming the disallowed amount Mr. Walldorff has submitted a reclaim voucher accompanied with a detailed statement of the legal expenses involved. The items claimed as shown on copies of the reclaim voucher are as follows:

1. Real Estate Purchase
   (a) Closing Fee $125
2. Real Estate Sale
   (b) Review proposed multiple listing agreement with real estate broker and prepare addendum thereto, conferences with client concerning initial sale contract with Mr. & Mrs. Norman Smith concerning termination of contract, conference with client concerning offer to purchase premises from Mr. & Mrs. Ritter and discussions with realtor concerning terms of purchase offer; review of purchase offer, review purchase offer and discuss with client prior to execution by client $150

(c) Obtain abstract of title and survey from mortgagee, order continuation of tax and title search and redate of survey; obtain proof of payment of all real property taxes; complete all requirements of purchaser as to clearance of title including extensive discussions and negotiations with officials of the Erie County Health Department concerning septic system deficiencies---------- $350

(d) Negotiations with attorney for purchaser concerning contract revisions resulting from the requirement of the Erie County Health Department that the premises be connected to a public sewer line and codification of contract as a result hereof; preparation of easement agreement and extensive discussions with purchaser's attorney and client's neighbor with respect to the terms of said agreement; obtain approval of the Erie County Health Department and Erie County Sewer District No. 2 as to the terms of the agreement; review contracts with contractor for the installation of the sewer line connection and obtain approval of the Health Department and sewer authority after the completion of the sewer line connection---------- $250

(e) Prepare deed and closing statement; makes arrangement with respect to client's mortgage lender as to assumption of mortgage by purchaser; attend closing and record easement agreement; send all final documents after closing to client---------- $150

Statutory authority for reimbursement of the legal expenses incurred by an employee in the sale of his or her residence at the old official station and purchase of a home at the new station is found at 5 U.S.C. § 5724a (1970). Regulations implementing that authority at the time of Mr. Walldorff's transfer were contained in paragraph 2–6.2c of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973). Paragraph 2–6.2c provides that:

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

surveys, preparing drawings or plats when required for legal or financing purposes; and similar expenses. Costs of litigation are not reimbursable.

In our decision in 56 Comp. Gen. 561 (1977), we reviewed the policy concerning the extent to which legal fees may be reimbursed. In that decision we held that necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by reason of the purchase or sale of a residence incident to a permanent change of station may be reimbursed provided that the costs are within the customary range of charges for such services within the locality of the residence transaction. Since, however, that decision is to be applied prospectively only to cases in which settlement of the transaction occurs on or after April 27, 1977, the present matter, being settled before that date, must be determined in accordance with the previously applicable laws and decisions.

Those previous decisions consistently held that only legal services of the type enumerated in FTR para. 2–6.2c are reimbursable. No reimbursement may be allowed for legal services of an advisory nature such as representation or counseling. 48 Comp. Gen. 469 (1969); B–183443, July 14, 1975; B–183102, June 9, 1972.

Regarding item (a), attorney's fees for preparing closing documents and conducting the same may be authorized for reimbursement. B–176876, November 27, 1972; B–174011, November 15, 1971. However, charges which are attributable to representation and services rendered at the closing are advisory and not reimbursable. B–186254, March 16, 1977; B–183443, *supra*. While the voucher itself merely states that $125 is for closing, Mr. Walldorff states in his letter to our Office, dated October 17, 1977, that "the fee was for services provided at the closing." Therefore, item (a) is not reimbursable unless shown that the law firm of Laura Ruth McNeil conducted the closing and prepared the closing statement.

The services provided by the firm of Hodgson, Russ, Andrews, Woods and Goodyear as described in item (b) were performed incident to the residence sale transaction. The items enumerated include office conferences with the claimant, correspondence, review of documents and discussions with the realtor. These items are advisory and representational and are not within the class of services contemplated by the cited regulation. B–186290, September 30, 1976. The fact that a prudent seller would require such services will not affect such a determination. See B–183443, *supra*.

Included in item (b) is the preparing of two documents, services normally reimbursable under FTR para. 2–6.2c. First is the addendum to a multiple listing agreement. While we recognize the need for a broker and provide for the reimbursement of the cost in FTR 2–6.2(a), there

is no recognition of the need for attorneys in the broker-client relationship. Any such involvement by the client's attorney must be viewed as advisory even when it includes the amending of documents used by the parties and, therefore, is not reimbursable. Second is the preparation of a sales contract. We have held that the intent of the Federal Travel Regulations relating to reimbursement of real estate expenses is to reimburse the employee for only one set of authorized expenses relating to one sale and one purchase. B–184869, September 21, 1976. Accordingly, legal fees relating to an unconsumated contract are not reimbursable. B–190122, November 23, 1977.

Paragraph 2–6.2c of the Federal Travel Regulations provides that, if *customarily paid by the seller* at the old residence, the costs of preparing an abstract and search of title are reimbursable. Such expenses are included in item (c) along with charges for a tax search and clearance of title as it relates to requirements imposed by the Erie County Health Department concerning septic system deficiencies. Services relating to discussions and negotiations with county officials are advisory in nature and not provided for in the regulations. We have been informally advised by the Buffalo office of the Department of Housing and Urban Development that the seller of real property has some obligation to furnish an abstract of title and, therefore, customarily pays for it. However, a complete title search is not required and is usually done to satisfy the buyer. Consequently, this expense is properly borne by the purchaser. Additionally, proof that the seller has paid all related taxes would be revealed in the abstract of title showing no liens. Other taxes would not be part of the real estate transaction and not properly paid by the seller as it relates to FTR para. 2–6.2c. To the extent that the claimant can further separate the services in item (c) to reflect the charge for furnishing the abstract of title, it may be reimbursed. The Buffalo office of the Department of Housing and Urban Development has informed us that $100 is an acceptable and reasonable fee for such services.

The fee expenses contained on item (d) are all related to activities for sewer line corrections and construction imposed by the Erie County Health Department. These items involve costs incurred in connection with structural alterations which are excluded as miscellaneous expenses from reimbursement under FTR para. 2–3.1c(13). Attorney's fees connected with these structural alterations are likewise not reimbursable. Reimbursable costs are only those which are normally connected with a real estate action and not extraordinary costs which may arise in connection with a particular transaction. B–180945, August 29, 1974. In denying reimbursement for expenses related to structural changes, we have stated that the regulations do not con-

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template underwriting the costs of new furnishings or equipment. For example, where the claimant has installed air conditioning wiring as in B-173572, August 23, 1971, or skirting around a mobile home as in B-183809, October 3, 1975, we have denied reimbursement. We see no distinction to be made between those alterations and the subject alterations involved here with the public sewer line. Additionally, an improvement of this type properly can be characterized as a capital improvement which increases the value of the residence and thereby is reflected in the purchase price. B-183794, October 9, 1975. We agree with the administrative determination that the charges contained in item (d) are not reimbursable.

The charges contained in item (e) generally relate to the closing. As in our discussion on item (a), attorney's fees for attendance at the closing, services which are advisory in nature, are not reimbursable. However, a fee charged for conducting the settlement may be reimbursed. B-184599, September 16, 1975. The actual preparation of the deed is also reimbursable. B-176876, November 27, 1972. However, for the reasons discussed above, any charges resulting from the easement as part of fulfilling requirements imposed by county officials are not reimbursable. To the extent that the claimant can show that charges listed in item (e) are attributable to his attorney's work in actually drafting the documents, conducting the settlement and related expenses, reimbursement may be made. Negotiations and conferences held in anticipation of the drafting of such documents represent services by an attorney which are advisory in nature. As such, they are not reimbursable.

Accordingly, the voucher is returned for processing pursuant to the above.

[B-136318]

Departments and Establishments—Services Between—Cost Comparisons

Unless otherwise necessary to accomplish some competing congressional goals, policies or interests, cost comparisons and billings under section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686 (1970), to requisitioning agencies should not include items of indirect cost which are not significantly related to costs incurred by the performing agency in executing the requisitioning agency's work and which are not funded from currently available appropriations (*e.g.*, depreciation). 56 Comp. Gen. 275, modified.

Departments and Establishments—Services Between—Intra- and Inter-Departmental

The law vests authority to operate and manage Dulles International and Washington National Airports in the Federal Aviation Administration (FAA) which has delegated this function to Metropolitan Washington Airports, a component

of the FAA. There is no reason to distinguish the furnishing of facilities by the airports to other components of the FAA from the provision of facilties to other departments and agencies of the Government. Therefore, the same standard for determining cost under the Economy Act should apply to both.

Departments and Establishments—Services Between—Reimbursement—Actual Cost Requirement

Washington National and Dulles International Airports are operated as self-sustaining commercial entities with rate structures and concession arrangements established so as to assure recovery of operating costs and an appropriate return on the Government's investment during the useful life of the airports, with over 98 percent of their revenue coming from non-Government users. Therefore, fees collected from both Government and non-Government users should include depreciation and interest.

Miscellaneous Receipts—Special Account *v.* Miscellaneous Receipts—Reimbursement Payments

While section 601 of the Economy Act permits the depositing of reimbursements to the credit of appropriations or funds against which charges have been made pursuant to any order (except as otherwise provided), such reimbursements may, at the discretion of the agencies, be deposited in the Treasury as miscellaneous receipts. However, deposit of reimbursements to an appropriation or fund against which no charge has been made in executing an order is an unauthorized augmentation of the agency's appropriation and such sums must be deposited as miscellaneous receipts.

In the matter of Washington National Airport; Federal Aviation Administration; intra-agency reimbursements under 31 U.S.C. 686 (1970), August 14, 1978:

This decision is in response to an inquiry from E. M. Keeling, Director of Accounting and Audit, Federal Aviation Administration (FAA), Department of Transportation, concerning the applicability of our decision, *Commerce Department—inclusion of departmental overhead under 31 U.S.C. § 686 (1970)*, 56 Comp. Gen. 275 (1977), to cost recovery under intra-departmental service agreements between Washington National Airport or Dulles International Airport (both administered, operated and maintained as commercial airports by the FAA) and other components of the FAA. These agreements are made under authority of section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686 (1970).

The Director says that the FAA operates Washington National Airport and Dulles International Airport with the goal of making them self-sustaining. These operations involve a wide variety of activities, one of which is the rental of space in the airport facilities to airport users. These users include not only the airlines and the public, but other Government agencies and the FAA itself. The rental rates are now based on full cost, including depreciation and interest. However, prior to our 1977 decision, depreciation and inter-

est were excluded from rental rates charged to other Government agencies and the FAA.

The Director asks whether our decision, requiring reimbursement for full costs in Economy Act transactions, applies to intra-agency agreements between the airports and other elements of FAA, which are funded from different appropriations, as well as to inter-agency agreements. For fund accounting purposes, airport revenue from the airlines and the public are presently being deposited in the general fund of the Treasury by appropriate miscellaneous receipt symbols, fees charged to other Government agencies are treated as reimbursements, and fees charged to other elements of FAA are treated as refunds. For operating statement purposes, all fees are treated as revenue, and costs are reflected in gross amounts to provide a more realistic picture of the true operating results of the airports. Thus, any failure to recover total costs directly affects the operating profit or loss.

Consequently, we have been asked specifically:

1. Is it mandatory that the FAA operated airports base the fees established for intra-agency agreements upon full cost recovery including depreciation and interest when the receiving organization is funded from a different appropriation than the airports?
2. If the answer to question No. 1 is no, would it not be advisable to base such fees upon full cost since the airports are required to operate on a self-sustaining basis?
3. Would it be permissive for the FAA to treat fees collected from other Government agencies and other elements of FAA for services similar to those furnished to the airline and the public as general fund receipts rather than as reimbursements and refunds? The total reimbursements and refunds amount to only 1.8% of total revenue or approximately $500,000 out of a total of approximately $30 million.

Regarding this last question, it was indicated that:

If this is permissive it would significantly simplify the accounting: i.e., (1) fund and operational accounting would be brought substantially into agreement, thus some of the existing reconciliation would be eliminated; (2) revenue analysis by type of customer would no longer be necessary; and (3) the number of accounting adjustments would be reduced because the final recipient of a service is not known at the time of obligation and must be adjusted after the service is rendered.

The inter- and intra-departmental furnishing of materials or performance of work or services on a reimbursable basis, when not otherwise specifically authorized by statute, is authorized by section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686(a) (1970), which provides in pertinent part that:

Any executive department or independent establishment of the Government, *or any bureau or office thereof*, if funds are available therefor and if it is determined by the head of such executive department, establishment, *bureau, or office* to be in the interest of the Government so to do, may place orders with any other such department, establishment, *bureau, or office* for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may

be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon its furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned: * * *. [Italic supplied.]

In 56 Comp. Gen. 275 (1977) we considered the question of whether the Department of Commerce was required to include administrative overhead applicable to departmental supervision (departmental overhead) as part of the "actual cost" to be recovered from another agency for which the Department performed services under the authority of 31 U.S.C. § 686(a). In responding, we stated:

We now take this opportunity to resolve any doubt which may exist as a result of the language of our earlier decisions and of the headnote to 38 Comp. Gen. 734. Effective compliance with the reimbursement provision of 31 U.S.C. § 686(a) is only achieved when all *significant* elements of cost are recognized and recovered in any transaction under that section. If overhead expense is significant, then like other elements of costs it should be recognized and recovered. *The recognition of these costs is necessary so that the performing agency and the ordering agency will know the costs of their operations. Also, the requirement that prices of the performing agency be based on full costs affords the ordering agency a financial measurement for determining whether to deal with one or another Government agency, procure the services elsewhere, or forego the undertaking entirely.* Prior decisions are overruled to the extent they are inconsistent with this conclusion. 56 Comp. Gen. at 277. [Italic supplied.]

That decision was necessary, in part, because of prior decisions of this Office which had held that indirect costs, including depreciation, might be recovered by the agency performing work or services for, or providing materials to, another agency under the Economy Act. However, none of these prior decisions had held that such recovery was required in every reimbursement made under the Act. Because of questions informally raised since our decision in 56 Comp. Gen. 275, particularly questions concerning recovery of unfunded costs, we now take this opportunity to reexamine our position in order to give due consideration to these concerns.

Section 601 of the Economy Act of 1932, as amended, was passed partly in response to decisions by this Office that an agency performing work for another agency could not be reimbursed for the salaries of the personnel during the time they were performing the work. Reference to the legislative history of section 601 makes it clear that all costs attributable to the performing agency's currently available appropriations were to be reimbursed.

H.R. 10199, 71st Cong., was introduced on February 22, 1930, for the purpose of authorizing inter-agency procurement of work, materials, or equipment with reimbursement to be based upon "actual cost." During hearings on H.R. 10199, before the Committee on Expendi-

tures in the executive departments, Representative French, sponsor of the bill, testified that:

The purpose of the legislation is to permit the utilization of facilities and personnel belonging to one department by another department or establishment and to enact a simple and uniform procedure for effecting the appropriation adjustments involved.

It is believed to be the policy of Congress, as evidenced in various provisions of the different appropriation acts, that whenever possible departments and establishments should make use of personnel and facilities of other departments or establishments.

As an example the Navy Department appropriation act requires:

"No part of the moneys herein appropriated for the naval establishment or herein made available therefor shall be used or expended under contracts hereafter made for the repair, purchase, or acquirement by or from any private contractor, of any naval vessel, machinery, article or articles that at the time of the proposed repair, purchase, or acquirement can be repaired, manufactured, or produced in each or any of the Government navy yards or arsenals of the United States, when time and facilities permit, and when, in the judgment of the Secretary of the Navy, such repair, purchase, acquirement, or production would not involve any appreciable increase in cost to the Government."

Also in title 38, section 434, of the United States Code under the Veterans' Bureau it is provided:

"The director * * * is hereby authorized * * * to utilize the now existing or future facilities of the United States Public Health Service, the War Department, the Navy Department, the Interior Department, the National Home for Disabled Volunteer Soldiers, and such other governmental facilities as may be made available for the purposes set forth in this act."

It is also a requirement of law, in using appropriations for the support of any activity that the appropriation be expended only for the objects specified therein. Section 3678 of the Revised Statutes states that:

"All sums appropriated for the various branches for expenditure in the public service shall be applied solely to the objects for which they are respectively made."

This requires that when one department obtains work, materials or services from another department it should pay the full cost of such work, materials or services.

If full cost is not paid, then such part of the cost as is not reimbursed must fall upon the department doing the work, which is contrary to section 3678 of the Revised Statutes and the appropriation of the department for which the work was done will be illegally augmented because it does not bear all of the cost of the work done for it.

REASON FOR THE LEGISLATION

There is no general authority for one department or establishment to order work, materials or services from another although a number of departments and establishments have authority to perform certain specific classes of work for other establishments. Examples are the Bureau of Standards, Bureau of Mines, Department of Agriculture, the Government Printing Office, and the Navy Department. The Comptroller General has held (7 C.G. Dec. 710):

"Where work can be done for another establishment only by increasing the plant or the number of employees of the establishment doing such work, there is no authority therefor in the absence of specific legislation that refers thereto."

This bill is intended to provide the specific legislative authority stated by the Comptroller General to be necessary by authorizing the performance of work or services or furnishing of materials by one department or establishment to another without any limitation as to existing facilities or personnel. On a job of any size for another department or establishment it might frequently be necessary to take on additional personnel in order to utilize existing facilities and complete the job within the time required or to retain the services of employees who would otherwise be discharged.

In spite of the provisions of section 3678 of the Revised Statutes the Comptroller General has held (7 C.G. Dec. 710) that the general rule is:

"The payment by the establishment receiving the benefit of the service is limited to the additional expense incurred by the employee during [the period] * * * he is engaged on the work of the establishment to which he is loaned, the salary of the employee remaining a charge against the appropriation of the establishment to which he belongs."

And also in the decision (6 C.G. Dec. 71), quoted from the syllabus:

"Where the performance of services by one establishment of the Government for another establishment does not involve the incurring of any extra expense or the increasing of the regular force and equipment, there is no basis for charging the appropriation of the establishment receiving the benefit of all such services."

Under existing decisions of the Comptroller General—except in a few instances specifically provided for by statute—one department can not undertake work for another if it involves increasing the personnel or facilities, nor can it receive reimbursement for the pay of its regular personnel even though such personnel are laborers or mechanics and paid at a daily or hourly rate of pay. The effect of these rulings is to prevent the free use by the Government of its own facilities for the reason that no department can afford to neglect its own work and use the time of its employees on work for another department. [Italic supplied.] *Hearings on H.R. 10199 before the House Committee on Expenditures in the Executive Departments*, 71st Cong. 3–5 (1930).

Representative French's testimony also indicated that H.R. 10199 was prepared by the Chief Coordinator of the United States (*Hearings, supra*, pp. 5–6) who, in commenting on H.R. 10199, stated as follows:

The Comptroller General in his decision, No. A–2272 of June 16, 1924, stated:

"The performance of work by one department for another, etc., without reimbursing the whole cost of such work, as accurately as it may reasonably be ascertained, would contravene the requirements of law in that it would augment one appropriation at the expense of another."

This decision was followed by the General Accounting Office for several years. But beginning with 1926 the Comptroller General's decisions have departed from this ruling by requiring that the amount chargeable to the funds of an establishment of the Government for services performed therefor by another establishment to be limited to the additional expense actually incurred by reason of such service. *This ruling in effect penalizes the performing department's appropriation for a part of the cost of the work and makes it loath to perform services for other departments and establishments for fear that its own work might be crippled thereby. This interpretation would be impossible if the proposed legislation were enacted.* [Italic supplied.] (*Hearings, supra*, pp. 13–14.)

The House Committee reported an amended version of H.R. 10199 which, among other things, expanded the coverage of the proposed law to include intra-agency as well as inter-agency orders (no longer termed procurements). Further, the Committee bill expanded the activities that could be performed pursuant to such orders to include furnishing of supplies and equipment, but limited orders only to agencies that were in a position to supply the material or perform the work. It also provided that, except in emergencies, such work, service, or materials must be performed by another agency if, in the opinion of the Director of the Bureau of the Budget, it would cost less to do so than to have the work or material performed by or procured from a non-Government source. Other changes were also made, including a proposal that the law be an amendment to section 7 of the Fortification Act of May 21, 1920, 41 Stat. 613, rather than a separate law.

However, reimbursement was still required to be based on "actual cost."

In commenting on the amended bill, the Committee stated:

PURPOSE OF LEGISLATION

The purpose of this bill is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practicable for all departments.

Your committee also believes that very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of its own.

* * * * * * *

COST OF WORK

Heretofore the cost of such services as have been performed by one department for another has frequently been paid for out of the appropriations for the department furnishing the materials and services. This is unfair to the department doing the work. All materials furnished and work done should be paid for by the department requiring such materials and services. Under the bill as amended working funds must be created by the Secretary of the Treasury upon request of department heads and adjustments made whereby the entire cost is borne by the department calling upon another department for materials and services. This will hold each department to strict accountability for its own expenditures and result in more satisfactory budgeting and accounting. [Italic supplied.] Report of the Committee on Expenditures in the Executive Departments on H.R. 10199, H.R. Rep. No. 2201, 71st Cong. 2–3 (1931).

While no further action was taken on H.R. 10199 in the 71st Congress, an almost identical provision was included as section 801 of H.R. 11597, 72d Congress, a bill to effect economies in the National Government. The report of the House Committee on Economy on H.R. 11597 (H.R. Rep. No. 1126, 72d Cong., 1st Sess. 15–16 (1932)) provides the same comments on the purpose of section 801 as were made about H.R. 10199 in H.R. Rep. No. 2201, 71st Cong., quoted *supra*. Thereafter, H.R. 11597 was incorporated as Part II of H.R. 11267, 72d Cong., the bill which became the Legislative Branch Appropriation Act for fiscal year 1933, June 30, 1932, Ch. 314, 47 Stat. 417. Section 601 of that Act is the provision for interagency transactions which had its origin in H.R. 10199, 71st Cong.

The one important dissimilarity between the two bills (H.R. 10199 as reported by the Committee on Expenditures and H.R. 11597) was that H.R. 11597 did not contain the requirement that the Government agency place its order with another Government agency (assuming the latter agreed) unless the Budget Bureau determined that the work or material could be more cheaply performed or procured otherwise. While the bill was under consideration by the House, Representative

Williamson offered an amendment to section 801 of H.R. 11597 as follows:

"Provided, however, That if such work or services can be as conveniently or more cheaply performed by private agencies, such work shall be let by competitive bids to such private agencies." 75 Cong. Rec. 9349 (1932).

Mr. Williamson's amendment was thereafter adopted. 75 Cong. Rec. 9350 (1932). Thus, instead of requiring the placement of orders with a Government agency rather than a private source unless the work or material could be more cheaply performed privately, Congress required placement of orders with private agencies, when the work could be performed or the service provided more cheaply or as conveniently than by a Government agency.

While the law and its legislative history are silent as to what was meant by the term "actual cost" when computing reimbursements for orders for inter- and intra-departmental work or services, the legislative history does indicate that by enactment of section 601 of the Economy Act, the Congress intended to effect savings for the Government as a whole by: (1) generally authorizing the performance of work or services or the furnishing of materials pursuant to inter- and intra-agency orders by an agency of Government in a position to perform the work or service; (2) diminishing the reluctance of other Government agencies to accept such orders by removing the limitation upon reimbursements imposed by prior decisions of this Office; [1] and (3) authorizing inter- and intra-departmental orders only when the work could be as cheaply or more conveniently performed within the Government as by a private source. Thus in determining the elements of actual cost under the Economy Act, it would seem that the only elements of cost that the Act requires to be included in computing reimbursements are those which accomplish these identified congressional goals. Whether any additional elements of cost should be included would depend upon the circumstances surrounding the transaction.

Insofar as cost is concerned, the last of the three congressional goals set forth above indicates an intent to have work performed at the least cost to the Government, but adds little in the way of aiding a determination of what are "actual costs" under 31 U.S.C. § 686. The Economy Act's overall goal is to effect economy in the Government as a whole. All that would be necessary to accomplish this would be to compute the additional costs to the agency performing the work or providing the service and permit it to execute the order when its additional costs are equal to or less than the cost of having the work

[1] These decisions were viewed as penalizing the performing agency by forcing it to bear the cost of performing another agency's work and at the same time augmenting the appropriation of the requisitioning agency by freeing its funds for other work.

or service performed or the material provided by a private source. To use a cost basis that included elements of cost that would be incurred by the agency (and hence the Government) regardless of whether the order for materials or work is placed within the Government or with a private source would distort the comparison required by 31 U.S.C. § 686. When a cost comparison between procurement from a private source and procurement from another Government agency is made on this basis--including in the cost of procurement within the Government elements of indirect cost which will be incurred regardless of where the order is placed--it is hard to conceive how economy would be effected by placing the order with the private source; in addition to the cost of the private procurement, the Government would then still incur all indirect costs not affected by receipt or non-receipt of the order. In such a situation the amount of money available for carrying out the various purposes for which appropriations are available is reduced and, in the end, while the total outlay by the Government might not be increased, the total amount of goods or services acquired for the money available is reduced.

The Economy Act clearly requires the inclusion as actual cost of all direct costs attributable to the performance of a service or the furnishing of materials, regardless of whether expenditures by the performing agency were thereby increased. Otherwise, the performing agency would be penalized to the extent that its funds are used to finance the cost of performing another agency's work, while the requisitioning agency's appropriations are augmented to the extent that they now may be used for some other purpose.

For the same reasons, certain indirect costs are recoverable as actual cost. However, for the reasons given above, only those indirect costs which are funded out of the performing agency's currently available appropriations and which bear a significant relationship to the performing of the service or work or the furnishing of materials are recoverable. To be recoverable, indirect costs must be shown, either actually or by reasonable implication, to have benefitted the requisitioning agency, and that they would not otherwise have been incurred by the performing agency. If an item of indirect cost does not bear a significant relationship to the service or work performed or the materials furnished, and is not funded from currently available appropriations, it should not be included as an element of actual cost for purposes of 31 U.S.C. § 686 (absent some other overriding consideration). Recovery in these circumstances would not restore to the performing agency amounts which it expended on the requisitioning agency's work which it would otherwise have expended on its own

work and hence would not serve the statutory purpose of preventing the performing agency from being financially penalized for transactions under 31 U.S.C. § 686. Recovery for such items of indirect cost—normally small in relation to direct costs—would probably have minimal impact on the decision of the performing agency to agree to perform the work or services or furnish the material involved and thus would have minimal impact in accomplishing one of the goals Congress sought to be achieved in adopting the Economy Act.

Furthermore, recovery and retention of such indirect cost items by the performing agency would augment the performing agency's appropriation since, in fact, these cost items had not financed the service, work, or material. Thus unless otherwise necessary to accomplish some recognizable goal or policy, billings under the Economy Act to requisitioning agencies should not include items of indirect cost which are not significantly related to costs incurred by the performing agency in executing the requisitioning agency's work and are not funded from currently available appropriations.

While the foregoing discussion indicates what the Economy Act requires as a minimum to be included in computation of costs for cost comparisons and reimbursement purposes, the law is not so rigid and inflexible as to require a blanket rule for costing throughout the Government. It must be recognized that there is a wide diversity of activities performed by the Government, and the means chosen to perform them. Certainly neither the language of the Economy Act nor its legislative history requires uniform costing beyond what is practicable under the circumstances. This is not to say that costing is expected to be different in a substantial number of circumstances. We are merely recognizing that in some circumstances, other competing congressional goals, policies or interests might require recoveries beyond that necessary to effectuate the purposes of the Economy Act. 56 Comp. Gen. 275 (1977) is modified accordingly.

The cost comparison and reimbursement requirements under the Economy Act differ from those established administratively by OMB Circular A–76, as revised, August 30, 1967, for Executive agencies to determine whether to initiate a commercial or industrial activity or to continue one in operation. OMB Circular A–76, in paragraph 4e, specifically provides that it does not apply to products or services obtained from other Federal agencies authorized by law to furnish them. Moreover, the Economy Act applies to purchases of materials or services which may not be the product of a Government commercial or industrial activity but may be part of basic agency operations. Further, under OMB Circular A–76, an agency may decide to initiate

or continue a commercial or industrial activity for reasons other than cost.

The above bases for comparing or reimbursing costs under the Economy Act are hence not relevant to an agency determination, under the Circular, to initiate new starts or to continue existing Government commercial or industrial activities, since such determinations are based upon the criteria of the Circular. Under the cost comparison criteria of OMB Circular A-76, an activity may be undertaken by the agency if it has determined that procurement from a commercial source would result in higher cost to the Government. But that determination, and the determination to continue a Government commercial activity, are independent of a decision by an agency, under the Economy Act, to procure materials or services from a Government commercial or industrial activity. Conversely, the decision to continue a Government commercial or industrial activity cannot be dependent on whether other agencies may choose to call upon that activity under the Economy Act for materials or services.

With regard to the specific questions presented, authority to operate and manage the airports is vested by law in the FAA (see D.C. Code §§ 7-1302, 1401, 1404 (1973)). This function has been delegated within FAA to a division of that agency called Metropolitan Washington Airports. Funds are appropriated to FAA generally for "operations" and otherwise made available for construction (through appropriations for: "Facilities, Engineering and Development," "Facilities and Equipment," and "Research, Engineering and Development"). Funds are also specifically appropriated to the FAA for "Construction, Metropolitan Washington Airports" and "operation and maintenance, Metropolitan Washington Airports." See, *e.g.*, the Department of Transportation and Related Agencies Appropriation Act, 1977, Public Law 94-387, August 14, 1976, 90 Stat. 1173-1174. These funds are available only for the purpose for which appropriated and no other. 31 U.S.C. § 628 (1970) ; 37 Comp. Gen. 472 (1958).

The airports' activities are funded separately from other components of the FAA. There is no reason to distinguish the provision of their facilities to other components of the FAA or to the Department of Transportation under the Economy Act, from the provision of facilities to other departments or agencies of the Government. The same standards should control the determination of costs in both situations.

Moreover, the airports are operated as self-sustaining commercial entities with rate structures and concession arrangements established so as to assure the recovery of operating costs, and an appropriate return on the Government's investment during the useful life of the

airport. *Hearings on Department of Transportation and Related Agencies Appropriations for 1977 before a Subcommittee of the House Committee on Appropriations*, 94th Cong., Part 4, pp. 618–620 (1976). The FAA director stated that over 98 percent of the airports' revenue was from non-Government sources. This being the case, we see no reason for fees assessed to the Government as a user of services or facilities to be based on a different rate structure from fees charged non-Government users. To do so would be contrary to the goal that such activities be self-sustaining unless the additional costs were passed on to the non-Government users which would be inequitable. While the Economy Act requires recovery of "actual costs," as discussed above, the term has a flexible meaning and recognizes distinctions or differences in the nature of the performing agency, and the purposes or goals intended to be accomplished. Here the primary beneficiaries of the airports' operations are the airlines and passengers. Any benefit to the Government in operating such airports is incidental at best. In such a situation, fees collected from both Government and non-Government users should include depreciation and interest.

Finally, we do not object to the FAA proposal to deposit fees collected from within the Government for services provided at the airports into the Treasury as miscellaneous receipts. Section 601 of the Economy Act of 1932, as amended, permits the depositing of reimbursements to the credit of appropriations or funds against which charges have been made pursuant to any such order (except as otherwise provided). Nevertheless, in 56 Comp. Gen. 275, at 278–79, we said that reimbursements for indirect costs in transactions under 31 U.S.C. § 686 may be deposited in miscellaneous receipts. The same conclusion applies to reimbursements for direct costs. We suggested in 56 Comp. Gen. 275, at 279, that the deposit in miscellaneous receipts of indirect cost recovery was justified at least in part because to do so would not impair the agency's ability to perform work for other agencies and yet would not reduce the amount available to it for its own activities. Although the deposit in miscellaneous receipts of reimbursements for direct costs would reduce the amount available to the performing agency, we see no compelling reason, on that account, not to allow the deposit in the agency's discretion.

One exception to the foregoing principles should be mentioned. Deposit of reimbursements to an appropriation or fund against which no charges had been made in executing an order is an unauthorized augmentation of the agency's appropriation. Such collections must be deposited into the general fund as miscellaneous receipts. Where depreciation is concerned, for example, since the appropriation which most reasonably might be said to have borne the cost is the one made

for construction of the facility involved, and this is presumably no longer available for that purpose, this amount should be deposited in the Treasury as miscellaneous receipts.

[B-190093]

Contracts—Specifications—Samples—Noncompliance With Specifications—Bid Rendered Nonresponsive—Rejection Required

Bid samples furnished without interior graining, not listed as subcharacteristic of prescribed "interior appearance" criterion, could not be evaluated as required by solicitation for neatness and smoothness of interior appearance because samples could not demonstrate that with addition of graining bidder's product would retain requisite appearance. Procuring activity lacked reasonable basis to conclude samples complied with solicitation's subjective characteristics and was required to reject bid as nonresponsive to solicitation.

Bids — Rejection — Nonresponsive — Sample Requirements — Nonconformance

Agency's favorable consideration of bid samples furnished with note stating that although samples' interior did not comply with solicitation, production items would conform to specification, is tantamount to allowing bidder to submit additional samples after bid opening and violates rule that bid may not be altered after bid opening to make it responsive to solicitation.

Contracts—Federal Supply Schedule—Requirements Contracts—Evaluation of Bids, etc.—Propriety—Sample Requirements

While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid *conforms* to the solicitation. 41 U.S.C. 253(b) (1970).

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

Portion of protest concerning procuring activity's treatment of protester's bids in response to earlier solicitations which are not the subject of the protest here in question will not be addressed.

Contracts—Specifications—Samples—Adequacy—Agency Acceptance of Nonconforming Items in Prior Procurement Effect

Assertion that protester previously furnished acceptable bid samples to procuring activity does not determine acceptability of samples submitted in response to instant solicitation, nor does acceptance of items on a prior contract bind agency to accept nonconforming items under a subsequent contract.

Contracts — Specifications — Samples — Defective — Determination Upheld

Protest against rejection of bid as nonresponsive because bid samples were found not to comply with objective characteristics listed in invitation for bids (IFB) is denied. Invitation for bids advised that nonconforming samples would require

rejection of bid, tested samples manifested condition proscribed by IFB specification, and protester did not show its samples were not fairly evaluated by procuring activity.

Contracts—Specifications—Samples—Tests to Determine Product Acceptability—Validity—Timeliness of Protest

Protest concerning validity of objective tests for bid sampling filed more than 5 months after bid opening is untimely as such procedures were readily apparent from examination of IFB.

In the matter of Airway Industries, Inc.; United States Luggage Corporation, August 14, 1978:

Airway Industries, Inc. (Airway), and United States Luggage Corp. (USLC) have protested against the award of a contract for dispatch cases by the General Services Administration (GSA), Federal Supply Service, to Eastern Case Co., Inc. (Eastern), resulting from invitation for bids (IFB) No. FPGA-HH-90071-A.

The IFB, issued on June 16, 1977, contemplated the award of a requirements contract for molded plastic (metal frame) dispatch cases, National Stock Numbers (NSN) 8460-00-782-6726 and -6729, in accordance with Federal Specification KK-C-1535B, August 16, 1976, as modified, for the period of July 1, 1977, or the date of award, to June 30, 1978.

Bid samples were required to be furnished as part of the bids, and bids were to be rejected if the samples failed to conform to specified characteristics. Federal Procurement Regulations (FPR) § 1-2.202-4 (1964 ed. amend. 139). The IFB contained a Bid Sample Requirements clause which provided, in pertinent part, as follows:

a. Two bid samples are required for each of the following items in this solicitation:

NSN-8460-00-782-6726, NSN-8460-00-782-6729

b. Two representative samples shall be submitted for each of the following items bid upon:

ITEMS	ACCEPTABLE REPRESENTATIVE SAMPLE
1-14	
15-28	

* * * * * * *

c. Samples will be evaluated to determine compliance with all characteristics stated below:

Subjective Characteristics	Objective Characteristics
a. *Workmanship*	a. *Drop Test (Para. 4.3.2) Fed. Spec. KK-C-1535B*
b. *Convenience of carrying*	b. *Tumble Test (Para, 4.3.3) Fed. Spec. KK-C-1535B*
c. *Stability while standing*	
d. *Exterior appearance*	
e. *Interior appearance*	
(i) *General*	
Matching color of apron, with interior	

Subjective Characteristics		
(ii) Unlined		*(iii) Lined*
Neatness and smoothness of visible interior with no evidence of sharp jagged or rough unfinished components		*Harmony of color with exterior case of removal*

Unit-price bids were to be submitted, f.o.b. 14 destinations, for estimated quantities of NSN–6726 (items 1–14) and NSN–6729 (items 15–28). Four bids were received at the bid opening on July 26, 1977. The low bidders for NSN–6726 were: Airway on items Nos. 2 and 3, USLC on item No. 13, and Eastern on the remaining 11 items. For NSN–6729, Airway was the low bidder on items Nos. 16 and 17, USLC on items Nos. 15, 23, 24 and 27, and Eastern on the remaining eight items.

GSA requested a preaward survey of Eastern's facilities, pursuant to FPR § 1–1.1205–4 (1964 ed. amend. 95); General Services Procurement Regulation (GSPR) § 5A–1.1205–4 (1976 ed.), on August 22, 1977. The Plant Facilities Report (PFR) dated September 2, 1977, found the firm capable of performing under the IFB.

BID SAMPLE EVALUATIONS

According to a GSA memorandum dated October 4, 1977, subjective tests were performed on the bidders' samples on August 8, 1977, with the following results:

1. Airway Industries 5'' & 3''—Passed
2. U.S. Luggage 5'' & 3''—Passed*

*NOTE—Lock is of the Lunch Box type and should be checked out under objective tests.

3. Eastern Case Company 5'' & 3''—Passed*

*It was noted in bid samples submitted by Eastern: "The bid sample does not have a grained interior. Production cases will have a grained interior as per specification."
This can be corrected in production and the manufacturer encounters no problem in production.

GSA's Bid Sample Evaluation Report, dated August 25, 1977, concluded with respect to the above-quoted objective characteristics that the samples of Airway, Eastern and USLC for NSN–6726 did not comply with the specification requirements. More specifically, Airway's initial sample failed the Tumble Test because a latch opened during the test (Federal Specification KK–C–1535B (Fed. Spec.) para. 3.3.5, August 16, 1976), and Eastern's lid shell separated from the frame section of the case (Fed. Spec., para. 3.3.2); the bidders' second samples, however, passed the test. USLC's sample failed the Drop Test because the case evidenced dimpling on the corners (Fed. Spec., para. 3.3.2) and deficiencies were also noted concerning the case latches and

feet (Fed. Spec., paras. 3.3.5.3 and 3.3.9). The Airway and Eastern samples for NSN–6729 were found to comply with the specification requirements, but USLC's sample failed to comply for the same reasons stated with regard to the firm's sample for NSN–6726.

The following statement concerning interior graining, apparently directed at the note affixed to Eastern's sample, was added to the above-quoted October 4 memorandum by GSA's memorandum of October 14, 1977.

> The requirements for the appearance of the grained interior of the unlined molded plastic dispatch cases are set down in paragraph 3.3.6.1 of Fed. Spec. KK–C–1535B, and must be adhered to in manufacturing production items for delivery in accordance with a contract.
>
> In evaluating the subjective characteristics of bid samples of Molded Plastic Dispatch Cases no consideration of the grained unlined interior of the cases is listed in Solicitation No. FPGA–HH–90071–A–7–26–77.
>
> A potential supplier would have no trouble meeting this requirement in production by either graining the interior of the case concurrent with the molding of the plastic shells or by using sheets that have been grained prior to molding the shells.

On the same day GSA requested an additional PFR as to Eastern's capability to furnish the prescribed case interior. See GSPR § 5A–2.202–4(g) (1976 ed.). The report, dated October 20, 1977, concluded that an inspection of the firm's plant indicated Eastern was capable of producing cases in compliance with paragraph 3.3.6.1 of the applicable specification (i.e., with grained interior).

During the interim the bidders complied with GSA's request for extension of the acceptance period of their bids. On December 19, 1977, however, GSA issued a Determination and Findings of urgency, FPR § 1–2.407–8(b) (4) (1964 ed. amend. 68), pursuant to which a contract for items 2, 3, 16 and 17 was awarded to Airway and a contract for the remaining 24 items was awarded to Eastern on December 23, 1977. By letter dated January 6, 1978, GSA notified USLC that its bid had been rejected as nonresponsive because the firm's bid samples failed to conform to the specification requirements.

AIRWAY INDUSTRIES PROTEST

On September 9, 1977, Airway filed its protest with our Office against the award of a contract under the IFB to any other bidder on the grounds that Eastern's bid samples failed to meet the requirements of the IFB and the applicable Federal specification. More specifically, Airway asserts that:

1. Eastern's bid samples do not conform to the dimensions required by paragraph 3.3 of the Federal specification; differences in dimensions of bid samples and production items could produce different test results; thus, there is no guarantee that production

items would have passed the objective tumble test. Prior Eastern samples of the required dimensions did not consistently pass the tumble test.

2. The note pasted in Eastern's samples indicates that the samples do not met the IFB's subjective characteristics for interior appearance. The IFB requires unlined cases have a neat, smooth visible interior free from rough jagged or rough finished components and the Federal specification defines "neatness" to require a "uniform grain." Samples furnished without graining cannot be inspected for appearance and should be rejected as failing to comply with the listed subjective characteristics.

3. Eastern's samples do not comply with the requirements for "workmanship," Federal specification, para. 3.5, because they do not present the requisite material, interior and exterior appearance, and locks, which affect the product's serviceability and appearance.

GSA, however, takes the position that (1) neither case dimensions nor grained interior is included in the subjective characteristics listed in the IFB, (2) lack of grained interior is a defect easily subject to correction in production, and (3) Eastern's samples are deemed to comply with the IFB.

Initially, we agree that case dimensions were not included among the subjective characteristics for which bid samples were to be evaluated. Insofar as Airway has merely alleged, without proving, that Eastern's bid samples fail to comply with the required dimensions and workmanship, we will neither speculate as to their compliance nor substitute our judgment for that of the GSA evaluators.

Although interior graining was not specifically listed as a subcharacteristic under any of the subjective characteristics set forth in the IFB, we cannot concur with GSA's delimitation of the scope of bid sample evaluation for interior appearance. We believe that the agency's interpretation fails to consider the integral correlation between the IFB and the applicable Federal specification. The purpose of listing sample evaluation criteria is to advise prospective bidders of the standards against which their bid samples will be evaluated.

Paragraph 3.3.6 of the Federal specification gave bidders the choice of furnishing cases with either lined or unlined interior, as specified in paragraph 3.3.6.1 or 3.3.6.2. Paragraph 3.3.6.2, *Unlined Interior*, required in part that:

> [b]oth top and bottom finished interior surfaces shall be grained prior to or concurrent with the molding process and, after molding, shall result in a uniform grain.* * *

According to paragraph 3.3.6, samples were to be evaluated for either subjective characteristic paragraph (e)(ii) *or* (e)(iii), above, because bidders were required to furnish either lined or unlined interior, not both.

Paragraph (e)(ii) of the above-quoted IFB subjective characteristics states that the bid samples were to be evaluated for "*unlined neatness and smoothness* of visible interior with no evidence of sharp jagged or rough unfinished components." [Italic supplied.] Notwithstanding the fact that graining might readily be supplied during the production process, we believe that the neatness and smoothness of unlined, grained interior cannot be determined by examining bid samples with unlined, ungrained interior. The fact that Eastern's bid samples presented a neat, smooth interior did not suffice to indicate that with the addition of graining Eastern's production items would retain the requisite interior appearance. Because Eastern's samples could not adequately demonstrate the characteristic listed for evaluation, GSA had no reasonable basis upon which to determine that the firm's samples complied with the subjective characteristics of the IFB and was required to reject Eastern's bid as nonresponsive.

Moreover, we have long followed the rule basic to competitive bidding that a bid may not be altered after bid opening in order to make it responsive to the solicitation. 40 Comp. Gen. 432, 435 (1961). Because bid samples are part of the bid, the same rationale applies to changes in bid samples subsequent to bid opening. *Kaufman DeDell Printing, Inc.*, B–181231, March 24, 1975, 75–1 CPD 172.

The responsiveness of Eastern's bid, that is, the firm's intention to comply with all IFB specifications, must be determined from the company's actual bid and bid samples. See B–176699, November 30, 1972; *Sheffield Building Company, Incorporated*, B–181242, August 19, 1974, 74–2 CPD 108. Consideration of Eastern's bid samples as if they had been furnished with the interior proposed by the attached note was tantamount to allowing the bidder to submit a second set of bid samples after bid opening. See 40 Comp. Gen. 432 (1961); *Sheffield Building Company, Incorporated, supra; Kaufman DeDell Printing, Inc., supra.* GSA's favorable evaluation of Eastern's samples is particularly egregious because the agency was expressly advised that the samples did not comply with all the specifications of the IFB and, therefore, made its evaluation in reliance on the belief that production items would somehow be made to conform *after* a contract had been awarded.

Bid samples are permitted in order to determine the responsiveness of a bid and may not, as a general rule, be used for determining a bidder's ability to produce the required item. FPR § 1–2.202–4(a) (1964 ed. amend. 10); B–164732, September 30, 1968; *D. N. Owens Com-*

pany, 57 Comp. Gen. 231 (1978), 78-1 CPD 66. Where, as here, a bid may properly be rejected as nonresponsive, neither a determination as to the bidder's responsibility nor a preaward survey preparatory to such a determination is necessary. *Seal-O-Matic Dispenser Corporation*, B-187199, June 7, 1977, 77-1 CPD 399. The problem with GSA's evaluation procedure and its treatment of bid samples lies with its own internal regulations found at GSPR § 5A-2.202-4 (1976 ed.). Under those regulations, if bid samples have been found in compliance with *all* the listed characteristics of the IFB, but deficient with regard to unlisted characteristics, GSA must request a PFR. GSPR § 5A-2.202-4(g) (1976 ed.). Unlike the ordinary treatment of bid samples, a request for a PFR is properly made for the purpose of determining a bidder's *ability* to produce a conforming item (i.e., an affirmative determination of responsibility) and requires specific statements regarding the bidder's "ability * * * to correct each noted deficiency in *objective* characteristics as well as an overall appraisal of his capability." FPR § 1-1.1205-4 (1964 ed. amend. 95); GSPR § 5A-2.202-4(g) (1976 ed.). [Italic supplied.]

The problems inherent in the current GSA bid sample evaluation process, as we see them, are as follows:

(1) Solicitation evaluation characteristics are not sufficiently detailed to accurately apprise bidders of the standards against which bid samples are to be evaluated.

(2) Evaluations conducted according to currently used characteristics fail to consider salient product features prescribed by the controlling Federal specification.

(3) Further testing of bid samples whose nonconformity is apparent from visual inspection (subjective testing stage) needlessly prolongs sample evaluation and the entire procurement process, often requiring the extension of bids for no useful purpose.

Furthermore, we can find no reasonable basis in fact in the record for GSA's consideration of Airway or Eastern as eligible for award of a contract for any of items 1 through 14 (i.e., NSN-6726). As mentioned above, according to GSA's own evaluation memorandum of August 25, 1977, neither firm's bid sample for NSN-6726 complied with the objective characteristics listed in the IFB. The tests were, however, repeated with satisfactory results on another set of the bidders' samples. While the reason for which a second round of tests was administered is not clear, we note it as a further example of the unnecessarily extended evaluation process which characterizes the instant procurement, a concern which we will address below. Because the firms' bid samples for NSN-6726 clearly did not conform to *all* the evaluation characteristics listed in the IFB, GSA was required to reject their bids as non-

responsive. The conflicting test results do not affect the procuring activity's obligation in this regard because they merely render the bids, at best, ambiguous. In a procurement by formal advertising, award must be made to the responsible bidder whose bid, *conforming to the IFB*, will be most advantageous to the Government. 41 U.S.C. § 253(b) (1970). [Italic supplied.] The contracts awarded to Airway for items 2 and 3 and to Eastern for items 1 and 4 through 14 were, therefore, awarded in contravention of the terms of the IFB and in violation of pertinent procurement law and regulations.

Similarly, items 15 and 18 through 28 of Eastern's bid were supported by bid samples which failed to comply with the interior graining requirement of the IFB. Eastern's nonconforming bid samples required rejection of the firm's bid as nonresponsive. Consequently, GSA's award to Eastern for these items was also made in violation of controlling procurement law and regulations.

Accordingly, the protest is sustained. We are unable to recommend corrective action with regard to the base-period portions of the contracts, which have already been performed. We learned, however, on July 7, 1978, that GSA has exercised a 2-month option which extends the term of the contracts through August 31, 1978. We therefore recommend that no further orders for items 2 and 3 should be placed with Airway, no orders for items 1, 4 through 15, and 18 through 28 should be placed with Eastern under the option, and any new requirements should be solicited in a manner consistent with this decision.

UNITED STATES LUGGAGE CORPORATION PROTEST

USLC essentially contends that its bid was improperly rejected as nonresponsive because its bid samples were not properly evaluated by GSA. The protester questions the validity of the objective Drop Test, noting that previous sample cases were submitted without any adverse report; states that the specification is ambiguous with regard to the locks and latches to be furnished, and that sample cases equipped with the identical lock were not rejected on that basis; and alleges that GSA's actions evidence a longstanding course of conduct by the agency, intended to discourage USLC from competing on similar future solicitations.

Initially, USLC's concern with regard to the validity of the objective tests used by GSA questions the propriety of procedures, the use of which was readily apparent from an examination of the IFB. However, according to our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977 ed.), protests based upon such an alleged impropriety must be filed with our Office prior to bid opening. Because USLC filed its protest more than 5 months *after* the bid opening, this ground of the pro-

test is untimely filed and will not be considered on the merits. See B-176210, February 2, 1973.

Insofar as USLC's protest pertains to GSA's treatment of USLC bids in response to solicitations issued prior to the IFB here in question, those aspects of the protest will not be addressed because they do not concern the instant procurement and protests filed against them at this juncture would be untimely filed and not for consideration on the merits. 4 C.F.R. § 20.2 (1977 ed.).

In support of the exception taken to GSA's evaluation of its bid samples, USLC states that samples previously furnished to GSA have passed the Drop Test and that sample cases equipped with the same latch were not previously rejected on that basis. The fact that USLC may have previously furnished an acceptable item under an earlier GSA procurement is not, however, determinative of the acceptability of samples submitted in response to the instant IFB. *Seal-O-Matic Dispenser Corporation*, *supra; R & O Industries, Inc.*, 53 Comp. Gen. 810 (1974), 74-1 CPD 221; B-176262, December 4, 1972. Even the acceptance of nonconforming items on a prior contract does not bind the procuring activity to accept nonconforming items under a subsequent contract. *Lasko Metal Products, Inc.*, B-182931, August 6, 1975, 75-2 CPD 86.

USLC further asserts that its bid in response to the instant IFB was wrongfully rejected on the basis of GSA's improper evaluation of the firm's bid samples. GSA, however, takes the position that the samples were evaluated in accordance with the terms of the IFB. As GSA notes, we feel that procurement officials are better qualified than our Office to evaluate bid samples' compliance with the characteristics prescribed in solicitations. Consequently, we will not substitute our judgment for that of the contracting agency unless the record establishes that the agency's judgment was without basis in fact. *Lasko Metal Products, Inc.*, *supra; R & O Industries, Inc.*, B-183688, December 9, 1975, 75-2 CPD 377.

GSA rejected USLC's bid because the firm's bid sample did not comply with the IFB's objective characteristics, i.e., the case dimpled at the corners subsequent to the Drop Test. Paragraph 3.3.2 of the Federal specification expressly provides that when sample cases undergo the Drop Test they "shall show no evidence of corner dimpling." Moreover, USLC, despite its disagreement with the evaluation, has not shown that the samples were not fairly evaluated by GSA. We are, therefore, unable to conclude from the record that GSA's determination that USLC's samples failed to comply with the requirements of the objective test was without a reasonable basis in fact. *Products Engineering Corporation*, 55 Comp. Gen. 1204 (1976), 76-1 CPD 408. Accordingly, USLC's protest is denied.

Notwithstanding the fact that GSA could properly reject USLC's bid as nonresponsive on the basis of the aforementioned objective test results, we believe that confusion arose from the inclusion of GSA's remarks concerning additional sample deficiencies, not pertinent to the objective characteristics listed in the IFB, in GSA's October 4 memorandum and notice of award. Contrary to the above-quoted portion of the October 4 memorandum, any deficiency concerning the case latches was not properly for consideration with reference to the objective tests. In fact, the specification's sole testing provision regarding these items, paragraph 3.3.5, merely requires that "[l]atches and locks shall remain closed and locked when being tested * * * [and after testing] shall remain operable." Because GSA did not find that the USLC sample latches opened or became inoperable after testing, their configuration alone could not properly serve as a basis for determining that the samples did not comply with the IFB's *objective* characteristics. Although configuration of the latches might be subsumed in the subjective characteristic of "exterior appearance," GSA found, according to its August 25 memorandum, that the protester's samples met the enumerated subjective characteristics. Similarly, the manner in which the feet were secured to sample cases was not even mentioned in the subjective test results, nor was it relevant to the IFB's objective characteristics.

The purported deficiencies noted by GSA were, or should have been, apparent from visual inspection of the bid samples. Assuming, *arguendo*, that these deficiencies indicate that USLC's product, as represented by the bid samples, does not comply with the Federal specification, USLC's bid should have been rejected as nonresponsive without subjecting the samples to the subjective or objective tests. No useful purpose can be served by adducing additional reasons for which the bid sample and bid are nonresponsive to the requirements of the IFB. Under such circumstances, the time, effort and expense involved in prolonging sample evaluation and the overall procurement process, including the extension of bids, are needlessly expended.

Even if GSA considered these deficiencies minor or waivable, which appears inapposite to the tenor of the memoranda and notice of award, that possibility raises the question of whether the Federal specification and IFB actually overstated the procuring activity's minimum needs. However, because GSA had a reasonable basis in fact upon which to reject USLC's bid as nonresponsive, we find it inappropriate to pursue this issue.

For the foregoing reasons, we are recommending to GSA that bid sample testing procedures be implemented which will provide for the termination of testing at the earliest stage at which it becomes appar-

ent that bid samples do not comply with applicable specifications or characteristics of a solicitation, thus requiring rejection of bids in support of which the samples have been submitted. We will also consider the matter in connection with our audit functions.

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

[B-190554]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Former Residence

Employee who transferred to new duty station returned to family residence at old duty station on weekends. Where the return trips were not attributable to "official necessity" under the Federal Travel Regulations (FPMR 101-7) (May 1973), para. 2-5.2a, the period for claiming temporary quarters continues to run 30 consecutive days without interruption.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Absences

Employee who transferred to new duty station performed temporary duty at old duty station. Period for claiming temporary quarters may be interrupted for periods of temporary duty, but since temporary quarters may be reimbursed only in increments of calendar days, occupancy of temporary quarters for even less than a full day constitutes one of the 30 calendar days. 56 Comp. Gen. 15 (1976). Computation of 30-day period would depend upon when employee departed on temporary duty, when he returned, and which days he has claimed temporary quarters. 47 Comp. Gen. 322, modified.

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Seller's Mortgage Interest

Employee who transferred to new duty station claims reimbursement for payment of seller's mortgage interest due to delay in settlement on residence at new duty station. Despite employee's contention that delay was due, in part, to his performing temporary duty away from the new duty station, claim is not allowable as miscellaneous expense or incidental charge customarily paid in the area under Federal Travel Regulations (FPMR 101-7) (May 1973), paras. 2-5.2d and 2-5.2f.

In the matter of Roy C. Hitchcock—claim for temporary quarters and real estate expenses, August 14, 1978:

This action is in response to a request for an advance decision from Mr. H. Larry Jordan, an authorized certifying officer of the Department of Agriculture, reference FI-2, HLJ, concerning the claims of Mr. Roy C. Hitchcock, an Agriculture employee, for reimbursement for temporary quarters subsistence expenses and certain real estate expenses.

Mr. Hitchcock was transferred from Cook, Minnesota, to Duluth, Minnesota, effective June 28, 1976, and he was authorized reimbursement for certain relocation expenses including temporary quarters and real estate expenses. Mr. Hitchcock claimed reimbursement for temporary quarters for the period from June 28 through August 11, 1976, a period in which there were several occasions when he returned to his family's residence in Cook for the weekend or for periods of temporary duty in the vicinity of Cook. The administrative office held that Mr. Hitchcock's return trips to his home on weekends did not constitute a valid break in the period of temporary quarters and disallowed that part of his claim ($92.26) which was in excess of the 30-day limit for temporary quarters contained in the Federal Travel Regulations (FTR) (FPMR 101–7) (May 1973), para. 2–5.2a.

Mr. Hitchcock has submitted a reclaim voucher for the amount disallowed contending that since he began his temporary duty Monday morning in Cook he should be considered to be in a temporary duty status from the time of his departure from Duluth on Friday until his return to Duluth even though no per diem or subsistence was claimed for the weekend. The administrative report states that Mr. Hitchcock could have traveled the distance of 92 miles from Duluth to Cook on Monday morning to perform temporary duty, and the report concludes, "(t)herefore, it appears that departure on Friday evening could only be viewed as having been performed for Mr. Hitchcock's personal convenience and not out of official necessity."

Mr. Hitchcock has also filed an additional claim for temporary quarters in the amount of $141.53 which represents his total expenses for temporary quarters during his transfer. Mr. Hitchcock argues that the intent of the regulation governing temporary quarters is to reimburse all reasonable subsistence expenses incurred by an employee and his family and that the amount he claims is less than what he could have claimed for temporary quarters for himself and his family. Finally, Mr. Hitchcock seeks reimbursement in the amount of $92.19 for interest which he paid to the seller of his new residence in Duluth for the period of time between the date he occupied the residence and the date of settlement. Mr. Hitchcock contends that settlement on the new residence was delayed for the most part due to temporary duty which he performed away from his new duty station. This claim was denied by the administrative office as not reimbursable under the Federal Travel Regulations.

The statutory authority for reimbursement of subsistence expenses while occupying temporary quarters is contained in 5 U.S.C. § 5724a (a) (3) (1976) which provides that, under regulations prescribed by the President, such expenses may be paid "for a period of 30 days."

The applicable regulation concerning the time limitation on reimbursement for temporary quarters is contained in FTR para. 2–5.2a and provides, in pertinent part, as follows:

Length of time allowed and location of new official station. Subsistence expenses of the employee for whom a permanent change of station is authorized or approved and each member of his immediate family (defined in 2–1.4d) shall be allowed for a period of not more than 30 consecutive days while the employee and family necessarily occupy temporary quarters * * *. The period of consecutive days may be interrupted for the time that is allowed for travel between the old and new official stations or for circumstances attributable to official necessity, as for example, an intervening temporary duty assignment * * *.

In accordance with the provisions of the regulation, our Office has drawn a distinction between interruptions in the period for occupancy of temporary quarters that are the result of an employee's obligation to the Government (official necessity) and interruptions that are for personal reasons. See *Beverly J. Nordquist*, B–185338, February 19, 1976, and decisions cited therein. Where an employee is called away from his new duty station for reasons of official necessity such as the performance of temporary duty or military training, the 30–day period may be interrupted. See *Nordquist*, *supra*, and B–181482, February 18, 1975. However, in the present case it appears that Mr. Hitchcock's weekend trips to Cook were not for reasons of official necessity but were for personal reasons, and such absences from the new duty station do not interrupt the 30-day period for temporary quarters.

Mr. Hitchcock did perform some temporary duty away from his new duty station, and the agency questions how the 30-day period of temporary quarters should be computed in light of our decision in *Joseph B. Stepan*, 56 Comp. Gen. 15 (1976). In *Stepan* we held that since the statute allows reimbursement for temporary quarters only in increments of calendar days, occupancy of temporary quarters even for less than a full day constitutes 1 of the 30 calendar days during which such expenses may be paid. The computation of the 30-day period in the present case would therefore depend upon when Mr. Hitchcock left his temporary quarters to perform temporary duty, when he returned, and for which days he has claimed temporary quarters subsistence reimbursement.

In determining which day the period of temporary quarters is to resume following an interruption for reasons of official necessity, we must consider FTR para. 2–5.2g which provides as follows:

Effect of partial days. In determining the eligibility period for temporary quarters, subsistence expense reimbursement and in computing maximum reimbursement when the occupancy of such quarters for reimbursement purposes occurs in the same day that en route travel per diem terminates, the period shall be computed beginning with the calendar day quarter after the last calender day quarter for which travel per diem described in 2–2.1 and 2–2.2 is paid, except that when travel calendar day quarter during which travel per diem terminates. In all other cases, the period shall be computed from the beginning of the calendar day quarter for which temporary quarters subsistence reimbursement is claimed,

provided that temporary quarters are occupied in that calendar day. The temporary quarters period shall be continued for the day during which occupancy of permanent quarters begins.

Since Mr. Hitchcock's return travel from temporary duty is not considered to be "en route travel," the second sentence in the above-cited regulation would be applicable, and the period for computing temporary quarters would resume either the day the employee returns from temporary duty or the following calendar day, depending upon when the employee claimed reimbursement for temporary quarters. Mr. Hitchcock has claimed reimbursement for temporary quarters on the days he returned from temporary duty, and, therefore, the agency has correctly computed these days in the 30-day period.

The above-cited regulation does not directly address the question of when the 30-day period is to be interrupted by the employee's departure from his new duty station for reasons of official necessity. However, consistent with the rule governing the employee's return from temporary duty, we believe the day of departure from the new duty station may be excluded from the 30-day period if the employee chooses to not claim temporary quarters on that calendar day.

In the present case, the agency has determined that Mr. Hitchcock's absence from his new duty station during the weekend was for personal reasons and that, but for that absence, he could have departed to his new duty station Monday morning in order to travel to his temporary duty assignment. Since Mr. Hitchcock has not claimed temporary quarters for the days the agency has determined he would have departed on temporary duty, those days are not counted in the 30-day period, and the agency should correct its computation. We would point out that interruptions in the 30-day period for temporary quarters for reasons of official necessity must be computed in the manner set forth above. 47 Comp. Gen. 322 (1967) modified.

Mr. Hitchcock contends that the intent of the regulations is to reimburse all reasonable expenses incurred prior to the occupancy of permanent quarters at the new duty station. In addition, he states that his claim for temporary quarters is less than the amount he could have claimed for temporary quarters for himself and his family. However, reimbursement for temporary quarters subsistence expenses may only be allowed to the extent provided under the applicable statute and regulation. Where the interruption in the occupancy of temporary quarters is not attributable to reasons of official necessity, the 30-day period is not interrupted and there is no basis for payment for temporary quarters beyond the 30-day limit. The fact that Mr. Hitchcock could have claimed greater temporary quarters subsistence expenses if his family had accompanied him to the new duty station has no effect on his entitlement as outlined above. Since Mr. Hitchcock elected, for

reasons of his own, not to bring his family to the new duty station until a later date, there is no authority to reimburse him for temporary quarters subsistence expenses beyond that provided by statute and regulation for an employee traveling without his family.

Finally, Mr. Hitchcock seeks reimbursement for an interest payment he incurred as a result of a delay in the settlement on the residence at the new duty station. Mr. Hitchcock contends that the delay in settlement was due, in part, to his assignment to temporary duty away from his new duty station for a period of 2 weeks.

The types of expenses which are allowable in connection with a residence transaction are specified in FTR chapter 2, Part 6, but the payment of interest as described in the present case does not appear allowable as either a miscellaneous expense or an incidental charge customarily paid in the locality of the residence. FTR paras. 2-5.2d and 2-5.2f. We concur with the administrative determination that this claim may not be paid.

Accordingly, the voucher may be certified for payment in accordance with the discussion above.

[B-190926]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Computation of Allowable Amount—Thirty Day Period

Employee, while in temporary quarters, performed official travel during ¾'s of 2 days, for which time he was paid per diem. If he chooses, he does not have to count those 2 days as part of his 30-day entitlement to temporary quarters. He may, instead, be paid temporary quarters allowance for the 2 days following the date on which his entitlement would otherwise have expired.

Subsistence—Per Diem—Dependents—Rates

The rate of per diem for a member of an employee's family performing permanent change-of-station travel is determined on the basis of the age of the family member at the time the travel is performed.

Transportation—Household Goods—Rates—Metropolitan Area Rates

There is no entitlement to the additional allowance for shipments of household goods originating in or terminating in certain metropolitan areas, prescribed in GSA Bulletin FPMR A-2, Supplement 67, Attachment A, where the employee moves his household goods himself.

In the matter of Gerald K. Schultz—temporary quarters—period interrupted by temporary duty travel, August 14, 1978:

This responds to a letter with attachments, dated December 9, 1977, from Ms. Ruth W. Oxley, a certifying officer of the Bureau of Recla-

mation, Department of the Interior, requesting a decision as to the entitlement of Mr. Gerald K. Schultz, an employee of the Bureau, to certain relocation allowances.

I

Mr. Schultz was transferred from Albany, New York, to Amarillo, Texas, in 1976. He was authorized temporary quarters subsistence allowance for 30 days incident to this transfer. He reported for duty in Amarillo on December 23, 1976, entering temporary quarters there on December 27, 1976, at 12 a.m. He performed official travel on a temporary duty assignment from 7 a.m., on January 19, 1977, until 2:15 p.m., on January 20, 1977. Mr. Schultz was paid per diem for three quarters of a day for both days he performed this travel. One quarter of his expenses for each of these days was treated as temporary quarters subsistence expenses. The certifying officer counted January 19, and 20, each as 1 day of temporary quarters for purposes of determining when Mr. Schultz's entitlement to temporary quarters allowance ended, and, accordingly, treated Mr. Schultz's 30-day entitlement as ending on January 25, 1977. Mr. Schultz, however, thinks that his entitlement should not have expired until noon of January 27, because of the 1½-day period during which he was away from his station and for which he did not receive temporary quarters allowance.

An employee's entitlement to temporary quarters allowance is governed by Part 5 of the Federal Travel Regulations (FPMR 101–7, May 1973). Paragraph 2–5.2a thereof provides in pertinent part:

> Subsistence expenses of the employee for whom a permanent change of station is authorized or approved and each member of his immediate family * * * shall be allowed for a period of not more than 30 consecutive days while the employee and family necessarily occupy temporary quarters * * *. The period of consecutive days may be interrupted for the time that is allowed for travel between the old and new official stations or for circumstances attributable to official necessity, as, for example, an intervening temporary duty assignment.

Paragraph 2–5.2g of Part 5 provides:

> *Effect of partial days.* In determining the eligibility period for temporary quarters, subsistence expense reimbursement and in computing maximum reimbursement when occupancy of such quarters for reimbursement purposes occurs in the same day that en route travel per diem terminates, the period shall be computed beginning with the calendar day quarter after the last calendar day quarter for which travel per diem described in 2–2.1 and 2–2.2 is paid, except that when travel is 24 hours or less the period shall begin with the calendar day quarter during which travel per diem terminates. In all other cases, the period shall be computed from the beginning of the calendar day quarter for which temporary quarters subsistence reimbursement is claimed, provided that temporary quarters are occupied in that calendar day. The temporary quarters period shall be continued for the day during which occupancy of permanent quarters begins.

We have held that the term "30 consecutive days" as used in paragraph 2–5.2a refers to 30 calendar days and that if, on the first day for which temporary quarters subsistence expenses are claimed, only part

of the expenses of that day are claimed (because, for example, the employee receives per diem for the earlier part of that day), that day, nonetheless, counts as 1 full day of the period of temporary quarters subsistence allowance authorized the employee. 57 Comp. Gen. 6 (1977); 56 *id.* 15 (1976).

We have not, however, ruled on the question of what days must be counted as part of the employee's entitlement when, as in this case, an employee's period of entitlement is interrupted because of "circumstances attributable to official necessity," and, we are unaware of any statutory or regulatory provision directly governing this question. However, paragraph 2–5.2g provides that in cases involving partial days, other than en route travel, the period of temporary quarters allowance is to be computed from the beginning of the calendar quarter for which temporary quarters allowance *is claimed*. Return travel from temporary duty is not considered en route travel. Nor does paragraph 2–5.2g directly address the question of when the 30-day period is interrupted by the employee's departure from his new duty station for reasons of official necessity. Accordingly, and since paragraph 2–5.2a provides that the period of consecutive days may be interrupted for circumstances such as temporary duty, we conclude that the employee may elect to extend his temporary quarters period by not claiming temporary quarters allowance on the days of his departure and return from temporary duty rather than be reimbursed for the interruped days.

Thus, if Mr. Schultz so chooses, he may be reimbursed for his temporary quarters subsistence expenses, up to the maximum permissible amount, incurred on January 26 and 27, instead of those incurred on January 19 and 20. He is still limited to a total of 30 days for temporary quarters. Hence, he may not be reimbursed for the expenses he incurred on both 2-day periods.

II

Mr. Schultz's dependents commenced travel to Amarillo on April 2, 1977, and arrived there on April 7. His daughter, Lora, became 12 years old on April 3, 1977. The certifying officer, in computing Lora's per diem for this travel, used the rate for an 11 year old since she was 11 when Mr. Schultz reported for duty at Amarillo in December 1976. Mr. Schultz thinks his daughter's per diem should be determined on the basis of her age at the time she performed the travel. We agree. It is our view that the per diem is determined on the basis of the daughter's age at the time she performed the travel, that is, her per diem for April 2 should be at the rate for children under 12, and for

April 3–7, at the rate for children 12 and over. See paragraph 2–2.2b (2) of the Federal Travel Regulations.

Per diem is payable on behalf of the members of an employee's family when performing permanent change-of-station travel, to compensate the employee for the extra subsistence expenses incurred as a result of performing travel. *Bornhoft* v. *United States*, 137 Ct. Cl. 134 (1956). The rates are higher for older children because, presumably, they incur greater expenses. Accordingly, the rate of per diem for a member of an employee's family should be determined on the basis of the age of that member at the time travel is performed.

III

Finally, Mr. Schultz personally moved 11,000 pounds of household goods between Albany and Amarillo by truck. He thinks he is entitled to the additional allowance for metropolitan areas of $0.50 per hundred pounds payable for shipments originating in, or terminating in, Albany, and moving by common carrier, provided in GSA Bulletin FPMR A–2, Supplement 67, Attachment A, April 29, 1977.

The allowance for shipments originating in metropolitan areas, however, is specifically payable *only* where the shipment moves by common carrier (GSA Bulletin FPMR A–2, Supplement 67, Attachment A). Attachment A was apparently issued under authority granted in 5 U.S.C. § 5724(c) (1970) and Section 1(6) of Executive Order No. 11609, July 22, 1971 (36 Federal Register 13747), and its issuance appears to have been a valid exercise of that authority. Under its provisions there is no basis for paying the additional allowance for shipments originating in metropolitan areas to Mr. Schultz.

[B–191922]

Contracts—Protests—Authority to Consider—Reprocurement Due to Contract Default

Question concerning propriety of sole-source award of reprocurement contract is within General Accounting Office (GAO) bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals.

Contracts—Protests—Persons, etc., Qualified to Protest—Interested Parties—Bidders/Offerors on Original Procurement—Reprocurement on Default Termination

Bidder on original procurement is interested party under GAO Bid Protest Procedures so as to be able to protest sole-source negotiated reprocurement of original contract.

Contracts—Prices—"Best Possible Price"—Reprocurement—Default Termination of Original Contract

Contracting officer acted reasonably in awarding reprocurement contract to next low bidder on original procurement having equipment available to perform needed services at price not in excess of that bidder's original bid since agency had urgent requirement for immediate reprocurement and under circumstances prior bids could be considered acceptable measure of what competition would bring.

Contracts—Awards—Separable or Aggregate—Single Award—Propriety

Contention that required services for two air bases should have been reprocured separately instead of as one contract item is without merit in light of agency explanation that better pricing results from single procurement.

In the matter of Hemet Valley Flying Service, Inc., August 14, 1978:

Hemet Valley Flying Service, Inc. (Hemet Valley) of Hemet, California, protests the award on April 10, 1978, of a negotiated contract, number 49-101-162, by the Forest Service, Department of Agriculture, to the T&G Aviation-Globe Air, Inc. Joint Venture (T&G-Globe), of Mesa, Arizona, for air tanker services, which was a reprocurement of services defaulted under another contract. Hemet Valley contends that the reprocurement was improperly negotiated on a sole-source basis.

Under the contract originally awarded, Central Air Service (Central) of Rantoul, Kansas, was to have aircraft available for use from April 1, 1978.

On April 7, 1978, the contract with Central was terminated for default. On that same day, the contracting officer determined that the services had to be immediately reprocured because the Forest Service, Region 3 (Southwest) was "in very high to extreme fire condition" and Region 8 (Southeast) was experiencing "heavy fire activity" requiring the use of air tankers. The contracting officer then decided to negotiate the reprocurement with T&G-Globe, the third low bidder (19% higher than Central) on the original procurement, as T&G-Globe had planes available. (The second low bidder, 11% higher than Central, had also been awarded a contract for all aircraft offered and apparently did not have equipment available for this requirement. Hemet Valley was fourth low bidder at 38% above the Central bid. The other two bids were 40% and 69% higher than the bid of Central.)

The agency reports that the contracting officer, after considering the impact of inflation on wages and cost of aircraft parts, believed that if T&G-Globe would perform the contract at a price no greater than that bid on the original IFB, the price would be fair and reasonable. T&G-Globe agreed to perform the services required at the price originally bid.

The basic issue as framed by the protester is whether "the Forest Service abused its discretion by employing a non-competitive unreasonable method of reprocurement, a method which was inconsistent with the agency's duty to mitigate the excess costs of reprocurement."

Initially, we must decide whether this Office should exercise jurisdiction in this matter. The Forest Service and T&G-Globe both argue that we should not because the propriety of the default termination has been appealed by Central to the Agriculture Board of Contract Appeals (Board) and any assessment of excess costs of reprocurement against Central may also be appealed to the Board. However, as the protester points out, the propriety of the default termination is not an issue in this case. What is at issue is the propriety of the sole-source approach to the reprocurement. We do agree that to the extent "the reasonableness of the reprocurement costs is inferentially raised by the central issue of this protest," it is a Board matter and not for consideration by this Office. *See*, e.g., *Kaufman DeDell Printing, Inc.*, B–186158, April 8, 1976, 76–1 CPD 239; *International Harvester Company*, B–181455, January 30, 1975, 75–1 CPD 67. The basic issue itself, however—whether the reprocurement action was conducted in accordance with applicable procurement procedures—is one over which we properly can and do exercise jurisdiction without impinging on the jurisdiction of the contract appeal boards. See *PRB Uniforms, Inc.*, 56 Comp. Gen. 976 (1977), 77–2 CPD 213; *Charles Kent*, B–180771, August 7, 1974, 74–2 CPD 84; *Jets Service, Inc.*, B–186596, February 15, 1977, 77–1 CPD 108; *Steelship Corporation*, B–186937, March 10, 1977, 77–1 CPD 177.

T&G-Globe also questions the "standing" of Hemet Valley to the award. According to T&G-Globe:

> * * * although Hemet originally bid * * * it does not have the standing of an unsuccessful bidder in response to that solicitation to challenge the subsequent negotiated procurement by the Forest Service. In the absence of any formal procurement proceeding in which it participated, it may well lack standing to pursue its present protest.

Our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), provide that "[a]n interested party may protest to the General Accounting Office the award * * * of a * * * negotiated contract of procurement * * * by or for an agency of the Federal Government * * * ." 4 C.F.R. 20.1 (1977). We have stated that "[i]n determining whether a protester satisfies the interested party criterion, consideration is given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. * * * This serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the merits of a challenged procurement may be decided." *Damper Design*, B–190785, January 12, 1978,

78-1 CPD 31. Hemet Valley is clearly an interested party since its complaint is that it was improperly denied an opportunity to compete for the reprocurement award for which it was otherwise qualified; it need not have participated in the reprocurement to have that status. *See*, e.g., *Kenneth R. Bland, Consultant*, B-184852, October 17, 1975, 75-2 CPD 242; *Enterprise Roofing Service*, 55 Comp. Gen. 617 (1976), 76-1 CPD 5.

Although we agree with Hemet Valley as to the jurisdiction and interested party questions, we do not agree that the Forest Service's actions in this reprocurement were in contravention of the applicable procurement procedures. We have held that (as here) when a procurement is for the account of a defaulted contractor, the statutes and regulations governing procurement by the Government are not strictly applicable to the reprocurement. *Aerospace America, Inc.*, 54 Comp. Gen. 161 (1974), 74-2 CPD 130; B-171659, November 15, 1971; 42 Comp. Gen. 493 (1963). While we did state in *PRB Uniforms, Inc.*, *supra*, that when the contracting officer decides to conduct a new competition for the reprocurement he may not choose to ignore the regulatory provisions applicable to competitive procurement, the contracting officer has considerable latitude in determining the appropriate method of reprocurement, provided his actions are reasonable and consistent with the duty to mitigate damages. *Charles Kent*, *supra;* B-175482, May 10, 1972. The basic regulatory provision governing reprocurement upon termination for default is Federal Procurement Regulations (FPR) 1-8.602-6 (1964 ed.) which provides:

> (a) Where the supplies or services are still required after termination and the contractor is liable for excess costs, repurchase of supplies or services which are the same as or similar to those called for in the contract shall be made against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. * * *
>
> (b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the legal requirements with respect to formal advertising are inapplicable. However, the contracting officer shall use formal advertising procedures except where there is good reason to negotiate. If the contracting officer decides to negotiate the repurchase contract, he shall note the reason in the contract file and shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract. * * *

There is no argument here that formal advertising should have been used. Protester's objection concerns the negotiation of the reprocurement on a sole-source instead of a competitive basis. Thus, the question for resolution is whether the contracting officer's decision to contact only T&G-Globe was reasonable under the circumstances.

The defaulted contract covered items 12a and 12b (Coolidge and Coolidge/Rohnerville air bases, respectively) of the original solicita-

tion. As the contracting officer perceived the situation on April 7, 1978, the aircraft required by items 12a and 12b were to be on 24-hour standby from April 1st. Both aircraft were scheduled to be at the designated base, Coolidge, on May 1, 1978, unless called up sooner. Region 3 (Southwest), where the Coolidge base is located, was experiencing very high to extreme fire conditions. There was also heavy fire activity in Region 8 (Southeast) where air tankers were being used and there was the possibility that air tankers from Region 3 might have to be dispatched to Region 8. The contracting officer knew that T&G-Globe was the next low bidder on the original procurement which had aircraft available, and that its bid on the original contract was 19% higher than Central's. In the contracting officer's view, prices and costs had risen since the original bids had been received, so that a new contract price at not more than T&G-Globe's original bid would be a reasonable one and one arrived at through the recent bidding competition.

We think it is clear that the contracting officer was faced with a difficult decision. On the one hand, he had an extremely urgent need to obtain the necessary air tanker services; on the other hand, while taking steps to satisfy that need, he had the duty to act reasonably so as to keep excess reprocurement costs to a minimum. He resolved his dilemma by attempting to obtain what he believed would be the best price obtainable at that time, and planning to telegraphically solicit offers if he could not obtain that price from the firm most likely to agree to it. Although normally an agency must resort to competition to get the best available price rather than relying on prior bidding history as a firm indication of what prices could be expected from competing firms, *see Olivetti Corporation of America*, B–187369, February 28, 1977, 77–1 CPD 146, under the circumstances of this case we cannot conclude that the contracting officer was unreasonable in believing that he could best satisfy his responsibilities both to the Forest Service and to the defaulted contractor by negotiating for that price with the firm which had offered the price in a recent competitive environment.

In this regard, we point out that the awarding of a reprocurement contract to the second low bidder on the original solicitation is a recognized method of reprocurement, *see Steelship Corporation*, *supra*, particularly when the award is made at that bidder's original bid price. *Cf. Fitzgerald Laboratories, Inc.*, ASBCA 15205, 15594, 71–2 BCA 9029. Here, in light of the relatively short time span between the original competition and the default, we think the contracting officer could reasonably view the bids received on the original invitation as an acceptable measure of what competition would bring, and, in view of the unavailability of equipment from the second low bidder, go di-

rectly to the third low bidder to ascertain if it would perform at its original bid price.

The protester asserts, however, that the contracting officer's decision is shown to be unreasonable because Hemet Valley has made an offer to perform the services for approximately 5% above the original contract price, which is less than T&G-Globe's price of 19% above the original price and substantially less than Hemet Valley's original bid. However, this offer from Hemet Valley is dated April 18, 1978, some eleven days after the reprocurement and 4 or 5 days after Hemet Valley knew of the reprocurement. Under these circumstances, we do not find Hemet Valley's offer to be persuasive as to the reasonableness of the contracting officer's actions.

The protester also contends that the contracting officer should not have reprocured the total services required in a non-competitive manner, but should have split the reprocurement into two parts. The Forest Service's position in this regard is as follows:

> Several years ago, the Forest Service asked the Air Tanker Industry for their input for strengthening the air tanker bid. One of the most repeated items was to combine logical bases to lengthen the flying season for the successful bidders and in turn it would reduce the cost for the Forest Service, the rationale being, the longer the season, the more spread out the equipment amortizing rate would be, thus the daily rate could be reduced.
>
> The Coolidge base was one of the combinations that works in conjunction with Rohnerville base since their prime fire seasons are different. By combining two different size aircraft for Coolidge we gain additional price reduction because the successful bidder knows that he is assured he will have two aircraft working, one B–17 class and one C–119 class, one for the period April 1–September 14, at Coolidge and one for April 1–November 16, for Coolidge/Rohnerville combination. Therefore, by design Items 12(a) and 12(b) are awarded to one bidder to obtain the best price for the Forest Service and in return the successful bidder has a good working season.
>
> Contrary to the theory put forth in the protest letter we would be stuck with higher not lower prices because the security of a longer season would be gone. Also, most important, we could not bill for excess reprocurement cost against the defaulted contractor because he would not be obtaining the same service for which he was defaulted.

In light of that explanation, we find no basis to disagree with the Forest Service's approach. See *Paul R. Jackson Construction Company, Inc.* and *Swindell-Dressler Company* * * *, 55 Comp. Gen. 366, 370 (1975), 75–2 CPD 220.

The protest is denied.

[B–192356]

Contracts—Negotiation—Late Proposals and Quotations—Hand Carried

Late proposal sent via commercial carrier may not be considered for award and was properly rejected.

Contracts—Negotiation—Late Proposals and Quotations—No Provision in FPR for Agency Return—Return to Sender of Unopened Proposal *After Award* Recommended

In absence of any guidance in Federal Procurement Regulations, contracting officer immediately returned late proposal to offeror. General Accounting Office recommends that proposals be held by agency, unopened, until after award.

In the matter of Jerry Warner and Associates, August 25, 1978:

Jerry Warner and Associates (Warner) protests the determination that its late proposal could not be considered under request for proposals (RFP) 6111, for production of a motion picture, issued by the U.S. Geological Survey, Department of Interior. The solicitation provided that proposals would be received at the Geological Survey, Reston, Virginia, until 3 p.m., local time, June 27, 1978. Warner's proposal was received at 12:49 p.m., June 28, 1978. The contracting officer determined it was a late proposal and returned it, unopened, to Warner on June 29, 1978.

Warner had obtained the services of a commercial air carrier to deliver its proposal. However, because of a mechanical malfunction of the aircraft, the proposal was not delivered by the time set for receipt.

The general rule followed by our Office is that the offeror has the responsibility for the delivery of its proposal to the proper place at the proper time. Exceptions to the general rule requiring rejection of late proposals may be permitted only in the exact circumstances provided for in the solicitation. The late proposal clause, Federal Procurement Regulations (FPR) 1-3.802-1 (Second Edition, FPR Amendment 178, June, 1977), incorporated by reference into the solicitation, reads in part:

> (a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and:
>
> (1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);
>
> (2) It was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation * * *.

By choosing a method of delivery other than specified (mail or telegraph if authorized) in the late proposal clause, an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. *Emergency Care Research Institute*, B-181204, August 23, 1974, 74-2 CPD 118. Where, as here, the delay in delivering a proposal is not due to improper action of the Government, the proposal is not for consideration even if the delay resulted from unanticipated causes.

E-Systems, Inc., B–188084, March 22, 1977, 77–1 CPD 201.

The protest is therefore denied.

We note that Warner's late proposal was returned to it, unopened. FPR § 1–2.303–7 provides with respect to formally advertised procurements that late bids which are not for consideration are to be held by the agency, unopened, until after award. Unlike the Defense Acquisition Regulation/Armed Services Procurement Regulation, however, the FPR provides no guidance as to the disposition of a late proposal received in a negotiated procurement. Therefore, in returning to Warner that firm's unopened proposal, the contracting officer violated no regulation and in this case we believe the contracting officer correctly determined that firm's late proposal could not be considered.

Once a late bid has been returned to the bidder it no longer can be considered for award because one cannot ignore the possibility that the bidder has altered the bid with knowledge of its competitors' prices. The agency's return of a purportedly late bid can therefore deprive a bidder of an award it otherwise would have received should the agency or our Office subsequently determine that the bid was timely. See, e.g., *Dima Contracting Corporation*, B–186487, August 31, 1976, 76–2 CPD 208.

Since there is no public opening of proposals in a negotiated procurement, and information concerning the proposals received is to be kept confidential, there would seem to be less opportunity for an informed tampering of a late, returned proposal. Nevertheless, the mere fact that a proposal has passed out of the Government's possession after others' proposals have been submitted could create distrust in the event that proposal is resubmitted and considered. Although it is not a requirement of the FPR, we believe the most prudent course of action is for the agency to hold a late proposal, unopened, until after award.

[B–164031(3)]

States—Revenue Sharing by Federal Government—Used to Obtain Matching Funds—Legality

Funds distributed by the Department of the Treasury under title II, Public Works Employment Act of 1976 (Countercyclical Revenue Sharing), Public Law 94 369, 90 Stat. 1002, as amended (42 U.S.C.A. 6721 *et seq.*) may be used to meet non-Federal share matching requirements of Medicaid program, 42 U.S.C. 1396-1396j. Congress intends that Federal funds distributed under title II be treated in the same "no strings" manner as general revenue sharing funds under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.* rather than as grants. Accordingly, the lack of specific statutory language permitting use of these funds as non-Federal share does not stand in the way of such use as it would in the case of grants.

In the matter of Medicaid—use of Countercyclical Revenue Sharing funds as non-Federal share, August 30, 1978:

This decision responds to a request from the Administrator of the Health Care Financing Administration, Department of Health, Education and Welfare (HEW), for a decision on whether Federal payments to the State of Alabama under title II of the Public Works Employment Act of 1976 (Countercyclical Revenue Sharing) (Public Law 94–369, 90 Stat. 1002, as amended by Public Law 94–447, 90 Stat. 1498 and title VI, Public Law 95–30, 91 Stat. 164 (42 U.S.C.A. §§ 6721 *et seq.*)) may be used as the State's required non-Federal share under the Medicaid program (Social Security Act, sections 1901 *et seq.*, 42 U.S.C. §§ 1396 *et seq.*, as amended). The Administrator notes that, although the case at hand involves Alabama, this same question may arise with respect to any State's Medicaid program.

On February 25, 1977, the Office of Revenue Sharing, Department of the Treasury, which administers the title II program, advised the State of Alabama that funds available to the State under title II of Public Law 94–369 could be used as the State's required non-Federal matching share under the Medicaid program. On March 25, HEW's Regional Commissioner informed the State to the contrary. The State of Alabama has asked HEW to reconsider its decision.

HEW's position is summarized as follows by the Administrator:

> Section 1903 of the Social Security Act, 42 USC § 1396b, limits the extent of Federal financial participation in a State's Medicaid program to stated percentages of sums expended by the state in carrying out the program.
>
> 45 CFR § 74.52(b) (5) precludes Federal funds from being utilized as the non-Federal share for HEW programs "unless the other grant or contract may, under authority of law, be used for matching or costs sharing * * *." We have always interpreted this requirement to mean that the other statute must itself specifically authorize its use as the non-Federal share or that unambiguous legislative history evinces a clear Congressional intent that it be so used. Neither is found in connection with P.L. 94–369.

In 56 Comp. Gen. 645, 648 (1977), we recently summarized the usual rule with respect to grants as follows:

> We have consistently held that in the absence of specific statutory authority, Federal grant-in-aid funds from one program may not be used to satisfy the local matching requirements of another Federal grant-in-aid program.

The Department of the Treasury's response to our request for comments is premised on the view that title II of the Public Works Employment Act is a form of revenue sharing—*i.e.*, general budget support as opposed to categorical or block grants or contracts—which must be interpreted in the context of the general revenue sharing program, 31 U.S.C. §§ 1221 *et seq.* (Supp. V, 1975). Treasury argues in effect that, if it is so understood, there is no difficulty in interpreting title II as permitting the use of its funds as non-Federal share in the

Medicaid program because of the policy of "no strings" on local expenditures which is fundamental to the revenue sharing concept and which distinguishes it from grants and other forms of Federal assistance. See S. Rept. No. 92-1050 at 1 (1972); 118 Cong. Rec. 35498 (Oct. 12, 1972). Treasury comments that HEW's regulation, 45 C.F.R. § 74.52(b)(5) (1976), which prohibits the use of funds from Federal grants and contracts for matching or cost sharing with HEW programs unless authorized by law is not applicable because title II payments are not grants or contracts.

We find considerable merit in the Department of the Treasury's arguments for considering title II to be derivative from the State and Local Fiscal Assistance Act of 1972 (the so-called Revenue Sharing Act), Public Law 92-512, 31 U.S.C. §§ 1221 *et seq.* (Supp. V, 1975), as amended. It should be noted at the outset that "revenue sharing" is not a statutory term. The phrase does, however, dominate most legislative discussion of the State and Local Fiscal Assistance Act, and references to similar provisions of title II. In such discussion, the phrase appears to describe two aspects of the program that are not always distinguished. These are, first, the policy or program purpose of distributing Federal revenue to State and local governments under a particular formula and, second, the distribution method and conditions that are provided to carry out these purposes. Further, the adoption of "revenue sharing" in 1972 was a departure in both concept and methodology from existing methods of distributing Federal funds to State and local governments. See S. Rept. No. 92-1050, at 11 (1972).

There is little legislative history available to guide us in interpreting title II of Public Law 94-369. Title II was not part of either the House or Senate bills reported out of committee; it was introduced as a floor amendment to the Senate bill (S. 3201, 95th Congress) and is briefly described in the conference report as follows:

> Title II of the Senate amendment provides for the strengthening of the Federal Government's role as guarantor of a stable national economy by promoting greater coordination, during times of economic downturn, between national economic policy as articulated at the Federal level—and budgetary actions of State and local governments. Title II of the Senate amendment would accomplish this purpose by providing emergency Federal assistance to State and local governments hard hit by recessionary pressures, in order to reduce the reliance of these governments upon budgetary actions which run counter to Federal efforts to stimulate speedier economic recovery. The assistance provided is designed to meet the following criteria of a limited, antirecession program:
>
> First, the assistance provided would go quickly into the economy, with as little administrative delay as possible.
>
> Second, the assistance provided is selectively targeted, by means of the formula, to go to only those governments substantially affected by the recession.
>
> Third, the assistance provided would phase itself out, as the economy improves.
>
> A fundamental premise underlying title II of the Senate amendments is that the amount and quality of government services at the State and local levels should not be determined by national economic conditions over which State and local governments have no control. In other words, the conferees, in accepting

title II, have concluded that it is not sound governmental policy for a jurisdiction to be able to provide good police protection, fire protection, trash collection, and public education during good economic times, but be forced to lower the quality of those services significantly, whenever the health of the economy declines. S. Rept. No. 94-939, 25-26 (1976).

In floor debate in both Houses of Congress much of the discussion focused on the "revenue sharing" description of the program. In the Senate, title II opponents contended that because a State with unemployment as low as 4.5 percent would still be eligible to participate in the program, the measure actually amounted to nothing more than general revenue sharing or its equivalent. Cong. Rec. S5667, 5669 (daily ed. April 13, 1976) (remarks of Senator Baker); *id.*, S5671 (remarks of Senator Buckley).

Senator Muskie insisted that despite its critics, title II still retained "the essence of countercyclical idea." Cong. Rec. S5668 (daily ed. April 13, 1976). He did, however, also refer to the measure as countercyclical revenue sharing (*Id.*, S5675).

The argument about whether title II is to be called "revenue sharing" or not seems to arise out of the earlier noted distinction between the policy objective of unrestricted distribution of Federal revenue and the countercyclical public employment support objective of title II. The argument in the congressional debates was not concerned with the method of distributing the program funds or the use of the funds distributed. Senator Muskie's description of title II as "countercyclical revenue sharing" would appear particularly significant in this light. It suggests a mix of a more specific program objective—to counteract the impact on local government of economic cycles—with the method of distributing Federal funds associated with the revenue sharing "no strings" approach.

The method of the distribution created by title II resembles that used under Revenue Sharing Act, in that funds are distributed upon the submission of prescribed assurances by the recipients. *Compare* section 205, Public Law 94-369, 90 Stat. 1006 (42 U.S.C.A. § 6725) *with* 31 U.S.C. § 1243 (Supp. V, 1975), as amended by Public Law 94-488, 90 Stat. 2341 (October 13, 1976). Moreover, under both title II and the Revenue Sharing Act, the Office of Revenue Sharing has no discretion to decide whether to make an award and upon what terms and conditions. As Treasury points out, funds are paid to a class of recipients defined by statute in amounts determined by statutory formulas, to be expended without Federal approval and without regard to Federal restrictions, except as expressly provided.

Thus, at least the method of distribution of title II funds and funds under the Revenue Sharing Act is distinguishable from the method of distribution under established grant-in-aid procedures, where a

Federal grantor agency in its discretion approves an application or plan before making an award. (We note, however, that both assistance under title II and revenue sharing would appear to be the kind of transaction which section 5 of the Federal Grant and Cooperative Agreement Act of 1977 (Public Law 95-224, 92 Stat. 3, 4 February 3, 1978; 41 U.S.C. 504) requires to be governed by "a type of grant agreement.")

Even in the case of block grants, which are available under title I of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, as amended, 42 U.S.C. §§ 3701 *et seq.*) and the Housing and Community Development Act of 1974 (Public Law 93-383, 42 U.S.C. §§ 5301 *et seq.* (Supp. V, 1975)), which involve formula distribution and require approval of a general plan submitted by the grantee, the traditional grant-in-aid procedure of significant prior Federal program review is retained. In the case of the Housing and Community Development Act program, specific authority is included to permit funds to be used as a non-Federal share in other Federal grant-in-aid programs undertaken as part of the grantee's Community Development Program. 42 U.S.C. § 5305 (a) (9) (Supp. V, 1975). In the absence of such authority, that use would be prohibited. 56 Comp. Gen. 645 (1977).

By contrast, in the case of the Revenue Sharing Act, Congress originally included a provision prohibiting the use of revenue sharing funds as non-Federal share in other Federal programs. Public Law 92-512, § 104, 86 Stat. 920. When Congress amended the Act to permit the use of revenue sharing funds to meet local share requirements of Federal programs, it did so simply by repealing the prohibition—no positive grant of such authority was considered necessary. Public Law 94-488, § 4(a), 90 Stat. 2341 (October 13, 1976), 31 U.S.C. 1223.

We are faced with the question whether there is sufficient reason to distinguish Revenue Sharing Act payments from title II countercyclical payments for purposes of their availability as non-Federal share. The answer to this question will determine whether specific authority for the use of these program funds to satisfy local matching share requirements must be present, as is the rule for grant-in-aid programs.

HEW suggests that since Congress included express authority to apply funds authorized by title I of Public Law 94-369, as non-Federal share in certain instances, the absence of such a provision in title II indicates that Congress did not intend title II funds to be so applied. However, title I of Public Law 94-369, the Local Public Works Capital Development and Investment Act of 1976, is essentially a grant-in-aid program. We are persuaded that our general rule with re-

spect to grant-in-aid programs does not apply to title II because Congress patterned the method of distributing funds on the Revenue Sharing Act rather than on the more traditional grant program.

This conclusion is further reinforced by the amendment to section 204 of title II (42 U.S.C. § 6724), which removed a reference to the payments under title II as "grants." Section 201(4), Public Law 94–447, 90 Stat. 1498 (October 1, 1976). While "grant" is a term that may have a different meaning depending on the context, Treasury construes the change as intended to clarify the non-application of normal grant-in-aid restriction to title II payments. We agree with that construction.

Because of these considerations, we believe that the Department of Treasury's interpretation of title II as permitting payments under it to be applied as non-Federal share in the Medicaid program is reasonable. The Treasury Department has issued interim regulations that are intended to have this effect. 31 C.F.R. § 52.45 (42 F.R. 48552, September 23, 1977). It is our practice to place great reliance on the statutory interpretations of agencies responsible for administering a statute.

Accordingly, we conclude that title II countercyclical funds may be used as a State's non-Federal share in the Medicaid program so long as such funds are used for purposes authorized by title II.

Although it has no effect on this decision, we call attention to our earlier comment that title II distributions may fall under section 5 of the Federal Grant and Cooperative Agreement Act of 1977. (41 U.S.C. 501 note). It would seem prudent for the Department of the Treasury, under these circumstances, to clarify this status or request an exception from OMB, if necessary, as provided in sections 9 and 10 of that Act.

[B–188272]

Contracts—Negotiation—Requests for Proposals—Construction—Equipment Verification Provisions

Procurement documents in "four-step" procurement established goal for maximum use of "tried and true" computer equipment but did not necessarily rule out modified equipment based on preexisting technology or new equipment if based on preexisting equipment or technology. Documents were written broadly enough to permit use of tried technology or equipment. Under literal reading of provisions requiring equipment verification, preexisting technology—prototype related equipment—would qualify so long as technology had verified performance characteristics.

Contracts—Negotiation—Evaluation Factors—"Tried and True" Standard—New *v.* Preexisting Equipment/Technology

Given acceptance of Air Force's interpretation of "tried and true" provisions, fact that successful offeror proposed relatively new minicomputer—based on proven

technology and use within IBM Corporation—should not have disqualified proposal. Similar conclusion applies to proposed use of preexisting compiler. "Tried and true" evaluation standard—never identified in request for proposals (RFP) as separate evaluation factor—is of an entirely subjective character. All offerors should have expected that Air Force would necessarily have had to exercise extremely broad discretion in evaluating offerors' efforts under standard. Record reveals, moreover, that proposals were evaluated under standard.

Equipment—Automatic Data Processing Systems—Selection and Purchase—Evaluation Propriety

Given that RFP provision on "programming languages" did not expressly require—or prohibit—use of "high order" programming language, that provisions of DOD Directive 5000.29 did not apply to procurement, and that Air Force has refuted by force of argument alleged automatic superiority of "high order" programming language, view of implicit procurement requirements for "high order" language is rejected.

Contracts—Specifications—Restrictive—Unwarranted

To extent that protester objects to Air Force's determination that less restrictive specification—permitting offerors to use either "high order" or "low order" programming language—will meet Air Force's needs, ground of protest is not for review.

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Information—Specificity

As practical matter, it would have been impossible to have obtained from competitive-range offerors detailed information needed to evaluate life-cycle costs down to module level since design of software to module level would not occur until after award.

Contracts—Negotiation—Four-Step Procurement—Procedures—National Aeronautics and Space Administration *v.* DOD

In both National Aeronautics and Space Administration (NASA) and Department of Defense (DOD) procedures there are statements of need to allow competitive-range offerors opportunity for discussions. Both procedures stress need, however, to restrict discussion of technical proposals to clarifying or substantiating proposal and specifically prohibit discussions of technical weaknesses (NASA's term) or deficiencies (DOD's term) relating to offeror's lack of competence, diligence, inventiveness, or lack of management abilities, engineering or scientific judgment. Both procedures also provide for independent cost projection of "most probable" cost of doing business with offeror.

Contracts—Negotiation—Cost, etc., Data—"Realism" of Cost

Since it is fundamental that proposed costs of cost-reimbursement contract be analyzed by Government in terms of realism, approval has been granted to process of award selection based on Government-adjusted costs of proposals after close of negotiations even in non-four step procurements.

Contracts—Negotiation—Competition—Changes Subsequent to Negotiation—"Source Selection" Concept

No significant difference is seen between process (in non-four-step procurement) which permits cost adjustment of proposed costs after close of discussions for purposes of award selection—even though no formal adjustment of proposed contract price is made—and four-step process which, through cost adjustment process, permits changed contract price in line with Government-evaluated price.

Contracts — Negotiation — Competition — Competitive Range Formula—Selection Basis

Requirement in DOD procedures that selected proposal must meet Government's "minimum requirements" is nothing more than requirement that—aside from being most advantageous proposal—proposal is to satisfy Government's core requirements to extent that proposal is in competitive range and not all requirements as protester insists.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Technical Transfusion or Leveling

Since (1) selected proposal was rationally found to be in competitive range; (2) discussions could not have been held with selected offeror in contested areas without violating procedures; (3) appropriate discussions with selected offeror were otherwise conducted; (4) protester alleges lack of discussion with itself largely in the abstract; (5) post-selection discussions with highest-rated offeror did not result in "leveling," it cannot be concluded Air Force failed to comply with requirements of 10 U.S.C. 2304(g). Based on review of record, it is concluded that agency-evaluated cost and technical differences between proposals of protester and selected offeror are rationally founded.

In the matter of GTE Sylvania, Inc., November 30, 1977 [Published August 31, 1978]:

GTE Sylvania, Inc., has protested the Department of the Air Force award of a cost-plus-incentive-fee contract under request for proposals (RFP) F19628-76-R-0102 to International Telephone and Telegraph Corporation (ITT) for the "SATIN IV system." ("SATIN IV" is the Air Force designation for the Strategic Air Command (SAC) automated total information network, a communication system designed to connect five major centers and subcenters with SAC, including individual missile launch control centers. The SATIN IV system will be a complex of computers, terminals and related switching equipment capable of simultaneously sending, receiving and sorting messages.)

During the pendency of the protest, Sylvania filed suit in the U.S. District Court for the District of Columbia, *GTE Sylvania, Inc.* v. *Reed*, Civil Action No. 77-0519, requesting the court, among other things, to "find that the award [to ITT] * * * is * * * illegal and void." The requested finding, accompanied by motions for appropriate injunctive relief, was prefaced with extensive discussion of the issues raised in the protest before our Office. On March 28, 1977, the court denied plaintiff's request for a temporary restraining order, but otherwise expressed interest in having the views of our Office on the protest. Since the court wants our views, we will consider the issues raised even though one or more issues might otherwise be considered untimely filed (as urged by the Air Force) under our Bid Protest Procedures (4 C.F.R. part 20 (1977)). *Control Data Corporation*, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276.

The Air Force, through its Electronic Systems Division (ESD), formally released the SATIN IV procurement program by issuance of the RFP on January 9, 1976. The RFP informed offerors that the procurement was divided into two main phases:

> Phase I calls for the contractor to provide equipment, computer programming (software) and test data sufficient to show that the SATIN IV system is technically and economically feasible.
>
> Phase II calls for the contractor to develop additional items, while installing and testing production equipment and software for the completed system. (Upon successful completion of the Phase I effort and receipt of final approval, the Phase I contractor is to be awarded the Phase II contract.)

The RFP listed general considerations for the selection of the successful offeror, as follows:

a. *Understanding of the Requirements* * * *.
b. *Compliance with Requirements* * * *.
c. *Soundness of Approach* * * *.
d. *Soundness of Production Engineering and Management* * * *.
e. *Computer Security Approach*—The proposal must emphasize the approach to satisfying the multilevel security requirements of the SATIN IV system. The proposal must indicate the use of previously implemented technology to satisfy the * * * security requirement.
f. Program Management * * *.

The RFP also listed the order of importance of the evaluation criteria for the procurement as follows:

4.1 Technical Area

* * * * * * *

Design and Performance.
Computer Security.
Computer Program Functional Design.
Reliability/Maintainability/Availability.
SACCS Replacement Keyboard.
COMSEC.
Interfaces.
Nuclear Hardness.
Human Engineering.
System Safety.

The offeror's proposal will be assessed on the soundness of the proposed System Design and the responsiveness to the System Specification. Standard Equipment utilizing demonstrated techniques is expected to be used; therefore, the proposed design will be assessed as to the risk in technically implementing it in the allotted time and how it reduces known risk areas in the program such as: Computer Security, COMSEC, Interfaces, Missile Field Requirements, message accuracy, system response, and reconfiguration. Producibility of the proposed SPM design will also be assessed.

4.2 *Computer Program Design and Management*

The evaluation of this area will be broken down into the following items which are listed in their order of importance.

Management of Computer Program Development
Computer Programming Techniques
Language Description
Organization and Personnel
Background and Experience on Other Computer Program Projects

The offeror's proposal will be assessed on the feasibility of its management program to assure timely and complete computer programs. His management program will be assessed as to its ability to provide visibility of progress and response to contingencies. The offeror's proposed uses of design techniques and language will be assessed for responsiveness to the RFP. The offeror will also be assessed on demonstrated experience on like projects.

4.3 *System Operability*

* * * * * * *

4.4 *Cost* * * *

Phase I * * *

The proposals will be evaluated in terms of the total proposed target cost of Phase I * * * to determine whether the estimate is reasonable * * *.

Evaluation will be made of the realism of proposal costs as they relate to the offeror's design. This part of the evaluation will include a comparison of the offeror's proposed cost with the most probable cost derived by the Government after considering the offeror's technical approach.

* * * * * * *

Phase II * * *

The cost/price estimates for (Phase II) will be fully evaluated to establish the SATIN IV System Design to Cost Goal * * *.

* * * * * * *

Evaulation will also be made of the credibility of the estimated costs for [Phase II] * * * [based on] comparison * * * with the most probable cost derived by the Government * * *.

* * * * * * *

Phase I * * * II * * *

The Contracting Officer will determine and identify deficiencies contained in the selected offeror's proposal, and direct the selected offeror to correct deficiencies and advise of cost impacts resulting therefrom.

* * * Life Cycle Cost [is] a major and important factor in the acquisition of the SATIN IV system. * * * LCC [Life Cycle Cost] evaluation [will consider] * * *:

The offeror's * * * documentation as to the accuracy of his data inputs.

The offeror's ability to prove * * * costs * * * involved in arriving at the * * * LCC.

The offeror's ability to conduct an effective LCC program * * *.

4.5 Management

* * * * * * *

4.6 Logistics

* * * * * * *

4.7 Test and Deployment

* * * * * * *

The RFP also incorporated Department of Defense Directive 4105.62 which defines a "four-step" source selection process which was to be followed in selecting the successful contractor. A summary of the four-step selection process is contained within the directive, as follows:

Step 1. Separate technical proposals shall be solicited and evaluated and discussions held with all offerors * * *.

Step 2. A cost/price proposal shall then be obtained from each offeror together with any necessary revisions to correct the deficiencies in the technical proposals discussed in step 1. Subsequent to the receipt of the cost/price proposals and any technical revisions, the competitive range will be established. Those proposals outside of the competitive range at this point may be eliminated and the offerors so notified. Meaningful discussions will be held with the remaining offerors * * *.

Step 3. Following such discussions, a common cutoff date for the receipt of final revisions to technical and cost/price submittals will be established and the remaining offerors so notified. After receipt of any revised submittals, the proposals shall be evaluated based upon the offeror's total proposal and a contractor selected for negotiation of the contract.

Step 4. A definitive contract will then be negotiated with the selected offeror.

Technical proposals, called for under step 1 of the selection process, were submitted by Sylvania and three other offerors, including ITT, on March 23, 1976. Step 2 cost proposals were submitted by the four offerors on June 8, 1976, after which the Department spent nearly 2 months in evaluating proposals.

On August 20, 1976, the Department informed Sylvania that its proposal was found to be in the competitive range for the procurement and that, following discussions with each of the offerors within the competitive range, step 3 proposals were to be submitted. Following these discussions, Sylvania says that it submitted its step 3 proposal to the Department on September 20, 1976. Thereafter, the Department informed Sylvania that the successful offeror was ITT.

HISTORY OF THE SOURCE SELECTION

The Air Force evaluation of submitted proposals was initially to be made by a source selection evaluation board. The board found that the ITT proposal met or exceeded all standards and requirements. Although the company claimed that only "tried and true" hardware, firmware and software would be used for the work, the board noted that caution had to be exercised with respect to the claim since additional development appeared to be necessary in one area; also a proposed component was considered not nearly as advanced as first suggested in the company's initial proposal. Further, the board found that ITT's approach to the management of software development was well disciplined. Besides showing an excellent understanding of programming methodologies, the methodologies were extended and complemented by other tools, especially the use of an automated software development library system. The board considered acceptable ITT's "dual language" approach which involved the use of a "high order" computer programming language (compiler) and "low order" assembly language for the computer program. Additionally, the board noted one of ITT's proposed subcontractors would establish a computer program development facility thereby strengthening ITT's proposal.

Notwithstanding the overall judgment of the board that ITT's proposal met or exceeded the requirements and standards of the RFP, ITT's proposal was found to contain "significant weaknesses" in system control, response time and in three other areas—mainly dealing with security and certain tests. ITT's initial cost proposal was ad-

justed—through use of the so-called "parametric" cost technique—by the Air Force cost evaluators to a finally estimated cost. Similarly, phase II costs—including some elements of life-cycle costs—were adjusted. Because of the discrepancy between ITT proposed costs and Air Force evaluated costs, ITT's costs proposal was termed unrealistically low. Based, in part, on the analysis, ITT's technical proposal was rated "acceptable."

The board's evaluation of Sylvania's proposal shows that, although the company's proposal in areas such as human engineering and system safety demonstrated Sylvania's understanding of these requirements, the company's proposal in other areas demonstrated lack of sufficient detail, contradictions and inconsistencies. For example, the evaluators found Sylvania's proposal to contain (a) a fragmented design approach resulting in lack of technical consistency; (b) a lack of information regarding Sylvania's innovative approach to computer security; and (c) a poor showing of how the proposed design met "interface" requirements.

Sylvania's proposal was also considered to show an excellent understanding of management concepts and structured programming technology to be used for the software development. The use of "flexible architecture," the use of a single high order language for all software and the excellent design documentation approach were considered to enhance Sylvania's approach.

Inherent in Sylvania's flexible approach in software requirements, the board found, were two major problems: (1) flexibility of software required stringent controls; and (2) the general lack of Government experience with the approach leading to an "uncertainty risk" as opposed to a "threat-type risk."

Sylvania's initial cost proposal for phase I work was adjusted by the Air Force to a finally evaluated cost. Similarly, Sylvania's total system cost—including elements of life-cycle cost—was adjusted to reflect the parametric estimate. Sylvania's proposed costs were considered very optimistic but on the lower range of cost realism. Based on the foregoing analysis, in part, the board rated Sylvania's technical proposal "marginal."

The board's findings were then reviewed by a source selection advisory council. The council termed the relative ranking of Sylvania and ITT to be relatively close. ITT was considered to have a somewhat better overall understanding in the technical area, only a marginally weaker position in computer program design and management than Sylvania, an excellent view of system operating problems, and the probability of generally less risk of unknown schedule problems after negotiations. Because of these views, the council concluded that ITT's

proposal provided the better foundation for a successful SATIN IV program.

The general findings of the council were that none of the proposals, as submitted and modified through step 2 procedures, offered a clear demonstration on the part of the offerors that they totally understood and could satisfy the Air Force's requirements. But through negotiations with any of the offerors remaining in the competitive range —including Sylvania and ITT— "discrepancies" could probably be cleared up, points of concern could be eased, and a contract agreed to that would technically meet Air Force needs. As to specifics, the council agreed with the board that ITT's proposal, while seriously deficient in areas of system control and microprogramming documentation, could be corrected through negotiations. Moreover, the council concurred in the board's finding that ITT's technical approach presented lower risks than any other offeror's proposal. Other findings of the council which evidence concurrence in the board's conclusions were:

(1) ITT's probability of successful performance was slightly higher than Sylvania's probability of success;

(2) lack of supporting design detail in Sylvania's proposal raised uncertainties as to the company's understanding of the requirements; and

(3) ITT presented the best overall management structure.

The source selection official concurred in the analyses of the council and board and selected ITT for step 4 discussions. As a result of these discussions, ITT's proposed costs for the phase I work were raised —through correction of deficiencies— from approximately $23 million to approximately $32 million. This $32 million cost figure was within the cost projection for the correction of ITT deficiencies which the Air Force made prior to the selection of the company's proposal.

Although the negotiated phase I price for ITT was higher than Sylvania's proposed price of $29 million, the Air Force felt that ITT's proposal was still the most desirable because all deficiencies and unknown characteristics had been removed by step 4 discussions. On the other hand, Sylvania's proposal (based on estimated costs of $29 million) contained a significant quantity of deficiencies. Further, based on Air Force cost projections and analysis, the Air Force felt Sylvania's proposed cost would increase in similar proportion to ITT's proposed cost should step 4 discussions be held with Sylvania. This conclusion was based on Air Force findings that Sylvania deficiencies as an aggregate appeared to be of a similar overall magnitude to ITT's deficiencies. Since this evaluation confirmed the original award selection, the Air Force decided to proceed with the award to ITT.

Sylvania's protest, as amended, raises three basic issues: (1) the computer and related software proposed by ITT are not "tried and

true" and failed to meet the RFP requirements; (2) the Air Force's selection of a system containing a "low order level" (LOL) programming language was arbitrary and a product of the Air Force's failure to evaluate properly the software aspects of the proposals; and (3) the Air Force and ITT representatives negotiated major, material changes to the ITT proposal during step 4 of the SATIN IV procurement process in violation of DOD Directive 4105.62.

ISSUE 1—"TRIED AND TRUE" REQUIREMENT

Sylvania argues that ITT's proposed use of the "IBM Series/1 computer and its associated software * * * is neither 'tried and true' nor 'verified in a military or commercial environment' as required by the RFP." Sylvania draws attention to the following RFP requirements and provisions in "other procurement documents:"

Program Management Plan, paragraph 1.1.5:

* * * As a result, *the procurement will be: A. Off-the-shelf as far as possible; B. Modification of off-the-shelf equipment as necessary to meet operational requirements (within state-of-the-art) and; C. New hardware/software design (within state-of-the-art) only where necessary. Requirements for design of new hardware should be of a very low magnitude. Development of new technologies will not be required.* * * * [Italic supplied.]

Instructions for Proposal Preparation, section 1.1:

It is intended that *maximum use* of "tried and true" equipments/computer programs (*the design of which is known and the performance characteristics of which have been verified in a military or commercial environment*) be utilized throughout the entire acquisition of the SATIN IV program. [Italic supplied.]

Instructions for Proposal Preparation, section 6.3.1.2:

* * * *The offeror shall not propose any new computer programming language (assembly language or High Order Language) or any new language translator.* This does not preclude modifying existing translators or using a compiler generator. * * * [Italic supplied.]

Evaluation Factors for Award, section 3.0e:

* * * The proposal must indicate use of previously implemented technology to satisfy the SATIN IV multilevel security requirement. * * *

Evaluation Factors for Award, section 4.1:

* * * The offeror's proposal will be assessed on the soundness of the proposed System Design and the responsiveness to the System Specification. *Standard Equipment utilizing demonstrated techniques* is expected to be used; therefore, the proposed design will be assessed as to the risk in technically implementing it in the allotted time and how it reduces known risk areas in the program such as: * * * [Italic supplied.]

Preproposal Briefing, Attachment #1, dated 5 Feb. 1976, second full paragraph:

And this leads to the third point—there is to be no new technology developed to implement security features into the software and hardware of the system. *Especially in regard to the hardware, the ways in which the contractor chooses to combine existing hardware techniques or mechanisms with the software may be unique, but the actual hardware must be hardware that has been previously implemented.* [Italic supplied.]

Statement of Work, section 1010.03:

> Comply with Attachment 3 to this SOW, *Tasking and Relationship with CCPC*. Deliver to CCPC *hardware* and a *commercially available general purpose operating system* that will allow CCPC to develop, produce, and test application software. [Italic supplied in second sentence.]

Sylvania argues that the "intent of the Department to enforce these requirements is contained in the [litigation-related] testimony of Colonel Woodruff"—one of the Air Force's evaluators for the procurement—at pages 125–149 of the testimony.

Recognizing these requirements, which Sylvania considers to be a clear preference for "minimization of risks in the system" and a direction to offerors "not [to] seek the development of new hardware and software," Sylvania says that it proposed the "Burroughs Model A machine." This machine, Sylvania feels, is better—in state-of-the-art and prior record—than any other computer in a "military or commercial environment." By contrast, the IBM machine proposed by ITT is considered to be "commercially competitive for relatively low order requirements and not with the more extensive SATIN IV applications in mind." To amplify its argument that the IBM machine is not "tried and true" Sylvania argues:

> At the time ITT submitted its SATIN IV proposal, the IBM series/1 processor incorporated in the proposal was not in commercial use. IBM had not even announced its availability at that time. Specifically, the Series/1 machine had never been built and used in either a militarized or commercial application. The CS–1 processor (the militarized version of the Series/1) *has not been built to this date*. Neither the Series/1 machine nor its militarized cousin the CS–1 can, therefore, be considered either "off-the-shelf" or "tried and true," and the ITT proposal incorporating this equipment fails to meet the requirements of the RFP. Sylvania would emphasize that the processor (computer) is the driving, critical component of the system without which the system could not operate. All other equipment in the system is peripheral to and completely dependent upon the computers to which the standard of "tried and true" should have been strictly applied.
>
> The software associated with the Series/1 machine is equally "untried." At the time the ITT proposal was submitted, the software it proposed was non-existent or as a minimum had never been utilized in either a military or commercial context. The machine-oriented, low order language (LOL) required to program the new Series/1 machine is itself a new language and, when proposed by ITT, constituted a blatant violation of the RFP which prohibited the proposal of a new computer programming language.

The Air Force replies (contained in written reports dated March 21, and June 10, 1977) to issue one and Sylvania's counter-response (May 17, 1977) are summarized as follows:

Sylvania	Air Force
(1) The quoted RFP documents nowhere refer to "tried and true technology" as the desired standard but rather "tried and true" equipment. All new equipment	(1) An analysis of the ITT proposal shows not only that it is responsive to the requirements, but also that it satisfactorily achieved the other goals cited by

Sylvania

must be based on precedent—existing technology—and therefore *any* new item of hardware would meet the Air Force's tongue-in-cheek characterization of the intent of the RFP. The Air Force attempt to ignore the "tried and true" requirement by defining it so as to be meaningless. It admits that the IBM machine is a new equipment. Moreover, the defect in the Air Force evaluation approach affects both ITT's proposed hardware (series/equipment and compiler) and software.

Sylvania determined prior to submitting a proposal, that the IBM machine did not meet the "tried and true" requirements of the RFP. Sylvania also considered a Burroughs machine comparable to the IBM Series/1 unit but rejected it as not being "tried and true."

Air Force

Sylvania. The minicomputer offered in the ITT proposal (referred to as the Series/1 by Sylvania) is derived from the IBM 4955 commercial processor and memory. This model is relatively new, but is based on proven technology which has been successfully militarized in other defense programs. This minicomputer is now on the commercial market and requires no additional development for SATIN IV but for conversion to MIL packaging. Newly developed technology is not a part of the proposal. Furthermore, the subsidiary equipments (tape devices, discs, modems, etc.), more numerous in number than the minicomputers to be used, are essentially standard, off-the-shelf equipments. Therefore, the ITT proposal fully utilizes "tried and true" technology, as required, and also provides for the extensive use of existing equipments other than the Series/1 minicomputer. Furthermore, there is no new development for the SATIN IV program. The development of the Series/1 minicomputer was a private expense and has preceded any SATIN IV procurement.

In short, ITT's proposal is based on proven technology and is composed of standard equipment utilizing demonstrated techniques as is required by the RFP, rather than being completely dependent upon use of an untried computer as Sylvania has alleged.

Sylvania

(2) Mr. William C. Janofsky, who was head of the panel charged with the evaluation of computer program design and management, testified that, at least with respect to software, the "tried and true" nature of the proposals was not even evaluated or scored. Further, the software for the Series/1 is practically non-existent since the first IBM machines were not delivered until after the submission of SATIN IV proposals. One commercial customer has testified that the delivered IBM machine was accompanied by "skimpy" soft-

Air Force

The software is similarly derived from proven technology.

As to Sylvania's analysis of procurement documents, the protester relies on a number of excerpts to establish the supposed *requirement* for "tried and true," off-the-shelf hardware and software. Taken together, these characterizations establish goals to be worked toward rather than rigid requirements that the entire system be "tried and true." These excerpts show that SATIN IV was not to be a research and development effort in that new technologies were not to be developed. Each offeror was encouraged to maximize the use of "tried and true" equipments/computer software. However, it is clear that modified and/or new equipments could be used where necessary. There is no existing hardware/software that can perform the SATIN IV function as is.

(2) Sylvania has misunderstood Mr. Janofsky's testimony. What Mr. Janofsky said was that his panel did not evaluate under the "tried and true" test. Sylvania ignores Mr. Janofsky's prior testimony in which he pointed out that his panel was concerned with software management and, therefore, was not concerned with "tried and true." Another evaluator, Captain Furst, has explained that "tried and true" was not relevant to certain parts of the SATIN IV application software since no existing software

Sylvania

ware. There is no way that this barebones assortment of software could meet the "verified in a military or commercial environment" provision of the RFP.

Sylvania's proposal was prepared so as to make the maximum use of existing software available from other applications. Moreover, the SATIN IV software package is composed of a number of major components which were not necessarily unique to SATIN IV. For example, existing components such as a real-time operating system and the software needed to achieve a real-time multi-processor capability could be adapted from other applications. Sylvania did adapt these tried components. But Sylvania's efforts to use tried software were not recognized—notwithstanding the Air Force's efforts to encourage offerors to minimize risks in all proposed areas.

In attempting to comply with the important hardware and software "tried and true" requirement, Sylvania made numerous tradeoffs in the computers to be used, the form of the software and even as to subcontractors which would be used. But the Air Force ignored the requirements and Sylvania's efforts.

(3) The "untried" nature of the IBM software is shown by the proposed use of "PL-1" programming language in that, at the time ITT submitted its proposal and today, there exists no PL-1 compiler for the IBM machine. Moreover, since

Air Force

could have met SATIN IV requirements in these areas. Indeed, in the application software no offeror proposed preexisting software, and that offeror coming closest to such an offering was not Sylvania. Moreover, the question of "tried and true" was considered by the Air Force, namely: software, except application software, by Captain Furst's panel and hardware by the hardware subpanel. Neither took the precise approach which Sylvania implies should have been used because "tried and true"was a goal, not a requirement. The extent to which the goal was met by each offeror provided one of the many evaluation inputs analyzed.

(3) Sylvania's assumption that ITT has not yet developed a compiler for PL-1 is incorrect. The ITT proposal uses a modified preexisting compiler and complies with the RFP requirement that: "The offeror shall not propose any

Air Force	Sylvania
IBM recently announced that a PL–1 compiler would not be available until April 1978, it is clear that the 1978 compiler will be developed at Air Force expense. Further, it has been revealed that a software operating system will not be available until late 1977 despite the requirement that it be provided within 5 months of contract award.	new computer programming language * * *. This does not preclude modifying existing translators or using a compiler generator."
(4) The low order computer language proposed by ITT is designed to operate on a "new" machine and is, therefore, a "new" language prohibited by the RFP.	(4) For the IBM computer, the language proposed is assembly language. While the language might be categorized as "new" when compared to ALGOL or PL 1, it is off-the-shelf as far as SATIN IV is concerned, since it is one that is in existence and used with processors right now.

ANALYSIS—ISSUE ONE

The procurement documents cited by Sylvania for the proposition that the Air Force intended a fixed *requirement* for "tried and true" hardware and software—that is, completely developed, preexisting, off-the-shelf machinery and programming—do not, in our view, support the proposition advanced. Instead, we agree with the Air Force view that, in the main, the documents established a goal for maximum use of "tried and true" equipment, but did not necessarily rule out modified equipment based on preexisting technology or new equipment if based on preexisting equipment or technology. Nor do we agree with Sylvania that the "tried and true" statement referred only to existing equipment rather than to existing techniques or existing technology.

For example, the program management plan permitted modification of existing equipment as well as a new hardware/software design (where necessary). If there were a fixed requirement for "tried and true" equipment, it is obvious that the cited permission would not have been allowed. Similarly, the phrases instructing offerors to propose "demonstrated techniques" in responding to the technical criteria and to use "previously implemented technology to satisfy the * * *

security requirement" also support the view that an offeror could properly respond to the "tried and true" goal by proposing previously tried technology which might not necessarily be linked to previously tried equipment completely identical to the proposed equipment. Neither do we agree with Sylvania's view that permitting use of "tried and true" technology as opposed to accepting "tried and true," previously used equipment renders the "tried and true" provisions meaningless. In our view, the provisions were written broadly enough to permit use of tried technology or equipment. We find nothing necessarily inconsistent or improper in this approach.

Further, although Sylvania reads the requirement that the performance characteristics of proposed equipments/computer programs of known design were to have been "verified in a commercial or military environment" to mean that the actual equipment/programs were to be so verified, we do not agree that the literal reading of the provisions supports that view. All that is required under this provision is that performance characteristics of known design—as contrasted with the actual equipment/programs—be so verified. Under the literal reading of the provision, we agree that preexisting technology—prototype-related equipment—would qualify so long as the technology had verified performance characteristics which would be present in the delivered equipment/programs.

Finally, we see nothing in the record of the litigation-related testimony of Colonel Woodruff which is necessarily inconsistent with this interpretation. As was stated by Colonel Woodruff on page 130 of the testimony:

> Because of the philosophies, that we wanted to obviously derive the most modern technologies and the most modern capabilities in terms of hardware technologies for our system, but wanted to be careful that we did not burden the system with deep research and the development and that kind of thing.
> Having this kind of verbage, it gave the offeror the opportunity to offer to us his best balance between state of the art and modern equipment without pushing it into the R&D realm that we didn't want to get into.

Given our essential acceptance of the Air Force's interpretation of the cited provisions, the fact that ITT proposed a relatively new minicomputer—based on proven technology (an assertion not contradicted by Sylvania)—should not of itself disqualify the ITT proposal under the stated provisions. Under this view, the fact that at the time proposals were submitted the minicomputer was only being used within IBM is not decisive, since the machine was based on preexisting, proven technology. Moreover, given the vagueness of the "verified in a commercial or military environment" test, we cannot conclude that testing within IBM itself, or within any other concern, is not required verification. Additionally, to the extent that proven technology supported the ITT-sponsored minicomputer, we think merit would justi-

fiably be accorded the proposal. Similarly, ITT's proposed use of a modified, preexisting [1] compiler and associated programming language is not contrary to the RFP provisions and could in fact earn merit for the proposal to the degree the preexisting compiler and associated technology were proven.

Finally, we do not agree with Sylvania's assertion that the "tried and true" standard was not evaluated. First, let us be clear as to how the RFP portrayed "tried and true" as an evaluation standard. The standard is never identified as a separate evaluation factor—the standard is always found described *within* some other evaluation criterion. For example, the standard of employing "previously implemented technology" for the security requirement is found in the second sentence of the "computer security approach" general evaluation standard. Similarly, the reference to "standard equipment utilizing demonstrated techniques" is in the second sentence of the "technical" evaluation factor and is not even listed as one of the 11 specific subcriteria under the factor; rather, the referenced standard is identified as being linked to a "risk assessment" judgment in certain areas some of which—for example, message accuracy—are not even found as listed subcriteria within the "technical" evaluation factor. Further, the "Computer Program Design and Management" evaluation factor does not even mention the "tried and true" standard.

Although there are certain broad statements—especially section 1.1 of the Instructions for Proposal Preparation, *supra*—which state a preference for "maximum use" of "tried and true" equipments/programs, offerors are not told through these statements how the broadly stated preference was to be specifically linked with proposal evaluation. In this context, offerors—absent questioning the Air Force about the specific way(s) this preference would be evaluated before proposals were due—should not have automatically expected—as Sylvania appears to have assumed—that this broad preference would be separately identified and specifically scored. Instead, it seems clear that the RFP, reasonably read, promises no more than that the preference would, in some way, be evaluated as part of the technical evaluation under other separately identified factors. In any event, the board did in fact question—and thus, in our view, evaluate—a "tried and true" aspect of ITT's proposal. Thus, we take the Air Force statement that the "extent to which the goal was met by each offeror provided one of the many evaluation inputs" as indicating the "not-separately-scored-

[1] Although Sylvania insists the compiler is "non-existent," the Air Force position is that the compiler is actually a modification of a preexisting unit. In the absence of probative evidence supporting Sylvania's contention, a sufficient basis does not exist for sustaining its position. *Reliable Maintenance Service, Inc.,—request for reconsideration*, B-185103, May 24, 1976, 76-1 CPD 337.

and-identified" nature of the "tried and true" provisions. Further, given the entirely subjective character [2] of the "tried and true" provisions, all offerors should have expected that the Air Force would necessarily have to exercise extremely broad discretion in evaluating offerors' efforts under these provisions within the context of the specifically identified factors and subfactors.

Given the RFP's clear indication that the "tried and true" standard would not be separately evaluated but only considered within the context of other established criteria and subfactors, it is not surprising that the record of source selection evaluation does not contain—to our reading—specific scores and evaluation on the standard. This does not mean, as Sylvania suggests, that the goal was not considered. As noted above, we find at least one reference to the goal in the evaluation of ITT's proposal. Presumably, the offerors' evaluation scores in other areas reflect, in part, the Air Force's considered views of offerors' efforts toward the goal. Moreover, there is nothing in the record which contradicts the Air Force's position that (a) "tried and true" aspects of software, except application software, and hardware were evaluated by the appropriate panels; (b) no existing software could have met SATIN IV requirements in certain areas; and (c) no existing hardware could have met SATIN IV requirements.

Because of the foregoing analysis, we do not agree with Sylvania's argument—based on citation of several prior GAO decisions—that the Air Force omitted the "tried and true" evaluation standard or that the evaluation was based on undisclosed evaluation standards. Moreover, the further questions posed by Sylvania—so-called "areas to investigate"—relating to the precise ways in which the board, the council and the final selection official evaluated "software and hardware" deficiencies are also pegged to the erroneous assumption that the "tried and true" standard was a separately identified evaluation criterion. Relating specifically the precise ways in which the board, the council and the final selection official evaluated these deficiencies could be seen as a violation of restrictions placed on the documents evidencing the selection rationale.

("Areas to investigate" are also cited by Sylvania under its other issues. Providing answers to the questions posed by Sylvania could also be seen as a violation of the restrictions placed on the relevant agency

[2] Although Sylvania apparently understood these provisions as absolutely denoting various equipments and programming, the provisions do not in any way mention specific equipments and programs. Moreover, the fact that Sylvania and ITT—both of whom are obviously knowledgeable and experienced electronics equipment manufacturers and suppliers—arrived at different conclusions about the meaning of these provisions is a further indication that the provisions do not necessarily denote an objective list of equipment and programs.

documents. Consequently, these other "areas to investigate" will not be discussed either. Moreover, some of the questions are not relevant to our issue analysis.)

ISSUE 2—ALLEGED IMPROPER SELECTION OF PROPOSAL CONTAINING LOL LANGUAGE

Sylvania has explained that it is the company's understanding that the "principal and controlling differences between the proposals [of Sylvania and ITT] rest in their data processing aspects." In order to explain these differences, Sylvania has provided an explanation of the technical aspects of the system:

> The SATIN IV network is dependent upon the use of 300-400 computers working to sort and control the flow of messages between nodes at varying security levels. To do this each machine must contain the appropriate program. To some extent there are programs that will have common application to many machines and locations and other programs that are unique to a particular location and application. The job of programming all of the equipment for the SATIN IV system is a monumental task. Moreover, it is one that will need to be continuously updated as the system grows or is modified to meet as yet unanticipated needs.
>
> Each program must be written in a language the computer can "read" or accept. Programming languages break down into two broad types: high order languages (HOL's) and assembly or low order languages (LOL's). The differences between the two are significant to this protest.
>
> High order languages greatly facilitate the writing and reading of computer programs, their maintenance and the training of programmers all of which results in lower programming development and maintenance cost. HOL attempts to lighten the load of the programmer and coder by making the computer itself help to prepare the program (or code). This is accomplished by the use of another computer program, a compiler, which translates from a functional (high-level) language to the basic (low-level) instructions carried out by the computer's internal logic. Assembly language on the other hand is a low-level language in which the programmer instructs the computer to perform its operations at the level corresponding to the internal operations of the computer hardware itself. While assembly language provides the programmer direct control of the inner workings of the computer hardware, it requires the programmer to understand and concern himself more with the logic and architecture of the computer. As a result, there is a greater danger of programming incorrectly with low order assembly language than with HOL. A program written in low order assembly language is machine-dependent, i.e., executable only on the specific machine for which it is written, while a program written in HOL is machine-independent, i.e., executable on any computer which has the same language compiler.
>
> In its proposal, Sylvania chose to use the Burroughs "D" machine as its principal piece of computer hardware. The Burroughs machine is a proven product with an available software compiler permitting it to be programmed in a high order language specifically suited for communications work. The use of HOL permits the military associate contractor (CCPC) to accomplish its task with less skilled programmers and at a reduced cost. Indeed, Sylvania's selection of the Burroughs' machine was driven by these factors and the clear RFP requirements including those for off the shelf hardware.
>
> It is Sylvania's understanding that the ITT proposal, on the other hand, incorporated IBM's new Series/1, its first entry into the minicomputer field. This machine, unproven at the present time, can only be programmed in assembly language, requiring ITT to perform its programming in LOL.
>
> The choice of specific computer hardware and specific programming language constitutes a pivotal decision in the system approach to the SATIN IV requirement. The choice of language, in particular, permeates and controls many other aspects of the system design.

One example of this effect can be traced to the different memory capacities required by HOL and LOL. Software developed with LOL, utilizes less memory capacity within a machine than a similar program developed with HOL. Translated into costs, use of LOL allows the proposer to provide less memory capacity, i.e., less hardware to perform the minimum number of functions required, and will therefore have lower "front end" hardware cost than a proposal based upon HOL. In contrast, systems based upon HOL software have greater flexibility to meet future needs, are more reliable and result in lower maintenance and life cycle costs. A tradeoff therefore exists when a proposer determines which type of software it will utilize.

Sylvania insists that uses of "high order programming languages" for the procurement was "implicit in the SATIN IV RFP, which included emphasis upon life-cycle costs, system flexibility, maintenance of software, and the requirement to use structural programming concepts." Pertinent RFP provisions cited by Sylvania in support of this argument are the following:

Evaluation Factors for Award, section 4.0:

Specific Criteria

* * *

Computer Program Design and Management

* * *

Instructions for Proposal Preparation, section 6.3.1.6:

** * * Describe the techniques to be used to enhance the effectiveness and maintainability of software documentation. * * ** [Italic supplied.]

Instructions for Proposal Preparation, section 6.3.2.5:

** * * Discuss how the programming languages and hardware characteristics meet the software requirements for upward compatibility among processors and promote commonality and efficient development. Discuss software transferability between the software development/software maintenance facilities and the operational processors.* [Italic supplied.]

SATIN IV System Specification, paragraph 3.3.8.3:

*Programming languages. * * * Other considerations, such as programmer training, programmer productivity, and ease of maintenance, make it desirable that all SATIN IV software be developed in a suitable common language. As a minimum requirement, all communication processors, i.e., the SCPs, BCPs, and MBCPs, shall use the same upwardly compatible programming language.* In order for a language to be suitable for any processor, it shall include, but not be limited to, the following characteristics. * * * [Italic supplied.]

Sylvania also argues that the selection of the ITT "low order language" approach ran counter to the provisions of Department of Defense Directive 5000.29 (issued April 26, 1976) which provides, in pertinent part, as follows:

Software Language Standardization and Control. DoD approved High Order Programming Languages (HOLS) will be used to develop Defense system software, unless it is demonstrated that none of the approved HOLs are cost effective or technically practical over the system life cycle. * * *

Sylvania says that since its "high order language" approach was found technically acceptable and cost effective, use of the high order

language is clearly in order and ITT's use of "low order language" should not have been found to be acceptable. Further, Sylvania is of the opinion that any cost savings—estimated to be $2-$3 million—which might have followed from an offeror's use of the "low order language" would be more than offset by the "total systems life" savings of "high order language" use.

The Air Force reply to the "choice of language" issue and Sylvania's supplemental comments of this issue are summarized:

Sylvania	Air Force
(1) Even though directive 5000.29 was not *per se* applicable to the procurement, the underlying rationale of the directive is applicable. The goals of the directive are best achieved by use of "high order language" programming.	(1) The dictates of directive 5000.29 which mention *approved* "high order languages" were not effective until November 1976 when the first list of Defense Department approved "high order languages" was published. Moreover, in November 1976, the Defense Department said the provisions relating to "high order languages" were not to be retroactively applied. No offeror, including Sylvania, proposed an approved "high order language." Although the Government may have been determined that in most instances certain "high order languages" may be presumed to meet the Government's needs better, the determination of which language included in a total proposed system best meets the Government's needs is determined according to directive 5000.29 by the requirements of the specific program.
(2) The Air Force's concern with the importance of software is shown in the procurements which identify "computer program design and management" as a separate criterion, second only to the "technical" criterion. There	(2) Since neither the directive nor any "policy" regarding "high order languages" was to apply retroactively, the SATIN IV RFP was drafted so as to permit either "high order" or "low order" language. Further, the

Sylvania	Air Force
can be no doubt that proper evaluation of software was critical to the procurement. Choice of programming language is central to the accomplishment of the software cost and risk minimization objectives.	Government was unable to verify the existence of the claimed "high order language" benefits prior to the issuance of the RFP and the proposals did not prove otherwise. Moreover, it is important to realize that the award decision was not solely prompted upon an analysis of language choice as Sylvania suggests. The choice of a computer language was only a small aspect of the program. The Air Force chose the ITT proposal because it felt the proposal was the "best buy" under the RFP criteria, and this proposal used "low order language."
The Air Force's selection of "low order programming language" ignored the requirements of the RFP, was contrary to software acquisition policy, and was arbitrary (and therefore illegal.)	
(3) Mr. Janofsky said that the advantages the Air Force could expect from a system incorporating "low order language" were that the system would be more conservative, use less memory space, run faster, and be more familiar to the military associate contractor who is going to perform part of the SATIN IV system. Each of these bases for favoring "low order language" is either irrelevant to the system or a distortion of the truth. The directive shows that high order language offers fewer risks and, in that sense, should be considered more conservative.	(3) Mr. Janofsky of the Air Force did not say that ITT was chosen because of the proposed use of "low order language," nor did he say that "low order language" was selected as the more "traditional" approach. Rather, he was speaking of the reasons which led the Air Force to write an RFP which did not dictate "language" choice.
(4) While "low order languages" require less computer time and memory space—both factors relating to system response time—the RFP requires only that response times meet minimum levels—levels met by Sylvania. In any event, greater or lesser re-	(4) Response time of "languages" was evaluated; moreover, response time and memory space requirements having a direct impact on hardware costs and an indirect impact on maintenance costs (manpower and equipment) were properly evaluated.

Air Force

sponse time was not relevant and not an evaluation factor.

(5) Mr. Janofsky clearly admitted that during evaluation the Air Force determined that the software component of the life-cycle cost model was inadequate—it was thereafter ignored. In other words, the life-cycle costs of the various software proposals were never evaluated or considered. The Air Force ignored a major evaluation criterion rather than ask offerors for whatever further data was needed to evaluate software life-cycle costs properly. Since the criteria of maintainability, reliability, risk, etc., all have cost consequences that would be reflected in life-cycle costs, the failure to evaluate these costs as they relate to software means the Air Force effectively ignored these criteria as well. The assumption that software life-cycle costs would be the same was arbitrary in view of the directive's statement that "high order language" would have produced lower life-cycle costs and greater software reliability, maintainability and risk minimization.

Sylvania

(5) In response to Mr. Janofsky's concern that the ITT proposal might be more cost effective if more "high order language" programming were used, the Air Force allowed discussion with ITT limited to the company's reasons for choosing the language approach. This discussion satisfied the Government.

The analysis of life-cycle cost centered on those elements of follow-on support which were considered significant and susceptible to variations among the competing contractor's designs, and which would be meaningful in making a contract award decision. The conclusion reached was that, except for two cost elements, all other elements did not differ significantly enough to affect the award decision, or credibility in the proposed figures could not be achieved, thus rendering their use in comparative analysis meaningless and possibly inequitable to competing offerors.

In any event, the Air Force determined that its interpretation of the total minimum needs of the Government (lowest total system life-cycle cost, etc.) were met by ITT's proposal which incorporated a lesser degree of "high order language" than Sylvania's proposal.

ANALYSIS—ISSUE TWO

Given that the SATIN IV System Specification provision on "*Programming languages*," *supra*, did not expressly require—or prohibit—the use of "high order programming language," Sylvania's argument that use of "high order programming language" necessarily represented superior value for every phase of the SATIN IV system primarily rests on the presumed applicability of the provisions of directive 5000.29 to the subject procurement. Although Sylvania admits that the directive did not expressly apply to the procurement, it still argues that the "underlying rationale" of the directive—a stated preference for "high order language"—is applicable.

We agree with the Air Force view that since the directive was not expressly applicable to the procurement, the "underlying rationale" or policy views found in the directive are not expressly applicable to the procurement. To the extent that any views of the directive may be said to be applicable because of the force of logic, it is apparent that these views might be refuted by the weight of equally superior analysis. We think the Air Force has provided this analysis.

We agree with the Air Force's observation that, although in many instances, use of certain "high order languages" may be presumed to meet the Government's needs best, the decision as to which programming language is best for a given requirement—say, the SATIN IV system—is determined by the requirements of the specific system. The reasons given by one of the Air Force evaluators as to why the RFP was drafted so as to not rule out the use of "low order programming language"—that "low order language" was considered the more "conservative" system, would use less memory space, run faster and be more familiar to the military associate contractor who was going to perform part of the SATIN IV work—presumably were of some influence on those evaluators who did not exclude the ITT proposal from consideration for award merely because of its proposed language choice.

Although it is true that these reasons were not listed as the criteria by which offered programming languages would be evaluated, the fact remains that the SATIN IV System Specification provision on programming languages (see paragraph 3.3.8.3a–e) specifies only that proposed languages are to possess certain basic characteristics—relating to data structure, program structure, input/output, operating system calls, and macrocapability—none of which are apparently incapable of fulfillment with "low order language." It is these specifications, therefore, which have defined the Government's needs for programming language choice in the specific program—needs which were not questioned in any way before Sylvania submitted its proposal.

In view of these detailed specifications, those other procurement documents in which Sylvania finds an "implicit" requirement for "high order language" must be read in conjunction with these specifications which otherwise permit use of "low order language." Under this reading, we reject the view of "implicit" requirements for "high order language" in other procurement documents. To the extent, moreover, that Sylvania's protest objects to the Air Force's determination that a less restrictive specification—permitting offerors to use either "high order" or "low order" programming language—will meet Air Force needs for this particular requirement, the ground of protest is not for review. As we recently said in *Miltope Corporation—Reconsideration*, B-188342, June 9, 1977, 77-1 CPD 417:

> * * * where * * * it is asserted that the Government's interest as user * * * is not adequately protected [by a less restrictive specification] * * * the protester's * * * interest conflicts with the objective of our bid protest function, that is, to insure attainment of full and free competition. Assurance that sufficiently rigorous specifications are used is ordinarily of primary concern to procurement personnel and user activities. It is they who must suffer any difficulties resulting by reason of inadequate equipment. We, therefore, believe it would be inappropriate to resolve such issues pursuant to our bid protest function, absent evidence of fraud or willful misconduct by procurement or user personnel acting other than in good faith.

There is no evidence that the Air Force determined its needs for computer programming—that is, permitted either "high order" or "low order" programming language for this specific program—in other than in good faith.

Neither can we disagree with the Air Force's analysis as to why it did not pursue evaluation of software design life-cycle costs to the extent Sylvania believes the costs should have been examined. In our view, the Air Force position that the single largest element affecting life-cycle costs—that is, the cost of military maintenance personnel for full-time maintenance coverage—was out of the control of any prospective contractor is rationally founded. Similarly, we view as rationally founded that further Air Force view that the "small amount [of cost] added by software would not materially affect the total manpower cost" regardless of the choice of programming language used. Also, we do not agree that this approach eliminated, as Sylvania urges, life-cycle costs as an evaluation standard, since it is clear that certain cost elements pertaining to this standard were considered. Finally, we agree with the Air Force position that, as a practical matter, it would have been impossible to obtain from competitive-range offerors detailed information needed to evaluate life-cycle costs down to the module level since the design of the software to the module level would not occur until after contract award.

We further note that Sylvania's proposal was given a slight edge over ITT's proposal in computer program design, reflecting, in part,

Sylvania's language choice. To this extent, Sylvania was accorded—as it now urges should have been the case in its protest—an evaluation edge over ITT. To the extent, however, its protest under this issue can be viewed as an argument that it should have been accorded a greater advantage or that ITT's proposal should have been rendered unacceptable because of its language choice, we do not agree, since we find rational support for the Air Force's contrary evaluation results.

ISSUE 3—ALLEGED NEGOTIATION OF MAJOR, MATERIAL CHANGES TO ITT'S PROPOSAL DURING STEP 4 OF THE SATIN IV PROCUREMENT PROCESS IN VIOLATION OF DEPARTMENT OF DEFENSE DIRECTIVE 4105.62.

Sylvania's initial protest alleged that it "ha[d] reason to believe that contrary to the [DOD directive regarding the procedures to be followed on Step 4] the Air Force [was] currently contemplating a change in ITT's step 3 proposal to permit ITT to change from lower order programming language to 'higher order' as was proposed by Sylvania." Since that time, the Air Force has informed Sylvania that it did not permit this change. In response to this information Sylvania has revised its ground of protest to attack the propriety of all the changes which the Air Force has admitted were made in the ITT proposal during the step 4 procurement stage.

Initially, Sylvania argued that:

> DoD Directive 4105.62 in its Section III.D.5.c. delineates, in considerable detail, precisely how the step 4 negotiations are to be handled. This includes what can and cannot be discussed in these negotiations. Subparagraph (4) of this section states:
>
> "*Negotiations* after selection *shall not involve material changes in the* Government's requirements or the *contractor's proposal which affect the basis for source selection.* In the event that such changes are desired by the Government, the competition will be reopened in accordance with existing ASPR requirements." [Italic supplied.]
>
> Thus, Step 4 cannot be used to implement any change that would affect the source selection decision.

Sylvania also urged that if the Air Force felt there were deficiencies in the ITT proposal the appropriate time to have brought them to ITT's attention would have been subsequent to "Step 1 and 2 submissions [so as to permit modifications] in the * * * proposals submitted in Step 3."

The relevant parts of Defense Procurement Circular No. 75–7, February 27, 1976, which promulgated directive 4105.62 and "special test ASPR 3–805.3 language" provide:

> * * * The selected (for step 4 discussions) offeror's proposal must satisfy the Government's minimum requirement.
>
> * * * * * * *

Negotiations after selection shall not involve material changes in the Government's requirements or the contractor's proposal which affect the basis for source selection. In the event that such changes are desired by the Government, the competition will be reopened in accordance with existing ASPR requirements.

* * * * * * *

The following special test ASPR 3-805.3 language [duplicative of certain key provisions of the directive] is applicable only to those procurements involved in the test.

3-805.3 Discussions With Offerors.

(a) Except as provided in (b) below, all offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements.

(b) In discussing technical proposals for procurements involving advanced, engineering or operational systems development (see 4-101), contracting officers shall apprise offerors selected to participate in discussions of only those identified deficiencies in their proposals that lead to a conclusion that (i) the meaning of the proposal or some aspect thereof is not clear, (ii) the offeror has failed to adequately substantiate a proposed technical approach or solution, or (iii) further clarification of the solicitation is required for effective competition. Technical deficiencies clearly relating to an offeror's management abilities, engineering or scientific judgment, or his lack of competence or inventiveness in preparing his proposal shall not be disclosed. Meaningful discussions shall be conducted with the respective offerors regarding their cost/price proposals. Such discussion may include:

(i) cost realism;
(ii) mathematical errors or inconsistencies;
(iii) correlation between costs and related technical elements, and
(iv) other cost/price factors necessary for complete understanding of both the Government requirement and the proposal for meeting it, including delivery schedule, other contract terms, and trade-off considerations (with supporting rationale) among such elements as performance, design to cost, life cycle cost, and logistic support. Offerors shall be afforded a reasonable opportunity to correct or resolve deficiencies and submit revisions to either their technical or cost/price proposals.

Sylvania's supplemental comments to its initial protest and the Air Force reply are summarized as follows:

Sylvania	Air Force
(1) That Air Force has admitted that it saved many of ITT's proposal deficiencies for negotiation during step 4 after selecting the company in step 3. The Air Force admission of these deficiencies (as defined in the special ASPR provision) is also an express admission that ITT's proposal at step 3 did not meet the Government's requirements. Since it did not meet the Government's re-	(1) Taken together, the provisions of directive 4105.62 (sections III.D.5.(b)(2)(a)-(b) and III.D.5.b.(3)(a)) and special test Armed Services Procurement Regulation (ASPR) 3-805.3(b) create a very restricted boundary under which technical discussions may be held. Under these provisions, the Air Force was prevented from disclosing technical deficiencies relating to an offeror's

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quirements, the above-quoted provision of the Defense Procurement Circular should have prevented selection of ITT's proposal. The only permissible changes that may take place during step 4 proposal discussions are immaterial ones. The amount of the changes permitted here, as well as the granting to ITT of a 2-month delivery extension, are material changes.

Granted that preselection discussions are to be limited in scope, the Air Force should have discussed with ITT deficiencies in its software, since the several million dollar change in ITT's step 4 contract price indicates that ITT had not substantiated its proposed technical approach. This lack of a substantiated approach is an area specifically mandated for discussions under the directive and test ASPR provision. Mr. Janofsky of the Air Force confirmed that ITT's software approach had not been substantiated as late as step 4.

Additionally, the Air Force was mandated to investigate—through discussions—the cost realism of ITT's proposal especially as related to completely understanding an offeror's delivery schedules, tradeoffs and life-cycle costs. These cost and technical discussions are aimed at selecting the proposal with the highest degree of realism and credibility. Since ITT's proposal was increased by 35 percent it should not have been considered cost realistic.

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management abilities, engineering or scientific judgment, or lack of competence or inventiveness until step 4 of the procurement. Nevertheless, the Air Force recognized that step 4 discussions could not involve material changes in the Government's requirements or the contractor's proposal which affect the source selection. Consequently, if, during step 4 discussions, the Air Force discovered that ITT's proposal could not accomplish the aims of SATIN IV, or other significant details were discovered which if thoroughly understood at the time of selection would have affected source selection, the Air Force would have reopened the competition.

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These technical and cost discussions should have been held before source selection. For example, the substantial dollar change permitted in ITT's step 4 proposal could clearly have been discussed under the special test ASPR provision.

(2) Even though the Air Force has denied that ITT was permitted to substitute "high order" for "low order" language during step 4 negotiations, the Air Force has admitted that ITT's contract price was increased nearly 35-percent or $9 million on step 4. The sheer magnitude of these changes makes them material and a violation of the directive. This approach prejudiced Sylvania and other offerors by denying offerors the opportunity to correct deficiencies in a competitive environment.

The Air Force approach of deferring discussions of all deficiencies to step 4 for fear of "technical leveling" still results in technical leveling—although limited to the selected offeror. The prohibition against leveling must extend to step 4.

(3) It is sheer speculation for the Air Force to assert that, had step 4 discussions been conducted with Sylvania, Sylvania's proposed contract price would have increased $4–$7 million. The Air Force technique of avoiding negotiation of all technical and cost deficiencies and, prior to source selection, doing its own estimating

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(2) Notwithstanding that material changes—amounting to a 35-percent increase in the price of ITT's cost proposal—occurred on step 4, the changes did not affect source selection and hence were permissible. In order to constitute a "material change * * * which affect[s] the basis for source selection" the change must be an occurrence which both (1) was unexpected by the Source Selection Authority at the time of his source selection (step 3) decision and (2) would have changed a factor which constituted a significant portion of the inputs used by the authority at the time of his decision. Without the first, the change would not be the one which would affect the selection; without the second, the change would not be one which would be material to the basis for source selection.

(3) Those changes in ITT's proposal during step 4 were changes which were expected at the time of the step 3 selection. At the end of step 3 all offerors remaining within the competitive range had technical weaknesses and risks which could result in cost increases. In addition to traditional cost analysis, specifically

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of what it would cost to correct deficiencies means the end of competition as of the time original proposals were submitted. The benign questions asked during actual discussions were not aimed at, and did not result in, meaningful discussions. In any event, Sylvania's increase in price would still have been below the increase afforded ITT on step 4. For example, in the software area, the Air Force corrected ITT deficiencies that amounted to at least $3.4 million. No Sylvania deficiencies in the software area were identified by the Air Force. Therefore, this major part of the ITT price increase would not have been included in any negotiated Sylvania increase and the price difference between Sylvania and ITT which existed at step 3 would have disappeared. The Air Force's failure to give due weight to the software deficiencies in ITT's proposal despite the primary focus given software and associated risks in the RFP underscores the major defects in the evaluation.

Furthermore, a side-by-side comparison of Sylvania deficiencies as compared with ITT deficiencies—as shown in a March 22, 1977, Air Force letter to Sylvania—clearly evidences that Sylvania deficiencies were not as serious (and hence not as costly) as those of ITT.

Of the deficiencies in Sylvania's proposal, only one was a true technical weakness rather than a pres-

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tailored estimates projected each offeror's most probable cost for the work. This cost projection technique enabled comparative analysis of proposed costs and provided a projection of the likely results of step 4 discussions. The projections were used in making the selection. As long as step 4 discussions did not involve changes which significantly affected the projections on which the selection was based, there could have been no "material changes which affect[ed] the basis for source selection." These changes did not occur.

The Air Force also reviewed the cost increase which took place during step 4 discussions and the technical changes which were made. Those cost increases which did not occur were within the estimates which had been provided during step 3. Additionally, at the end of step 4, revised cost models were used to revalidate the cost analyses used during step 3. The selection authority ratified the step 3 selection of ITT only after receiving and reviewing it.

Sylvania's approach assumes that there would have been no reason to prevent the Air Force from discussing the various deficiencies in the ITT proposal prior to the step 3 solicition. Discussion of technical deficiencies relating to lack of competency or the problems attending unrealistically low cost proposals was prohibited. Although the Air Force

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entation weakness. By contrast, ITT's deficiencies related to the two most important evaluation criteria.

In summary, the Procedure followed by the Air Force improperly served to defer to step 4 many matters that should have been corrected by offerors prior to selection while the procurement was still in a competitive phase. The procedure prematurely cut short competition and resulted in a sole-source procurement by allowing an offeror to provide a deficient proposal on the assumption that it could be corrected on step 4.

might have rejected a proposal if deficiencies and problems were present, in questionable cases where discussions are desired proposals should not be rejected. Had expanded discussions been conducted, ITT's proposal certainly would not have been alone in undergoing changes.

From a comparison between those areas discussed with ITT during step 4 and those areas of weaknesses identified in a March 22 Air Force letter to Sylvania, Sylvania seeks to create a cost projection of its weaknesses and then compare that with the cost changes negotiated in ITT's proposal. The letter does not purport, however, to contain a detailed list of weaknesses from which Sylvania can make cost projections. This function is deferred to post-award debriefing.

ANALYSIS--ISSUE THREE

The genesis of the "four-step" procedures involved in the subject protest lies in procedures adopted several years ago by the National Aeronautics and Space Administration (NASA). Specifically, NASA Procurement Directive 70-15, December 1, 1970, provided that during discussions leading to the award of cost-reimbursement contracts (of the type awarded to ITT here) "ambiguities and uncertainties in the proposals * * * shall be pointed out * * * but not deficiencies." NASA explained its reasoning for adopting this approach in responding to a protest which was the subject of our decision in B-173677(2), March 31, 1972 (summarized in 51 Comp. Gen. 621 (1972)). The explanation was recited in B-173677(2), as follows:

In 1968 after [NASA's] attention was directed by [the General Accounting] Office to a number of negotiated procurements where discussions had been rather shallow, NASA promulgated PRD 69-5 prescribing a broader scope for oral and written discussions by providing that "deficiencies and omissions as well as ambiguities" should be pointed out and a reasonable opportunity afforded for

supporting, clarifying, correcting, improving or revising proposals. NASA believes that this went considerably beyond the Armed Services Procurement Regulation and the Federal Procurement Regulations, both of which emphasized "complete agreement" as the objective and called for discussions "to the extent necessary to resolve uncertainties." It is said that our decisions emphasizing the correction of deficiencies refer to all of these regulations without drawing distinctions among them and have emphasized the pointing out of deficiencies and weaknesses as well as clarification and support, citing 50 Comp. Gen. 117, 123 (1970). It is contended, however, that this and other decisions emphasizing the correction of deficiencies are all based on these regulations which either require or permit the correction of deficiencies on the initiative of the Government.

PRD 69-5 was superseded on December 1, 1970, by PRD 70-15 * * *.

* * * * * * *

It is reported that this change was prompted by experience under PRD 69-5 which indicated that discussions involving deficiency corrections had resulted in a leveling process with the following undesirable results: the revised proposals as finally evaluated were combinations of the efforts of the offerors and the Government; prospective contractors were discouraged from initially submitting their best technical proposals for fear of being overtaken by technically inferior but lower cost offerors; independent efforts as the determining factor in the competition were discouraged because of the risk of being overtaken by companies with general competence and greater resources for using the negotiation process to upgrade their proposals; actual or suspected technical transfusion resulted; and there was an obliteration of technical distinctions and a resulting unrealistic emphasis on cost estimates as the decisive factor.

Furthermore, it is argued that there is a valid basis for distinguishing between research and development contracts and cost-reimbursement contracts as compared to fixed-price contracts not involving research and development, where there are well defined specifications within the state of the art, in terms of the extent and nature of proper negotiation. In this connection, it is stated that just as the scope and depth of discussions depend on the facts of a particular case, so also should the rules applicable to negotiation depend on the characteristics of the type of procurement. Moreover, it is asserted that the current regulation projects and fosters the competitive relationship between the offerors and assures the integrity of competition even though deficiencies are not to be pointed out during negotiation of research and development contracts and cost-reimbursement contracts. Ambiguities and uncertainties are to be pointed out, and an opportunity given to support and clarify proposals. The aim of discussions as stated in the regulation is to assist the evaluators in fully understanding the proposals and their strengths and weaknesses based upon the individual efforts of each offeror; in evaluating the personnel proposed by each firm; and in presenting a report to the selection official that makes the discriminations among proposals clear and visible. *The report to the Source Selection official is to include an estimate of the potential for correction of the principal weaknesses identified, as well as an estimate of the approximate impact on cost or price that will result from the elimination of correctable weaknesses.* [Italic supplied.]

* * * * * * *

NASA contends that the statutory requirement [10 U.S.C. § 2304(g)] for written or oral discussions is broad and general; that procuring agencies have authority to prescribe implementing rules so long as they are not inconsistent with statute; that NASA PRD 70-15 is a reasonable implementation of the statute and not inconsistent with it or decisions of the Comptroller General interpreting the statute; and that in the instant case discussions were extensive and contributed to a fair and keen competition.

It is NASA's position that nothing in the language of the statute, its legislative history, or the decisions of the Comptroller General imply that the statute requires discussions which encompass a complete negotiation of the contract documents or identifications of weaknesses. NASA points out that the statute does not define the extent of discussions required and that in drafting the statutory

language on the point Congress recognized the need for flexibility, citing the following from Senate Report No. 1884, August 17, 1962:

> "*If discussions are unnecessary in the ordinary case*, it is difficult to understand that the procurement could not have been accomplished by formal advertising. At the same time, *an inflexible requirement for discussions with all offerors could encourage the offerors to pad their initial proposals and not quote their best prices first.*" [Italic supplied.]

Moreover, NASA points out, our Office has recognized that the circumstances which necessitate a negotiated procurement also necessitate the exercise of discretion on the part of the contracting officer in determining the extent of such negotiations, citing B-170855, December 21, 1970; B-169043, June 16, 1970. Therefore, NASA contends that it has broad authority to promulgate implementing regulations which, insofar as they are not inconsistent with the statute, have the force and effect of law, citing *G. L. Christian* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418; 160 Ct. Cl. 58, 320 F. 2d 345; cert. denied 375 U.S. 954 (1963); *Steinthal & Company* v. *Seamans etc., et al.*, CCA D.C. No. 24,595 (October 14, 1971).

Counsel for the protester in B-173677(2), *supra*, cited certain of our decisions (see, for example, 47 Comp. Gen. 336 (1967) and 50 Comp. Gen. 117 (1970)), which contain statements to the effect that for competitive negotiation to be meaningful, offerors should be informed of "weaknesses, excesses or deficiencies" in order to enable offerors to upgrade their proposals and provide sufficient information necessary to permit evaluation of the proposals. Because of the positions in these decisions, counsel argued that NASA Procurement Directive 70-15 was contrary to the provisions of 10 U.S.C. 2304(g) and that the discussions held with the protester were not meaningful.

On the other hand, NASA and counsel for an interested party noted that negotiation procedures are designed to be flexible and informal and that procuring agencies are permitted broad discretion in the conduct of discussions (see 47 Comp. Gen. 279 (1967); 49 *id.* 625 (1970); B-169042, June 16, 1970); that the issuance of amendments and an opportunity to revise proposals constitute discussions (50 Comp. Gen. 202 (1970)); that to point out every area in which another offeror has achieved a higher point score or provided detail is not required (B-164552, February 24, 1969); and that the correction of proposal uncertainties could constitute meaningful discussions (51 Comp. Gen. 102 (1971)).

We recognized that, although the provisions of 10 U.S.C. § 2304(g) (1970) do not define the nature, scope or extent of the required discussions, the legislative history of the law evidenced a congressional intent that negotiations be conducted under competitive procedures to the extent practicable and that they be "meaningful by making them discussions in fact and not just lip-service." We further observed:

> The many decisions cited by the parties to this protest, as well as others dealing with the matter of "discussions," were not decided in a vacuum or intended to be merely abstract statements of law. They involved actual disputes concerning the conduct of negotiations for various services and supplies, ranging from maintenance services to sophisticated electronic equipment; the justifications for negotiation involved many of the 17 exceptions to formal advertising, including public

exigency, research and development, and property or services for which it was impracticable to obtain competition; and the methods of contracting included fixed price and one of several cost reimbursement types. Necessarily, these varied procurements involved different considerations, requiring judgments as to the methods and techniques utilized in consummating the contracts. In recognition of these facts, we have not construed the requirement for "written or oral discussions" as an inflexible, stereotyped mandate unrelated to the particular procurement involved. Thus, in many cases we have found that deficiencies had to be pointed out in order to have meaningful discussions. On the other hand, in other cases the facts and circumstances called for a different conclusion. For example, in 50 Comp. Gen. 202 (1970), which NASA has cited as an instance where we held that the mere acceptance, in effect, of a late revision constituted discussions under 10 U.S.C. § 2304(g), the issue was whether the other offerors should also be given an opportunity to revise their initial proposals. We stated that since discussion had been conducted with one offeror, discussions must be conducted with all offerors within the competitive range. In B–170297, May 26, 1971, also cited by NASA, the procurement called for a quantity of generators on a firm fixed-price basis. Additional tests were required after the initial proposals were received, and the offerors were requested to submit revised prices to reflect these additional tests. Award was made after receipt of the revised prices. It was contended in part that these proceedings did not constitute "oral or written discussions" but rather the acceptance of an initial proposal without discussions. We disagreed with this contention but stated that, "we do not mean to discourage more extensive negotiations of price in similar situations nor to imply that they would be inappropriate." Thus, we have attempted to resolve these disputes not only in light of the particular procurement, but in recognition of the clear congressional mandate as evidenced by the legislative history of 2304(g), for *competitive* negotiations designed to obtain for the Government the most advantageous contract.

Therefore, it is our view that whether the statutory requirement for discussions must include the pointing out of deficiencies, and the extent thereof, is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for *competitive* negotiations, and that such determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis. However, the statute should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.

We think the propriety of the prohibition in NASA Procurement Directive 70–15 against discussing "deficiencies" must be considered in the light of these problems. We think certain weaknesses, inadequacies, or deficiencies in proposals can be discussed without being unfair to other proposers. There well may be instances where it becomes apparent during the course of negotiations that one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation. Unless this difference in the meaning given the solicitation is removed, the proposers are not competing on the same basis. Likewise, if a proposal is deemed weak because it fails to include substantiation for a proposed approach or solution, we believe the proposer should be given the opportunity, time permitting, to furnish such substantiation. Thus, it seems to us that the prohibition in NASA Procurement Directive 70–15 against discussing "deficiencies" needs clarification.

Despite our belief that the Directive needed to be clarified, we were unable to conclude—based on analysis of the particular facts involved—that the negotiations had with the protester "did not comport

with the statutory mandate for oral or written discussions." Particular facts entering into this conclusion were:

1. the protester had considerable "informal and formal contact" regarding technical requirements of the procurement for a 1-year period prior to submitting a proposal;
2. the procurement was for research and development and requested *independent* approaches substantiated by extensive data;
3. many of the protester's weaknesses resulted from failure to submit backup data;
4. written and oral discussions were in fact conducted although they did not include pointing out of deficiencies as such;
5. many of the technical questions asked did relate to areas later judged weak, although they were framed in the context of clarifications;
6. the protester did submit substantial revisions to its proposals;
7. although some informational deficiencies in one area of the protester's proposal might have been the subject of "fruitful discussions," any possible upgrading of the protester's proposal in this one area would have been insignificant because the source selection official's award decision was primarily based on a proper consideration -- confidence in engine design -- not involving this one area; and
8. the weaknesses in the protester's proposal were deficiencies only in comparison with relative strengths of the selected company; therefore, discussions concerning deficiencies in comparative weaknesses would initially have involved technical leveling.

In response to our expressed concern that the prohibition against discussing deficiencies in NASA Procurement Directive 70-15 needed clarifying, NASA issued revised Procurement Directive 70-15 which provided:

* * * *Cost-Reimbursement Type Contracts and All Contracts for Research and Development.* The contracting officer, in concert with or on behalf of the SEB, will conduct written or oral discussions of the work to be done and the cost of the work with those concerns whose proposals are within the competitive range. The discussions are intended to assist the SEB or other evaluators (i) in understanding fully the proposals and their strengths and weaknesses based upon the individual efforts of each proposer; (ii) in assuring that the meanings and the points of emphasis of RFP provisions have been adequately conveyed to the offerors so that all are competing equally on the basis intended by the Government; (iii) in evaluating the personnel proposed by each firm; and (iv) in presenting a report to the selection official that makes the discriminations among proposals clear and visible. In this process, prior to contractor selection, the Government's interests are not served by its assuming the role of an information exchange or clearing-house.

In cost-reimbursement type contracts and all research and development contracts, the contracting officer shall point out instances in which the meaning of some aspect of a proposal is not clear; *and* instances in which some aspect of the

proposal fails to include substantiation for a proposed approach, solution, or cost estimate.

However, where the meaning of a proposal is clear, and where the Board has enough information to assess its validity, and the proposal contains a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses. Discussions are useful in ascertaining the presence or absence of strengths and weaknesses. The possibility that such discussions may lead an offeror to discover that it has a weakness is not a reason for failing to inquire into a matter where the meaning is not clear or where insufficient information is available, since understanding of the meaning and validity of the proposed approaches, solutions, and cost estimates is essential to a sound selection. Proposers should not be informed of the relative strengths or weaknesses of their proposals in relation to those of other proposers. To do so would be contrary to other regulations which prohibit the use of "auction techniques." In the course of discussions, Government participants should be careful not to transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitior's ideas.

The foregoing guidelines are not all-inclusive; careful judgment must be exercised in the light of all the circumstances of each procurement to promote the most advantageous selection from the standpoint of the Government while at the same time maintaining the fairness of the competitive process.

* * * * * * *

[The evaluators should] estimate * * * the approximate [effect] on cost or price that will result from the elimination of correctable weaknesses during negotiations after selection. (The identical provisions are found in NASA Procurement Directive 70-15, December 3, 1975, currently in effect.)

Instead of the blanket prohibition against the discussion of deficiencies contained in the 1970 NASA Procurement Directive, the 1972 and 1975 NASA Procurement Directives omitted mention of the word "deficiency" and emphasized the following points:

1. although the Government's interests are not served by its assuming the role of an information exchange prior to contractor selection, the Government (contracting officer) should insure that the meanings and the points of emphasis of the RFP provisions have been adequately conveyed to the offerors so that all are competing equally;
2. the contracting officer should point out instances where a proposal is either not clear or a proposed approach, solution or cost estimate has not been substantiated;
3. weaknesses related to lack of competence and inventiveness shall not be pointed out;
4. offerors should not be informed of the relative strengths or weaknesses of their proposals; and
5. the approximate cost of correcting weaknesses in a proposal should be projected for use in source selection.

The observations made in B-173677(2), *supra*, have been used as guiding principles in deciding several other NASA protests. See, for example, *Lockheed Propulsion Company; Thiokol Corporation*, 53 Comp. Gen. 977 (1974), 74-1 CPD 339; *Sperry Rand Corporation et*

al., 54 Comp. Gen. 408 (1974), 74-2 CPD 276; *Dynalectron Corporation; Lockheed Electronics Company, Inc.*, 54 Comp. Gen. 562 (1975), 75-1 CPD 17; *Management Services, Inc.*, 55 Comp. Gen. 715 (1976), 76-1 CPD 74; *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76-1 CPD 134.

In *Lockheed Propulsion Company*, *supra*, the protester alleged that NASA's 1972 Procurement Directive improperly eliminated the need for an offeror to respond to findings of technical weaknesses by proscribing discussions related to design weaknesses. Lockheed argued that NASA's technique of correcting design weaknesses only after selection of a cost-reimbursement contractor—in this case Thiokol—put "NASA expertise to work in behalf of Thiokol" and resulted in a contract materially different from the contract proposed by Thiokol. Additionally, the protester contended that the deficiences should not have been made the subject of a "cost correction" under the provisions of the Procurement Directive but rather should have resulted in rejection of the proposal.

In reply, we emphasized, citing B-173677(2), *supra*, the authority of the procuring agency to decide—subject to a test of reasonableness—the manner of complying with the statutory requirements for discussions in negotiated procurements. Moreover, since we could not conclude that any single deficiency or aggregate of weaknesses in Thiokol's proposal could be categorized as major weaknesses, we could not conclude that NASA was (1) required to discuss these deficiencies with Thiokol prior to selecting the company; (2) prohibited from projecting the costs needed to correct these deficiencies as a technique to be used in selecting the successful offeror (in this case NASA cost adjustments to offerors' proposals amounted to $27 million); (3) prohibited from refusing to discuss these adjustments with the offerors; or (4) prohibited from correcting the deficiencies pursuant to discussions with Thiokol after source selection. Further, although we had some questions about the propriety of some of the cost adjustments made by NASA, we did not question the premise implicit in the cost adjustment technique, namely, that the procurement laws do not prohibit the adjustment of offerors' proposed costs—even if the adjustments run into the millions of dollars—and do not require discussion of the adjustments with the offerors prior to selection so long as the adjustments relate to correction of weaknesses which are not otherwise for discussion.

In *Sperry Rand Corporation*, *supra*, we observed:

> The NASA procedure represents one approach to meeting the statutory requirement for written and oral discussions, 10 U.S.C. § 2304(g). In part, at least, the underlying rationale is that to point out [certain weaknesses] during the discussions would compromise the competition, because weaker proposals would be improved, and a leveling effect would occur. To avoid this, discussions are limited to clarification of proposals; after selection, the agency then negotiates the best possible contract on terms most advantageous to the Government. Considered in the abstract, potential conflicts between the procedure and the statutory requirement can be envisioned; for instance, as appears to be contemplated by Univac, a situation where the discussions are so limited in scope and content that they amount to little more than a ceremonial exercise, with the meaningful discussions transported almost entirely into the final negotiations stage.

Notwithstanding our reservations about the possibility of ceremonial negotiations, we found that the protester had alleged the lack of meaningful discussions largely in the abstract. On this finding, and, after reviewing the record of discussions conducted, we could not conclude that NASA had violated the statutory mandate for discussions. Additionally, we rejected related complaints that NASA had improperly projected the cost of correcting the protester's deficiencies. We also noted:

> The fact that the [evaluators] judged that a deficiency in one proposal required an upward adjustment, while a deficiency in another proposal did not significantly impact its cost, does not prove that the evaluation of either was improper.

In *Dynalectron Corporation*, *supra*, we did not question NASA's decision to consider a proposal weakness involving retention of proposed personnel stemming from proposed salary reductions as falling within the Procurement Directive's list of weaknesses that may not be discussed with offerors. Similarly, in *Management Services, Inc.*, *supra*, we ageed that NASA properly omitted discussion of a weakness stemming from an offeror's failure to use appropriate wage rate information in its proposal and properly adjusted the offeror's cost proposal because of this weakness although we expressed some reservations about the adequacy of the cost analyses involved. Finally, in *Union Carbide Corportion*, *supra*, we disagreed with NASA's view that an offeror's request for direct reimbursement by the Government of its interest expense was an innovative idea not subject to discussion with offerors who had not proposed reimbursement. On the contrary, we thought the request for reimbursement was a departure from procurement "ground rules" which should have been communicated to all offerors.

DOD'S ADOPTION OF THE SUBSTANCE OF THE NASA PROCEDURES

The perceived advantages of NASA's procedures prompted the Department of Defense to issue similar procedures. Thus, Defense Procurement Circular #75–7 and "special test" ASPR § 3–805.3 were

promulgated. A side-by-side comparison of the NASA and DOD procedures is as follows:

NASA	DOD
(1) Discussions shall be conducted with those concerns whose proposals are in the competitive range. The Government, however, is not to be a "clearing house." Each competitive-range offeror shall be given a reasonable opportunity to support and clarify its proposal.	(1) Offerors selected to participate in discussions shall be informed of deficiencies and given a reasonable opportunity to correct the deficiencies with certain exceptions. A deficiency is defined as that part of a proposal which does not satisfy the Government's requirements.
(2) Discussions are held to ensure that offerors understand the meaning and points of emphasis of the RFP provisions; to point out unclear parts of proposals; and to allow an offeror to include substantiation for a proposed approach, solution and cost estimate.	(2) Offerors shall be informed only of those technical deficiencies that lead to a conclusion that the meaning of the proposal is not clear; the offeror has failed to substantiate a proposed technical approach; the solicitation needs to be further clarified for effective competition.
(3) Where the meaning of the proposal is clear and the proposal contains weakness inherent in the offeror's judgment, or lack of competitiveness and inventiveness, the weakness shall not be pointed out. Offerors should not be informed of relative strengths and weaknesses of their proposals.	(3) Discussions of technical proposals shall not involve technical deficiencies clearly relating to an offeror's management abilities, engineering or scientific judgment, or lack of competence or inventiveness in preparing the proposal.
(4) See paragraphs 2 & 3 above.	(4) Meaningful discussions conducted with offerors regarding their cost proposals shall include cost realism; correlation between costs and related technical elements; delivery schedules; trade-off considerations relating to performance, design to cost, life-cycle cost, and logistic support.
(5) See paragraph 3 above.	(5) Discussions shall not disclose the strengths and weaknesses of competing offerors, or dis-

NASA	DOD
	close any information from an offeror's proposal which would enable another offeror to improve his proposal.
(6) The evaluation board may discontinue evaluation of a proposal containing major technical or business deficiencies or omissions or out-of-line costs.	(6) The selected offeror's proposal must satisfy the Government's minimum requirements.
(7) The evaluation board is to prepare a best estimate of probable costs of performance for each proposer, if selected, and an estimate of significant changes in each proposal that would have to be negotiated after selection with a discussion of negotiation cost objectives. This information is to be presented to the source selection official. (From the NASA Source Evaluation Board Manual.)	(7) An independent cost estimate shall be developed to assist in determining the most probable costs of each competitor's proposal. Parametric cost estimating techniques or similar approaches should be used to the extent practicable to determine the reasonableness of these costs. The source selection authority shall base his selection on what is the most probable outcome for each proposal.
(8) Final contract negotiation with the selected offeror should include the correction of correctible weaknesses and the negotiation of estimated costs to favorable levels. (NASA Source Evaluation Board Manual.)	(8) Final negotiations leading to a definite contract will be held only with the selected offeror.
(9) No comparable provision.	(9) Negotiations after selection of the successful offeror shall not involve material changes in the Government's requirements or contractor's proposal which affect the basis for source selection.

The comparison reveals the similarity of the procedures. In both procedures there are statements of the need to allow competitive-range offerors the opportunity for discussions. Both procedures stress the need, however, of restricting discussion of technical proposals to clarifying or substantiating the proposal (or clarifying the solicitation meaning when needed) and specifically prohibit discussion of tech-

nical weaknesses (NASA's term) or deficiencies (DOD's term) relating to an offeror's lack of competence, diligence, inventiveness, or lack of management abilities, engineering or scientific judgment. Both procedures also provide—more clearly in NASA's procedure, although obviously implied in DOD's procedure—for independent cost projections of the "most probable" cost of each proposal including those costs made necessary by significant changes in each proposal that would have to be negotiated with the successful offeror after selection. These cost projections are also stated to be used in selecting the successful offeror. Both procedures also call for discussion of "correctable weaknesses" (explicit in the NASA procedure; implicit in the DOD procedure) with the selected offeror only.

Seeming differences between the procedures are: (1) DOD expressly mandates "meaningful discussions" of the cost proposal; NASA does not; and (2) DOD expressly requires that the negotiations with the successful offeror after selection not involve material changes in the Government's requirements or contractor's proposal which affect the basis for source selection; NASA does not.

Since the DOD procedures, in the main, are comparable to the NASA procedures, our decisions involving contested NASA procurements may be of aid in resolving the issue raised here. See, *AiResearch Manufacturing Company of America*, 56 Comp. Gen. 989 (1977), 77-2 CPD 229.

ISSUE ANALYSIS

The bulk of the Sylvania criticism of the Air Force's use of the DOD procedures goes to the substantial increase in the cost of the work negotiated by the Air Force with ITT after selection of the company. Sylvania believes that only immaterial changes may be made in the successful offeror's proposal in final post-selection negotiations with any offeror and that the admission of the Air Force that a substantial increase in the price of ITT's contract was negotiated renders invalid the Air Force procedure.

It is fundamental in the award of cost-reimbursement contracts of the type awarded here that proposed costs be analyzed in terms of their realism, since, regardless of the estimate submitted, the Government is required—within certain limits—to pay the contractor's actual, allowable and allocable costs. See *Bell Aerospace Company; Computer Sciences Corporation*, 54 Comp. Gen. 352, 359 (1974), 74-2 CPD 248, and cases cited therein. Thus, *Government-evaluated* costs rather than *contractor-proposed* costs are important in determining the successful contractor for a cost-reimbursement contract. This principle is for application whether the procurement is made under NASA negotiation procedures or otherwise.

Generally, the time for evaluating costs in a cost-reimbursement contract is during the course of negotiations. As we said in 50 Comp. Gen. 739 (1971), at page 745:

> * * * the time for exploring the cost aspects of a proposal—that is, *all* proposals within a competitive range—is during the course of negotiations and not at some time after the receipt of best and final offers. * * *

Nevertheless, in *Bell Aerospace Company*, *supra*, involving a non-NASA, non-four-step procurement, we approved the Department of the Army's decision to make significant cost adjustments to submitted best and final proposals. We rejected the argument that 10 U.S.C. § 2304(g) required that offerors be informed of those adjustments and be permitted—through the reopening of negotiations—to submit another round of proposals. As we stated in the decision:

> While we agree that negotiations are necessary to resolve uncertainties relating to the purchase or price to be paid, there is a point after which cost negotiations must be concluded and cost analysis must begin. 10 U.S.C. § 2304(g) (1970) has been interpreted so as to require conducting meaningful negotiations. However, once this requirement has been met and best and final offers have been received, it is, in the absence of more, then incumbent upon the agency to conclusively evaluate these best and final offers. We do not feel that the failure to disclose the quantum of cost adjustments made in cost analysis of the best and final offers, with an opportunity for the offerors to point out errors, constitutes a failure to have meaningful negotiations.
>
> In this case, the cost realism study was performed after submission of best and final offers. We recognize that such a study should be made in this kind of situation. On the other hand, the negotiation process cannot be indefinitely extended for the purpose of providing the offeror an opportunity to take issue with the cost realism study or any other evaluation determination. If the offeror feels that any aspect of the evaluation was improper, he may protest and the matter will be considered.

Although in the *Bell Aerospace Company* case cost proposals were adjusted for purpose of award evaluation, there is no indication—contrary to the case here—that the Department actually awarded a contract at the adjusted price. We did note that the Department's award was "based on * * * knowledge" of the adjusted cost, however. Nevertheless, we did approve the process of Government adjustment of cost proposals after the close of formal negotiations even when the non-NASA, non-four-step negotiation procedures which governed the procurement did not expressly provide for this adjustment process.

We see no significant difference between a process which allows cost adjustment of proposed costs after the close of discussions for purposes of determining the successful contractor—even though no formal adjustment of contract price is ultimately made—and an undisclosed cost adjustment process used in award selection which ultimately results in a changed contract price more in line with the Government-evaluated price as was done here.

In both cases, the undisclosed cost adjustments are used to determine—along with other factors—the successful offeror. From the standpoint of equal competition among contending offerors seeking

award, the net result is the same, namely, award selection on the basis of undisclosed cost adjustments. Moreover, it is clear that our Office has implicitly sanctioned the NASA procedure of allowing undisclosed cost adjustments to be used not only in determining the successful offeror but as a means of altering the selected offeror's proposed costs after selection but prior to award. See, for example, *Lockheed Propulsion Company*, *supra*, at page 1032. To the extent that DOD's four-step procedure similarly treats cost adjustments, it is not subject to question.

It is implicit in Sylvania's argument that the DOD procedure is different from the NASA procedure because the DOD procedure specifically directs the conduct of "meaningful discussions" regarding "cost realism" and "correlation between costs and related technical elements" whereas the NASA procedure does not contain a similar, express injunction.

Although this express direction is found in the DOD procedure, the DOD procedure also expressly requires negotiations after selection of the successful offeror without in any way prohibiting changes in the offeror's proposed costs to bring them more in line with the Government's estimate. Thus, the two procedures, although not completely identical on a word-by-word comparison, both contemplate cost and technical adjustments in the selected proposal prior to award.

Further, we do not agree that significant percentage adjustments may not be made in the selected offeror's cost proposal. We have already approved the concept of undisclosed cost adjustments both in the *Bell Aerospace* and *Lockheed Propulsion Company* cases. This approval is based, however, on assumptions that adequate cost and technical discussions have been previously conducted among competitive-range offerors; that all offerors have been permitted to submit best and final offers as a result of those discussions; that the Government projections of ultimate cost are sound; and that the ultimate changes in the successful offeror's proposal do not affect the underlying assumptions which prompted the selection.

Sylvania, in effect, questions whether ITT's proposal should have been considered in the competitive range because of the admitted weaknesses in the technical proposal, the correction of which, at least in part, resulted in the significant increase (over ITT-proposed cost) in the Government-evaluated cost used for award selection and the actual increase in contract price negotiated by the Air Force and ITT in post-selection discussions.

Sylvania makes this argument by noting the apparent inconsistency between the Air Force position that ITT's proposal was properly for acceptance and post-selection discussions (even though it contained significant deficiencies—the phrase used by the board and the council)

and some of the "special test" ASPR requirements. Those requirements provide that a selected offeror's proposal must satisfy the Government's minimum requirements and that a deficiency is that part of the proposal which does not meet the Government's requirements.

We find no real inconsistency in the Air Force's position. It seems to us that the provision that the selected proposal must meet the Government's "minimum requirements" is nothing more than a requirement that—aside from being the most advantageous proposal for acceptance under the stated evaluation criteria—the proposal is to satisfy the Government's core requirements for the work to be done to the extent that the proposal is genuinely considered to be in the competitive range for the procurement. Therefore, we do not view the "*minimum* requirements" provision as calling for a proposal meeting *all* requirements before selection, as Sylvania urges. This view is consistent with the ordinary understanding of what constitutes a competitive-range proposal. As we stated in 52 Comp. Gen. 382, 385 (1972) :

> We have held that a proposal must be considered to be within the competitive range so as to require negotiations unless it is so technically inferior that meaningful negotiations are precluded.

Thus, the mere fact that a proposal may be technically inferior in one or more respects—including "inferiority" relating to noncompliance with some RFP requirements—does not necessarily eliminate a proposal from being considered within the competitive range.

In any event, as noted above, the evaluation board specifically found that ITT's proposal met or exceeded all RFP requirements although the board found the proposal to contain "significant weaknesses" in certain areas. Further, the board's finding was confirmed by the council's observation that negotiations with either Sylvania or ITT would be successful to the end that a contract would be agreed to that would meet the Air Force's needs. Thus, we find rational support, based on our review of the entire record, that ITT's proposal was a competitive-range proposal properly for consideration for award as well as post-selection discussions. Further, based on our review of the record, we cannot conclude that the weaknesses—both as to costs and technical matters—in ITT's proposal were such that discussions—prior to selection—could have been held with the company—without violating the express restrictions of the DOD procedure.

As to whether sufficient cost and technical discussions were held with the offerors, we note that the Sylvania claims of less-than-sufficient negotiations relate, almost exclusively, to the supposed lack of discussions not with itself but with ITT. We have reviewed the lengthy record of the discussions held with ITT. In our view, there is nothing in the record to suggest that the discussions were other than reasonable attempts to comply both with the literal requirements of the statute and the DOD procedures. Further, it is our view that the

discussions held were in fact reasonably compliant with the governing statute and procedures, recognizing, under the above precedent, the broad authority granted procuring agencies to decide the nature and extent of the discussions necessary to comply with the statute. Consequently, and with full knowledge of the significant cost increase negotiated with ITT after selection, we reject Sylvania's argument that the Air Force improperly deferred to post-selection discussions matters that should have been discussed prior to selection. We also find—contrary to Sylvania's assertion—that proscribed "leveling" did not take place during the post-selection discussions. Moreover, it is our view that Sylvania is alleging lack of discussions—insofar as its own proposal is concerned—largely in the abstract by merely citing the "benign" character of the questions asked of it during discussions. To this extent, therefore, we consider that Sylvania's protest is akin to the protest in *Sperry Rand Corporation*, *supra*, where, in denying the protest, we also observed that the protester alleged lack of meaningfull discussions "largely in the abstract." Consequently, we cannot conclude that the Air Force failed to comply with the requirement of 10 U.S.C. § 2304(g) in this procurement.

Under the broad umbrella of its attack on the way the Air Force implemented the procedures, Sylvania also questions the soundness of the Air Force's cost projections concerning the likely ultimate cost of its proposal compared with the projected costs of ITT's proposal. Issue is also taken by Sylvania with the Air Force's judgment that its proposal was properly ranked lower than ITT's proposal.

We have specifically approved the use of the parametric cost evaluation technique adopted by the Air Force here in evaluating proposals. *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD 137. Given our acceptance of this technique, our approval of the concept of undisclosed cost adjustments to proposals for use in evaluation and post-selection discussions, and our review of the results of the cost adjustments, we cannot conclude that the projected differences in costs between ITT and Sylvania lack a reasonable foundation, notwithstanding Sylvania's allegation to the contrary. Moreover, as noted above, the Air Force's pre-selection projection of the costs needed to correct ITT's deficiencies was confirmed by the cost increase actually negotiated with ITT during post-selection discussions. Also, based on our review of the record, we do not agree that the evaluated technical differences between the proposals lack a rational foundation. On this point we must agree with the Air Force's view that Sylvania has not been informed of all the technical differences between the proposals and is therefore not in a position to realistically question the evaluated differences.

Protest denied.

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