Decisions of The Comptroller General of the United States

VOLUME 57 Pages 321 to 400

MARCH 1978
WITH
INDEX DIGEST
JANUARY, FEBRUARY, MARCH 1978

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300111700

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1978

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.40 (single copy) ; subscription price: $17.75 a year; $4.45 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATEE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer

TABLE OF DECISION NUMBERS

	Page
B–186875, Mar. 20	357
B–188284, Mar. 7	325
B–189189, Mar. 30	389
B–189387, Mar. 2	321
B–189603, Mar. 15	347
B–189730, Mar. 8	328
B–190035, Mar. 31	395
B–190105, Mar. 27	370
B–190223, Mar. 22	361
B–190292, Mar. 28	379
B–190348, Mar. 8	339
B–190511, Mar. 24	367
B–190896, Mar. 30	392
B–190897, Mar. 14	343
B–191155, Mar. 29	385
B–191216, Mar. 29	387
B–191300, Mar. 31	399

Cite Decisions as 57 Comp. Gen. —.
Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-189387]

Telephones—Long Distance Calls—Government Business Necessity—Effect of Area Code Procedures on Certifications

Where a telephone company does not utilize a local message unit system in its billing operation, but lists all calls as "long distance," even within the same metropolitan area, and the tolls charged for calls are not sufficient to qualify for use of the Federal Telecommunications System, all calls must be certified as being "necessary in the interest of the Government." 31 U.S. Code 680a (Supp .V. 1975).

Telephones—"Short Haul" Toll Calls—Random Sampling

Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b-1(a) (Supp. V. 1975); 3 GAO 44, as amended by B-153509, August 27, 1976.

In the matter of certification requirements for "short-haul" telephone toll calls, March 2, 1978:

This is in response to a request from the Chief of the Fiscal Management Branch of the North-Atlantic Regional Office, Internal Revenue Service (IRS), for a decision as to whether "short-haul" telephone toll calls must be certified under the provisions of 31 U.S.C. § 680a (Supp. V, 1975).

Although the request was not made by the head of the agency and the Chief of the regional office's Fiscal Management Branch does not appear to be writing in the capacity of a certifying officer, we are nevertheless rendering a decision to the Commissioner of IRS because of its application to agencies throughout the Government.

The issue is raised on behalf of the Hartford, Connecticut IRS office, whose telephone service is supplied by the Southern New England Telephone Company. That Company does not utilize a message unit system in its billing operation and, therefore, all calls, including calls within the immediate area of the office, are listed separately and billed as toll calls. IRS has designated as "short-haul" telephone calls all calls for which there is a charge of less than 50 cents for the first 3 minutes. Under a General Services Administration (GSA) directive, such calls cannot be made through the Federal Telecommunications System (FTS). IRS believes that 31 U.S.C. § 680a (Supp. V. 1975) does not specifically require certification of such "short-haul" toll calls and that such a requirement would be extremely burdensome administratively.

31 U.S.C. § 680a (Supp. V, 1975) prohibits use of any Executive department appropriation for payment of "long-distance telephone calls" except for those made in the course of Government business:

> And all such payments shall be supported by a certificate by the head of the department * * * or such subordinates as he may specially designate, to the effect that the use of the telephone in such instances was necessary in the interest of the Government.

7 GAO Policy and Procedures Manual § 25.3 (TS 7-37, March 31, 1970) (GAO) (which superseded 7 GAO § 5530.20, cited in the IRS request), requires that:

> Appropriate certification shall be made for all long-distance telephone toll payments. Charges for telephons calls within a metropolitan exchange billed as message units * * * are not considered to be long-distance telephone tolls for which certification is required by the above quoted statute.

We have also previously distinguished FTS calls from toll calls and held that the former are not subject to certification. 43 Comp. Gen. 163 (1963). Clearly, the telephone calls in question are neither FTS calls nor calls "billed as message units." Therefore, the "short-haul" calls fall under neither of the exceptions to the certification requirement.

We think IRS' designation of the relatively inexpensive toll calls as "short-haul" is misleading as it implies that these calls are distinguishable from other toll calls because the amount charged is less than 50 cents for the first 3 minutes. We note, from our examination of the bills submitted with the request for a decision, that while the great majority of the charges were for calls made to numbers within the Hartford, Connecticut area, the charges themselves ranged from a low of 17 cents to a high of $2.17. In fact, two calls within the Hartford area were made to the same number; the charge for one was 25 cents and for the other $1.69. It does not appear, therefore, that the amount of the charge is an appropriate factor to distinguish "long distance" calls from other toll calls for purposes of the certification requirement. We believe that, under the express language of 31 U.S.C. § 680a (Supp. V, 1975), certification of all calls billed as long distance calls is required to assure that these calls were necessary for the transaction of Government business and to provide management with the means to determine that "they are the most economical and practicable means of communication available for the transaction of Government business." 7 GAO § 25.3, *supra*. In the absence of a local message unit system, such certification might, for example, demonstrate that the leasing of special tie lines to high volume calling areas would be more economical than the present toll system.

We conferred with GSA about methods to ease the administrative burden on the IRS Hartford regional office in meeting the certification requirements. GSA concurs with our view that the so-called "short-haul" toll calls are covered by the certification requirements and it points out that the absence of a local message system in the Hartford area is not unique. There is a wide range of rates in various areas throughout the country charged for local and "short-haul" toll calls because of different tariffs charged by different local telephone companies. Apart from any legal restraints, it would be administra-

tively impractical to establish separate regulations for each of these areas in view of the variety of rates in effect. However, GSA concludes that while the statute requires certification of all toll calls, including "short-haul" toll calls, this certification could be based on a reasonable sampling of calls. In a letter to GAO, dated September 23, 1977, summarizing our discussion, the Acting General Counsel, Herman W. Barth, wrote:

> * * * GSA's experience with intercity calling on the FTS was explained with reference to the effectiveness of sampling as the basis for determining the use of intercity calling. Based on our experience, we recommended that GAO consider rather than 100% certification of all toll calls, a certification based on a sample, *e.g.*, 10% or any percent determined by GAO as applicable to its needs. Also, we suggest GAO consider auditing some agencies on a random basis to insure that this sample type of certification is effective.
>
> In summary, the essence of our recommendations was that certification of short-haul toll calls is desirable, but on a sampled basis in order to make it more practical, and that GAO randomly audit Federal agencies to insure the effectiveness of the certification.

While we agree that certification could be based on a sampling of "short-haul" toll calls, this would not relieve IRS from its statutory responsibility for certification of all long-distance telephone calls. Precedent exists in Federal law for use of sampling techniques in the examination of documents relating to Government expenditures. 31 U.S.C. § 82b–1(a) (Supp. V, 1975) authorizes heads of Government departments or agencies to:

> Prescribe the use of adequate and effective statistical sampling procedures in the examination of disbursement vouchers not exceeding such amounts as may from time to time be prescribed by the Comptroller General of the United States * * *.

Under the current ceiling, sampling may be used in the prepayment examination of disbursement vouchers for amounts not in excess of $500 or such lesser amount as set by the head of each department and agency who is required to "demonstrate by cost-benefit analysis that economies will result by use of the limit he selects." B–153509, August 27, 1976.

The size of the random sampling necessary to meet certification requirements is for each agency's administrative determination but it should be large enough and conducted with sufficient frequency to provide an accurate determination that the calls were made under circumstances that would be to the "interest of the Government," and to provide the means for enforcing this requirement. We offer the following guidelines from 3 GAO § 45 (TS 3–12, September 3, 1966) for assistance in setting up a certification sampling plan:

> Statistical sampling involves not only complying with the principles of probability but also developing and applying a scientific sample design which usually consists of the following six broad categories or steps:
>
> (1) Formulating the audit problem which includes (a) defining the universe of vouchers in terms of its elementary units and total number of vouchers and

possibly its sampling units (groups of vouchers) and (b) stating the objectives of the audit clearly in writing and in quantitative terms.

(2) Selecting and using appropriate statistical sampling methods.

(3) Determining the size of sample needed to meet the prespecified audit objectives.

(4) Selecting and using appropriate procedures for estimation of the characteristics of the universe of vouchers from the sample data.

(5) Selecting formulas for, and evaluating the magnitude of, sampling error in the resulting estimates.

(6) Presenting the results to management with proper interpretation.

Developing a good statistical sampling plan requires knowledge usually possessed by professionals in the field. Accordingly, the advice and assistance of a professional statistician expert in sampling principles should be obtained when setting up a system of statistical sampling. Once developed and tested in operation, a sampling system may be operated by persons not having statistical training. It must be supervised, however, by personnel having a sufficient knowledge of statistical sampling techniques as applied to auditing and of the essential features of the plan in use to assure its operation as designed and to make recommendations for its improvement.

Finally, 3 GAO § 49 established the following minimum requirements for an adequate statistical sampling system:

The minimum requirements for an adequate statistical sampling system are as follows:

1. The plan must be based on sound probability principles and concepts, clearly outlined in written instructions for guidance of personnel.

2. The plan must be predicated on economic and feasibility studies of the situation to which the plan applies, and these studies must be sufficiently documented to permit review and evaluation of the plan's characteristics. Sampling procedures should be adopted only when economies can be demonstrated or controls strengthened without adding to costs.

3. Controls must be established to ensure adherence to the established plan. Vouchers actually examined should carry evidence of the examination.

4. The plan must be supervised by personnel having adequate knowledge of statistical sampling techniques as applied to auditing and of the essential features of the plan. This does not necessarily require the services of a professional statistician. However, the advice and assistance of a professional statistician should be sought when the system is being set up or modified.

5. Recurring reports must be prepared for management presenting the results of the sampling audit. Management should provide a means for analyzing these reports and for correcting the causes of the errors disclosed therein.

6. All records pertaining to the voucher examination system should be readily available for examination by the agency internal auditors and the General Accounting Office.

In summary, all telephone calls billed as long-distance toll calls are subject to certification requirements established by 31 U.S.C. § 680a (Supp. V, 1975). However, in view of the frequency and large number of relatively low-cost toll telephone calls made by the Hartford IRS Regional Office, it would be appropriate for certification to be based on a well-designed sampling of a large enough number of calls to assure probable accuracy in enforcement of the prohibition against use of long-distance telephone service unless necessary for official business.

In our reviews of accounting systems, we will evaluate the adequacy and effectiveness of statistical sampling procedures used.

[B-188284]

Leaves of Absence—Forfeiture—Administrative Error—Restored Leave

Internal Revenue Service employee on August 26, 1975, submitted a Standard Form 71 application for annual leave which was denied by his supervisor due to an exigency of public business. Employee forfeited 152 hours of annual leave at close of 1975 leave year. Leave may be restored under 5 U.S. Code 6304(d) (1) (A) (Supp. III, 1973) because the employee timely requested the leave and the agency failed to approve and schedule the leave or present case to proper official for determination of a public exigency. This administrative error caused the loss of leave which, but for the error, could have been restored under 6304(d) (1) (B), as caused by exigencies of public business.

In the matter of William D. Norsworthy—restoration of forfeited annual leave, March 7, 1978:

This responds to a request by the Director, Personnel Division, Internal Revenue Service (IRS), for an advance decision as to whether IRS may restore 152 hours of annual leave forfeited by Mr. William D. Norsworthy, an IRS employee, at the end of the 1975 leave year.

Mr. Norsworthy, Special Agent, Intelligence Division, Chicago District, was assigned to a high priority investigation throughout the 1975 leave year. On August 26, 1975, he submitted a Standard Form 71 (Application for Leave) requesting annual leave from September 2, 1975, through September 26, 1975, a period encompassing 152 hours. His request was denied by his group manager due to an exigency of the public service, namely, the need for timely completion of Mr. Norsworthy's investigation. An oral agreement was reached with his group manager that Mr. Norsworthy could take his leave upon completion of the investigation, which was expected to be in mid-October. However, the investigation was not completed until December 6, 1975, at which time Mr. Norsworthy orally requested leave for the remainder of December, a period encompassing only 136 hours. Although this request was orally granted, Mr. Norsworthy's supervisor cancelled the leave when a need for an additional review arose. Thus, Mr. Norsworthy had no opportunity to use 152 hours of excess leave which could not be carried into the 1976 leave year. As a result, he forefeited the 152 hours by operation of section 6304(c) of title 5, United States Code (1970).

On May 14, 1976, the question of whether Mr. Norsworthy's leave could be restored was first posed to the agency official authorized to determine an exigency of public business for the purpose of restoring leave forfeited by IRS employees in the Chicago District. That official, the IRS Midwest Regional Commissioner, denied the request because the matter was not presented to him for decision in advance of the cancellation of scheduled leave. After being asked to reconsider, the

Midwest Regional Commissioner referred the case to the IRS Personnel Division by a memorandum dated January 3, 1977, which stated that in his opinion, after having made a thorough review of the facts in Mr. Norsworthy's case, this case "meets every requirement for restoration, except that the exigency of the service involved was, through management oversight, not determined by him." He stated further that if the case had been presented to him on a timely basis, he would have determined the exigency to be of such major importance as to permit restoration of leave. The Director of the Personnel Division is of the opinion that Mr. Norsworthy's leave should be restored to a special leave account for his use.

Forfeited annual leave can be restored under the limited circumstances set out in section 6304(d)(1) of title 5, United States Code (Supp. III, 1973), which provides:

> Annual leave which is lost by operation of this section because of—
> (A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;
> (B) exigencies of the public business when the annual leave was scheduled in advance; or,
> (C) sickness of the employee when when the annual leave was scheduled in advance;
> shall be restored to the employee.

The Civil Service Commission's implementing regulations and guidelines, issued pursuant to 5 U.S.C. 6304(d)(2) and 6311, are contained in Federal Personnel Manual Letter (FPML) No. 630–22, dated January 11, 1974. The regulations, but not the guidelines, were also published in the Federal Register of January 11, 1974, and have been codified in Subpart C, Part 630, title 5, Code of Federal Regulations.

For restoration under subsections (B) or (C), there is a statutory requirement that the annual leave be scheduled in advance. See *Matter of Michael Dana*, 56 Comp. Gen. 470 (1977). Regarding this requirement, 5 C.F.R. 630.308 provides:

> Beginning with the 1974 leave year, before annual leave forfeited under section 6304 of title 5. United States Code, may be considered for restoration under that section, use of the annual leave must have been *scheduled in writing* before the start of the third biweekly pay period prior to the end of the leave year. [Italic supplied.]

Paragraph 5c(3)(e) of the Attachment to FPML 630–22 further elaborates:

> * * * The scheduling and, as necessary, rescheduling of the annual leave must be in writing. (In this regard, Standard Form 71, Application for Leave, may be used to document the actions, supplemented as required.) Documentation must include the following:
> —The calendar date the leave was scheduled, i.e., *approved by the official having authority to approve leave* * * *. [Italic supplied.]

The rule requiring approval in writing stems from the legislative history of section 6304(d)(1) itself:

The committee intends that for purposes of complying with the "scheduled in advance" requirement, some formal documentation will have to be furnished to show that the employee, a reasonable time before the end of the leave year, did, in fact, request a certain amount of annual leave in advance, that such request was approved by the appropriate authority, and that such annual leave was lost due to exigencies of the service or sickness of the employee. H.R. Rept. No. 93–456, 93rd Cong., 1st Sess. 9 (1973).

Since Mr. Norsworthy's annual leave was never approved in writing by his group manager, it was not scheduled in advance within the meaning of subsection 6304(d)(1)(B), and may not be restored under that subsection.

Congress intended that section 6304(d)(1) would authorize restoration of leave lost "through no fault of the employee," but would not authorize restoration of leave lost because the employee chose on his own volition not to use leave. Page 4 of H.R. Rept. No. 93–456, *supra*. Regarding leave lost due to exigencies or sickness, the statute places a modest burden, i.e., the scheduling requirement, upon the employee to prove that leave was not lost because he chose not to use it:

To ease the administration of the above two provisions, the bill contains provisions that annual leave must have been scheduled in advance in order for the leave to be credited. This would be subject to Civil Service Commission regulations, and the committee feels that the regulations should be liberal. All that should be required is that the employee make a bona fide, formal, and timely request for leave and that the request be approved. Page 6 of H.R. Rept. No. 93–456, *supra*.

In connection with the scheduling of leave subsection (1) of paragraph 5c of the Attachment to FPML 630–22 reads in pertinent part:

(1) *Discussion.* This particular provision recognizes and re-emphasizes management's longstanding responsibility for the planning and effective scheduling of annual leave for use through the leave year. While employees also have an obligation to request annual leave in a timely manner, failure on their part to do so does not relieve management of its responsibility to assure that the leave is in fact scheduled for use. When an employee chooses not to request or to use annual leave to avoid forfeiture, he is not entitled to have the forfeited leave restored for later use.

In view of the legislative history and implementing instructions, we construe subsections 6304(d)(1)(B) and (C) as creating a right to restoration of annual leave when it was lost because of a public exigency or sickness and was not lost due to the fault of the employee. Consequently, when an employee submits a "bona fide, formal, and timely request for leave," there can be no discretion whether to schedule the leave or not. The agency must approve and schedule the leave either at the time requested by the employee or, if that is not possible because of the agency's work load, at some other time. In the case of an exigency of public business the matter must be submitted to the designated official for his determination.

Failure on the part of the agency to properly schedule requested leave constitutes administrative error. Management can no more deny a

proper leave request in derogation of the statutory right to restoration than it can fail to carry out written administrative regulations having mandatory effect for the purpose of counseling an employee in cases concerning retirement. See *Matter of John J. Lynch*, 55 Comp. Gen. 784 (1976).

Since subsection 6304(d)(1)(A) authorizes restoration of leave lost because of administrative error when the error "causes" the loss, if an employee demonstrates that, but for an administrative error in failing to schedule leave, he would be entitled to restoration of leave under subsection 6304(d)(1)(B), then such leave may be restored under subsection 6304(d)(1)(A).

In Mr. Norsworthy's case, the record shows that he submitted a proper, written leave request which was summarily denied by his group manager due to an exigency of public business. The group manager orally agreed upon leave at another date, but failed to schedule it in writing or submit the question of whether a public exigency existed to the proper official. Having submitted a timely written request, Mr. Norsworthy sufficiently documented his effort to take leave during the existence of a particular exigency. Since that same exigency lasted throughout the 1975 leave year, and since the Midwest Regional Commissioner has already determined the existence of such an exigency as to require forfeiture of leave, we have no objecion to restoration in Mr. Norsworthy's case.

Accordingly, pursuant to title 5, United States Code, section 6304(d)(1)(A), IRS may restore Mr. Norsworthy's 152 hours of forfeited leave and credit it to a special account for his use.

[B–189730]

Contracts—Research and Development—Initial Production Awards—Selection of Contractor to Continue Research Project—Review by General Accounting Office

Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, General Accounting Office (GAO) will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable.

Contracts—Research and Development—Propriety of Award—Follow-On Phase of Research—Changes in Price, Specifications, etc.—Not Prejudicial

Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Most Advantageous Technical/Cost Relationship

Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—"Meaningful" Discussions

Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its costs acceptable.

General Accounting Office—Recommendations—Contracts—Requests for Proposals—Issuance—Follow-On Phases of Research Projects

While protester was not misled as to evaluation factors for award of follow-on phase of competitive parallel procurement, GAO suggests that agency issue request for proposals prior to selection of contractors for each succeeding phase.

In the matter of the Westinghouse Electric Corporation, March 8, 1978:

By letter dated July 27, 1977, Westinghouse Electric Corporation (Westinghouse) protests the selection by the Energy Research and Development Administration, now Department of Energy (DOE), of General Electric Company (GE) and Curtiss-Wright Corporation (CW) to proceed with Phase 2 under existing contracts for DOE's ongoing high temperature turbine technology (HTTT) program. CW, as an interested party, has filed comments on the protest.

As background, on June 25, 1975, DOE issued request for proposals (RFP) E (49–18)–1806 for the research, design and development of a HTTT program. Under the program, DOE seeks "to advance, in a six-year period, the technology of a high temperature (multi-stage) power turbine subsystem to a technology readiness condition, *i.e.*, to a point where minimal risks would be involved for an agency or manufacturer in developing the turbine subsystem for use in a full-scale, open-cycle gas turbine system." As a result of the competition, on May 28, 1976, DOE awarded separate contracts to Westinghouse, GE, CW and United Technologies, Inc. (UTI), in the respective amounts of $2.8, $3.1, $1.5 and $2.1 million.

Under Phase 1 (Program and Systems Definition) of the contracts, the contractors were to submit proposals for revised scopes of work for Phase 2 (Technology Testing and Support Studies) and Phase 3 (Technology Readiness Verification Test Program). These revised scopes of work and continuation proposals were the deliverables under

Phase 1 of the contracts. Selection of the contractors for Phase 2 was to be made from among the contractors participating in Phase 1.

With regard to the Phase 2 contractor selection and evaluation process, the contracts state, in pertinent part, as follows:

ARTICLE VI—EVALUATION OF PHASE 1 PERFORMANCE DETERMINATION TO PROCEED TO PHASE 2

Prior to completion of Phase 1 a determination must be made whether to proceed with Phase 2. This determination will be influenced by but not be limited to the following:

1. The technical feasibility of the Overall Plant Design Descriptions for both fuels, the reference and backup turbine subsystem design, the proposed Phase 2 and Phase 3 programs, and the combustor designs for burning low Btu gas.
2. The contractor's plan to implement what he has gained from the HTTT program indicating the percentage of gas turbine subsystems to be manufactured by the contractor. (Note: The most desirable plans will be those containing a higher percentage of contractor manufacturing capability.)

(Article VI further advised that the agency would utilize an advisory panel to assist in the technical evaluation.)

Westinghouse, as well as the other Phase 1 contractors, submitted Phase 2 cost and technical proposals. DOE's Source Evaluation Board (SEB) reported the following technical and implementation ratings of the Phase 2 proposals.

Offeror	Technical	Implementation
GE	777	outstanding
Westinghouse	667	outstanding
CW	502	poor
UTI	474	poor

The results of DOE's advisory panel evaluation were:

Offeror	Score
GE	850
Westinghouse	755
CW	715
UTI	672

The evaluated costs proposed by the contractors in escalated millions of dollars for Phase 2 were as follows:

Offeror	Evaluated Phase 2 Costs in Millions of Dollars
GE	$24.6
Westinghouse	$72.2
CW	$31.0
UTI	$23.0

By letter dated July 19, 1977, DOE advised Westinghouse that it was not selected for continuation into Phase 2. The selection document explained the Phase 2 award selection as follows:

Selection-Decision

Based upon the evaluation of the Technical Panel and the Board as well as my own consideration, I [the Deputy Assistant Administrator for Fossil Energy] have concluded that General Electric and Curtiss-Wright have presented technologies which should be further explored and developed in Phase 2 of their respective contracts.

General Electric received the highest rating in the evaluation of the Technical Panel and the Board. Their approach to water cooled turbine blade appears promising and has been well executed, to date. Furthermore, the G.E. proposed estimated cost for Phase 2 appears resonable and is next to lowest of the four contractors.

Curtiss-Wright, although it was ranked third in the overall evaluation by the Board and the Technical Panel, has a decidedly different technical approach from that of G.E. It appears worthy of continued effort. This technology of blade cooling by air provides a contrast from the water cooling approach being pursued by G.E. and the water and air cooling approach being pursued by United Technologies.

Westinghouse, despite the fact that it received the second highest evaluation and has a very good program in my judgment, has presented a very expensive plan. Its proposed costs are far above those of the other three contractors and are not justifiable in view of the technological approach of air cooling, which is similarly being attempted by Curtiss-Wright. Hence, I direct that we proceed to Phase 2 in the Curtiss-Wright contract.

As indicated above, Westinghouse protested to this Office on July 27, 1977. DOE awarded GE and CW Phase 2 contracts on July 29, 1977, notwithstanding the protest, on the basis that delay would be costly, disrupt the inter-relationship between the HTTT program and other DOE programs and impair the staff team assignments of contractor personnel.

At the outset, we must consider DOE's and CW's contention that our Office should not consider the protest on its merits. As indicated above, the HTTT program contracts were applicable to all Phase 2 offerors. The contracts provided:

In the event that the Government fails to exercise its *unilateral right to require the Contractor to proceed with the next succeeding phase* the Contractor is not authorized to expend any additional funds in excess of the amount obligated and set forth separately for each Phase. [Italic supplied.]

The contracts also provided in general terms a statement of work inclusive of all three phases of development. Thus, DOE and CW maintain that by accepting the terms of the contract Westinghouse granted to the Government an option exercisable at the sole discretion of the Government. Citing our decisions *C. G. Ashe Enterprises*, 56 Comp. Gen. 397 (1977), 77-1 CPD 166, and *Inter-Alloys Corporation*, B-182890, February 4, 1975, 75-1 CPD 79, they argue the protest pertains to contract administration which is a function and responsibility of the contracting agency and that under our Bid Protest Procedures (4 C.F.R. Part 20 (1977)) we should not consider contentions that the agency should have exercised a contract option provision which is purely for the interest and benefit of the Government.

As the decisions cited above state, we will not review a protest by a contractor challenging a contracting agency's determination to ful-

fill its needs through competition in lieu of exercising a contract option, because such a determination is a matter solely within the agency's discretion. *Industrial Maintenance Services, Inc.*, B–189958, September 15, 1977, 77–2 CPD 195. Here, however, while Westinghouse is protesting because DOE did not exercise its Phase 2 option, the agency did not solicit offers for Phase 2, but instead exercised options of other Phase 1 contractors to perform Phase 2. Essentially, Westinghouse is challenging the validity of that selection process.

We think it reasonably clear from DOE's conduct in this matter, at every stage, that it was essentially conducting a competitive procurement for Phase 2. In the first place, DOE conducted a competitive evaluation of the proposals submitted under Phase 1. It used a source evaluation board and designated a source selection official. Criteria for source selection were stated and proposals ranked on a competitive basis. The source selection document itself refers to another "competition" for Phase 3. Phases 2 and 3 were unpriced under the contracts, and throughout the record of the protest, DOE refers to the "award" of the Phase 2 contracts. Thus, we do not believe that the decisions cited above are applicable in this situation, and therefore we will consider Westinghouse's protest.

Westinghouse contends that it lost the competition primarily because of an evaluation factor which was not disclosed to it until after the selection process was completed. It concludes from the record that its submissions were highly regarded from a technical standpoint and that the reason for its not being considered for negotiation of Phase 2 was its cost. It believes that the "agency's program budget was, in fact, driving the program" and that "cost was, in fact, the deciding factor in the source selection."

At no time, however, Westinghouse states, "did the agency suggest that it was willing to take more risks than it had originally intended or that it had budget constraints." Rather, Westinghouse feels the agency encouraged Westinghouse to expand its program under Phase 1 an.. incur more cost.

In addition, Westinghouse states that no attempt was made by the agency evaluators to evaluate or give a technical rating based on the work actually to be performed by the Phase 2 contractors. As an example, it states that the proposals were evaluated on the basis of inclusion of full scale engines but the contracts negotiated with GE and CW call for subsize or subscale activity, full scale activity having been effectively eliminated. Westinghouse believes that its technical rating would improve relative to GE if the evaluations were made on the actual contracted subsize/subscale activity.

Accordingly, Westinghouse states that our Office should direct the agency to do what Westinghouse asserts the agency should have done

at the outset—"to enter promptly into meaningful contract discussions with Westinghouse." At the conclusion of these negotiations, Westinghouse believes that the agency then would be in a position to determine whether Westinghouse's proposal is superior to CW's.

DOE, in turn, points out that Westinghouse was advised well before the Phase 2 selections were made that DOE did not plan to issue a Phase 2 RFP but would make the selections based on the Phase 1 submissions. DOE explains that the Phase 2 selection process was not conducted as a traditional competition, but rather as part of an ongoing research and development program, the ground rules for which were set forth in the Phase 1 RFP.

Further, DOE states that agency and Westinghouse representatives closely coordinated during Phase 1 and that, as a result of this continual coordination, the agency technical personnel were thoroughly familiar with Westinghouse's Phase 2 approach and associated costs, which were deliverables under the Phase 1 contract.

DOE also believes that as a result of this coordination, Westinghouse was or should have been aware of the agency's concern with the cost element in the Phase 2 selection process prior to the submission of its revised Phase 2 statement of work. In this regard, DOE has submitted an affidavit from its HTTT project manager stating that he advised the Westinghouse HTTT project manager, in December 1976, that "Westinghouse's estimate of their Phase 2 costs, which appeared in the Phase 1 proposal, was high by a factor of two."

We note that the Westinghouse project manager admits that this statement was made to him, but states that other times thereafter, other responsible agency representatives told him that Westinghouse's function was to perform well in Phase 1 and that it was the agency's responsibility to obtain the necessary funding to accomplish the objectives of the program.

DOE contends that, in any event, the importance of cost was evident from the Phase 1 RFP, which listed cost as an evaluation factor and required offerors to submit cost proposals for the entire program in competing for the Phase 1 awards. To DOE, it is clear that offerors could reasonably assume that cost would continue to be important in the Phase 2 selection. Moreover, DOE observes that Westinghouse is an experienced Government contractor and therefore is familiar with the GAO decisions and Federal Procurement Regulations (FPR) provisions indicating that cost is always a factor to be considered in awarding a contract. It cites FPR 1–3.805 and our decision 51 Comp. Gen. 153 (1971) (as well as others) in support. It concedes, however, that "it would have been desirable not only to more clearly state this in the original RFP but also to indicate the relative importance of cost to the technical evaluation factors therein." DOE states that cor-

264-989 O - 78 - 3

rective steps will be taken in subsequent competitive parallel contracts, as well as in the Phase 3 selection, to insure technical compliance with these requirements.

DOE also disputes Westinghouse's assertion that the goals of the HTTT program have been reduced. The goal of the program, DOE states, is to develop high temperature turbine subsystem technology to a "Technology Readiness" status for burning coal in coal-derived fuels in a utility application. It states that in Phase 1, all contractors utilized a conceptual design of their commercial gas turbine in their tasks. When submitting the Phase 2 proposals, DOE states, some contractors included the cost of detailed design of the commercial turbine and some did not, and therefore an allowance was made for this in the evaluation of proposals. However, when contracts for Phase 2 were negotiated, detailed commercial turbine design efforts were deleted from the scope of the work "because of DOE's conviction that the HTTT Program is *technology* oriented" and that "final commercial turbine design goes beyond the scope of the program."

DOE notes that 3 of the 4 contractors estimated Phase 2 cost at about $20–30 million, while Westinghouse proposed a $72 million program. DOE states that it is not prepared to say that the higher cost program represented a lesser goal. It does say, however, that:

> * * * the path chosen by Westinghouse required more effort and, therefore, cost more to reach the HTTT goal. The proposals of the successful contractors represent their best estimate of the effort and cost necessary to reach the goal. They may be lower than Westinghouse because of a different starting point or other unique advantage. In DOE's judgment, their proposals are nevertheless responsive to DOE's goal of achieving technology readiness of a high temperature turbine subsystem.

As Westinghouse states, it appears that the GE and Westinghouse technical submissions were scored by the SEB based on the inclusion of full scale engines. We cannot say that the technical ratings of these proposals would have remained exactly the same if they had been rescored based on the reduced scope of work. However, we think it is clear from the record that the award selection would not have changed.

GE proposed a water cooled turbine while Westinghouse proposed an air cooled turbine. The SEB considered it desirable to carry both concepts into Phase 2, and GE, the top ranked firm, received a Phase 2 award based on its water cooled concept. Of the remaining Phase 1 contractors, Westinghouse's technical proposal was scored highest. However its proposed cost was also the highest of the three by a considerable amount. Consequently, even though Westinghouse's technical proposal was highly regarded, award was ultimately made to CW, since CW also proposed the air-cooled approach, its proposed costs were deemed reasonable, and DOE considered it to be a capable contractor. Thus, while the proposals were not rescored when full scale

engine development was dropped, Westinghouse was eliminated from Phase 2 because its costs were too high and not because its technical proposal received a lower score than GE's based on full scale engine development. Therefore, we can see no prejudice to Westinghouse because the technical proposals were not rescored.

As to the cost factor, Westinghouse notes that it was selected for Phase 1 award notwithstanding its high cost. It argues that because of this and because the agency encouraged Westinghouse during Phase 1 to undertake added tasks (it cites a deposition/corrosion/erosion test as an example), it was led to believe that its cost approach was justified. It contends that it was thereby misled by the agency, and cites *Virgin Islands Business Associates, Inc.*, B–186846, February 16, 1977, 77–1 CPD 114, and *Iroquois Research Institute*, 55 Comp. Gen. 787 (1976), 76–1 CPD 123, to support its position.

So far as the record shows, Westinghouse was selected for Phase 1 award not because the agency considered its total program costs to be acceptable, but because Westinghouse was considered to be a capable source and the agency was interested in that firm's approach to the HTTT program. In fact, each of the 4 offerors responding to the RFP was awarded Phase 1 contracts based on estimated costs that were relatively low in comparison to the estimated costs of the follow-on phases. In the circumstances, we do not think that an offeror receiving a Phase 1 award reasonably could assume that the agency considered its program costs for the remaining phases to be acceptable.

Moreover, it is clear from the record that Westinghouse was aware during Phase 1 that budgetary restraints could reduce the scope of the HTTT program. While Westinghouse states that the agency would not reveal the amount of funds that were available for the program, and that its project manager was given conflicting advice by the agency as to the importance of reducing costs, the fact that Westinghouse on several occasions asked agency officials about funding limitations indicates that Westinghouse was aware that funding could be a problem. Therefore, we can see no reason for Westinghouse to assume that cost would not be an important consideration to DOE.

In the two cases cited by Westinghouse, we admonished contracting agencies for failing to advise offerors of the relative importance of cost to the technical factors. DOE concedes that it would have been desirable to have stated the importance of cost relative to the technical factors. However, as DOE asserts, Westinghouse should have been aware prior to the Phase 2 selection that cost could be a factor in the award selection process. Indeed, cost cannot be ignored by an agency in any contractor selection process. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76–1 CPD 225; *Bell Aerospace Company*, 55

Comp. Gen. 244 (1975), 75-2 CPD 168. Therefore, Westinghouse may not complain because its high cost approach was a matter of great concern to the agency.

We agree that generally the procuring agency should define the scope of work and level of risk as clearly as possible. In this case, however, DOE set objectives in a developing area leaving to the ingenuity of the offerors the approach to be followed in achieving those objectives. Precise definitions of the work scope or risk level would have tended to restrict the very industrial ingenuity which DOE sought to exploit.

Westinghouse was aware that the agency placed maximum reliance on the Phase 1 contractors to propose the plan they believed would best meet the program goal of technology readiness. In fact, the Phase 1 RFP made it plain that:

> The Program will place *maximum reliance on the Contractor(s) for systems and program definition.* Only general objectives are given in this RFP in order that *maximum use can be made of extensive contractor experience* in planning and implementing similar gas turbine technology programs for commercial applications * * * [Italic supplied.]

Nevertheless, we think it is important that interested parties have an equal opportunity to compete. DOE equalized here by independently assessing probable costs and by eliminating from proposals, including Westinghouse's, those aspects not to be utilized in Phase 2. Obviously, the acceptability of risk and its extent must be assessed in evaluation. DOE concluded here that any greater risks which might have been inherent in the successful proposals were acceptable relative to the higher costs involved in materially reducing the risk. Whether the DOE judgment will prove sound cannot be determined at this time; however, it appears to have a rational basis. Given the circumstances, we cannot find the procurement deficient for indefiniteness or lack of opportunity to compete on an equal basis.

Westinghouse insists, however, its proposal could be reduced by $27 million. In support, it has submitted an alternate HTTT program to this Office which it states will meet the objectives of the program at a cost competitive with the costs proposed by the successful contractors.

Thus, Westinghouse maintains that the agency should have conducted meaningful negotiations with it concerning the reduced scope of work. It cites a provision of its Phase 1 contract stating that:

> The contractor and the contracting officer shall promptly enter into good faith negotiations to establish the revised estimated costs and Statement of Work for the performance of the following phase.

The statement in Westinghouse's Phase 1 contract that the parties shall enter into "good faith" negotiations prior to the following phase, appears in Article III of the contract, entitled "Statement of

Work and Determination of Estimated Costs." Article III required the Phase 1 contractor to provide a statement of work and revised cost estimate for the following phase and, in that context, provided for good faith negotiations between the parties to establish the revised estimated costs and statement of work for the following phase. Article VI, as quoted above, listed the factors to be considered prior to a determination to proceed with Phase 2. There is no statement in Article IV to the effect that negotiations would be conducted with each Phase 1 contractor prior to Phase 2 selection.

DOE states however that the evaluators did give serious consideration to the question of whether discussions with Westinghouse would be fruitful in lowering the cost of Westinghouse's proposal to an acceptable level. According to DOE, it was decided that such discussions would not be fruitful because the proposal could only be reduced by $9.35 million short of a complete revamping of Westinghouse's technical approach.

In DOE's view, the absence of negotiations between the agency and Westinghouse was consistent with ordinary principles of fairness and equality of treatment in exercising a contract option, was consistent with agency procedures applicable to research and development contracting, or, analogizing to ordinary procurement rules, was consistent with FPR 1-3.805, in that Westinghouse's proposal was out of the competitive range because of its high price. DOE cites its Interim SEB Handbook, dated December 5, 1975, applicable to research and development contract selections and in effect during the Phase 2 selection process, as cautioning against advising offerors of the relative strengths or weaknesses of their proposals in relation to those of other proposers.

This Handbook states that discussions should be used by the agency evaluators to clear up ambiguities or lack of substantiation in a proposal, but should not be used to point out inherent weaknesses in the offeror's approach. DOE states that meaningful discussions of the cost weaknesses in Westinghouse's proposal "would have necessarily entailed discussion of those technical areas [which] could have been modified to lower the proposed cost." Citing a number of our decisions, including 51 Comp. Gen. 621 (1972), DOE believes that such discussions "would have created a real possibility of technical transfusion and technical leveling, and eventuality of which GAO has clearly disapproved." Finally, DOE cites FPR 1-3.805 and our decisions, including *RKFM Products Corporation*, B-186424, September 15, 1976, 76-2 CPD 247, as stating that discussions need be held only with those offerors within the competitive range, that price is properly a consideration in determining the competitive range, and

that an efforer eliminated from the competitive range on the basis of price carries the burden of proving that such elimination resulted from an abuse of agency discretion. DOE concludes that Westinghouse has not carried that burden of proof in this case.

We agree with DOE. Westinghouse acknowledges that in order to reduce its costs to an acceptable level it must select other technical approaches. In our view, neither our prior decisions nor the quoted provision of the Westinghouse Phase 1 contract required the agency to negotiate with Westinghouse in order to permit it to offer other approaches. The negotiation process should not be used to re-write an offeror's proposal or to engage in technical leveling and technical transfusion. The negotiation process is not designed for that purpose. *Raytheon Company*, 54 Comp. Gen. 169 (1974), 4–2 CPD 137; 51 Comp. Gen. 621, *supra*.

Finally, we recognize that a portion of Westinghouse's protest consists of specific criticism of the CW and GE proposals based on the limited material made available by DOE to the protester. Westinghouse contends that the GE approach to blade cooling has certain shortcomings which were not fully considered by the agency evaluators. Additionally, the protester believes that the GE Phase 3 plan is impractical because its test vehicle would require more fuel than is presently projected to be available and because of certain blade design problems that have to be solved.

As for CW, Westinghouse believes that its technical approach is inadequate (for example, its wire-mesh approach to transpiration cooling), and that, as stated above, this contractor is not capable of successfully performing the program. Westinghouse also contends that much of the work to be conducted by CW in its Phase 2 program has already been demonstrated by Westinghouse's subcontractor, Detroit Diesel Allison, under Government contract. Westinghouse argues that it could achieve the same level of technology readiness at a lesser cost, and furthermore, that CW is not qualified as a manufacturer of heavy turbines.

With respect to GE's approach to blade cooling, it is DOE's view that Westinghouse's objections to air cooling are speculative and that the Phase 2 investigation to be undertaken by GE will settle some of the questions raised. As for fuel availability, DOE anticipates that adequate fuel supplies will be available. Also, DOE points out that while GE would have to investigate certain blade design problems during Phase 3, Westinghouse, under its different approach, would have to deal with still other problems. As to CW, DOE disagrees with Westinghouse's technical criticisms and has found CW to be a capable contractor.

We do not consider it appropriate to resolve these differences between Westinghouse and DOE. Suffice it to say that the issues in dispute involve highly technical matters and, as the parties recognize, it is not our function to independently evaluate the technical adequacy of proposals. *Decision Sciences Corporation*, B-182558, March 24, 1975, 75-1 CPD 175. As DOE points out, this Office will not question an agency's technical evaluation unless it is clear from the record that there was not a reasonable basis for the evaluation. *Tractor Jitco, Inc.*, 55 Comp. Gen. 499 (1975), 75-2 CPD 344. Based on the record, we cannot say that agency's technical evaluation was unreasonable.

Accordingly, the protest is denied.

However, with respect to these competitive parallel procurements, we note that DOE states that in conducting the Phase 3 selection it will advise the competitors of the relative importance of cost to the other evaluations factors. We agree that Phase 3 competitors should be advised of the relative importance of cost. While it is not clear how DOE plans to disclose these evaluation criteria, we think, and are suggesting to the Secretary of Energy, that competition would be enhanced in these procurements if the agency issued an RFP prior to each of the succeeding phases. While, in this case, we do not believe that the competitors for Phase 2 selection were misled as to the selection factors, we do believe that the possibility of the competitors being misled would be diminished, and more effective competition would result, with the implementation of our suggestion.

[B-190348]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset

Monthly Survivor Benefit Plan annuity payable to a widow under 10 U.S. Code 1451 and Section 401a(2) of Department of Defense Directive 1332.27 should not be offset by Social Security mother's benefit when entitlement is denied administratively by the Social Security Administration.

Pay—Retired—Survivor Benefit Plan—Spouse—Alternate Rights

Monthly Survivor Benefit Plan annuity payable to a widow age 62 under 10 U.S. Code 1451 shall be reduced by Social Security survivor benefit to which she would be entitled based solely upon the decreased husband's military service, notwithstanding fact that the Social Security Administration may allow her an alternative of receiving the higher of Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage.

In the matter of Mary E. Bitterman and Carmen K. (Kincaid) Klimes, March 8, 1978:

This action is in response to letter dated October 5, 1977, with enclosures, from Mr. Ernest E. Heuer, Deputy Chief, Accounting and

Finance Division, Air Force Finance and Accounting Center, Denver, Colorado, submitting vouchers and requesting an advance decision concerning whether the Survivor Benefit Plan (SBP) annuities of Mrs. Mary E. Bitterman and Mrs. Carmen K. Klimes should be offset by Social Security benefits in the circumstances described. This request was assigned Control Number DO–AF–1275 by the Department of Defense, Military Pay and Allowance Committee, and was forwarded to this Office by the Assistant Director of Accounting and Finance of the Air Force letter dated October 5, 1977.

It is reported that Lieutenant Colonel Irvin E. Bitterman, USAF (Retired), 196–01–9266, elected to participate in the SBP as authorized under section 3(b), Public Law 92–425, approved September 21, 1972, 86 Stat. 706, 709, and that his widow, Mrs. Mary E. Bitterman, is receiving SBP annuity payments under this election. The amount of her annuity was reduced from the date of her initial entitlement, February 19, 1977, through August 31, 1977, by Dependency and Indemnity Compensation (DIC) and the Social Security mother's benefit to which she ordinarily would be entitled as a widow with one child under 18 years of age based upon the member's military earnings. Her monthly Social Security offset was $126.90 through May 31, 1977, then increased to $134.10 effective June 1, 1977.

The Social Security Administration (SSA) advised her that her entitlement to Social Security benefits was limited to one lump-sum death payment and that she could not receive Social Security mother's benefit as young widow with a dependent child of the deceased wage earner under 18 years of age while her son, David A. Bitterman, was residing with and in the care of Mrs. Sheryl Sturgill, Mrs. Bitterman's daughter. Mrs. Sturgill received monthly Social Security benefits on behalf of the child in the amount of $250. Mrs. Bitterman was further advised that she could apply for mother's benefit from SSA when her son, David A. Bitterman, returned to her care. If at that time she met all requirements for entitlement, she would receive the monthly mother's benefit for which qualified.

The submission questions whether Mrs. Bitterman's SBP annuity should be offset under the provisions of 10 U.S.C. 1451 and section 401a(2) of Department of Defense (DOD) Directive 1332.27 where Social Security benefits are not actually received.

Subsection (a) of 10 U.S.C. 1451 (Supp. II, 1972) relating to the determination of the amount of the annuity payable to a widow with dependent child under the SBP provides in pertinent part:

> (a) If the widow or widower is under age 62 or there is a dependent child, the monthly annuity payable * * * shall be equal to 55 percent of the base amount. However, when the widow has one dependent child, the monthly annuity payment shall be *reduced by an amount* equal to the mother's benefit, *if*

any, to which the *widow would be entitled* under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410(*l*) (1) of title 42 and calculated assuming that the person concerned lived to age 65. * * * [Italic supplied.]

In House of Representatives Report No. 92–481, 92d Congress, 1st session, accompanying H.R. 10670, which became Public Law 92–425, it is stated on page 16, that:

Where there is a widow and one child, under Social Security the family benefits consist of separate payments for the mother and the child. The bill provides that in such cases *the military survivor annuity will be reduced by an amount equivalent to the mother's payment from the Social Security program to which the widow would be entitled based solely upon her husband's active military service.* This reduction is made regardless of age of the widow. The mother's payment under Social Security is normally 75 percent of the Primary Insurance Amount (PIA), and the payment due to the child is also 75 percent of the PIA. *There would be no reduction in the payment for the child,* and thus *the minimum family income in such cases would be 55 percent of the retired member's base amount plus the 75 percent of Social Security PIA for the child.* [Italic supplied.]

It is indicated that Mrs. Bitterman does not receive any Social Security benefit based upon the member's active service or otherwise. Further, we understand that she was not entitled to a mother's benefit because her child was not residing with her. Apparently it was determined that such child was not in her care as required by 42 U.S.C. 402(g)(1)(E). Since the SSA has made an administrative determination that she was not eligible to receive the mother's benefit for the period questioned, the military survivor annuity should not be reduced.

Mrs. Carmen K. (Kincaid) Klimes, widow of Lieutenant Colonel Robert H. Kincaid, Jr., SSN 408–12–3208, is receiving SBP annuity benefits less her DIC entitlement and Social Security offset based on Colonel Kincaid's military earnings. The submission states that she was married to George Vladimer Klimes on April 20, 1977, that since this marriage occurred after she reached age 60 she continues to be entitled to receive the SBP annuity arising from her marriage to Robert H. Kincaid, Jr. 10 U.S.C. 1450(b) (Supp. II, 1972). Since she is 62 and thus eligible for Social Security benefits, her SBP annuity benefits were reduced under 10 U.S.C. 1451(a) (Supp. II, 1972) by the amount of Social Security survivor benefits to which she is entitled based on the military earnings of Robert H. Kincaid, Jr.

The accounting and finance officer understands that her Social Security benefit is reduced by 50 percent of the Primary Insurance Amount (PIA) until 9 months after the marriage. At that time, the SSA determines whether the highest benefit results from her marriage to the member or her subsequent marriage. If the higher benefit derives from the second marriage, the member's widow receives no benefit based on the member's service. If the higher benefit derives from the member's service, she receives no benefit from the second marriage.

The submission questions whether Mrs. Klimes' SBP annuity should be offset under 10 U.S.C. 1451 and the related DOD directive where, notwithstanding that the highest Social Security benefit relates to the member, she elects to take the lower Social Security benefit of her second marriage, in order to possibly avoid an SBP offset.

Subsection (a) of 10 U.S.C. 1451 (Supp. II) relating to the determination of the amount of the annuity payable to a widow age 62 under the SBP provides in pertinent part:

> * * * When the widow or widower reaches age 62 * * * the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower *would be entitled* under subchapter II of chapter 7 of title 42 *based solely upon service by the person concerned* as described in section 410(*l*)(1) of title 42 and calculated assuming that the person concerned lived to age 65. For the purpose of the preceding sentence, a widow or widower shall be considered as entitled to a benefit under subchapter II of chapter 7 of title 42 even though that benefit has been offset by deductions under section 403 of title 42 on account of work. [Italic supplied.]

In House of Representatives Report No. 92–481, *supra*, it is stated on page 14, that:

> *Integration with Social Security Benefits*
>
> As indicated earlier, the program created by the bill is designed to build upon the income-maintenance foundation of the Social Security system. Thus, the benefits are integrated with Social Security benefits.
>
> Section 1450(a) of the bill [section 1451(a) as enacted] provides, therefore, that when the widow reaches age 62, or when there are no dependent children, whichever occurs later, the monthly annuity paid under the Survivor Benefit Plan shall be reduced by an amount equal to the amount of Social Security survivor benefit, if any, to which the widow is entitled based solely upon the active military service of the retiree. * * *
>
> In other words, when the widow reaches age 62, her annuity based on her husband's military retired pay would be offset by the equivalent of the Social Security payment which is *attributable to her husband's military service.*

And on page 15 of that report it states:

> There is no reduction in the Social Security benefits that may have been earned as the result of the husband's employment in his post-retirement years or any amount above the amount of the survivor benefit flowing from her husband's military service that the widow may have earned in her own right in private employment. It cannot be overemphasized that the only Social Security payments which are taken into account in this integration of benefits are the payments to the widow *based on her husband's Social Security earned while he was on active duty in military service.*

Enactment of the SBP did not modify Social Security entitlements or payments due from the SSA under the Old Age and Survivor Benefits provisions. The SBP, however, provides that payments thereunder will be reduced on account of Social Security benefits which are predicated upon the member's military service. Where a member's military service would enhance the Social Security benefits his widow could receive under Social Security, the amount involved must be used to reduce the SBP payment. The widow's annuity after such deduction meets the design of the SBP in that the amount she will receive from SBP and Social Security will be at least equal to 55 percent of the mem-

ber's retired pay. See 53 Comp. Gen. 733 (1974). Therefore, the Social Security offset of the SBP annuity for a widow aged 62 or more is determined by the Social Security payment attributable to the military service of the member on whose death the SBP annuity is payable even where the widow may receive Social Security payments based upon her own employment or the employment of some other person.

Based on the above, Mrs. Klimes' SBP annuity must be offset by the Social Security benefit attributable to the deceased member's military earnings notwithstanding the fact that the SSA may allow her an alternative of receiving the higher Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage.

The voucher in the case of Mrs. Bitterman may be paid and is being returned to the Finance Center. The voucher concerning the case of Mrs. Klimes which may not be paid will be retained in our files.

[B–190897]

Transportation — Dependents — Military Personnel — Advance Travel of Dependents—School Facilities Lacking, etc.

Member of armed services stationed overseas whose dependent son returned to the United States for his second year of college is not entitled to reimbursement for such travel notwithstanding orders issued subsequent to the travel stated that the travel was in accordance with paragraph M7103–2, item 7, 1 JTR, and the Base Commander certified that the delay in publishing the orders was through no fault of the member. Even if orders had been timely issued, there is no legal basis for such travel at Government expense because the law and regulations authorize such travel only if there is a lack of overseas educational facilities which arose after the dependent's arrival at the overseas station, and that was not the case.

In the matter of Colonel Harris J. Taylor, USAF, March 14, 1978:

This action is in response to a communication from Colonel Harris J. Taylor, USAF, 455–52–4371, in effect appealing our Claims Division settlement of April 5, 1976, disallowing his claim for reimbursement for his dependent son's travel from England to San Marcos, Texas, for the purpose of returning to college.

The file shows that while stationed in England, Colonel Taylor, by document dated August 22, 1974, requested, under the provisions of paragraph M7103–2, item 7, and M80303, Volume 1, Joint Travel Regulations (1 JTR), the early return of his dependent son from the member's duty station in England to South West Texas State University, San Marcos, Texas, during the month of August 1974. The early return was not in connection with a permanent change of station of the member. The justification given for the early return was to "attend college." The member indicates that his son was returning to enter his second year of college. This request was approved Au-

gust 27, 1974, with the statement that shipment of household goods in accordance with paragrph M7103–2, item 7, and M8303, 1 JTR, was not authorized. However, Special Order No. TA–382 which authorized the travel of the member's son to San Marcos, Texas, was not issued until September 19, 1974. A statement from the member's Base Commander certified that Colonel Taylor was advised prior to August 24, 1974, that travel orders for his dependent's early return to continental United States would be published, that due to an administrative delay at headquarters the orders were not published until after the travel had already been performed, and that the delay was through no fault of the member.

The member's son travelled on August 24, 1974, by commercial aircraft to Texas and thereafter the member submitted a claim for reimbursement for the cost of the travel which was denied by our Claims Division's settlement of April 5, 1975. It appears that Colonel Taylor returned to the United States in July 1975, 11 months after the travel of his son.

In his appeal Colonel Taylor contends that there is an inherent moral obligation and responsibility on the Government, when concurrent travel of dependents to an overseas station is authorized, to transport dependents to the overseas location and then to return them to the United States. He further states that the fact that his son returned home in advance of him and his other dependents should not relieve the Government of this responsibility.

The transportation of member's dependents at Government expense must be in accordance with applicable laws and regulations issued pursuant to law. Under the pertinent law, 37 U.S.C. 406 (1970), a member of the uniformed services who is ordered to make a permanent change of station is entitled to transportation of his dependents. However, it is the general rule that all travel under transfer orders must be performed after the issuance of the orders. Subsection 406(h) provides that in the case of a member who is serving at a station outside the United States, if the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States, he may, when orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for transportation of his dependents, authorize the movement of the member's dependents, baggage, and household effects at that station to an appropriate location in the United States.

Implementing regulations for such dependent travel are contained in chapter 7, 1 JTR. Paragraph M7103–1 (change 259, effective July 2, 1974) of that chapter provided that a member who is permanently

stationed outside the United States may request, and the member's commanding officer may authorize, transportation of dependents to a designated place in the United States, notwithstanding the fact that his permanent station remains unchanged. The authority authorizing such transportation will determine the designated place to which transportation of dependents is authorized and will ensure that a reasonable relationship exists between the condition and circumstances in each case and the destination to which transportation is authorized. When dependents have performed travel without orders to an appropriate destination under circumstances which would have permitted their travel to have been authorized under the provisions of this paragraph, no reimbursement for such travel is authorized even though orders are subsequently issued under the provisions of paragraph M8303–3.

With regard to the above statement concerning travel even though orders are subsequently issued under paragraph M8303–3, 1 JTR, that paragraph relates to the shipment of household effects and since the approval of the travel involved here expressly provided that shipment of household goods was not authorized, that portion of the regulation is not for application in this matter.

Without regard to the question of the issuance of orders, however, the types of cases in which transportation of dependents may be approved under 37 U.S.C. 406(h) are limited to those meeting the conditions set forth in paragraph M7103–2. The only two types of cases which appear to have any applicability to this case are:

> 5. lack of adequate educational facilities or housing for dependents when supported by a statement of the approving authority that the inadequacy of such educational facilities or housing was caused by conditions beyond the control of the member and arose after commencement of travel of dependents to the member's overseas stations;
>
> * * * * * * *
>
> 7. when determined that the best interests of the member or his dependents and the Government will be served by the return of one or more of his dependents for compelling personal reasons, such as marital difficulties, financial difficulties, unforeseen family problems, death or serious illness of close relatives, or for reasons of a humanitarian or compassionate nature, and in other situations which have an adverse effect on the member's performance of duty, such determination to be in the form of a statement of the approving authority;

Condition 5 of paragraph M7103–2 has application to the travel of a dependent to the continental United States when adequate educational facilities are not available at the overseas location and the conditions causing the lack of educational facilities "arose after commencement of travel of dependents to the member's overseas station." In the present case, it does not appear that the member's son was travelling because of lack of educational facilities at the overseas location which arose after his initial travel overseas. On the contrary, the son had

already attended college in Texas for 1 year and was returning to commence his second year of schooling. While, as the member indicates, the higher educational opportunities available in England for the member's dependents may have been limited, that condition did not arise after his dependents travelled there. In the absence of an official determination that there was a lack of appropriate educational facilities for the member's son and that this situation arose after the member's arrival in England, there was no proper basis for the issuance of orders for the son's advance travel to the United States under paragraph M7103–2, item 5. See 47 Comp. Gen. 151 (1967) and B–156558, June 25, 1965. There was no such determination in this case nor does it appear that any such determination could have been properly made.

With regard to travel under item 7 of paragraph M7103–2, 1 JTR, while the Base Commander made the determination that in accordancce with the member's request, the travel was in the best interest of the service member, his dependent and the Government, the facts do not support such a determination. Rather than the compelling personal reasons such as marital difficulties, financial difficulties, unforseen family problems, etc., the sole reason here was for the member's son to return to start his second year at college. That is not one of the situations in which this paragraph is applicable. While a contemporaneous authorization or certification by proper authority usually is considered to be the best evidence of the facts, it is not conclusive of the matter where the facts are otherwise clearly established. See 39 Comp. Gen. 561, 563 (1960); and 39 *id.* 614, 617 (1960). We have held that the regulations do not authorize, and the law is not broad enough to permit, the advance travel of member's dependents for educational purposes when the lack of educational facilities at the overseas station was known when the member was ordered overseas. 47 Comp. Gen. 151 (1967). See also B–176384, May 21, 1973, and November 14, 1972; and B–182778, October 30, 1975.

Accordingly, travel of the member's son at Government expense was not authorized under paragraph M7103–2, item 5 or 7, 1 JTR. The disallowance of the claim is, therefore, affirmed.

It is to be noted that under the student travel program permitted under Department of Defense Regulation 4515.13R, paragraph 4–4 (July 14, 1972), a dependent engaged in full-time undergraduate study in the continental United States is permitted Military Airlift Command (MAC) space available transportation from the overseas aerial port of embarkation serving the sponsor's duty station to the continental United States aerial port of debarkation. The student, to obtain this space available travel, must have orders issued by the proper authority authorizing such travel. The record does not indicate

how Colonel Taylor's son arrived at the overseas location. However, it would appear that he would have been eligible for the student travel program and could have returned to the United States by that means. Of course he would then have been allowed only MAC space available travel and the travel to and from the aerial ports would have been at the member's expense.

[B-189603]

Regulations—Constructive—Agency Determination—Acceptance

Agency's determination that provisions of one of its regulations are not applicable to particular situation is clearly correct. Moreover, even if regulation was less than clear and subject to being construed to cover situation, agency interpretation of its own regulation would be entitled to "great deference."

Contracts — Negotiation — Awards — Administrative Determination—Conclusiveness

Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Most Advantageous Technical/Cost Relationship

Allegation that price was improperly evaluated must fail where such allegation is directly related to assertion that technical evaluation was also improper and it is found that technical evaluation was proper.

Contracts — Negotiation — Competition — Discussion With All Offerors Requirement—Pricing or Technical Uncertainty

Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors.

Contractors—Responsibility—Determination—Current Information

Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application.

Contracts—Negotiation—Evaluation Factors—Point Rating—Recent Experience Information for Consideration

Where agency evaluates company experience by means of point scoring, but such evaluation does not take into account most recent experience information which is in possession of agency, source selection official should consider such information along with results of point scoring, particularly where significantly less costly proposal is point-scored low in prior experience but nearly the same as competing offer in technical area, and most current information suggests that low offeror's prior performance problems have been cured. Since record does not indicate that recent experience was considered General Accounting Office recommends that source selection official reconsider award selection.

In the matter of New Hamphire-Vermont Health Service, March 15, 1978:

New Hampshire-Vermont Health Service protests the award of a contract for Medicare Part B Carrier Services for the State of Maine to Blue Shield of Massachusetts, Inc. (BSM) under a request for proposals (RFP) issued by the Department of Health, Education and Welfare, Bureau of Health Insurance (HEW), on March 18, 1977. The RFP solicited fixed-price proposals for a contract period of 3 years and 3 months, from July 1, 1977, through September 30, 1980, and reserved to the Government the option to extend the contract in year increments after September 30, 1980.

Proposals from five firms were received by the May 2, 1977 submission date. New Hampshire-Vermont Health Service submitted the lowest priced proposal at $4,737,498. BSM submitted the second lowest price proposal at $5,285,000. The RFP advised that award of the contract would be made to "that financially responsible and technically responsive offeror whose proposal conforms to all conditions and requirements of the RFP and is considered most advantageous to the Government, price and other factors considered." The evaluation and award factors were described in Section III of the RFP as technical, 30 percent; experience, 30 percent; price, 40 percent. The final evaluation shows that out of the total 1000 award points available, New Hampshire-Vermont Health Service received 848.18 points and BSM received 863.21 points. The contract was awarded to BSM on July 11, 1977.

The protester alleges that there were improprieties in the evaluation of proposals, absent which the protester's proposal would have been the highest rated, and that HEW waived an RFP requirement for BSM without informing other offerors.

The RFP required offerors to complete and sign a "Representations and Certifications" section dealing with such matters as an offeror's stat as a small business and as a regular dealer or manufacturer, its type of business organization, contingent fees, equal opportunity, Buy American, clean air and water, and independent price determination. BSM's proposal contained the completed representations and certifications but the section was not signed. In addition, BSM responded to the RFP requirement that it be in full compliance with applicable licensure and other state and local statutory or regulatory requirements by including in its proposal a statement to the effect that it had been advised by counsel that it was authorized to do business in the State of Maine without filing any specific forms. By telegram of May 4, 1977, HEW notified BSM of these "deficiencies" in its proposal and requested that it submit a signed copy of the representations and certifications and

"documentation from a competent authority within the State of Maine * * * certifying to [BSM's] ability to operate" in Maine. BSM submitted the requested documents on May 10 and May 11, 1977, respectively.

By telegram of May 13, 1977, HEW also advised BSM that its proposal did not meet the requirements of RFP section VIII. B.6.C. That section provided in pertinent part as follows:

> 6. Program Reimbursement
> c. If the offeror proposes to change the 1964 CRVS procedure codes currently used by Union Mutual [the incumbent contractor when the RFP was issued] he must substantiate the reasons for change and present a detailed conversion plan commenting upon the advantages of proposed coding approach.

BSM was the only offeror to propose changing the 1964 CRVS procedure codes; it proposed to convert the Maine Medicare Part B procedure coding structure to the format it utilizes in Massachusetts. Although BSM's proposal advanced several justifications for the change, the telegram further advised BSM that:

> * * * The level of documentation must meet the published requirements for approval specified in Part 405.512(A)(B) and (C) of Chapter III of Title 20 of the Code of Federal Regulations. We cannot complete the evaluation of your proposal without full compliance with all requirements of the regulation. Please present the full necessary documentation by May 20, 1977, or as a minimum, guarantee by May 20, 1977, the date the documentation will be available.

On May 24, 1977, BSM submitted its response to the telegram. However, HEW's final evaluation team members subsequently determined that the regulations found at 20 C.F.R. 405.512 (1975) had been erroneously cited and did not apply to BSM's proposal to extend its own procedure coding system into another geographic location. BSM's proposed change of procedure codes was then found to be adequately substantiated and acceptable to HEW.

The protester initially objected to HEW's allowing BSM to furnish, after the closing date for receipt of proposals, the signed "Representations and Certifications" section and additional evidence of ability to perform the contract in Maine. However, in a subsequent submission, the protester stated its agreement that "if BSM was legally able to do business in Maine at the time it submitted its proposal, then clarification of this issue and the [absence of] the signature on the Representations and Certifications could be construed as an informality and could be corrected * * *." Since it appears from the record—particularly BSM's submission to HEW which included the required statement from a Maine official that BSM could perform the contract in the state—that this condition is satisfied, we view these initial objections as having been withdrawn.

With regard to BSM's proposed conversion plan, the protester contends that the provisions of 20 C.F.R. 405.512 are applicable to the pro-

posed change, that BSM did not satisfy those provisions as required by the RFP, and that "the substantial RFP condition and appropriate published regulations for justifying the proposed change and presenting a detailed conversion plan were eliminated for only one bidder without notice to other offerors" in violation of Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. Amend. 153). The referenced FPR section provides that a written amendment to an RFP shall be furnished to each prospective contractor when, "during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of work or statement of requirements * * *."

20 C.F.R. 405.512 sets forth several specific "considerations and guidelines" for use "in evaluating a carrier's proposal to change its system of procedural terminology and coding." The protester contends that these were applicable to the change proposed by BSM primarily because of HEW's original request that BSM comply with the regulatory provisions and because of the statement in the RFP section entitled "Carrier Responsibilities-Scope of Work" that "The Carrier shall comply with the regulations of the Government as codified in the Code of Federal Regulations Title 20, part 400 * * *."

We do not agree with the protester's contention. The regulation clearly refers to a carrier's proposal to change its own system rather than to an offeror's proposal to convert a system used by a prior contractor. Moreover, even if we found the regulation to be less clear and subject to being construed as the protester interprets it, we would be required to afford "great deference" to the interpretation of HEW, the agency which promulgated the regulation. *See Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *High Voltage Maintenance Corp.*, 56 Comp. Gen. 160 (1976), 76-2 CPD 473; *Mayfair Construction Company*, B-186278, August 10, 1976, 76-2 CPD 148 and cases cited therein. In addition, we agree with HEW that the RFP statement concerning 20 C.F.R. Part 400 referred only to the contractor's responsibilities during performance of the contract and not to the responsibilities of an offeror when preparing a proposal. Accordingly, we find no basis for concluding that HEW's original reference to the regulation was anything more than an inadvertence or that there was a relaxation or elimination of an RFP requirement merely because there may not have been adherence to the guidelines of the regulation.

With respect to BSM's compliance with section VII. B.6.C. of the RFP, which required substantiation of a proposed new approach along with a "detailed conversion plan commenting upon the advantages" of the new approach, the record indicates that BSM's original proposal submission contained only a one and one half page discussion of the

proposed change which briefly set forth the reasons for the change, the advantages that would accrue, and, in general terms, the steps that would be taken to make the conversion. BSM's May 24, 1977 response to the HEW telegram, however, contained a more highly detailed response that in BSM's view would actually comply with the detail required by 20 C.F.R. 405.512. According to HEW, review and analysis of this additional information "established * * * that the proposed coding procedures presented no detrimental program impacts" and therefore were acceptable and were no longer "an impediment to award."

The record affords no basis for our objecting to this aspect of the evaluation. Determinations as to the needs of the Government and the adequacy of a proposal submitted in response to an agency's statement of its needs are the responsibility of the procuring activity. *See*, e.g., *Joanell Laboratories, Incorporated*, 56 Comp. Gen. 291 (1977), 77-1 CPD 51. Accordingly, a determination as to whether information submitted in response to solicitation requirements is sufficiently detailed to permit a finding of acceptability is essentially a matter within the subjective judgment of agency procuring officials. *Checchi and Company*, 56 Comp. Gen. 473, 480 (1977), 77-1 CPD 232; *Urbdata Associates, Inc.*, B-187247, April 20, 1977, 77-1 CPD 275; *W. S. Gookin & Associates*, B-188474, August 25, 1977, 77-2 CPD 146; *cf. Continental Service Company*, B-187700, January 25, 1977, 77-1 CPD 53; *Mosler Airmatic Systems Division*, B-187586, January 21, 1977, 77-1 CPD 42. In HEW's view, the information submitted by BSM was sufficient to substantiate the proposed change. Although the protester apparently believes that BSM's submissions did not constitute the "detailed conversion plan" required by the RFP, the record, in our view, does not establish that HEW's judgment in this regard was unreasonable.

The protester's contention with regard to the price evaluation is directly related to its contention regarding the acceptability of BSM's proposed procedure code change. The protester's position is that BSM's proposal was erroneously evaluated as to price so that although its own proposal received the maximum number of award points available under the price evaluation formula, it did not receive "full value" for its low proposal. The protester argues that:

> * * * The primary justification by Blue Shield of Massachusetts, Inc. for changing procedure codes was that it would result in reducing their administrative costs by $800,000.
>
> The proposal to change procedure codes should have been denied since it was not substantiated according to RFP specifications and published regulations. This would have added $800,000 to their bid price resulting in a total bid of $6,086,000. This price would have given Blue Shield of Massachusetts, Inc. 311.42 points for price and would have reduced its total points to 816.07. We would then be the highest rated offeror by 32.74 points, and the difference in price between Blue Shield of Massachusetts, Inc. and New Hampshire-Vermont Health Service would have been $1,347,502.

In view of our finding that HEW did not act improperly in accepting BSM's proposals to change the codes, this contention of the protester must fail and need not be considered further.

However, we are concerned about the procedures used by HEW to obtain the additional justification from BSM. FPR 1-3.805-1(a) (1964 ed. Amend 153) requires that, with certain exceptions, after receipt of initial proposals written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Although the cited regulation permits an agency to dispense with discussions under certain circumstances, if discussions are held with one offeror, then they must be held with all offerors in the competitive range. 51 Comp. Gen. 479 (1972); 50 *id.* 202 (1970).

HEW maintains that it did not conduct discussions in this case and that its contacts with BSM after receipt of proposals were only for "clarification" purposes and were in accordance with FPR 1-3.805-1(a)(5) and HEW Procurement Regulations (HEWPR) 3-3.5103(e), 41 C.F.R. 3-3.5103(e). The FPR provision states:

> In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make any award without further explanation and discussion prior to award.

The HEWPR provision states:

> (e) For the sole purpose of eliminating any uncertainty or ambiguity in an initial proposal, the contracting officer may make inquiry of an offeror. Such inquiry of and clarification furnished by such offeror shall not be considered to constitute "discussions" within the meaning of § 1-3.805-1(g) of this title and shall not necessitate any inquiry of other offerors. However, if the clarification results in an offeror revising its proposal or it would in any way prejudice the interests of other offerors, discussions must be held with all responsible offerors within the competitive range.

It is not always easy to determine if a Government-offeror contact or interchange constitutes the competitive range discussions envisioned by FPR 1-3.805-1(a) or is merely a clarification inquiry such as is permitted by HEWPR 3-3.5103(e). However, whether discussions have been held "is a matter to be determined upon the basis of the particular actions of the parties, and not merely the characterization thereof by the contracting officer." *The Human Resources Company*, B-187153, November 30, 1976, 76-2 CPD 459. Certain inquiries, and the responses thereto, are generally regarded as not constituting discussions. *See* Armed Services Procurement Regulation (ASPR) 3-805.1(b), which is similar to HEWPR 3-3.5103(e), and ASPR 2-405, which treat such things as an offeror's correction of its failure to (1) furnish required information concerning the number of its employees; (2) indicate its size status, and (3) execute equal opportunity and affirmative action program certifications, as clarification of minor

irregularities. We have also regarded such things as an agency's receipt of a second cloth sample from one offeror to verify that the offeror's original sample met the solicitation requirements, *Fechheimer Brothers, Inc.*, B-184751, June 24, 1976, 76-1 CPD 404, and an agency's informing offerors, after receipt of initial proposals, of a change in the class of black powder to be furnished by the Government, *Ensign Bickford Company*, B-180844, August 14, 1974, 74-2 CPD 97, as not constituting discussions.

On the other hand, we have held that acknowledgement of an RFP amendment constitutes discussions, 50 Comp. Gen. 202, *supra*, as does holding a "clarification" meeting which results in substantive proposal revisions, *National Health Services, Inc.*, B-186186, June 23, 1976, 76-1 CPD 401, and requesting "clarifications" which are essential for determining the acceptability of a proposal. *The Human Resources Company*, *supra*. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. *The Human Resources Company*, *supra;* 51 Comp. Gen. 479, *supra*.

Although here HEW states that no discussions were held with BSM because "no basic change was made in price or in any other factors, and at no time was the scoring of any offeror's proposal affected by the clarification," the record indicates that the acceptability of BSM's proposal was dependent upon its explaining the proposed code changes to HEW's satisfaction. As stated earlier in this decision, it was only after HEW evaluated BSM's supplemental submission that it determined the proposed change to be acceptable, thereby removing "the coding issue * * * as an impediment to award." Thus, we think this case is similar to *Centro Corporation et al.*, B-186842, June 1, 1977, 77-1 CPD 375, where the agency, prior to establishing a competitive range, sought "clarification" from offerors on various technical aspects of their proposals. We held that the "questions asked of the offerors went to the heart of their proposals and had a substantial effect on the Government's determination of acceptability" and therefore "constituted negotiations."

Moreover, HEW's reference to FPR 1-3.805-1(a)(5) negates its own position, since that provision refers to competitive range "discussion[s]" and not to mere clarification. *See*, e.g., *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976), 76-1 CPD 71; *Spacesaver Corporation*, B-188427, September 22, 1977, 77-2 CPD 215; 53 Comp. Gen. 201 (1973).

Accordingly, while we find HEW's desire to obtain additional justification from BSM was appropriate under the circumstances and consistent with the general requirement for maximizing competition,

we also find that the "clarification" data required of BSM was essential to a determination of proposal acceptability and therefore constituted discussions. Consequently, HEW should have established a competitive range and conducted discussions, including calling for best and final offers, with all offerors in that range. *See* FPR 1-3.805-1 (a) and (b).

Contrasted with the above is HEW's treatment and evaluation of company experience.

The applicable RFP provision stated:

> Experience—30 percent of total points
>
> * * * Up to a total of 36 months of experience gained since April 1972 will be considered in the evaluation. Quality will be derived from sources knowledgeable about the past performance of the offeror. The type, amount and quality [of] data will be scored and then converted to award points.

In implementing this provision, HEW quantified the quality of company experience by means of a formula established in its evaluation plan. For offerors with Medicare Part B carrier or intermediary experience, Annual Contractor Evaluation Report (ACER) ratings were used. The ACERs, issued by HEW's Bureau of Medicare, review a Medicare Part B carrier's performance in the areas of claims process, coverage and utilization safeguards, program reimbursement, EDP operations, beneficiary services and professional relations, fiscal management, and carrier management. The ACER reports the carrier's performance in detail and includes a summary rating of satisfactory, acceptable but needs improvement, or unsatisfactory for each of the seven areas. In quantifying these ratings, HEW took into account the ACER ratings for the 3 most recent years (covering January 1, 1973 through September 30, 1976), assigning 2 points for each satisfactory rating, 1 point for each adequate rating, and no points for unsatisfactory ratings. The total evaluation/award points for company experience for carriers with 3 years of experience in administering the Medicare Part B program was based solely on the ACER ratings.

The protester objects to the evaluation based solely on the ACERs because it had the effect of precluding consideration of the most recent company experience for the 7-month period between the date of the last ACER and the proposal submission date and of performance trends indicated by the ACERs. The protester explains that this recent experience was important because at least 5 of the past 10 "adequate" ratings it received in the ACERs were directly related to problems with its data processing system, but that those problems were solved, with a resulting substantial improvement in its performance, during the period immediately subsequent to the end of the last ACER reporting period (September 30, 1976). According to the protester, HEW knew or should have known of this recent experience

from (1) the protester's proposal, which stated that substantial improvements had been made to its processing system and performance; (2) references, submitted pursuant to an RFP requirement; and (3) a memorandum from the HEW Resident Health Insurance Representative (who was listed as one of the protester's references) to the Regional Medicare Director which discussed the protester's ability to process the additional workload reflected in the RFP and stated that due to improvements in the protester's claims processing and EDP systems, an update of its ACER would result in satisfactory ratings in all sections.

HEW initially argues that this aspect of the protest is untimely. HEW asserts that the RFP is explicit as to the manner in which company experience would be evaluated and that the protester's objection is based upon an alleged impropriety in the RFP which was apparent prior to the date for receipt of proposals. Such improprieties are required to be raised prior to the closing date for receipt of proposals. 4 C.F.R. § 20.2(b)(1) (1977). We do not agree, however, that this issue is untimely. The protest is directed not toward the RFP provision, but rather to its implementation. Accordingly, the issue will be considered on the merits. *U.S. Nuclear, Inc.*, 57 Comp. Gen. 185 (1977), 77-2 CPD 511.

We have held that determinations as to the responsibility of a bidder or offeror to perform a contract should be based on the most current information available. *Inflated Products Company, Incorporated*, B-188319, May 25, 1977, 77-1 CPD 365; 51 Comp. Gen. 588 (1972); 49 *id.* 139 (1969). We believe the thrust of that holding is also applicable to cases where a responsibility-type concern such as company experience is comparatively evaluated under evaluation factors established for a negotiated procurement. See *SBD Computer Services Corporation*, B-186950, December 21, 1976, 76-2 CPD 511.

On the other hand, we have recognized that the selection of a particular method for proposal evaluation is within the broad discretion of the procuring activities. "The only requirements are that the method provide a rational basis for source selection and that the evaluation itself be conducted in good faith and in accordance with the announced evaluation criteria." *Francis & Jackson, Associates*, 57 Comp. Gen. 244 (1978), 78-1 CPD 79.

Here HEW's evaluation plan called for the point scoring of company experience on the basis of the ACERs for offerors with prior Medicare Carrier or intermediary experience. Although the RFP stated that "[w]henever possible, at least two references should be supplied for each category of experience," the evaluation plan appears to have provided for point scoring of responses received from offeror

references only in the case of firms which had not been Medicare carriers or intermediaries. Thus, in accordance with the evaluation plan, the protester and BSM were point-scored in the area of company experience solely on the basis of prior ACERs.

HEW explains that the ACER, as the "official appraisal of contractor performance," was determined to be "the best available source of data to evaluate the quality of experience of offerors presently participating in the Medicare program." While recognizing that "there is necessarily some lag time between the latest completed [ACER] period and the current date," HEW states that it used the yearly performance evaluations because it has been its experience "that performance indicators fluctuate from quarter to quarter and the best gauge of performance occurs on a yearly basis." In HEW's view, it used "the best, most currently published data in evaluating company experience."

Based on the above, we cannot say that the evaluation of experience *which resulted in the point scoring* was without a rational basis. However, under the circumstances of this case, we also think it would have been appropriate for *the source selection official*, when considering the results of the evaluation and point scores, to take into account the information available concerning the most recent experience of the offerors. In this regard, we point out that the RFP did not mandate award in accordance with the results of the point scoring scheme, so that the source selection official properly could determine whether whatever advantage was indicated by the numerical scoring was worth the cost that might be associated with the higher-scored proposal. See *Telecommunications Management Corp.*, 57 Comp. Gen. 251 (1978), 78-1 CPD 80.

Here—where the highest-scored proposal was priced more than $500,000 above the price associated with the next highest scored proposal; where that second-ranked proposal was scored at only 15.03 points (out of 1,000) below the top-ranked offer; where the point-scoring of the technical area resulted in a virtually equal rating (220.24 for the protester; 222.86 for BSM) for the top two proposals; where the difference in final overall scoring was due almost exclusively to the difference in numerical ratings given to the two top offerors in the experience area; and where the agency was in possession of current information indicating that an up-to-date performance appraisal of the second-ranked offeror would result in significantly improved ACER ratings in view of the elimination of previously incurred problems—it would seem particularly apt for a meaningful source selection decision to be based not only on the results of the point-scoring, but also on available information which is relevant to the selection

and which was more current than that reflected by the point scores. In other words, just as HEW was interested in giving full consideration to what BSM could offer, we think it would have been appropriate for it to do the same with respect to the protester.

There is no indication in the record that this information was considered by the HEW source selection official prior to the selection of BSM for award. Accordingly, we are recommending to the Secretary of Health, Education, and Welfare that the source selection decision be reconsidered in light of the views expressed herein.

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-186875]

Appropriations—Availability—Space Rental—Day Care Centers for Children

The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located.

In the matter of space rental for HEW employee day care centers, March 20, 1978:

The General Counsel of Health, Education, and Welfare (HEW) requested the opinion of this Office on whether that Department may use appropriated funds to lease space for the purpose of establishing day care centers for the children of HEW employees, in those instances in which there is no suitable space for the establishment of such centers in buildings in which HEW components are located. He notes that section 524 of the Education Amendments of 1976, authorizes the Secretary of HEW to establish, equip, and operate day care center facilities to serve children of HEW employees. It is expected that these

centers will generally be established in buildings owned or leased by the Government in which components of HEW are located. However, the Department anticipates that in some instances HEW buildings may not be suitable for the establishment of day care centers and therefore any facilities which might be established would have to be located in specially leased space. The General Counsel asks whether Department appropriations are properly available for such purpose.

In a legal memorandum enclosed with his request, it is argued that based upon the language and legislative history of section 524 of the Education Amendments, the language and legislative history of a "comparable statute," and applicable decisions of the Comptroller General, the Secretary may lease space for a child day care center where suitable space is unavailable in buildings in which HEW facilities are located.

Section 524 of the Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081, 2240, 20 U.S.C. § 2564, which was approved on October 12, 1976, provides:

> Nothwithstanding any other provision of law, the Secretary of Health, Education, and Welfare is authorized by contract or otherwise to establish, equip, and operate day care center facilities for the purpose of serving children who are members of households of employees of the Department of Health, Education, and Welfare. The Secretary is authorized to establish or provide for the establishment of appropriate fees and charges to be chargeable against the Department employees or others who are beneficiaries of services provided by such facilities to pay for the cost of their operation and to accept money, equipment, or other property donated for use in connection with the facilities. No appropriated funds may be used for the equipping or operation of any centers provided under this authority. The prohibition made by the preceding sentence shall not preclude the provision of appropriate donated space nor the purchase of the initial equipment for the centers, except that the cost of such equipment shall be reimbursed over the expected life of such equipment, not to exceed 10 years.

The statute on its face specifically authorizes the Secretary of HEW to establish, equip, and operate day care facilities for the benefit of HEW employees. However, it also makes it clear that the expenses of equipping and operating these facilities be borne solely by Department employees and others who benefit from them and not, in the long run, by the Federal Government. The costs of establishing as opposed to equipping or operating the centers, are not specifically included in the general prohibition against using appropriated funds for the day care center. It is the extent to which appropriated funds may be used for establishment of the center which is at issue.

Section 524 originated as an amendment to Senate bill 2657, which was subsequently enacted by Congress into the Education Amendments of 1976, *supra*. It was proposed by Senator Beall and agreed to by the Senate on August 26, 1976. As originally proposed, its language was virtually identical to the section as eventually passed, ex-

cept that the two final sentences were added subsequently by the Conference Committee. Senator Beall remarked at the time he introduced the amendment:

> Mr. President, the need for this amendment was called to my attention as the result of the efforts of HEW's employees at Parklawn to have a day care center. In this case, space is available to the employees for a day care facility, but under an existing interpretation, HEW lacks—or has inadequate authority to address this and similar situations which the Department has confronted.
>
> I initially became involved in the Parklawn situation when I assisted the Parklawn Day Care Foundation, an employee organization, in securing permission from GSA to establish a day care center for them. However, one of the conditions of GSA's permission was that alterations to be accomplished by GSA would be done on a reimbursable basis. HEW has refused—because they do not have specific enabling statutory authority to do so—to pass renovation money from the Foundation to GSA so that the required renovation could proceed. A similar situation arose at the Department of Housing and Urban Development and the Senate amended the Housing Amendments of 1976 to provide HUD with the needed authority. This is now Public Law 94-375.
>
> The amendment I am proposing tracks the HUD language with one addition. My amendment would make it clear that HEW could accept donations—either money, equipment or other property—for use in such child care facilities. I would emphasize this amendment does not require the Department to establish day care centers. It is permissive. And, further, it—like the HUD-passed provision—authorizes the Secretary to provide for or establish appropriate fees and charges for the operation.
>
> Mr. President, when employees band together in recognition of their need for child care services and the Government cannot accept the money they wish to donate for the purpose of renovating a facility to make this child care center possible, it is no wonder our citizens shake their heads in amazement as they try to fathom governmental action or inaction. This group has been confronted with unbelievable roadblocks in trying to bring into being a child care center. The obstacles can be removed by providing—as the amendment does—HEW with the same authority as was given to HUD earlier.
>
> Mr. President, I want to pay particular tribute to the work of my House colleague, Congressman GUDE, for his efforts to resolve this problem.
>
> I urge the enactment of this amendment.
>
> Simply, Mr. President, this is an amendment that would give HEW the needed authority. It will help clarify the situation that has arisen at Parklawn, but elsewhere at HEW. 122 Cong. Rec. S14655 (daily ed. August 26, 1976).

It is evident from Senator Beall's comments that the pricipal purpose of his amendment was to provide HEW with the specific enabling authority to act as a conduit between one of its employees' organizations and the GSA for the purpose of transferring that organization's renovation money. The amendment was offered, in large part, in response to the situation of HEW employees at Parklawn, represented by the Parklawn Day Care Foundation, who sought the establishment of a child day care center in the Parklawn facility.

One of the conditions to GSA's granting permission for the establishment of the facility was that alterations necessary to render the space suitable for a day care facility would be done only on a reimbursable basis. According to Senater Beall, because it had no specific enabling statutory authority to pass renovation money from the Foundation to GSA, HEW declined to do so. The amendment was offered, "to make it clear that HEW could accept donations—either money, equipment

or other property." *Id.* It thus appears that renovation of space was not intended to be accomplished at public expense even though the statute does not explicitly include such costs in its general prohibition.

The question of whether public funds, *i.e.*, HEW appropriations, could be used to rent additional space for the day care facilities was not considered at the time section 524 was initially approved by the Senate. As indicated earlier, Senator Beall's amendment was proposed in large part as a result of the situation at HEW's Parklawn location during a time when it was believed that suitable previously leased space in the building was available.

As noted above, the final sentences of section 524 which allows the Department to provide "appropriate donated space" was added in the conference committee. Conf. Com. Rep. No. 1701, 94th Cong., 2d Sess. (1976). Representative Quie, one of the conferees, in explaining the conference amendment to the House of Representatives during its consideration of the conference committee report stated:

> The Senate bill contained language permitting the Secretary of Health, Education and Welfare to establish day care centers for departmental employees. The conference committee retained that section with an amendment which I offered to make clear that no appropriated funds may be used for operating any of the centers, and to further provide that any equipping of facilities done by the Department would have to be repaid. I have no objection at all to the provision of these centers. My only concern is that these centers not become a fringe benefit over and above those recognized by Civil Service laws. They should be self-supporting in every way possible. *The language does permit the Secretary to provide space for those facilities.* 122 Cong., Rec. H11699 (daily ed. September 29, 1976). [Italic supplied.]

The phrase, "appropriate donated space" is stated as a special exception to the immediately preceding statutory prohibition against using appropriated funds for other day care center needs. Clearly the Secretary is permitted, in his discretion, to provide the day care facility with suitable space without charge. That is, the Secretary may "donate" the space to the facility.

We can find nothing in the statute or its legislative history which requires that HEW appropriations be limited to the provision of space only within buildings in which HEW components are located. It is true that the situation of employees at HEW's Parklawn location where suitable space was thought to be available prompted the legislation. However, the authority of section 524 extends to the establishment of day care centers for any component of HEW which may or may not have suitable space available in already owned or rented space.

From a financial point of view there is not much difference between the cost to HEW of space donated in an already occupied building and space leased specially for the day care center. Space provided in GSA-controlled buildings occupied by HEW will result in the Department's being charged the standard level user charge (SLUC)—as it is with all space assigned to it—which generally approximates commercial

charges for comparable space. 40 U.S.C. § 490(j) (1976). There is little distinction, insofar as HEW's appropriations are concerned, between the payment of SLUC and the payment of the rental charge which would be incurred by HEW were it to provide facilities in specially leased space in other buildings. Therefore, we find no basis upon which to distinguish between the provision of space within a building occupied by HEW and of space in another building.

In light of the foregoing, we conclude that Department of HEW appropriations are available for the leasing of space specifically for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located.

[B-190223]

Bidders—Responsibility *v.* Bid Responsiveness—Bidder Ability to Perform

Invitation for bids provision that successful bidder shall meet all requirements of Federal, State, or City codes pertains to bidder responsibility, not bid responsiveness, since it concerns bidder's legal authorization to perform resulting contract.

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—General Accounting Office Review Discontinued—Exceptions—To Determine Arbitrary Rejection of Bid

Allegation concerning bidder's capacity to perform involves question of responsibility. While General Accounting Office (GAO) will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or proposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials.

Contracts—Protests—Award Approved—Prior to Resolution of Protest

Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office (GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected.

In the matter of New Haven Ambulance Service, Inc., March 22, 1978:

New Haven Ambulance Service, Inc. (NHAS), protests the award of a contract to Flanagan Ambulance Service, Inc. (Flanagan), the low bidder under invitation for bids (IFB) No. 78-14 issued by the

Veterans Administration Hospital (VA), West Haven, Connecticut, on October 27, 1977.

The IFB, as amended, was for furnishing ambulance service to beneficiaries of the VA during the period November 28, 1977 through September 30, 1978. Items 1 and 2 of the schedule solicited bids for day and night rates, respectively, for emergency medical care vehicle trips during the proposed contract period based on estimated quantities set forth therein. Flanagan bid the same unit price for Items 1 and 2, a bid of $29.75 each for trips entirely within city limits and $1.60 per mile for trips beyond city limits. The IFB limited payment for mileage traveled beyond city limits to "one way only," the distance over which the patient was to be transported. Such mileage costs were to be paid in addition to the applicable rate per trip for any trip entirely within city limits. NHAS' bid was $40 per trip and $1.75 per mile.

The solicitation contained the following clause on page 4 under Special Conditions:

2. *QUALIFICATIONS:* a. Proposal will be considered only from bidders who are regularly established in the business called for and who are financially responsible and have the necessary equipment and personnel to furnish service in the volume required for all the items under this contract. Successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service.

The State of Connecticut, by Connecticut General Statutes § 19–73bb, requires the licensing by the Office of Emergency Medical Services (OEMS), State Department of Health, of firms engaged within the State in the business of providing commercial ambulance services. Further, OEMS has the authority to establish rates charged by commercial ambulance services within the State. By Memorandum of Decision, dated February 19, 1976, upon application for rate increases by commerical ambulance services, including Flanagan and NHAS, and after due notice and hearing, OEMS issued the following order:

The office finds that in light of the information supplied the rate increase is warranted and the following schedule of rates is established for all commercial ambulance services licensed under the provisions of Chapter 334b. The rates are effective starting March 1, 1976 except that for state governmental agencies, it is effective July 1, 1976.

Base Rate	$49.00
Mileage	$ 1.75

* * * * * * *

It is ordered that rates as set forth above include ambulance services rendered for the account of all State, City, Governmental or municipal agencies. Contract rates negotiated between governmental agencies and commercial ambulance operators will not be permitted unless prior approval is received from the Office of EMS.

It is NHAS's position that Flanagan failed to comply with special condition 2(a) of the IFB, thereby rendering its bid "nonresponsive"

to the solicitation. Specifically, NHAS's protest is based on the following contentions: (1) Flanagan does not have a valid state license to provide ambulance services since Flanagan made application for and obtained its license at a time when the corporation was dissolved by forfeiture because of its failure to file annual reports (Flanagan's application for the license at such time, it is argued, was in violation of Connecticut regulations); (2) Flanagan is not licensed to provide all of the services required by the IFB, specifically, paramedic advanced life support emergency services (R5 service); (3) Flanagan failed to obtain prior approval from OEMS for its bid of $29.75 per trip and $1.60 per mile, a rate below that specified by OEMS' February 19, 1976 order and thus requiring prior approval by the terms of that order; and (4) Flanagan does not have sufficient emergency care vehicles and equipment to satisfy the performance requirements of the contract.

Notwithstanding the receipt by the contracting officer of a copy of the protest transmitted to GAO, the contract was awarded to Flanagan on November 25, 1977. NHAS then filed suit in the United States District Court, District of Connecticut (*New Haven Ambulance Service, Inc.* v. *Max Cleland, Administrator, et al.*, Civil Action No. N–77–390), seeking to enjoin contract performance. The court issued an order, dated December 27, 1977, deferring the matter pending our decision on the protest.

The protester first questions the validity and adequacy of the state license held by Flanagan. NHAS believes the bid of Flanagan to be nonresponsive to the solicitation because the bidder does not have a valid license to provide all services called for in the solicitation.

For the reasons stated below, we find that the issues raised by the protester pertain to the matter of Flanagan's responsibility and, as such, are not for resolution by our Office.

There is a definite distinction between requirements related to bid responsiveness and those concerned with bidder responsibility. As we stated in 49 Comp. Gen. 553 (1970), at page 556:

> * * * [T]he test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *

Responsibility, on the other hand, concerns a bidder's ability to perform its obligations under the terms of its submitted bid. In the instant solicitation, nothing on the face of Flanagan's bid, or specifically made a part thereof, limited, reduced, or modified its *obligation* to perform the required services in accordance with the terms of

the IFB. NHAS, by disputing the validity of state licenses held by Flanagan, essentially questions the latter's *ability* to comply with special condition 2(a)'s license requirement, not Flanagan's apparently express obligation under its bid to do so. In short, NHAS questions Flanagan's legal authorization to perform the contractually specified services without possessing the necessary licenses. In this regard, our Office has consistently held that a license requirement in an invitation is a requirement concerning the responsibility of prospective contractors—that is, to determine a bidder's legal authorization to perform the contract, which is a matter of responsibility and is not related to an evaluation of the bid. 53 Comp. Gen. 36 (1973); 47 *id.* 539 (1968); 46 *id.* 326 (1966); see, generally, Federal Procurement Regulations (FPR), 41 C.F.R. subpart 1-1.12 (1977) (Responsible Prospective Contractors).

Furthermore, we have had occasion in previous cases to consider the question of the impact of a requirement in a solicitation for compliance with state and local licensing laws. In 53 Comp. Gen. 36 (1973), wherein we denied a similar protest involving a solicitation containing identical language to that in special condition 2(a) here, we stated at 37:

> With respect to the effect of a State law requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, in our decision B-125577, October 11, 1955, we considered an IFB for a Federal construction contract to be performed in Tennessee, under which the contractor was to obtain all licenses and permits required for the prosecution of the work. We held therein that:
>
> "State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be."

The present solicitation merely required in general terms that contractors "meet all requirements of Federal, State, or City codes" and is therefore distinguishable from circumstances where the solicitation expressly requires that the successful bidder actually hold a specified State or local license. See 53 Comp. Gen. 51 (1973). We also point out that the solicitation did not require bidders to provide an R5 paramedic advanced life support emergency service as alleged by NHAS.

Moreover, Flanagan's asserted failure to obtain prior approval for its bid from OEMS is analogous to the licensing requirement. Indeed, counsel for NHAS characterizes Flanagan's failure to obtain prior approval as a violation of a specific "licensure requirement." Compliance with such a requirement, if it was indeed intended to be applicable

to bidders involved in the Federal procurement process, is a matter which must be settled between the local authorities and Flanagan, either by agreement or by judicial determination. For the reasons stated above concerning state licensing requirements, we conclude that the failure of Flanagan to obtain prior approval for its bid did not render its bid nonresponsive to the solicitation.

NHAS' next contention, whether Flanagan has sufficient vehicles and equipment to perform the contract, in essence also questions Flanagan's responsibility and the VA's affirmative finding thereof. While this Office does review protests involving negative determinations of responsibility to assure that bids or offers are fairly considered, we do not review affirmative determinations of responsibility except where the protester alleges actions by procuring officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See *Central Metal Products, Inc.*, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. We note in passing that the record indicates that the VA conducted a preaward inspection of Flanagan. The inspection report, dated November 25, 1977, showed that Flanagan satisfactorily complied with all necessary requirements concerning emergency medical care vehicles and equipment. The Inspection Team recommended award of the contract to Flanagan.

NHAS also argues that the VA awarded the contract after notice of its protest to the GAO in violation of FPR § 1-2.407.8(b)(3). Generally, under FPR § 1-2.407.8(b)(4), where a protest is received before award, a contracting officer may nevertheless proceed to make award based upon a written determination of urgency, that delivery or performance will be unduly delayed by failure to make award, or that a prompt award will otherwise be advantageous to the Government. Further, FPR § 1-2.407.8(b)(3) provides that "[w]here it is known that a protest against the making of an award has been lodged directly with GAO, a determination to make award under § 1-2.407.8(b)(4) must be approved at an appropriate level above that of the contracting officer, in accordance with agency procedures." Our Office's Bid Protest Procedures provide that award during the pendency of a protest will be made as provided for in the applicable procurement regulations. 4 C.F.R. § 20.4 (1977).

NHAS protested to our Office against any award being made in a mailgram sent at 4:11 p.m., November 23, 1977, the bid opening date, and received in our Office at 3:36 p.m., Friday, November 25, 1977.

NHAS, at 4:13 p.m., November 23, 1977, concurrently sent an exact copy of its GAO protests to the contracting officer which was received by him at approximately 9:08 a.m., November 25, 1977. The contracting officer states that during a meeting with representatives of the protester in the early afternoon of November 25, at approximately 1:40 p.m., he was told that "a protest was also registered with the Comptroller General." The VA further reports that during that day, November 25, and prior to award, the contracting officer made a telephone call to the VA's Washington office to ascertain whether it had been notified by GAO of a protest. He was informed that the VA had not as yet been so notified. (In fact VA was not notified by our Office of this protest until the following week.) The contract was awarded at approximately 4:20 p.m. on November 25, without a written determination having been made or approval having been obtained at a level above that of the contracting officer.

Initially, VA conceded that the contracting officer had notice of the protest prior to award and should have obtained the requisite approval of his determination to proceed with the award. The agency stated that it would take remedial action to prevent a recurrence. In a subsequent report to our Office, however, the agency argued that its contracting officer did not have notice of the GAO protest until after the award was made.

We agree with VA's initial position. We believe that where the contracting officer receives, through the regular course of mail, a copy of the protest transmitted to the GAO, he is thereby placed on notice of the protest and is deemed to "know" that a protest has been "lodged" with the GAO. The very purpose of our requirement for the protester to concurrently file its protest with the contracting officer is to place him on such notice of the protest. It would be a rare instance indeed for a protester to transmit a copy of its GAO protest to the contracting officer and not to have sent the original to our Office. Receipt by the contracting officer of a copy of the GAO protest is sufficient evidence that the protester has at least concurrently transmitted the original protest to our Office. The fact that we may not receive it for a short time thereafter is not relevant or dispositive. The act of mailing a letter or sending a mailgram or telegram, with reference to the addressee's receipt of the communication, gives rise to a presumption of due delivery. 1 *Wigmore on Evidence* § 95 (3rd ed. 1940 & Supp. 1977). Receipt by the contracting officer constitutes effective notice for a reasonable time, such time dependent on the circumstances, during which the communication can arrive at our Office. We note that often protests are lodged by bidders local to the area where the procuring activity is located and that therefore it is natural and probable for a copy of the

GAO protest to reach the contracting officer before it is received by us. In such circumstances, telephonic notification by our Office of receipt of the protest is not necessary to place the agency on notice of the protest. If award is urgent or otherwise advantageous and necessary prior to resolution of the protest, the appropriate regulatory procedures for award should be followed.

However, these regulations concerning award pending protest are purely procedural and we have consistently held that even though the award action was contrary to these FPR provisions, the legality and the validity of the award is not thereby affected. *Starline, Inc.*, 55 Comp. Gen. 1160 (1976), 76-1 CPD 365; B-178303, June 26, 1973. Therefore, the matter requires no further consideration by our Office.

Finally, NHAS argues that a preliminary injunction granted by the United States District Court on October 25, 1977, involving a prior soliciation for ambulance services by the VA and involving these same two bidders, constitutes res judicata for the purposes of this protest. At the time of the prior solicitation, Flanagan was not a corporation in good standing in Connecticut, its corporate charter having been forfeited. Flanagan had also not obtained prior approval from OEMS for the bid that it submitted on the prior solicitation. We do not decide this issue of res judicata since we perceive the court's December 27, 1977, order deferring the case to our Office as a request to decide the matter on the merits. We leave it to the court to decide what effect, if any, it will give to its prior preliminary injunction.

Accordingly, the protest is denied.

[B-190511]

Subsistence—Per Diem—Actual Expenses—Itemization of Actual Food Expenses—Requirement

Employee of National Oceanic and Atmospheric Administration on temporary duty in Washington, D.C., a designated high-rate geographical area, was authorized actual expenses of subsistence. Employee failed to itemize actual subsistence expenses and claims reimbursement on a flat-rate basis. Claim on a flat-rate basis may not be allowed since employee may not be reimbursed on per diem basis and voucher does not identify daily expenditures for meals so that such expenses may be reviewed by the agency to determine that they are proper subsistence items.

Orders—Amendment—Retroactive—Travel Completed

Where employee was authorized subsistence on actual expense basis for temporary duty in Washington, D.C., a designated high-rate geographical area, and he failed to maintain daily record of subsistence expenses, his travel orders may not be retroactively amended to provide reimbursement on per diem basis. Travel orders may not be revoked or modified retroactively so as to increase or decrease rights that have accrued and become fixed under law and regulation

except to correct error apparent on face of orders or when facts demonstrate a provision previously definitely intended has been omitted through error or inadvertance. Record shows no such error or omission in original orders.

In the matter of H. D. Anderson—subsistence, per diem, actual expenses, March 24, 1978:

This matter concerns a request for an advance decision by Mr. John Houston, an authorized certifying officer of the National Oceanic and Atmospheric Administration (NOAA), as to whether Mr. H. D. Anderson, an agency employee, may be reimbursed the amount of $46.80 for subsistence expenses during the time that he was performing temporary duty in Washington, D.C., a high-rate geographical area.

The record shows that Mr. Anderson was authorized travel expenses by NOAA Travel Order No. 20–7–W3A–0733 dated June 17, 1977, in connection with round-trip travel between Kansas City, Missouri, and Washington, D.C., incident to temporary duty. In connection with his temporary duty in Washington, D.C., Mr. Anderson submitted a voucher for per diem expenses of $87.50, $35 per day for a 2½-day period from June 20 through June 22, 1976. The agency states that Mr. Anderson was authorized reimbursement for actual subsistence expenses and that accordingly he was required to itemize his expenses on a daily basis in order to be allowed payment for the amount claimed. He was allowed $40.70 which represents the cost of 2 nights' lodgings for which receipts have been submitted. The remainder of the claim in the amount of $46.80 has been disallowed due to the lack of itemization of expenses.

Mr. Anderson states that he was unaware of the requirement for him to maintain an account of his actual expenses and therefore he is unable to reasonably reconstruct his subsistence expenses. He has submitted a reclaim voucher for the $46.80 disallowed by NOAA.

Mr. Anderson's Travel Order dated June 17, 1977, states in block 12 entitled "per diem rate(s)" that reimbursement would be "in accordance with Travel Handbook." The NOAA Travel Handbook dated March 1976 provides in pertinent part as follows:

1–8.6 *Travel to High Rate Geographical Areas*

a. Actual subsistence expense reimbursement shall normally be authorized or approved whenever temporary duty travel is performed to or in a location designated as a high rate geographical area, except when the high rate geographical area is only an enroute or intermediate stopover point at which no official duty is performed. *Therefore, all NOAA travelers performing TDY at any place designated as a metropolitan high rate area normally will claim reimbursement on an actual expense basis.* An exception may occur when circumstances of the travel clearly show the cost to the government would be less if the lodgings plus $14 system were used. In such cases the official approving the travel should specify in Block No. 12 of the CD–29 the per diem rate (not to exceed $33) for that specific travel assignment.

b. Officials listed in Part 1–1.4d shall approve travel on an actual expense basis for the high rate metropolitan areas listed below:

Designated High Rate Geographical Areas	Prescribed Maximum Daily Rates
* * * *	* * *
Washington, D.C. (all locations within the corporate limits of Washington, D.C.; and the County of Arlington and the City of Alexandria, VA).	$42

The above-cited provision of the NOAA handbook implements the provisions of para. 1–8.1 of FPMR Temporary Regulations A–11, May 19, 1975, as amended by FPMR Temp. Reg. A–11, Supp. 1, Attachment A, June 27, 1975.

We note that FPMR Temp. Reg. A–11, Supp. 3, September 28, 1976, provides that the Prescribed Maximum Daily Rate for the Washington, D.C. area is $50 and expands the definition of Washington, D.C., to include Montgomery and Prince George's Counties in Maryland, and Arlington, Loudon, and Fairfax Counties, and City of Alexandria in Virginia. The changes were incorporated into the NOAA Travel Handbook by NOAA Circular 76–78, October 1, 1976.

In view of the reference in block 12 of Mr. Anderson's travel order to the Travel Handbook and the pertinent provisions of the Travel Handbook with regard to temporary duty in high-rate geographical areas, including Washington, D.C., we find that Mr. Anderson was authorized reimbursement of actual expenses of subsistence rather than a flat-rate per diem allowance.

Upon the completion of Mr. Anderson's temporary duty the agency issued a Travel Order dated June 30, 1977, which stated that the original travel orders were amended to authorize per diem not to exceed $35 per day. The general rule is that travel orders may not be revoked or modified retroactively after travel has been performed so as to increase or decrease rights that have accrued and have become fixed under applicable law and regulation. B–176236, October 30, 1972. The exception to this rule is that travel orders may be amended to correct an error apparent on the face of the orders or where the facts and circumstances demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence. B–176236, *supra.* There has been no such error or omission in Mr. Anderson's original travel order and, therefore, the amendment is not effective.

With regard to reimbursement of actual subsistence expenses para. 1–8.5 of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) provides as follows:

1–8.5 *Evidence of actual expenses.* Actual and necessary subsistence expenses incurred on a travel assignment for which reimbursement is claimed by a traveler shall be itemized in a manner prescribed by the heads of agencies which will

permit at least a review of the amounts spent daily for lodging, meals, and all other items of subsistence expenses. Receipts shall be required at least for lodging.

Paragraph 1–8.3 of the FTR provides that agencies shall review actual expenses claimed by the traveler to determine whether they are proper subsistence items. An employee is responsible for maintaining a contemporaneous record of expenses incurred incident to official travel and for submitting a voucher itemizing such expenses. See FTR paras. 1–11.2 and 1–11.3.

In accordance with the above provisions we have held that the submission of a voucher which does not clearly identify daily expenditures for meals is insufficient to allow computation of daily subsistence expenses so that such expenses may be compared to the daily maximum rate allowable for per diem. *Matter of John D. Sammon*, B–184614, October 5, 1976; B–116908, October 12, 1965. Since the rate of $35 per day claimed by Mr. Anderson for subsistence expenses for the 2½ days of his temporary duty assignment is not an itemization of actual costs, but represents a per diem rate of $35 per day, his claim may not be allowed on the basis presented.

Accordingly, the reclaim voucher may not be certified for payment.

[B–190105]

Contracts—Protests—Timeliness—Negotiated Contracts—Date Basis of Protest Made Known—Award on Initial Proposal Basis

Protest after submission of initial proposals objecting to award on basis of initial proposals and agency's failure to amend request for proposals (RFP) is not untimely, because protest is not directed at any apparent impropriety in RFP, but at conduct of procurement after initial proposals were received.

Contracts—Protests—Timeliness—Negotiated Contracts—Date Basis of Protest Made Known—Award on Initial Proposal Basis

Where offeror received information on July 25 leading it to inquire whether agency would amend RFP, waited for promised response, and protested within 10 working days after it was told on August 25 that award was being made on basis of initial proposals, protest is not untimely. Basis for protest was not known until agency responded to July inquiry, and delay in agency response is not so great that agency inaction charged protester with knowledge of basis for protest prior to August 25.

Contracts—Negotiation—Awards—Initial Proposal Basis—Competition Sufficiency

Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals were there is no showing that Armed Services Procurement Regulation (ASPR) 3–807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown.

Contracts—Negotiation—Changes, etc.—Written Amendment Requirement—Exceptions—*De Minimis* Rule Applicability

Protester's contention—that Air Force erred in making award on initial proposal basis because ASPR 3–805.4(a) (1976 ed.) required amendment to RFP due to change in requirements—is not sustained. Sole change (removal of 1 of 617 equipment items to be serviced) appears to be *de minimis* where Air Force maintains there was no significant change in service requirements, successful offeror had previously accepted requirement to service deleted item as no cost modification to prior contract, and even protester alleges only small reduction in its proposed price was due to change.

Contractors—Incumbent—Competitive Advantage

Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3–805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3–805.1(v) (1976 ed.).

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

In view of conclusions that agency did not err in making award on basis of initial proposals, that there was no requirement to amend RFP for *de minimis* change in requirements, and that incumbent contractor did not have unfair competitive advantage, there is no basis to find arbitrary and capricious action by agency necessary to support recovery of proposal preparation costs. Claim is accordingly denied.

In the matter of Telos Computing, Inc., March 27, 1978:

Table of Contents

		Page
I.	Introduction	371
II.	Background	372
III.	Alleged Untimeliness of Protest	373
IV.	Alleged Advantage to Government as Reason for Conducting Discussions	375
V.	Change in Requirements	376
VI.	Alleged Unfair Competitive Advantage	377
VII.	Claim for Proposal Preparation Costs	379
VIII.	Conclusion	379

I. Introduction

This is our decision on a protest by Telos Computing, Inc. (Telos), concerning the award of a contract to AIL, Inc., under request for proposals (RFP) No. F09603–77–R–1063, issued by the Department of the Air Force. The protester contends that rather than making an

award on the basis of the initial proposals, the contracting officer should have amended the RFP and conducted discussions with the offerors. Telos seeks, alternatively, (1) a recommendation that negotiations be reopened, or (2) a recommendation that the contract options not be exercised, as well as a decision granting recovery of its proposal preparation costs. The Air Force and AIL maintain the protest is untimely, or, if timely, is in any event without merit.

II. Background

The RFP contemplated the award of a contract for services and repair work in support of various equipment peculiar to 11 sites (6 in the continental United States, 2 in Hawaii and 3 in Germany) which handle intelligence data. Proposals were to be submitted for a 1-year contract period and for 2 option years, priced in terms of man-month rates at the 11 sites. It appears from section D of the RFP that given acceptable technical proposals, the lowest evaluated price for the 3 years would be the determinative factor for award.

Attachment I to the RFP listed the equipment, by type and quantity of type at each site, for which repair and maintenance services would be required. Altogether, 221 types and 617 items of equipment were listed. For one of the sites (Stuttgart, Germany), 11 different types of equipment (17 total items) were listed. One of the units at this site was identified as an ARM–2365 Magnetic Core Memory System.

The RFP was issued on June 3, 1977. At a preproposal conference on June 21, one question was whether there would be any future changes to the Attachment I equipment list. Prospective offerors were advised that "The equipment list is up to date at this time; however, requirements are always subject to change."

The Air Force reports that on July 15, 1977, the ARM–2365 was "de-installed." The RFP was not amended to advise prospective offerors of this development. (The Air Force states that the contracting officer was unaware of the de-installation at this time.) On July 18, 1977, initial proposals were submitted by AIL, the incumbent contractor, and Telos. The Air Force states that both proposals were considered to be "responsive" to the RFP. The evaluated prices for the three priced years were AIL: $1,450,296.95; and Telos: $1,457,562.30.

By message of July 26 and letter of July 27, 1977, Telos advised the Air Force that it had been informed by a third party on July 25, 1977, that the ARM–2365 had been de-installed. Telos requested clarification of the status of the ARM–2365 and several other items in the solicitation as well as "necessary amendment" to the RFP, on the basis that changes in the various items could have a significant cost impact

on the Telos proposal. By letter dated August 25, 1977, to the Air Force, Telos complained that it had received neither written nor oral response to its inquiry.

In the meantime, the contracting officer by letter of August 23, 1977, confirmed that the ARM-2365 had been de-installed, furnished information as to the other aspects of Telos' inquiry, and advised Telos that negotiations would not be conducted and that an award was being made on the basis of the initial proposals. Telos protested to the Air Force by message and letter dated August 26, 1977, and filed its protest with our Office on September 9, 1977.

III. Alleged Untimeliness of Protest

AIL and the Air Force argue that the protest is untimely because it is directed against alleged deficiencies in the RFP and was not filed prior to the closing date for receipt of initial proposals (July 18, 1977). This contention is apparently based on the facts that the RFP advised offerors that award might be made on the basis of the initial proposals without discussions, and that offerors were informed that while the equipment list in the RFP was up to date the requirements were always subject to change.

Protests alleging improprieties which are apparent in an RFP as originally issued must be filed prior to the closing date for receipt of initial proposals. See section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977). The protester's position, based upon information it received after submitting its initial proposal, is that the Air Force was required to amend the RFP and initiate discussions. The above-noted RFP statements do not conclusively establish that an award would be made on the basis of the initial proposals, nor do they exclude the possibility that the RFP might be amended due to changed requirements, discussions conducted, and best and final offers requested. Accordingly, we do not believe it is accurate to characterize the protest as objecting to these RFP statements, nor can we conclude that the basis for protest was apparent from the terms of the RFP.

The decisions of our Office cited by AIL and the Air Force in this connection involve the kind of situation where the protester objects to terms and conditions apparent in the RFP—such as the type of contract contemplated (*Kappa Systems, Inc.*, 56 Comp. Gen. 675 (1977), 77-1 CPD 412), a requirement that a sample be submitted within 2 days should the agency request one (*Comspace Corporation*, B-186342, January 24, 1977, 77-1 CPD 46), or the listing of a particular manufacturer's part as equal to another manufacturer's part (*Miltope Corporation*, B-188342, April 18, 1977, 77-1 CPD 270). The present protest, in contrast, is the type of case where, given the RFP

terms and conditions, the protest is essentially directed at the way the procurement was conducted after initial proposals were received. See, in this regard, *Amram Nowak Associates, Inc.*, B-187253, November 29, 1976, 76-2 CPD 454; *U.S. Nuclear, Inc.*, 57 Comp. Gen. 185 (1977), 77-2 CPD 511.

AIL, however, maintains that even if the protest is not directed against the RFP, it is still untimely because it was not filed within 10 working days after the basis for protest was known or should have been known (4 C.F.R. § 20.2(b)(2)). AIL points out that while Telos learned of the removal of the ARM-2365 on July 25, 1977, it did not protest to the Air Force until August 26, 1977, and to our Office until September 9, 1977.

The basis for protest is that the agency proceeded with an award on the basis of the initial proposals rather than amending the RFP and conducting discussions. We believe this basis was not known until the Air Force responded to Telos' July 26 inquiry. Further, we cannot say that the amount of time which elapsed between Telos' July 26 inquiry and the agency's response in late August was so great that the Air Force's inaction charged Telos with knowledge of the basis for protest. In this regard, Telos has stated that in several telephone conversations with Air Force personnel subsequent to July 26, 1977, it was told that its inquiry was under consideration and would be resolved when key Air Force procurement personnel returned from vacation.

We believe Telos first had knowledge of the basis for protest on August 25, 1977, when it telephoned the Air Force and was told an award had been made. Telos immediately protested to the Air Force. Without waiting for a decision by the Air Force on its protest, Telos filed its protest with our Office on September 9, 1977 (the tenth working day after August 25, 1977).

Accordingly, the protest to our Office was timely filed within 10 working days after the basis for protest was known or should have been known. The decisions cited by AIL in this regard are inapposite. *Jerry M. Lewis Truck Parts & Equipment, Inc.*, B-188960, June 27, 1977, 77-1 CPD 458, involved a situation where the untimely protest was filed more than 10 working days after the protester received notice that an award had been made to another offeror. In *Microsurance, Inc.-Request for Reconsideration*, B-188830, June 3, 1977, 77-1 CPD 393, the untimely protest, allegedly prompted by the contents of the bids as revealed at bid opening, was filed several months after bid opening.

Finally, one peripheral objection raised by the protester is untimely. Telos has contended that incorporating by reference in the RFP a provision advising offerors that award might be made on the basis of the initial proposals (paragraph 10 of Standard Form 33A (March 1969),

incorporated at page 6 of the RFP), is not a sufficient notice to offerors. In this regard, we have noted that the obligation rests on offerors to carefully scrutinize the RFP and that an apparent solicitation impropriety can consist of an omitted provision which allegedly should have been included. *Honeywell Inc.*, B–184245, November 24, 1975, 75–2 CPD 346. Any uncertainty on Telos' part concerning this matter should have been timely raised prior to the closing date for receipt of initial proposals.

IV. Alleged Advantage to Government as Reason for Conducting Discussions

Telos contends that where, after the receipt of initial proposals, a contracting officer is presented with a situation where the Government stands to benefit greatly from negotiations, he should conduct negotiations, citing 47 Comp. Gen. 279 (1967), 49 *id.* 156 (1969) and *Development Associates, Inc.*, 56 *id.* 580 (1977), 77–1 CPD 310 (cited by the protester as B–187756, May 5, 1977). Telos also alleges that Armed Services Procurement Regulation (ASPR) § 3–805.1(v) (1976 ed.) was contravened because it was not clearly demonstrated that adequate competition sufficient to support an award on the basis of the initial proposals existed.

ASPR § 3–805.1(v) allows award to be made in a negotiated procurement without discussions where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided that the solicitation advised offerors of the possibility that award might be made without discussions, and provided that award is in fact made without discussions. ASRP § 3–807.1 (a) (1976 ed.) provides that adequate price competition exists if at least two responsible offerors which can satisfy the Government's requirements independently contend for a contract to be awarded to the "responsive" and responsible offeror submitting the lowest evaluated price by submitting priced offers "responsive" to the expressed requirements of the solicitation. If these criteria are satisfied, ASPR § 3–807.1 (b) provides that price competition may be presumed to be adequate unless the contracting officer specifically determines otherwise.

Aside from a general expression of doubt that adequate price competition existed, Telos has furnished nothing to demonstrate why the criteria of adequate price competition were not satisfied in this procurement. Moreover, the decisions of our Office relied on by the protester are not in point. In 47 Comp. Gen. 279, an offeror attempted to reduce its initial proposal price from $795,397 to $636,317. While this was a late modification to the proposal and could not be accepted, we

held that the contracting officer, confronted with this information, should have conducted discussions rather than making an award on the basis of the initial proposals, because the late price reduction indicated that the Government stood to "benefit greatly" from negotiations. In the present case, however, as far as the record shows Telos did not at any time after submitting its initial proposal either submit a price reduction or advise the contracting officer of the amount by which its price might be reduced if discussions were conducted. In this regard, the protester's information submitted to our Office showing a possible price reduction has been claimed to be proprietary by Telos, and has not been released to either the Air Force or AIL.

Further, 49 Comp. Gen. 156 is not in point as it involved a case where discussions were in fact conducted and the issue related to the failure to issue a written amendment to the RFP reflecting changed delivery requirements. In *Development Associates*, *supra*, we found no objection to an award on the basis of the initial proposals notwithstanding the protester's contention that the agency should have conducted discussions with it.

In view of the foregoing, we see no merit in the protester's contention that the advantages to the Government called for the opening of discussions.

V. Change in Requirements

Telos next contends that the de-installation of the ARM–2365 was a change in the Government's requirements requiring amendment of the RFP as provided in ASPR § 3–805.4(a) (1976 ed.):

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

The change which occurred in the present procurement involved the deletion of only one of the 617 items to be serviced. The record clearly indicates the *de minimis* character of the change. In this regard, AIL points out that when the ARM–2365 was added several years ago to the equipment to be serviced, it was accepted at that time as a no-cost modification to AIL's contract. As discussed *infra*, Telos contends the deletion of the ARM–2365 has a significant impact on the price of its proposal. However, the information furnished by Telos concerning the alleged price impact, even if accepted at face value, would involve only a small reduction in its proposed price. Further, the Air Force calls attention to ASPR § 3–505(a) (1976 ed.) which provides in pertinent part that if, after issuance of an RFP but before receipt of proposals, it becomes necessary to make significant changes in quantity or specifications, such changes shall be accomplished by an amendment to the

RFP. The Air Force states that prior to award ASPR § 3-505(a) was considered and a determination made that de-installation of the ARM-2365 did not constitute a significant change in the requirements because a comparable level of services for the other equipment at the Stuttgart site was still required.

Under these circumstances we do not believe that ASPR § 3-805.4 (a), considered in and of itself, required the Air Force to amend the RFP. Further, the decisions of our Office relied on by Telos do not support its argument. *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 386 (cited by the protester as B-181782, December 26, 1974), and B-174492, June 1, 1972, involved procurements of equipment (a digital simulation system and printing presses, respectively). Both decisions essentially dealt with the question whether an agency's acceptance of one offeror's technical approach as the answer to its needs, without amending the RFP to reflect this, deprived other offerors of an equal opportunity to compete. The present case does not involve the Air Force's adoption of one offeror's individual technical approach to furnishing an equipment end item.

VI. Alleged Unfair Competitive Advantage

Telos further alleges that AIL, the incumbent contractor, enjoyed an unfair competitive advantage because it knew prior to submitting its proposal that the ARM-2365 had been de-installed. In this regard, the Air Force cites *Boston Pneumatics, Inc.*, 56 Comp. Gen. 689 (1977), 77-1 CPD 416, where we quoted at page 691 the following statement from *ENSEC Service Corp.*, 56 Comp. Gen. 656 (1976), 76-1 CPD 34:

> * * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances. * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected. Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government.

In *Boston Pneumatics*, it was alleged that the previous contractor had an unfair advantage because only it could qualify for waiver of initial production testing, and because the solicitation did not provide for furnishing a sample to bidders. However, we found no preference or unfair action by the Government in the circumstances. In *ENSEC*, likewise, no unfair advantage was found in respect to offerors' possible participation in a Federal program affording tax benefits and other advantages.

There are many similar decisions. Unfair competitive advantages have been alleged, but not shown, in cases where the prior contractor

has done a design study (*Teledyne Ryan Aeronautical*, 56 Comp. Gen. 635 (1977), 77-1 CPD 352) or has drafted plans or preliminary studies relevant to the current work (*H. J. Hansen Company*, B-181543, March 28, 1975, 75-1 CPD 187). Other cases where unfair competitive advantages have not been found have involved allegations that the prior contractor had already developed certain necessary operating procedures (*Field Maintenance Services Corporation*, 56 Comp. Gen. 1008 (1977), 77-2 CPD 235), was better able to propose the direct labor force (*Field Maintenance Services Corporation*, B-185339, May 28, 1976, 76-1 CPD 350), was in a position to offer more substantial backup facilities (*Houston Films, Inc.*, B-184402, December 22, 1975, 75-2 CPD 404), had already developed a large data base (*Aerospace Engineering Services Corporation*, B-184850, March 9, 1976, 76-1 CPD 164), or was in a position to respond to an allegedly unreasonable proposal response period of only 5 days (*Price Waterhouse & Co.*, B-186779, November 15, 1976, 76-2 CPD 412).

Such decisions, however, are not fully dispositive of the present protest. They essentially stand for the proposition that there is no requirement to attempt to equalize the competition to compensate for the experience, resources or skills one offeror has obtained in the course of performing a prior contract. A different question is presented where information concerning the Government's requirements in the RFP, known by the Government and the incumbent contractor to be inaccurate, gives the incumbent an unfair competitive advantage against any competitor. See, for example, *Informatics, Inc.*, 56 Comp. Gen. 402 (1977), 77-1 CPD 190, modified in part, 56 *id.* 663 (1977), 77-1 CPD 383, where we stated that the RFP as issued should have contained a greatly reduced estimate of the number of files in a suspense file system, in order to eliminate the unfair competitive advantage arising from the incumbent's knowledge that the actual number of files in existence was considerably less than the number indicated in the RFP. We noted that the absence of an accurate estimate would operate to the competitive disadvantage of any offeror competing against the incumbent.

Unlike *Informatics*, we do not believe there has been a sufficient showing in the present case that the RFP as issued contained inaccurate information resulting in AIL, the incumbent contractor, having an unfair competitive advantage over any competitor. In this regard, AIL had accepted the requirement to service the ARM-2365 as a no-cost modification to its prior contract, the contractor maintains its proposal offered without exception to service all equipment, including the ARM-2365, and the contracting officer has contended that the pricing structure of the AIL proposal shows that the incumbent did not reduce its price due to prior knowledge of the ARM-2365 removal.

Moreover, it is our view, as previously noted, that the protest is essentially directed at the way the procurement was conducted after initial proposals were received. Rather than an unfair competitive advantage on the part of AIL, we believe that the thrust of the protest is that Telos was operating at an unfair competitive disadvantage because removal of the ARM–2365 allegedly had a favorable impact on its staffing plans but the Air Force did not give it the opportunity to reduce its price accordingly.

However, we have found no basis for objection to the Air Force's actions which precluded the protester from such an opportunity—that is, we have found no violation of ASPR § 3–805.1(v) in regard to making an award on the basis of the initial proposals, and in our view ASPR § 3–805.4(a) did not require the Air Force to amend the RFP after receipt of the initial proposals due to a change in requirements within the meaning of the regulation. In these circumstances, we are not persuaded that an unfair competitive advantage on the part of the incumbent contractor has been established.

VII. Claim for Proposal Preparation Costs

Telos also suggests that it should be granted recovery of its proposal preparation costs.

Bid or proposal preparation costs may be recoverable where it is shown that the Government's arbitrary and capricious action towards a claimant has denied the claimant fair and honest consideration of its bid or proposal. See, generally, *T&H Company*, 54 Comp. Gen. 1021 (1975), 75–1 CPD 345. In the present case, for the reasons previously indicated we have found no basis for objection to the award, and accordingly see no grounds to find the existence of arbitrary and capricious action necessary to satisfy the standard for recovery of proposal preparation costs. Accordingly, the claim is denied.

VIII. Conclusion

The protest is denied.

[B–190292]

Clothing and Personal Furnishings—Special Clothing and Equipment—Protective Clothing—Cooler Coats and Gloves—Meat Grader Employees—Ariculture Department

Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Depart-

ment may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination.

Uniforms—Civilian Personnel—Requirements—Administrative Determination—Agriculture Department

Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide frocks as uniforms for meat grader employees. If the Secretary of Agriculture determines that these employees are required to wear frocks as uniforms, appropriated funds may be expended for this purpose. Applicable law and regulations do not preclude negotiations on the determination.

Mileage—Travel by Privately Owned Automobile—Between Residence and Headquarters—Portal-to-Portal Mileage Allowance

Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee must bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement.

Mileage—Travel by Privately Owned Automobile—Rates—Administrative Determination of Rate Payable

Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires the Department of Agriculture to authorize the maximum mileage rate for meat grader employees who use their privately owned vehicles in connection with their work. The Federal Travel Regulations (FTR) require agency and department heads to fix mileage rates in certain situations at less than the statutory maximum. Hence, the proposed provision is contrary to the FTR.

In the matter of National Council of Meat Graders, AFGE—legality of bargaining proposals, March 28, 1978:

This action is in response to a request of September 27, 1977, from the Federal Labor Relations Council (FLRC) for a ruling by the General Accounting Office on certain proposed collective-bargaining agreement provisions involved in *American Federation of Government Employees, National Council of Meat Graders and U.S. Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch*, FLRC No. 77A-63. The agreement provisions were proposed to the Meat Grading Branch, United States Department of Agriculture, by the National Council of Meat Graders, American Federation of Government Employees (AFGE). They were determined to be non-negotiable by the Secretary of Agriculture. The AFGE then requested the FLRC to review the Secretary's determination and FLRC now seeks our opinion as to whether the proposed provisions are in conflict with applicable law, regulations, or Comptroller General decisions.

FIRST UNION PROPOSAL

The portion of the first union proposal determined to be non-negotiable by the Secretary of Agriculture provides:

> Section 22. "The employer agrees to furnish all necessary protective clothing such as gloves, frocks, and cooler coats * * *."

The FLRC has asked us to rule on:

> * * * (1) whether the portion of the proposal pertaining to protective clothing such as gloves and cooler coats, as intended to be implemented, conflicts with the holding in 51 Comp. Gen. 446 (1972) and applicable statutes; and (2) whether the portion of the proposal pertaining to protective clothing such as frocks, as intended to be implemented, conflicts with 5 U.S.C. § 5901 (1970).

At the outset we should point out the limits of our jurisdiction with regard to this matter. Our function is not to decide the broad question of which issues are, or are not, negotiable, because this is the responsibility of the FLRC. However, we are required by 31 U.S.C. § 74 to rule on the legality of expending appropriated funds. Hence, we shall confine our consideration to the latter question.

The Department of Agriculture considered cooler coats and gloves as protective clothing under occupational health and safety laws and regulations and considered frocks as uniforms under laws and regulations governing the furnishing of uniforms to employees. We believe this categorization is appropriate and we shall also consider them in this context.

Cooler Coats and Gloves

The Department of Agriculture found that cooler coats and gloves could not be considered as "uniforms" for the meat graders because such items did not satisfy the criteria established in Department of Agriculture Personnel Manual, chapter 594 (June 14, 1974), governing uniform allowances. The Department also found, relying on our decision 51 Comp. Gen. 446 (1972), that cooler coats and gloves could not be considered as "protective clothing" inasmuch as they are personal items of clothing and are not required to protect an employee engaged in hazardous work. The Department points out that, although there is a variance of temperatures from meat plant to meat plant, it believes the work environments of the employees of the Meat Grading Branch easily satisfy the standards prescribed by the Occupational Safety and Health Administration, Department of Labor, for safe and healthful working conditions.

Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 668 (1970), Federal agency heads are required to establish and maintain a comprehensive occupational safety and health program

consistent with the standards set forth in the Act. Section 668(a) of title 29 of the United States Code explicitly provides that:

> * * * The head of each agency shall (after consultation with representatives of employees thereof)—
>
> (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;
>
> (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees * * *.

Pursuant to authority contained in the above-quoted statute and Executive Order 11807, September 28, 1974, 39 F.R. 35559, the Secretary of Labor has promulgated Safety and Health Regulations for Federal Employees in 29 C.F.R. Part 1960. The regulations specify that "it is the responsibility of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standard promulgated under section 6 of the Act." Section 1960.1(a). Executive Order 11807 requires the heads of agencies to consult with employee unions and to provide for employee participation in the operation of agency safety and health programs. Such participation is to be consistent with Executive Order 11491, as amended. 29 C.F.R. § 1960.2(d). Each agency head is also required by Executive Order 11807 to designate an agency official to administer the agency's program and to give that official sufficient authority to represent the interest and support of the agency head. The designated official assists the agency head in taking steps to provide sufficient funds for necessary staff, equipment, material, and training to ensure an effective agency occupational safety and health program. 29 C.F.R. § 1960.16.

Our decision in B–174629, January 31, 1972, published at 51 Comp. Gen. 446, does not bar negotiations between an agency and a union with respect to safety and health programs. On the contrary, that decision makes it clear that protective clothing and equipment may be furnished by the Government if determined to be necessary under the Occupational Safety and Health Act of 1970, regardless of whether or not the purchase satisfies the requirements of 5 U.S.C. § 7903. We pointed out that the Secretary of Labor's general standard for personal protective equipment, in 29 C.F.R. § 1910.132(a), provides that protective equipment and protective clothing shall be provided, used, and maintained whenever necessary because hazards of processes or environment could cause injury or physical impairment.

Therefore, if the head of an Executive agency or department, or an official designated by him, determines that certain items of equipment or clothing are required to protect employees from the aforementioned hazards, the agency or department may expend its appropirated funds to procure such items. See B–187507, December 23, 1976.

Nothing in the law and regulations discussed above or our decisions, including 51 Comp. Gen. 446, *supra*, would serve to preclude negotiations on the determination required by the Secretary of Agriculture or his designee to procure cooler coats and gloves for the meat grader employees. In fact, 29 U.S.C. § 668(a) requires him to consult with representatives of his employees about the safety and health program of the Department and the implementing regulations of the Secretary of Labor further emphasizes that this shall be done consistently with the labor management relations program set up under Executive Order 11491. We conclude that the proposal as to cooler coats and gloves is not in conflict with the law, regulations, or our decisions, provided the required determination is made.

Frocks

We shall next examine the conditions under which frocks may be provided for meat grader employees as uniforms. Entitlement of Federal employees to uniforms and uniform allowances is governed by 5 U.S.C. § 5901 (1970). The implementing regulations for 5 U.S.C. § 5901 are contained in Bureau of the Budget (now Office of Management and Budget) Circular No. A–30, Revised August 20, 1966. Paragraph 4b of that circular provides:

b. *Deciding whether to furnish uniforms or to pay allowances.* Whenever the agency head determines that a group of employees is required to wear a uniform, he shall determine whether the best interests of the Government will be served by furnishing Government-owned uniforms to employees, or by paying uniform allowances for uniforms procured by employees or by a combination of both methods. In making his decision he shall consider the comparative cost, including administrative costs, of each alternative to the Government, as well as the comparative advantages of each alternative to employees. The decision may be effective as of the date it is made provided funds usable for this purpose are available; otherwise, the decision may be effective when funds become available.

From the foregoing, it is clear that an agency or department head must make a determination that a group of employees are required to wear uniforms before appropriated funds may be expended for this purpose. See 48 Comp. Gen. 678 (1969).

As with protective clothing discussed above, neither the law, regulations, or our decisions governing employee uniform allowances would serve to preclude negotiations on this matter. If the appropriate determination is made, we would interpose no objection to the proposed agreement provision regarding frocks. In this connection, we note that the Department's letter of July 12, 1977, states that the employer has determined that frocks do meet the criteria for uniforms and has requested authority to provide an allowance for frocks under 5 U.S.C. § 5901.

SECOND UNION PROPOSAL

The first and second paragraphs of the second union proposal determined by the Secretary of Agriculture to be non-negotiable provide:

> Section 27.1. "Employees using their private vehicles in the performance of their work will be paid mileage portal to portal when work is performed at one or more duty points.
> "The maximum mileage rate will be paid regardless of the number of miles an employee drives in the performance of their work."

The FLRC requests us to rule on:

> * * * whether these paragraphs of the proposal, as intended to be implemented, conflict with the Federal Travel Regulations or with prior Comptroller General decisions. * * *

Portal to Portal Mileage

The matter covered by the first paragraph of the second proposal, concerning mileage allowances from residence to official duty station and return for employees who use their private vehicles in connection with their work, has been the subject of several decisions of our Office. We have consistently held that employees must place themselves at their regular places of work and return to their residences at their own expense, absent statutory or regulatory authority to the contrary. 55 Comp. Gen. 1323, 1327 (1976); 36 *id.* 450 (1956); and B–185974, March 21, 1977.

Because the above-quoted proposal concerning portal-to-portal mileage allowances could be construed as making the Government responsible for providing travel expenses to meat grader employees for travel between their residences and their official headquarters without exception, we hold that the above-quoted proposal is contrary to law and our decisions and, therefore, may not be included in an agreement. 54 Comp. Gen. 312, 318 (1974). However, we are of the opinion that the law, regulations and our decisions governing such travel expenses would not serve to preclude the negotiation of an agreement provision that would conform to the guidance set forth in our decision *Matter of Department of Agriculture Meat Graders–Mileage*, B–131810, January 3, 1978, covering travel expenses for meat grader employees.

Maximum Mileage Rate

We turn now to the proposal that requires the Department of Agriculture to pay meat grader employees the maximum mileage rate regardless of the number of miles they drive their privately owned vehicles in connection with their work. Pursuant to paragraphs 1–2.2c (3), 1–4.2a and 1–4.4 of the Federal Travel Regulations (FPMR 101–7), as revised May 1977, agency and department heads have been restricted as to the rates they may authorize in certain situations. These

regulations requires that the determination as to the mileage rate to be paid depends upon whether the use of the private vehicle is advantageous to the Government. Accordingly, this proposed agreement provision is contrary to the Federal Travel Regulations and, therefore, may not legally be included in an agreement.

[B-191155]

Appropriations—Availability—Gifts—To Attendees to EPA Exhibit

Novelty plastic garbage cans containing candy in the shape of solid waste were distributed at an exposition run by an association, to attract attendees to the Environmental Protection Agency (EPA) exhibit on the Resource Conservation and Recovery Act. An expenditure therefor does not constitute a necessary and proper use of EPA's appropriated funds because these items are in the nature of personal gifts.

In the matter of novelty garbage cans distributed by Environmental Protection Agency, March 29, 1978:

A certifying officer of the Environmental Protection Agency (EPA) has requested our opinion as to the propriety of certifying for payment a voucher in favor of Lewis C. Weisbradt, Inc., in the sum of $120, covering the cost of 1,152 plastic novelty garbage cans. The garbage cans were filled with pieces of candy representing items of solid waste such as tin cans, shoes, and tires, and were distributed at an EPA exhibit during the International Waste Equipment and Technology Exposition, sponsord by the National Solid Waste Management Association in New Orleans, Louisiana. These novelty garbage cans were used to help attract attention to EPA's exhibit where information on solid waste management was disseminated to attendees at the conference. The publications officer of EPA's Office of Solid Waste (OSW) explained the purchase of these miniature cans as follows:

> The plastic garbage cans containing candy in the shape of household trash were given out to attendees of the recent National Solid Waste Management Association meetings in New Orleans, not as gifts. They were certainly too insignificant to qualify as gifts, however, the little cans certainly did attract convention attendees to our exhibit where the attendees then had an opportunity to learn about the provisions of the new Resource Conservation and Recovery Act, to receive copies of the *Federal Register* indicating the first steps OSW is taking to implement the Act, and to see samples of many OSW publications. The little garbage cans were definitely part of our exhibit promoting Solid Waste Management.

The solid waste activities of EPA are carried out under the authority of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. §§ 6901 *et seq.* (1976). The strategy for dealing with

the solid waste management problem focuses on (1) achieving acceptable and safe waste management practices protective of public health and environment and (2) conserving natural resources through the institution of resource recovery programs. The act, as amended, recognizes the necessity for full Federal action through financial and technical assistance and leadership. To implement this strategy, EPA provides technical asistance to State and local Governments to help them find solutions to solid waste management problems, issues guidelines and recommended procedures, and undertakes demonstrations of advanced technology. See H.R. Rep. No. 94–1220, 94th Cong., 2nd Sess. 19 (1976).

The appropriation (Public Law 94–378, August 9, 1976, 90 Stat. 1099), that would be charged with payment for these items does not specifically provide for the distribution of personal gifts or novelty items to individuals. In order to qualify, therefore, as a proper expenditure, it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the EPA. See 55 Comp. Gen. 346 (1975).

We have previously held that an expenditure by the Small Business Administration (SBA) for the distribution of decorative ashtrays to Federal officials at the SBA-sponsored conference was unauthorized. The ashtrays were distributed with the intent that the SBA seal and lettering on the ashtrays would generate conversation relative to the conference and serve as a continuing reminder to the officials of the purposes of the conference, thereby furthering SBA objectives. We held that those items were in the nature of personal gifts, and therefore, the expenditure did not constitute a necessary and proper use of appropriated funds. 53 Comp. Gen. 770 (1974). Similarly, we have held that appropriated funds could not be used to purchase and distribute cuff links and bracelets as promotional items under the International Travel Act of 1961. Such items also belong in the category of personal gifts, we said, and did not constitute a necessary and proper use of funds appropriated to carry out that act. B–151688, December 5, 1963. In another case, we held that a voucher covering the cost of decorative key chains given to educators attending Forest Service-sponsored seminars, with the intent that the symbol on the key chains would generate future responses from participants, may not be certified for payment since such items are in the nature of personal gifts. 54 Comp. Gen. 976 (1975).

It is difficult to distinguish the novelty garbage cans here involved from decorative ashtrays, cuff links, or key chains, all of which were

termed "personal gifts" in our previous cases. Even the EPA publications officer does not contend that the little garbage cans were themselves communicating information about solid waste disposal problems. While we do not doubt her statement that the free candy novelties induced a great many people to visit the EPA booth, there is nothing to show that without the distribution of the novelties, the EPA would have been unable to reach its intended audience and disseminate its informational brochures.

Our Office has long held that appropriated funds may be used for objects not specifically set forth in an appropriation act only if there is a direct connection between such objects and the purpose for which the appropriation was made, and if the object is essential to the carrying out of such purposes. 27 Comp. Gen. 679, 681 (1948); 55 *id.* 346, 347 (1975). In this case, as in the other situations described above, no such direct connection between the novelties and the agency's mission has been demonstrated. We therefore cannot approve the use of appropriated funds for the procurement of novelty garbage cans. Accordingly, the voucher covering this expenditure may not be certified for payment.

[B–191216]

Foreign Service—Retirement—Postponement of Return to U.S.

Foreign Service employee who retired overseas has delayed return travel more than 7 years even though State Department travel regulations require that such travel must begin not later than 18 months after separation. State Department regulation granting exceptions to travel regulations where allowances are exceeded or excess costs are incurred provides no basis for granting exceptions to time limitation on return travel, and former employee may not be granted any further time extensions.

In the matter of Robert R. Schott—extension of time limitation for beginning return travel from overseas post, March 29, 1978:

This action is in response to the request for an advance decision dated January 26, 1978, from Mr. Lawrence J. Dupre, Deputy Assistant Secretary for Operations, Department of State, concerning the request of Mr. Robert R. Schott, a former employee of the Department of State, for an extension of the time limitation for beginning return travel and shipment of household goods to the United States from an overseas post.

The report from the Department of State indicates that Mr. Schott retired from the Foreign Service in 1970 while stationed in Iran and that since that time he has been living and working in Iran as a private

citizen. It appears that Mr. Schott was eligible for travel and shipment of his household goods at the time of his retirement. However, Mr. Schott has delayed his return travel and has requested and been granted extensions in his travel authorization of some 90 months (7 years, 6 months). The current time limit extension expires on April 30, 1978, and the Department of State has expressed reluctance to grant another extension in light of our decision in 52 Comp. Gen. 407 (1973).

Our Office has long held that return travel and transportation from a post of duty outside the continental United States must be clearly incidental to the termination of an assignment and should commence within a reasonable time. 52 Comp. Gen. 407 (1973); 28 *id.* 285, 289 (1948); *James P. O'Neil*, B–182993, August 13, 1975; and B–177455, June 22, 1973. We have further held that acceptance of private employment overseas generally requires the view that subsequent return travel is not incident to the separation. 37 Comp. Gen. 502 (1958).

These decisions have involved employees who were authorized return travel under the provisions of what is now 5 U.S.C. § 5722 (1976) and the implementing regulations currently contained in the Federal Travel Regulations (FTR) (FPMR 101–7) (May 1973). The regulations implementing this statutory provision have required that travel must begin within 2 years, without exception, and our decisions have applied this time limitation to return travel following separation. See FTR para. 2–1.5(2); 28 Comp. Gen. 285, 289, *supra;* and *O'Neil*, *supra.* However, the provisions of 5 U.S.C. § 5722 and the implementing regulations are not applicable to employees in the Foreign Service (see 5 U.S.C. § 5722(d)) and, therefore, our decisions requiring that return travel be incidental to the separation and that it commence within a reasonable time are not directly applicable to the present case.

The authority for payment of the travel and related expenses of officers and employees of the Foreign Service is contained in 22 U.S.C. § 1136 (1970). Under that section, an employee who is separated from the Foreign Service is entitled to travel and shipment of his household goods to the place where he will reside *in accordance with regulations prescribed by the Secretary of State.* The applicable regulations, contained in Volume 6 of the Foreign Affairs Manual (FAM), section 132.2–2, provides, in pertinent part, as follows:

Separation From the Service

When an employee is separated from the Foreign Service and qualifies for travel and shipment of effects * * *, the actual departure of the employee, the departure of the employee's family, and the transportation of all effects shall not be deferred more than 12 months * * *. The time limitation will be calculated

from the employee's last day in pay status, unless an earlier or later limitation is specified in the travel authorization or the time limitation is extended. *Such later limit or extension shall not exceed 18 months after the employee's last day* in pay status. [Italic supplied.]

Despite the language of the regulation that time extensions shall not exceed 18 months, Mr. Schott has been granted time extensions which have extended for a period of 90 months the deadline for the departure of himself, his family, and his household goods. The reasons why such extensions have been granted are not entirely clear, but Mr. Schott's delayed departure is apparently related to his private employment in Iran.

We have been informally advised that the time extensions have been granted to Mr. Schott under the authority of 6 FAM 121.1–4 which provides, in pertinent part, as follows:

Exceptions to Foreign Service Travel Regulations * (*State/USIA*) *

a. Although employees are responsible for strict compliance with these regulations, there are instances in which allowances are exceeded or excess costs are incurred for travel, transportation, or storage of effects, despite all reasonable precautions taken by the employees * * *. The Department * and USIA have * established special committees for reviewing requests for relief and recommending appropriate action when it has been conclusively demonstrated that such excesses have occurred through no fault of the employee, or when an increase in the limited shipping allowance is fully justifiable. Employees who have unavoidably incurred excess charges for travel, transportation, or storage of their effects, or who can justify an increase in their limited shipping allowance, may submit their requests for appropriate relief to the Department * or USIA (as pertinent) for consideration by these committees * * *.

This regulation provides for the granting of exceptions to the Foreign Service Travel Regulations where allowances are exceeded or excess costs are incurred but makes no reference to granting exceptions under any other circumstances. Therefore, we do not believe that the provisions of 6 FAM 121.1–4 provide authority for the granting of exceptions to the time limitation contained in 6 FAM 132.2–2, and we find no basis for the Department of State to grant Mr. Schott any further time extensions to begin his return travel.

[B–189189]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Subsistence Expenses—Husband and Wife Both Civilian Employees

Husband and wife, both civilian employees of Marine Corps in Philadelphia, were authorized temporary quarters subsistence expenses incident to transfer to Albany, Georgia. Where transfers were approximately 2 weeks apart, wife was entitled to temporary quarters subsistence expenses as employee as of date husband departed shared temporary quarters at old station for new duty station. While Federal Travel Regulations para. 2–1.5c provides that where members of

immediate family are entitled to allowances incident to transfer only one is eligible as employee, restriction is only applicable to transfers which occur at same time.

In the matter of Roberta J. Shoaf—temporary quarters subsistence expenses—husband and wife both employees, March 30, 1978:

This action is in response to a request for an advance decision by Mr. Leon A. Guimond, a disbursing officer with the United States Marine Corps Logistics Support Base, Atlantic, in Albany, Georgia, concerning whether Ms. Roberta J. Shoaf, a civilian employee of the Marine Corps, is entitled to payment of temporary quarters subsistence expenses (TQSE) for the period January 6 through January 13, 1976, in the amount of $227.67.

The record shows that Ms. Shoaf and her husband were both employees of the Marine Corps Supply Activity, Philadelphia, Pennsylvania, and that they were both authorized a transfer to the Marine Corps Logistics Support Activity, Albany, Georgia. Incident to this transfer, Ms. Shoaf and her husband were initially scheduled by the agency to depart Philadelphia on December 24, 1975. However, on December 3, 1975, the Marine Corps rescheduled Ms. Shoaf's departure from Philadelphia from December 24, 1975, to January 13, 1976. In connection with this change in her travel orders Ms. Shoaf's new order dated December 18, 1975, in pertinent part, authorized that she be paid the full rate for temporary quarters allowances for the entire period that she would remain in temporary quarters in the Philadelphia area. Ms. Shoaf and her husband both vacated their permanent residence in the Philadelphia area on December 22, 1975, and on December 23, 1975, occupied temporary quarters in Haddon Heights, New Jersey. On December 29, 1975, Mr. Shoaf departed the Philadelphia area and moved into a permanent residence in the Albany, Georgia, area at his new headquarters on January 5, 1976.

Concerning the length of time for entitlement to temporary quarters allowances at Government expense in connection with a transfer para. 2–5.2(f) of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) provides in pertinent part as follows:

* * * The period of eligibility shall terminate when the employee or any member of his immediate family occupies permanent residence quarters or when the allowable time limit expires whichever occurs first.

Accordingly, the agency has determined that Ms. Shoaf's entitlement to temporary quarters subsistence expenses terminated on January 5, 1976, the date on which her husband occupied permanent quarters at his new duty station in Albany, Georgia. The agency asserts

that Ms. Shoaf's amended transfer orders of December 18, 1975, authorizing Ms. Shoaf full temporary quarters subsistence expenses were invalid since as a dependent family member of a Government employee, Ms. Shoaf was not entitled to a separate allowance for the expenses of temporary quarters. The agency cites as authority for limiting Ms. Shoaf's entitlement to temporary quarters subsistence expenses Volume 2 of the Joint Travel Regulations (JTR) para. C13005–2a which provides in pertinent part as follows:

2. REIMBURSEMENT LIMITATION

a. *General.* When in the same household an employee's spouse or other dependent also is an employee, eligibility for temporary quarters subsistence expenses allowance will be limited to that for an employee with dependents. Separate entitlement will not be allowed for each as an employee. The amount which may be reimbursed will be the lesser of either the actual amount of allowable expenses incurred for each 10-day period or the amount allowable in accordance with the periods covered in subpars. b through d.

The above-cited regulation is apparently based on para. 2–1.5c of the FTR which provides in pertinent part as follows:

c. *Two family members employed.* Except as provided in 2–1.5h(3)(a), if two or more members of an immediate family are entitled to allowances under these regulations as Government employees incident to movements between official stations, their old and new stations, respectively, being located close together, the allowances authorized in the regulations will apply only to one member; the other is eligible as a family member only. The same limitations apply to new appointees, overseas employees returning to places of actual residence for separation, and combinations of employees otherwise eligible.

We do not believe that the restriction on reimbursement incident to a transfer contained in para. 2–1.5c of the FTR is applicable in this case. While not explicitly stating so, FTR para. 2–1.5c is apparently intended to apply only to those situations where Government employees, who are members of the same immediate family, are transferred at the same time. The apparent purpose of the restriction is to preclude duplicate payments for the same purposes for expenses incident to what is essentially a single relocation. Paragraph 2–1.5c of the FTR does not operate to preclude the separate authorization of temporary quarters subsistence expenses where members of the same immediate family who are Government employees are transferred at distinctly different times and the expenses of temporary quarters are incident to each employee's transfer.

Since Ms. Shoaf resided with her husband in temporary quarters in the Philadelphia area until December 28, 1975, in order to prevent a duplicate payment where reimbursement for temporary quarters subsistence expenses is restricted to that of a dependent. However, for the period December 29, 1975, until January 13, 1976, Ms. Shoaf is entitled to temporary quarters subsistence expenses as an employee

in connection with her transfer as was authorized in her amended travel order of December 18, 1975.

In accordance with the above, the voucher in the amount of $227.67 may be certified for payment if otherwise proper.

[B-190896]

Pay—Additional—Parachute Duty—Active Duty for Training Status

Under current regulations member of Reserves receiving parachute pay while assigned to parachute duty on inactive duty status is not entitled to receive such incentive pay while assigned to active duty for training where the latter position is not designated as parachute duty. Secretary of Defense advised that regulations may be changed to provide parachute pay in appropriate circumstances.

In the matter of Lieutenant Colonel Richard G. Weinberg, ARNG, March 30, 1978:

We have received a request for an advance decision from the Finance and Accounting Officer, Headquarters Carlisle Barracks, Carlisle Barracks, Pennsylvania, regarding the entitlement of Lieutenant Colonel Richard G. Weinberg, 363-40-3202, a member of the Florida Army National Guard, to parachute pay during the period he was on full-time training duty (FTTD) at the United States Army War College, Carlisle Barracks. The request was forwarded by the Chief, Finance Services Division, Office of the Comptroller of the Army, and was assigned Control Number DO-A-1280 by the Military Pay and Allowance Committee, Department of Defense.

Colonel Weinberg was a member of the Florida National Guard assigned to a unit in which he was eligible for and did receive hazardous duty incentive pay by reason of being assigned to a parachute position. Colonel Weinberg was ordered by the Department of Military Affairs, of the State of Florida, to full-time training duty (FTTD) at the United States Army War College for the period June 13-25, 1976, in order to attend a course of instruction. These orders stated that he was entitled to parachute pay. However, this position did not require the performance of hazardous duty. The Finance and Accounting Officer of Carlisle Barracks has determined that Colonel Weinberg was not entitled to hazardous duty parachute pay for this period of active duty. However, due to the request of the United States Property and Fiscal Officer for Florida that the matter be presented to us, the Finance and Accounting Officer presents the following specific questions:

a. Is the definition of a permanent station as stated in paragraph 4-1b, AR 37-106, Army Travel Regulation, also applicable to military pay and allowances, DODPM?
b. Are reserve or national guard members who have met the hazardous duty performance requirements at their inactive duty training stations and who are ordered to ADT, Annual Training (AT), or FTTD in a non-hazardous duty field entitled to hazardous duty incentive pay for the period of ADT, AT, or FTTD?
c. Does the order assigning a member to hazardous duty at his inactive duty station remain in effect when he is ordered to ADT, AT, or FTTD in a non-hazardous duty field?
d. In this specific case, does entitlement to parachute pay for the period of FTTD exist?

The question presented is whether a National Guard or Reserve member who is receiving parachute pay as a result of the duties he performs in his National Guard or Reserve unit while not on extended active duty is entitled to such pay when assigned to a limited period of active duty with a unit which does not qualify for parachute duty pay.

Incentive pay for performance of hazardous duty is authorized by 37 U.S.C. § 301 (1970). Under 37 U.S.C. § 301(a)(6), hazardous duty incentive pay may be allowed members who are required to perform parachute jumps as an essential part of their military duty.

Executive Order No. 11157, June 22, 1964, as amended, 37 U.S.C. 301 note, implementing section 301 provides at section 108(d) that:

Members of reserve components of the uniformed services who have complied with the requirements prescribed in this section shall be entitled to receive incentive pay for both active-duty and inactive-duty training performed during such period.

Thus, a member of the Reserves may receive parachute pay while in a parachute position and is entitled to basic pay, such as when on FTTD, annual training (AT), or active duty for training (ADT), provided he otherwise qualifies.

Colonel Weinberg made his last jump on June 6, 1976, while on inactive duty training, and was qualified for incentive pay for the quarter of April-May-June in accordance with the applicable regulations.

However, even though a member is otherwise qualified for parachute pay such pay terminates when he is assigned to a position in which parachute duty is not required. That rule is stated in the DOD Military Pay and Allowances Entitlements Manual (DODPM) which is in further implementation of the controlling statute and Executive order. Specifically, paragraph 20301, DODPM, provides in pertinent part:

When the requirements have been met, entitlement to hazardous duty incentive pay commences on the date the member reports for and enters on duty in compliance with his orders. Entitlement ceases on the effective date published in orders for termination of such duty or on the date the member is detached from and no longer required to perform the hazardous duty, whichever occurs first.

Table 2-3-5 of DODPM contains the rule that if a member is under orders to perform a hazardous duty, and is reassigned on permanent

change of station (PCS), including temporary duty in conjunction with the PCS, with the orders to perform the hazardous duty remaining in effect, and the member meets the performance requirements, the incentive pay entitlement is not affected by the PCS. However, note 3 to the table states that orders to perform hazardous duty remain in effect only when the member is being reassigned PCS successively to hazardous duty. If the new position does not require hazardous duty as an essential part of military duty, the orders to perform the hazardous duty terminate on the date of departure from the old duty station, and incentive pay is stopped as of that date. This rule is predicated upon the requirement of 37 U.S.C. 301, that incentive pay may be allowed only when that duty is an essential part of the member's military duty. It is recognized, however, that a member who is not reassigned but performs temporary duty, does not lose hazardous duty pay by virtue of the temporary duty assignment.

Relating those rules to National Guard and Reserve officers, the status of such members under travel regulations has been used as determinative. Under those regulations when a Reserve is ordered to active duty for training, his training duty station is the permanent station, regardless of the length of time he remains there. AR 37–106, Ch. 4–1(b). In B–166980, July 14, 1969, a Reserve officer claimed parachute pay for periods he was ordered to active duty for training, not involving parachute jumping, at The Pentagon. During intervals between the periods of active duty for training, he made inactive duty parachute jumps with his Reserve unit. We denied his claim for parachute pay during the periods of active duty, stating:

> When a Reserve officer serves on active duty for training he ordinarily is not serving on temporary duty away from a designated post of duty. The place where duty is directed to be performed has been viewed as his designated post of duty no matter how short a period of active duty for training he was to perform. In such circumstances, unless he is in a "parachute duty" status while on active duty for training within the meaning of that term as defined in the regulations, there is no basis for payment of parachute pay for any period of active duty for training.
>
> Accordingly, in the absence of orders designating your active duty at the Pentagon as duty in the "parachute position" as contemplated by the regulations, we must conclude that payment of parachute pay during such active duty is not proper.

Accordingly, under current regulations as they have been applied in decisions of this Office, Colonel Weinberg is not entitled to parachute pay for the period of his FTTD at the United States Army War College, Carlisle, Pennsylvania. The voucher submitted may not be paid and is retained in our file.

In answer to question a, while our conclusion that parachute pay may not be allowed in this case is consistent with the cited regulations as they exist, we do not intend to imply that the regulation regarding

permanent duty status for travel purposes would be controlling with regard to entitlement to hazardous duty pay if there were specific provisions in applicable regulations regarding hazardous duty pay which permitted a different conclusion. As has been noted, the performance of periods of temporary duty in nonhazardous duty positions does not terminate the hazardous duty pay entitlement of members on extended active duty.

Whether or not the Department wishes to prescribe regulations authorizing hazardous duty pay in circumstances such as those presented is for administrative determination on a prospective basis. In any case, in view of the uncertainty created by the current regulations the Department may wish to revise the hazardous duty pay regulations to provide more specific rules to be applied to National Guard and Reserve members who are entitled to parachute pay when ordered to active duty for training or full-time training duty. It is, however, implicit that members ordered to active duty or to periods of active duty for training which amount to reassignments must qualify for parachute pay by virtue of the duties they perform on such assignments.

In view of the above, questions b and c as well as question d regarding the case at hand are answered in the negative.

[B-190035]

Contracts—Protests—Administrative Reports—Failure by GAO to Request—Reconsideration Request—Fact *v.* Law Basis

General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto.

Contracts—Offer and Acceptance—Acceptance—Effect—Scope of Contractor's Obligation

Where solicitation language does not require submission of information concerning preventive maintenance prior to award, bidder's insertion of bid price in invitation for bids for such maintenance constitutes an offer to provide the required maintenance and acceptance of bid results in binding obligation to perform in accordance with Government's requirements.

In the matter of the Storage Technology Corporation—reconsideration, March 31, 1978:

By letter of December 16, 1977, Storage Technology Corporation (STC) requests a second reconsideration of our decision, *Storage*

Technology Corporation, B–190035, October 3, 1977, 77–2 CPD 257, affirmed November 21, 1977, 77–2 CPD 388.

The decision dealt with a solicitation which required the contractor to provide preventive maintenance on the equipment it furnished to the Government under the contract. The solicitation stated as follows:

	Quantity	Unit	Unit price	Amount
0003 maintenance for items 0001 and 0002 optional periods:				
(1) First year	12	mo		
(2) Second year	12	mo		
(3) Third year	12	mo		
(4) Fourth year	12	mo		
(5) Fifth year	12	mo		

Item C of the schedule furnished specifications for the two types of maintenance (on-call and preventive) called for under Item 0003. The protest concerned the meaning to be ascribed to the following segment of Item C.

Preventive Maintenance

The Contractor shall specify in writing the frequency, duration and quality of preventive maintenance. The quality shall be comparable to that provided by the Contractor for identical leased equipment.

The solicitation required each bidder to bid both the equipment items (Items 0001 and 0002) and the maintenance item (Item 0003) and warned that failure to bid any of the items would render the bid nonresponsive. Both STC and Telex Computer Products, Inc. (Telex), the low bidder, bid all three items as required. However, unlike the protester, the low bidder did not specify in its bid the frequency, duration or the quality of preventive maintenance it normally provides. The protester argued that the failure to provide such information rendered the bid nonresponsive, while the agency argued that the information could be supplied by the "Contractor" after the award was made. We agreed with the agency, noting that the solicitation called for preventive maintenance "comparable to that provided by the contractor for identical leased equipment" and included a liquidated damages clause in the event the equipment was inoperative for a specified period of time. We therefore concluded that information pertaining to frequency, duration and quality of preventive maintenance was not a material condition of the contract and could be provided after the award was made.

Our decision was affirmed on November 21, 1977. STC requests this second reconsideration on the basis that the affirming decision of No-

vember 21 was "premature" and did "not accord with administrative due process" because it was rendered before STC responded to the Telex reply to STC's initial request for reconsideration. As stated by STC:

> * * * On October 12, 1977 STC requested * * * [reconsideration]. On October 26, 1977, Telex filed its reply to the * * * request * * * . While [STC] was awaiting the reply of the [procuring agency], in order that it could simultaneously respond to the replies of both the [procuring agency] and Telex, STC received [the decision of November 21] * * * . In other words, despite the fact that the [agency] had not submitted its reply memorandum, and that STC had not responded to the reply of Telex, and had not received the reply of the [agency], your Office rendered its decision of November 21, 1977.

STC misunderstands the procedures followed by this Office when reconsideration of a bid protest decision is requested. A request for reconsideration based on alleged errors of fact in the decision for which reversal or modification is sought will normally trigger a request for a response from the contracting agency so that factual matters can be resolved on the basis of a complete record containing "both sides of the story." However, when it is alleged that a decision is erroneous as a matter of law, and when our preliminary review of the statements made in support of the allegation do not lead us to that conclusion, we would see little need for an agency response. In other words, we would not normally request an agency response when it appears from the record in the case and from the submission of the party requesting reconsideration that the prior decision is not legally erroneous since that would unnecessarily delay final resolution of the matter and thus would be inconsistent with a basic aim of our Bid Protest Procedures (4 C.F.R. Part 20)—resolving bid protest disputes as expeditiously as possible.

In this case, STC's first request for reconsideration alleged that we legally erred in concluding that the Telex bid was responsive. However, we saw nothing in STC's submission which led us to believe that the prior decision was legally unsound. Consequently, we did not request a response from the agency. Although we did receive a response from Telex, the response was unsolicited and apparently was submitted after STC furnished Telex a copy of the reconsideration request. At no time during the approximately three weeks that elapsed between receipt of the Telex response and issuance of our decision were we informed that STC desired to submit a response to the Telex comments or that it anticipated receiving a copy of a response from the contracting agency. Accordingly, we cannot agree that issuance of our November 21 decision was "premature" or inconsistent with any reasonable standards of fairness.

Aside from the procedural allegation discussed above, STC's main point seems to be that our two prior decisions never addressed the central issue of whether, in the absence from the Telex bid of the written statement on the frequency, duration and quality of preventive maintenance, Telex obligated itself to perform any preventive maintenance. We think it is eminently clear from our prior decision that we view the Telex bid as obligating the firm to perform the maintenance required by the solicitation. However, we will briefly review the basic principles on which our decisions are predicated.

A bid, to be accepted, must constitute an unequivocal and unambiguous offer to furnish what the Government says it wants on the terms and conditions the Government sets forth. *See*, e.g., 46 Comp. Gen. 434 (1966); Shnitzer, Government Contract Bidding 237 *et seq.* (1976). Generally, a signed bid containing a bid price will constitute such an offer. See *Nordam Division of R. H. Siegfried, Inc.*, B–187031, January 4, 1977, 77–1 CPD 3.

Where, however, the Government's solicitation requires a bidder to do more than enter a bid price and sign the bid, a bidder generally must comply with the additional requirement. For example, where a solicitation requires the submission of descriptive data so that the Government can determine exactly what the bidder proposes to furnish, a bid submitted without such data will be rejected as nonresponsive. 40 Comp. Gen. 132 (1960). The reason, of course, is that the data is required to be part of the offer; acceptance of a bid not accompanied by such data would not result in the legal obligation to perform sought by the Government.

On the other hand, the Government may require the submission of data which is not intended to be a part of the "bargain" between the Government and the bidder; rather, in that situation, the data is requested for informational purposes, such as for use in determining bidder responsibility. See, e.g., *Cubic Western Data*, 57 Comp. Gen. 17 (1977), 77–2 CPD 279; 39 Comp. Gen. 655 (1960). Since the data in such a case has no bearing on a bidder's legal obligation to perform upon acceptance of the bid, it is not legally required to be a part of the bidder's offer, and the bidder's failure to submit the data with the bid properly may be waived or cured after bid opening.

We do not read the quoted segment of Item C of the solicitation in this case as establishing a requirement for the submission of information which was to be a part of the resulting contract. The solicitation language itself did not provide that failure to submit the information with the bid would preclude consideration of the bid, *see* 36 Comp.

Gen. 376 (1956), did not otherwise require submission of the Item C information with the bids, and in fact did not require "bidders" to submit the information at all. Rather, it called for the submission of written data by the "contractor" and thus, as we interpret it, established only a post-award contractual requirement for contract administration purposes so that the agency would know what to expect and how often to expect it during the course of ongoing operations. Accordingly, we think it is clear that the procuring activity did not intend to evaluate the "frequency, duration and quality of preventive maintenance" in determining the awardee but rather, in this formally advertised procurement, it merely sought a low bid offering to furnish equipment (Items 1 and 2) and maintenance on that equipment (Item 3).

We think that the solicitation was sufficiently definite so as to give rise to a binding commitment to furnish necessary maintenance upon acceptance of a bid which did not contain the data mentioned in Item C. The statement in Item C establishes a requirement for a certain level or quality of maintenance. The submission of a bid on Item 0003 represents not only a bidder commitment to provide that level of maintenance, but also a commitment to furnish maintenance of whatever frequency and duration is required to keep the equipment in the operating condition which is satisfactory to the agency. Therefore, in accordance with our interpretation of this solicitation and with the principles discussed above, we think that by inserting prices next to line Item 0003, a bidder unequivocally offered to furnish the maintenance required by the agency. Thus, the fact that one bidder did not include information about preventive maintenance in its bid did not in any way negate that bidder's offer to furnish required maintenance. Accordingly, we cannot agree with the protester that acceptance of the Telex bid did not result in a legal obligation to provide the maintenance required by the invitation.

For the foregoing reasons, the decision of October 3, 1977, is affirmed.

[B-191300]

Payments—Advance—State Lands—Leased by Federal Government—Rent

The advance payment of rent, on annual basis, under proposed lease of land with the State of Idaho is not in contravention of the prohibition against advance payments in 31 U.S. Code 529 since possibility of loss is remote where a State is the recipient.

In the matter of Air Force request for advance decision, March 31, 1978:

The Deputy Director, Plans and Systems, of the Department of the Air Force, by letter dated February 1, 1978, has forwarded to our Office a request for an advance decision as to the propriety of annual advance payment of rent under a proposed real estate lease with the State of Idaho.

It is reported that the Seattle District, Corps of Engineers, Department of the Army, has been negotiating with the State of Idaho since May 5, 1977, for the renewal of Lease No. DACA67–5–73–196. Under the proposed renewal agreement, the State of Idaho is to continue to lease to the Government 520 acres, more or less, located at Mountain Home Small Arms Range, Mountain Home AFB, Idaho, for use as a "clear zone" in compliance with safety regulations. After an initial term of 6 months, the proposed lease is to remain in force from year to year until June 30, 1982, unless the Government gives notice of termination or adequate appropriations become unavailable. Annual payment of rent under the lease is to be made by the Accounting and Finance Officer at Mountain Home AFB.

The State of Idaho has refused to sign the proposed lease without a provision for advance payment of rent, insisting that, under Idaho Code § 58–305, all leases of State land are conditional upon the payment of rent annually and in advance.

Advance payments generally are prohibited by the provisions of 31 U.S.C. § 529 (1970). While this section has been interpreted as prohibiting advance payments under leasehold interests, 19 Comp. Gen. 758, 760 (1940), it has been recognized that the primary purpose of the prohibition against advance payments is to preclude the possibility of loss to the Government in the event a recipient of advance payments should fail to perform or refuse or fail to refund moneys advanced. Consequently, having due regard for the established responsibility of State governments, and since danger of loss is minimized where a State or agency thereof is the recipient, we have consistently authorized advance payments to States. 39 Comp. Gen. 285 (1959); 25 id. 834 (1946); B–118846, March 29, 1954; B–109485, July 22, 1952; B–65821, May 29, 1947; B–36099, August 14, 1943; and B–35670, July 19, 1943.

We note that, once executed, the lease requires no further active participation or performance by the State. The possibility of the State's failure to perform, therefore, is remote.

Accordingly, we have no objection to the annual advance payment of rent under the proposed lease.

INDEX

JANUARY, FEBRUARY, AND MARCH 1977

LIST OF CLAIMANTS, ETC.

	Page
Agency for International Development	300
Air Force, Acting Asst. Secretary	266
Air Force, Dept. of	201, 339
Air Force, Deputy Director	400
American Air Filter Co., Inc	285
American Federation of Government Employees	226, 380
Analysis & Computer Systems, Inc	240
Anderson, H. D	368
Army, Acting Asst. Secretary	306
Army, Dept. of	392
Bitterman, Mary E	339
Burstein, Larry	281
CADCOM, Inc	290
Chown, Thomas H	281
Commodity Futures Trading Commission	214
Denton, Frank H	300
Drug Enforcement Administration	281
Environmental Protection Agency	385
Federal Energy Administration, Administrator	316
Federal Labor Relations Council	226, 380
Federal Railroad Administration	226
Ferguson, Jerel P	281
Fortec Constructors	312
Francis & Jackson, Associates	245
General Elevator Co., Inc	257
Gough, John S	256
Health, Education, and Welfare, Dept. of	205
Health, Education, and Welfare, General Counsel	357
Informatics, Inc	218
Interior, Asst. Secretary of	259
Internal Revenue Service	325
Internal Revenue Service, Asst. Commissioner	298
Internal Revenue Service, Commissioner	321
Irizarry, Luis A	270
Isles Industries, Inc	235
Justice, Dept. of	281
Klimes, Carmen K	339
ManTech of New Jersey Corp	290
Marine Corps, United States	390
National Council of Meat Graders	380
National Institutes of Health	205
National Oceanic and Atmospheric Administration	368
New Hampshire-Vermont Health Service	348
New Haven Ambulance Service, Inc	361
Norsworthy, William D	325
Olin Corp	210
Operations Research, Inc	290
Owens, D. N., Co	232
Palmetto Enterprises	272
Rainbolt, John V	214
Schott, Robert R	387
Shea, Patrick J	281
Shoaf, Roberta J	390
Southern Maryland General Contractors, Inc	277
Stacor Corp	235
State, Dept. of	256
State, Deputy Asst. Secretary of	387
Storage Technology Corp	395
Sutphen, James L	201
Taylor, Harris J	343
Telecommunications Management Corp	252
Telos Computing, Inc	371
Transportation, Dept. of	226
Treasury, Dept. of	270
Veterans Administration	228
Weinberg, Richard G	392
Weisbradt, Lewis C., Inc	385
Westinghouse Electric Corp	329
Wilson, Arthur C	281

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page
1960, July 12, 74 Stat. 407	214
1973, Dec. 18, 87 Stat. 748	206
1976, Sept. 22, 90 Stat. 1293	313
1976, Aug. 9, 90 Stat. 1099	386

UNITED STATES CODE

See, also, U.S. Statutes at large

	Page
5 U.S. Code 5343 note	260
5 U.S. Code 5504(b)	302
5 U.S. Code 5544	262
5 U.S. Code 5544(a)	263
5 U.S. Code 5544(a)(1)	264
5 U.S. Code 5544(a)(2)	264
5 U.S. Code 5544(a)(3)	264
5 U.S. Code 5584	265, 284
5 U.S. Code 5702(a)	281
5 U.S. Code 5722	388
5 U.S. Code 5722(d)	388
5 U.S. Code 5901	383
5 U.S. Code 5925	300
5 U.S. Code 6304(c)	325
5 U.S. Code 6304(d)(1)	326
5 U.S. Code 6304(d)(1)(A)	328
5 U.S. Code 6304(d)(1)(B)	326
5 U.S. Code 6304(d)(1)(C)	326
5 U.S. Code 6304(d)(2)	326
5 U.S. Code 6311	326
5 U.S. Code 7903	382
7 U.S. Code 4a(a)	214
7 U.S. Code 4a(a)(B)	215
10 U.S. Code 1201	307
10 U.S. Code 1201-1203	307
10 U.S. Code 1201-1206	306
10 U.S. Code 1204	307
10 U.S. Code 1204-1206	307
10 U.S. Code 1448 note	340
10 U.S. Code 1450(b)	341
10 U.S. Code 1451	340
10 U.S. Code 1451(a)	340
10 U.S. Code 2304(g)	246
10 U.S. Code 2305(b)	277
10 U.S. Code 2685	312
10 U.S. Code 3497	308
10 U.S. Code 3499	308
10 U.S. Code 3687	308
10 U.S. Code 3721	308
10 U.S. Code 3722	308
10 U.S. Code 4532(a)	212
10 U.S. Code 7300	212
12 U.S. Code 1755	313
15 U.S. Code 631	297
15 U.S. Code 632	297
15 U.S. Code 637(b)	298
15 U.S. Code 637(b)(6)	291
16 U.S. Code 832a	266
20 U.S. Code 2564	358
22 U.S. Code 1136	388
26 U.S. Code 1	212
28 U.S. Code 2671	227
29 U.S. Code 651	381
29 U.S. Code 668	381
29 U.S. Code 668(a)	382
31 U.S. Code 71	312
31 U.S. Code 71a	282
31 U.S. Code 74 (1970)	312, 381
31 U.S. Code 82b-1	323
31 U.S. Code 200	207
31 U.S. Code 529	400
31 U.S. Code 638a(c)	226
31 U.S. Code 638a(c)(2)	227
31 U.S. Code 680a	321
31 U.S. Code 951-953	265
31 U.S. Code 1176	226, 289, 357
37 U.S. Code 204(g)	309
37 U.S. Code 301	393
37 U.S. Code 301 note	393
37 U.S. Code 301(a)(6)	393
37 U.S. Code 406	267, 344
37 U.S. Code 406(e)	266
37 U.S. Code 406(h)	345
37 U.S. Code 411(d)	267
40 U.S. Code 278a	318
40 U.S. Code 490(j)	361
42 U.S. Code 286b(b)	206
42 U.S. Code 402(g)(1)(E)	341
42 U.S. Code 6239	317
42 U.S. Code 6401	316
42 U.S. Code 6901	385
42 U.S. Code 7151	316
50 U.S. Code 1013(c) (1958 ed.)	309
50 U.S. Code App. 454(j)	201
50 U.S. Code App. 1211	212
50 U.S. Code App. 2168	210

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
9 Comp. Gen. 251	299
9 Comp. Gen. 490	203
16 Comp. Gen. 65	232
16 Comp. Gen. 850	203
17 Comp. Gen. 940	232
19 Comp. Gen. 758	400
22 Comp. Gen. 304	299
25 Comp. Gen. 834	400
27 Comp. Gen. 679	387
28 Comp. Gen. 285	388
28 Comp. Gen. 732	283
31 Comp. Gen. 246	271
32 Comp. Gen. 267	283
33 Comp. Gen. 196	203
34 Comp. Gen. 239	208
35 Comp. Gen. 148	283
35 Comp. Gen. 615	313
36 Comp. Gen. 376	399
36 Comp. Gen. 450	384
36 Comp. Gen. 380	277
36 Comp. Gen. 769	298
37 Comp. Gen. 403	306
37 Comp. Gen. 502	388
37 Comp. Gen. 650	258
37 Comp. Gen. 845	232
38 Comp. Gen. 143	319
39 Comp. Gen. 285	400
39 Comp. Gen. 561	346
39 Comp. Gen. 614	346
39 Comp. Gen. 655	398
40 Comp. Gen. 132	398
40 Comp. Gen. 550	293
40 Comp. Gen. 664	309
41 Comp. Gen. 706	309
42 Comp. Gen. 337	283
42 Comp. Gen. 604	230
43 Comp. Gen. 163	322
43 Comp. Gen. 639	267
44 Comp. Gen. 761	276
45 Comp. Gen. 159	267
45 Comp. Gen. 312	364
46 Comp. Gen. 326	230
46 Comp. Gen. 371	230
46 Comp. Gen. 434	398
47 Comp. Gen. 151	346
47 Comp. Gen. 279	375
47 Comp. Gen. 539	364
48 Comp. Gen. 678	383
49 Comp. Gen. 1	295
49 Comp. Gen. 139	355
49 Comp. Gen. 156	375
49 Comp. Gen. 493	283
49 Comp. Gen. 553	363
49 Comp. Gen. 663	203
49 Comp. Gen. 740	238
50 Comp. Gen. 99	309
50 Comp. Gen. 202	353
50 Comp. Gen. 323	313
50 Comp. Gen. 540	286
50 Comp. Gen. 655	258
51 Comp. Gen. 153	333
51 Comp. Gen. 403	279
51 Comp. Gen. 446	381
51 Comp. Gen. 479	352
51 Comp. Gen. 588	355
51 Comp. Gen. 595	295
51 Comp. Gen. 621	337
52 Comp. Gen. 78	257
52 Comp. Gen. 198	248
52 Comp. Gen. 382	249
52 Comp. Gen. 400	258
52 Comp. Gen. 407	388
52 Comp. Gen. 870	244
53 Comp. Gen. 36	364
53 Comp. Gen. 40	211
53 Comp. Gen. 51	364
53 Comp. Gen. 148	283
53 Comp. Gen. 201	353
53 Comp. Gen. 364	257
53 Comp. Gen. 733	343
53 Comp. Gen. 770	386
53 Comp. Gen. 800	248
54 Comp. Gen. 33	306
54 Comp. Gen. 66	365
54 Comp. Gen. 169	338
54 Comp. Gen. 312	384
54 Comp. Gen. 530	248, 254, 377
54 Comp. Gen. 783	230
54 Comp. Gen. 855	227
54 Comp. Gen. 896	248
54 Comp. Gen. 976	386
54 Comp. Gen. 1021	379
55 Comp. Gen. 60	244
55 Comp. Gen. 179	283
55 Comp. Gen. 201	249
55 Comp. Gen. 244	249, 255, 336
55 Comp. Gen. 280	225
55 Comp. Gen. 346	386
55 Comp. Gen. 432	249
55 Comp. Gen. 499	248, 339
55 Comp. Gen. 546	230
55 Comp. Gen. 636	243
55 Comp. Gen. 693	353
55 Comp. Gen. 784	328
55 Comp. Gen. 787	335
55 Comp. Gen. 839	249
55 Comp. Gen. 1111	248, 254, 335
55 Comp. Gen. 1160	367
55 Comp. Gen. 1188	291
55 Comp. Gen. 1315	250
55 Comp. Gen. 1323	384
55 Comp. Gen. 1332	203
56 Comp. Gen. 245	249
56 Comp. Gen. 160	350
56 Comp. Gen. 291	351
56 Comp. Gen. 369	238
56 Comp. Gen. 397	331
56 Comp. Gen. 402	378
56 Comp. Gen. 470	326
56 Comp. Gen. 473	351
56 Comp. Gen. 580	375
56 Comp. Gen. 635	378
56 Comp. Gen. 656	387
56 Comp. Gen. 663	378

	Page
56 Comp. Gen. 675	373
56 Comp. Gen. 689	377
56 Comp. Gen. 712	248, 255
56 Comp. Gen. 835	250, 253
56 Comp. Gen. 1008	378
56 Comp. Gen. 1018	296
57 Comp. Gen. 17	398
57 Comp. Gen. 185	355, 374
57 Comp. Gen. 244	355
57 Comp. Gen. 251	356

DECISION OVERRULED OR MODIFIED

	Page
16 Comp. Gen. 65	231
36 Comp. Gen. 769	298
40 Comp. Gen. 664	305
43 Comp. Gen. 639	266
B-131105, May 23, 1973	298
B-187606, Feb. 2, 1977	312
B-187606, June 7, 1977	312
B-188770, Apr. 14, 1977	312

DECISIONS OF THE COURTS

	Page
Abell *v.* United States, 207 Ct. Cl. 207	266
Air-A-Plane Corp. *v.* United States, 408 F. 2d 1030	286
Amell *v.* United States, 182 Ct. Cl. 604	261
Armstrong *v.* United States, 144 Ct. Cl. 659	263
Ayres *v.* United States, 186 Ct. Cl. 350	262
Begley *v.* Mathews, 544 F. 2d 1345	297
Bennett *v.* United States, 194 Ct. Cl. 889	263
Boeing Company, ASBCA No. 19224, Feb. 18, 1977, 77-1 BCA 12,371	212
Clark *v.* United States, 162 Ct. Cl. 477	227
Keco Industries, Inc. *v.* United States, 364 F. 2d 838; 175 Ct. Cl. 983	289
Kelly *v.* United States, 119 Ct. Cl. 197	263
Luria *v.* United States, 231 U.S. 9	263
New Haven Ambulance Service, Inc. *v.* Max Cleland, Administrator, et al., Civil Action No. N-77-390	363
Perrimond *v.* United States, 19 Ct. Cl. 509	203
Premier Electrical Construction Co. *v.* Miller-Davis Co., 422 F. 2d 1132	280
Townsley, United States *v.*, 323 U.S. 557	264
Udall *v.* Tallman, 380 U.S. 1	350
United States Biscuit Co. of America *v.* Wirtz, 359 F. 2d 206	312

INDEX DIGEST

JANUARY, FEBRUARY, AND MARCH 1978

Page

ABSENCES
Leaves of absence. (*See* **LEAVES OF ABSENCE**)

AGRICULTURE DEPARTMENT
Employees
Protective clothing
Meat graders. (*See* **CLOTHING AND PERSONAL FURNISHINGS**, Special clothing and equipment, Protective clothing, Cooler coats and gloves, Meat grader employees, Agriculture Department)
Uniforms
Requirements
Administrative determination. (*See* **UNIFORMS**, Civilian personnel, Requirements, Administrative determination, Agriculture Department)

ALLOWANCES
Home service transfer allowances. (*See* **FOREIGN SERVICE**, Home service transfer allowances)
Temporary lodging allowance
Foreign Service employees. (*See* **FOREIGN SERVICE**, Home service transfer allowances, Temporary lodgings)

APPOINTMENTS
Presidential
Holding over beyond expiration of term

Commissioner was appointed to serve for 2-year period on newly created Commodity Futures Trading Commission. Upon expiration of that period no successor was nominated. Commission asks whether holdover provision of 7 U.S.C. 4a(a)(B) applies to commissioners first appointed to serve immediately following creation of Commission. Purpose of holdover provision is to avoid vacancies which may prove disruptive of Commission work. Thus, holdover provision does apply to those commissioners first appointed to the Commission 213

APPROPRIATIONS
Agriculture Department
Availability of appropriation for protective clothing for meat graders. (*See* **APPROPRIATIONS**, Availability, Protective clothing, Meat grader employees, Agriculture Department)
Availability of appropriation for uniforms for meat graders. (*See* **APPROPRIATIONS**, Availability, Uniforms, Meat grader employees, Agriculture Department)

APPROPRIATIONS—Continued Page

Availability

Advance payments. (*See* PAYMENTS, Advance)

Attorney fees

Defending traffic offenses cases

Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility 270

Children day care centers

Space rental. (*See* APPROPRIATIONS, Availability, Space rental, Day care centers for children)

Gifts

To attendees to EPA exhibit

Novelty plastic garbage cans containing candy in the shape of solid waste were distributed at an exposition run by an association, to attract attendees to the Environmental Protection Agency (EPA) exhibit on the Resource Conservation and Recovery Act. An expenditure therefor does not constitute a necessary and proper use of EPA's appropriated funds because these items are in the nature of personal gifts 385

Protective clothing

Meat grader employees

Agriculture Department

Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

Space rental

Day care centers for children

The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located 357

APPROPRIATIONS—Continued
Availability—Continued Page
Uniforms
Meat grader employees
Agriculture Department
Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide frocks as uniforms for meat grader employees. If the Secretary of Agriculture determines that these employees are required to wear frocks as uniforms, appropriated funds may be expended for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

Commissary surcharge funds. (*See* **APPROPRIATIONS, What constitutes appropriated funds, Commissary surcharge funds**)

Expenditures
Without regard to law
Negotiated agreements
Section 9(b) of Public Law 92-392, August 19, 1972, 5 U.S. Code 5343 note, governing prevailing rate employees, exempts certain wage setting provisions of certain bargaining agreements from the operation of that law. However, section 9(b) does not exempt agreement provisions from the operation of other laws or provide independent authorization for agreement provisions requiring expenditure of appropriated funds not authorized by any law 259

Fiscal year
Availability beyond
Federal aid, grants, etc.
Alternate grantees
Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application 205

Obligation
Section 1311, Supplemental Appropriation Act, 1955
Federal grants-in-aid, etc.
Transfer of obligated funds
Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital.

APPROPRIATIONS—Continued Page
Obligation—Continued
Section 1311, Supplemental Appropriation Act, 1955—Continued
Federal grants-in-aid, etc.—Continued
Transfer of obligated funds—Continued
Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed 205

What constitutes appropriated funds
Commissary surcharge funds
Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled 311

ATTORNEYS
Fees
Employee litigation
Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility 270

AUTOMATIC DATA PROCESSING SYSTEMS (*See* EQUIPMENT, Automatic Data Processing Systems)

AWARDS
Contract awards. (*See* CONTRACTS, Awards)

BIDDERS
Collusion
Collusive bidding. (*See* BIDS, Collusive bidding)
Multiple bidding. (*See* BIDS, Multiple)
Responsibility *v.* bid responsiveness
Bidder ability to perform
Invitation for bids provision that successful bidder shall meet all requirements of Federal, State, or City codes pertains to bidder responsibility, not bid responsiveness, since it concerns bidder's legal authorization to perform resulting contract 361

BIDS
Acceptance
Failure to furnish information not necessary for bid evaluation
Where solicitation language does not require submission of information concerning preventive maintenance prior to award, bidder's insertion of bid price in invitation for bids for such maintenance constitutes an offer to provide the required maintenance and acceptance of bid results in binding obligation to perform in accordance with Government's requirements 395

BIDS—Continued Page
Acceptance time limitation
Extension
After expiration
Acceptance of renewed bid
Effect on competitive system
A bid, once expired, may be accepted when revived by bidder provided such acceptance does not compromise integrity of competitive bidding system ---- 228
Initial refusal and delay in reviving low bid
Award to second low bidder *v.* solicitation cancellation
Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency ---- 228
Bidders
Generally. (*See* BIDDERS)
Cancellation. (*See* BIDS, Discarding all bids)
Collusive bidding
Allegations unsupported by evidence
Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitiors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations ---- 277
Competitive system
Negotiated contracts. (*See* CONTRACTS, Negotiation, Competition)
Contracts
Generally. (*See* CONTRACTS)
Discarding all bids,
Prices excessive
Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here ---- 234
Resolicitation
Auction atmosphere not created
Cancellation of solicitation after bid opening and subsequent resolicitation do not create "auction" atmosphere where solicitation was properly canceled due to unreasonable prices and lack of adequate competition ---- 234
Small business set-asides. (*See* CONTRACTS, Awards, Small business concerns, Set-asides, Withdrawal)
Evaluation
Manning levels
Use of "award amount" (fee) provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose ---- 271

BIDS—Continued Page
Evaluation—Continued
Point system
Negotiation. (*See* CONTRACTS, Negotiation, Evaluation factors, Point rating)
Invitation for bids
Pricing structure
Risk
The fact that invitation for bids (IFB) pricing structure places risk on the bidder does not render IFB improper, since bidders are expected to take risks into account in formulating their bids ---- 271
Mistakes
Correction
After bid opening
Rule
Erroneous bid should not have been corrected, since cost proposal for items omitted from bid price was prepared after bid opening and correction would be recalculation of bid to include factors not originally considered ---- 257
Denial
Waiver of correction
Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promtply revived at request of agency ---- 228
Multiple
Propriety
Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations ---- 277
Negotiated procurement. (*See* CONTRACTS, Negotiation)
Prices
Reasonableness
Administrative determination
Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here ---- 234
Protests. (*See* CONTRACTS, Protests)
Rejection
Nonresponsive
Information requirements
Descriptive data
Invitation for bids contained brand name or equal clause providing that if bidder proposed furnishing equal product bid must contain sufficient descriptive data to evaluate it. Where bidder furnished no descriptive data, furnishing similar product to agency under previous solicitation is

BIDS—Continued
Page
Rejection—Continued
Nonresponsive—Continued
Information requirements—Continued
Descriptive data—Continued
not acceptable substitute for descriptive data requirement, and bid was properly rejected as nonresponsive 234
Small business concerns
Contract awards. (*See* CONTRACTS, Awards, Small business concerns)
Specifications. (*See* CONTRACTS, Specifications)
BOARDS, COMMITTEES AND COMMISSIONS
Members
Holding over beyond expiration of term
Commissioner was appointed to serve for 2-year period on newly created Commodity Futures Trading Commission. Upon expiration of that period no successor was nominated. Commission asks whether holdover provision of 7 U.S.C. 4a(a)(B) applies to commissioners first appointed to serve immediately following creation of Commission. Purpose of holdover provision is to avoid vacancies which may prove disruptive of Commission work. Thus, holdover provision does apply to those comissioners first appointed to the Commission 213
Commissioner of Commodity Futures Trading Commission continued to serve beyond expiration of fixed period of appointment on April 14, 1977, pursuant to holdover provision of 7 U.S.C. 4a(a)(B). Commissioner's entitlement to compensation after expiration of first session of 95th Congress is questioned since statute provides that a commissioner may not continue to serve "beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." The word "next" before "session" refers to the adjournment of a subsequent session of Congress. Therefore, the Commissioner may be compensated until expiration of the 2d session of the 95th Congress, or appointment and qualification of successor, whichever event occurs first 213
CLAIMS
Correction
Limitation
Travel voucher errors
Administrative correction
Agencies may administratively correct travel vouchers with underclaims not exceeding $30. Overclaims in any amount may be administratively reduced. 36 Comp. Gen. 769 and B-131105, May 23, 1973, modified. 298
CLOTHING AND PERSONAL FURNISHINGS
Special clothing and equipment
Protective clothing
Cooler coats and gloves
Meat grader employees
Agriculture Department
Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

Page

COMMISSARIES (*See* **POST EXCHANGES, SHIP STORES, ETC.**)
COMMISSIONS (*See* **BOARDS, COMMITTEES AND COMMISSIONS**)
COMMODITY FUTURES TRADING COMMISSION
Commissioners
Holding over beyond expiration of term
Compensation

Commissioner of Commodity Futures Trading Commission continued to serve beyond expiration of fixed period of appointment on April 14, 1977, pursuant to holdover provision of 7 U.S.C. 4a(a)(B). Commissioner's entitlement to compensation after expiration of first session of 95th Congress is questioned since statute provides that a commissioner may not continue to serve "beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." The word "next" before "session" refers to the adjournment of a subsequent session of Congress. Therefore, the Commissioner may be compensated until expiration of the 2d session of the 95th Congress, or appointment and qualification of successor, whichever event occurs first 213

COMPENSATION
Aggregate limitation
Post differential payments

Agency for International Development properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552 299

Differentials
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)
Post. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Post differentials**)
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)
Overtime
Prevailing rate employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees, Overtime**)
Prevailing rate employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)
Wage board employees
Prevailing rate employees
Entitlement to negotiate wages
Compliance with law and regulations requirement

Section 9(b) of Public Law 92-392, August 19, 1972, 5 U.S. Code 5343 note, governing prevailing rate employees, exempts certain wage setting provisions of certain bargaining agreements from the operation of that law. However, section 9(b) does not exempt agreement provisions from the operation of other laws or provide independent authorization for agreement provisions requiring expenditure of appropriated funds not authorized by any law 259

COMPENSATION—Continued Page
Wage board employees—Continued
Prevailing rate employees—Continued
Overtime
Meal periods
Delayed or preempted
Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on top of overtime" which is not authorized by 5 U.S.C. 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Hence, it may not be paid ---- 259
Work-free
Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work ---- 259
Rate
One and one-half times basic hourly rate
Department of Interior questions whether it may pay prevailing rate employees, who negotiate their wages, overtime compensation at rates more than one and one-half of the basic hourly rate. Although computation provision (1) of 5 U.S.C. 5544(a) states that overtime pay is to be computed at "not less than" one and one-half the basic hourly rate, computation provisions (2) and (3) of 5 U.S.C. 5544(a) state that overtime pay is to be computed at one and one-half the basic hourly rate. Since provisions (2) and (3) were enacted by statute amending original statute enacting provision (1), 5 U.S.C. 5544 is construed as establishing the overtime pay rate at one and one-half the basic rate and a greater figure may not be used ---- 259

CONTRACTING OFFICERS
Subjective judgment
Supported by record
Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable ---- 347

CONTRACTORS
Incumbent
Competitive advantage
Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3–805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3–805.1(v) (1976 ed.) ---- 370

CONTRACTORS—Continued Page
Responsibility
Contracting officer's affirmative determination accepted
Allegation concerning bidder's capacity to perform involves question of responsibility. While General Accounting Office (GAO) will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or porposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials 361
Determination
Current information
Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application 347

CONTRACTS
Automatic Data Processing Systems. (*See* EQUIPMENT, Automatic Data Processing Systems)
Awards
Protest pending
Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office (GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected 361
Small business concerns
Self-certification
Status protests
GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business 277
Set-asides
Withdrawal
Bid prices excessive
Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here 234
Withdrawal of small business set-aside does not violate Government policy of setting aside percentage of procurements for small business where as here governing regulations were complied with 234
Size
Eligibility determination date
Since Small Business Administration (SBA), as a matter of policy, now requires that to be eligible for award of small business set-asides, firm must be small business concern both at time for submission of bids

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Size—Continued
Eligibility determination date—Continued
or initial proposals and time for award, General Accounting Office will no longer review question of good faith of bidder or offeror self-certification as small business where SBA determines that firm was large on date for submission of initial proposals, even though firm might be small at date of award and might have self-certified in good faith at time for submission of initial proposals 290
Bid procedures. (*See* BIDS)
Bids
Generally. (*See* BIDS)
Cost accounting
Cost Accounting Standards Act application
Negotiated contracts
Cost comparisons
Cost comparisons required by Arsenal Statute for determination whether supplies can be obtained from Government-owned, contractor-operated (GOCO) factories on economical basis may be made by comparing fixed priced offers from contractor-owned and -operated plants with out-of-pocket cost estimates from GOCO plants and such comparisons are not prohibited by Cost Accounting Standards Act 209
Cost-plus
Cost-plus-fixed-fee
Negotiated contracts
As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable 239
De minimis rule
Negotiated contracts
Protester's contention—that Air Force erred in making award on initial proposal basis because ASPR 3-805.4(a) (1976 ed.) required amendment to RFP due to change in requirements—is not sustained. Sole change (removal of 1 of 617 equipment items to be serviced) appears to be *de minimis* where Air Force maintains there was no significant change in service requirements, successful offeror had previously accepted requirement to service deleted item as no cost modification to prior contract, and even protester alleges only small reduction in its proposed price was due to change 370
Experimental
Evaluation of results
Cost consideration
Where experimental contract structure may result in award that does not represent lowest total cost to the Government, it is recommended that agency fully consider this aspect of "experiment" when evaluating results achieved 271

CONTRACTS—Continued Page
Mess attendant services
Status of contract
Contract for mess attendant services is not a personal services contract since there is no direct Federal supervision of contractor personnel ---- 271
Mistakes
Allegation before award. (*See* **BIDS, Mistakes**)
For errors prior to awards. (*See* **BIDS, Mistakes**)
Modification
Change orders
Within scope of contract
Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirements, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters ---- 285
Negotiation
Awards
Administrative determination
Conclusiveness
Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable ---- 347
Initial proposal basis
Competition sufficiency
Contract awarded on basis of initial proposals without discussions is proper where solicitation notified offerors of such possibility and agency determines that there was adequate competition resulting in fair and reasonable price ---- 244
Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals where there is no showing that Armed Services Procurement Regulation (ASPR) 3–807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown ---- 370
Propriety
Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3–805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3–805.1(v) (1976 ed.) ---- 370
Propriety
Report of Investigation contrary to protester's report
Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' *direct responses* formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract ---- 217

CONTRACTS—Continued Page
Negotiations—Continued
Awards—Continued
Small business concerns
Size. (*See* CONTRACTS, Awards, Small business concerns, Size)
Changes, etc.
Written amendment requirement
Exceptions
De minimis rule applicability
Protester's contention—that Air Force erred in making award on initial proposal basis because ASPR 3-805.4(a) (1976 ed.) required amendment to RFP due to change in requirements—is not sustained. Sole change (removal of 1 of 617 equipment items to be serviced) appears to be *de minimis* where Air Force maintains there was no significant change in service requirements, successful offeror had previously accepted requirement to service deleted item as no cost modification to prior contract, and even protester alleges only small reduction in its proposed price was due to change 370
Competition
Discussion with all offerors requirement
"Meaningful" discussions
Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its costs acceptable 328
Pricing or technical uncertainty
Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors. 347
Preservation of system's integrity
Reliance on significant misstatements
Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that *it determined* which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire" of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning 217
Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. *Cf. The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75-2 CPD 1940. Thus, recommendation is made under Legislative Reorganization Act of 1970 that selected concern's proposal be excluded from consideration for award 217
Prices
Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals where there is no showing that Armed Services Procurement Regulation (ASPR) 3-807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown 370

CONTRACTS—Continued Page
Negotiation—Continued
Cost, etc., data
Final pricing actions
As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable 239
Price analysis requirement
Comparison of proposed prices with each other and with independent Government estimate satisfies regulatory requirement that price analysis be conducted 244
Cost-plus-fixed-fee. (*See* CONTRACTS, Cost-plus, Cost-plus-fixed-fee)
Evaluation factors
Criteria
Same for small and large business
In unrestricted procurement, it is improper to evaluate proposal submitted by small business differently from how proposals of large business are evaluated 244
Out-of-pocket costs
COCO *v.* GOCO plants
Cost comparisons required by Arsenal Statute for determination whether supplies can be obtained from Government-owned, contractor-operated (GOCO) factories on economical basis may be made by comparing fixed priced offers from contractor-owned and -operated plants with out-of-pocket cost estimates from GOCO plants and such comparisons are not prohibited by Cost Accounting Standards Act 209
Point rating
Price consideration
Where agency evaluates proposals by numerically scoring proposals under each of four evaluation factors, it is not Improper under circumstances of case for price to be scored on basis of entire "spread" of points available, so that total available points are awarded to lowest proposed price and less points, mathematically determined, are awarded to other proposed prices 244
Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically thereby making price the determinative criterion for award 251
Recent experience information for consideration
Where agency evaluates company experience by means of point scoring, but such evaluation does not take into account most recent experience information which is in possession of agency, source selection official should consider such information along with results of point scoring, particularly where significantly less costly proposal is point-scored low in prior experience but nearly the same as competing offer in technical area, and most current information suggests that low offeror's prior performance problems have been cured. Since record does not indicate that recent experience was considered, General Accounting Office recommends that source selection official reconsider award selection 347

CONTACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Price elements for consideration
Most advantageous technical/cost relationships
Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors---- 328
Allegation that price was improperly evaluated must fail where such allegation is directly related to assertion that technical evaluation was also improper and it is found that technical evaluation was proper---- 347
Offeror
Qualifications. (*See* CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors)
Offers or proposals
Best and final
Discussions
All offerors requirement
Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors---- 347
Prices. (*See* CONTRACTS, Negotiation, Prices, Best and final offer)
Essentially equal technically
Price determinative factor
Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determinative criterion for award--- 251
Evaluation
Improper
Based on significant misstatements in proposal
Selected concern's submission of significant misstatement to NASA about method, manner, and results of survey of incumbent employees' willingness to accept employment with concern if successful in competition was material in evaluation leading to selection---- 217
Method
Not prejudicial
Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied- 328
Reasonable
Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable---- 347

CONTRACTS—Continued Page
Negotiations—Continued
Offers or proposals—Continued
Follow-on phase of research
Cost evaluation
Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors ... 328
Irregularities in survey report submitted
Representations to NASA about methods, manner, and results of questioning of incumbent contractor's employees are not "subject to differing opinions" and differing results of later survey cannot reasonably be attributed to employees' memory lapses or unwillingness to respond to inquiries ... 217
Preparation
Costs
In view of conclusions that agency did not err in making award on basis of initial proposals, that there was no requirement to amend RFP for *de minimis* change in requirements, and that incumbent contractor did not have unfair competitive advantage, there is no basis to find arbitrary and capricious action by agency necessary to support recovery of proposal preparation costs. Claim is accordingly denied ... 370
Qualifications of offerors
Experience
Current information
Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application ... 347
Technical proposals
Cost acceptability
Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its costs acceptable ... 328
Options
Generally. (*See* CONTRACTS, Options)
Pricing data. (*See* CONTRACTS, Negotiation, Costs, etc., data)
Prices
Best and final offer
Hourly rates reduced
Offer rejected
As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable ... 239
Contracting agency's allegation, disputed by protester, that oral request for best and final offers included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice ... 239

CONTRACTS—Continued Page
Negotiations—Continued
Prices—Continued
Proposals essentially equal technically
Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determinative criterion for award-- 251
Pricing data. (*See* CONTRACTS, Negotiation, Cost, etc., data)
Qualification of new sources
Qualifying data
Evaluation
Propriety
Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' *direct responses* formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract---------- 217
Requests for proposals
Amendment
Required for changes in RFP
Exceptions
Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learend that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3-805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3-805.1(v) (1976 ed.)---------- 370
Protests under
Timeliness
Filed after closing date for receipt of proposals
Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, General Accounting Office does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination---------- 244
Small business concerns. (*See* CONTRACTS, Awards, Small business concerns)
Specifications. (*See* CONTRACTS, Specifications)
Termination. (*See* CONTRACTS, Termination)
Offer and acceptance
Acceptance
Delays
Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency---------- 228

CONTRACTS—Continued Page
Offer and acceptance—Continued
Acceptance—Continued
Effect
Scope of contractor's obligation
Where solicitation language does not require submission of information concerning preventive maintenance prior to award, bidder's insertion of bid price in invitation for bids for such maintenance constitutes an offer to provide the required maintenance and acceptance of bid results in binding obligation to perform in accordance with Government's requirements---- 395
Options
Exercisable at sole discretion of Government
Review by GAO
Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, General Accounting Office (GAO) will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable-- 328
Personal services. (*See* **PERSONAL SERVICES, Contracts**)
Prices
Costs, etc., data
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Protests
Administrative reports
Failure by GAO to request
Reconsideration request
Fact *v.* law basis
General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto---- 395
Timeliness
Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period---- 251
Allegations
Not supported by record
Protest based on allegations of statutory and regulatory violations, without meaningful explanation as to why or how the violations exist, is without merit---- 271
Award approved
Prior to resolution of protest
Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office

CONTRACTS—Continued Page
Protests—Continued
Award approved—Continued
Prior to resolution of protest—Continued
(GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected 361
Conflict in statements of contractor and contracting agency
Contracting agency's allegation, disputed by protester, that oral request for best and final offers included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice 239
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
To determine arbitrary rejection of bid
Allegation concerning bidder's capacity to perform involves question of responsibility. While General Accounting Office (GAO) will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or proposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials 361
Non-appropriated fund activities
Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled 311
Procedures
Bid Protest Procedures
Administrative reports
Timeliness
Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period 251
Reconsideration
Error of fact or law basis
General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto 395

CONTRACTS—Continued Page
Protests—Continued
Timeliness
Negotiated contracts
Date basis of protest made known
Award on initial proposal basis
Protest after submission of initial proposals objecting to award on basis of initial proposals and agency's failure to amend request for proposals (RFP) is not untimely, because protest is not directed at any apparent impropriety in RFP, but at conduct of procurement after initial proposals were received---- 370
Where offeror received information on July 25 leading it to inquire whether agency would amend RFP, waited for promised response, and protested within 10 working days after it was told on August 25 that award was being made on basis of initial proposals, protest is not untimely. Basis for protest was not known until agency responded to July inquiry, and delay in agency response is not so great that agency inaction charged protester with knowledge of basis for protest prior to August 25- 370
Small business set-aside
Administrative determination
Not for GAO review
Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, General Accounting Office does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination---- 244
Research and development
Initial production awards
Selection of contractor to continue research project
Review by General Accounting Office
Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, General Accounting Office (GAO) will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable---- 328
Propriety of award
Follow-on phase of research
Changes in price, specifications, etc.
Not prejudicial
Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied---- 328
Samples. (*See* CONTRACTS, Specifications, Samples)
Small business concern awards. (*See* CONTRACTS, Awards, Small business concerns)
Specifications
"Award amount" (fee)
Mess attendant services
Use of "award amount" (fee) provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose---- 271

CONTRACTS—Continued Page
Specifications—Continued
Changes, revisions, etc.
Negotiated procurement. (*See* CONTRACTS, Negotiation, Changes, etc.)
Failure to furnish something required
Samples
Where specification is clear and definite and fully sets forth requirements of Government, and there are no characteristics which cannot be described adequately in the applicable specification, agency erroneously required submission of bid sample. Therefore, in circumstances, bidder who did not submit sample prior to opening may be considered for award even though invitation for bids (IFB) required bid sample be furnished by opening date. 16 Comp. Gen. 65, modified---------- 231
Samples
Effect of furnishing or failure to furnish on contract award
Competitive system
Where IFB fully sets forth requirements of Government, bidder obtains no undue advantage by not submitting required sample before bid opening and integrity of competitive bidding system is not hindered, because Government may require bidder to perform in accordance with the specifications notwithstanding failure to submit sample. 16 Comp. Gen. 65, modified---------- 231
Termination
Convenience of Government
Recommendation
Resolicitation
Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirments, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters---------- 285

COST ACCOUNTING STANDARDS ACT
Application to negotiated contracts. (*See* CONTRACTS, Cost accounting, Cost Accounting Standards Act application, Negotiated contracts)

DONATIONS
Gifts
To attendees to EPA exhibit
Novelty plastic garbage cans containing candy in the shape of solid waste were distributed at an exposition run by an association, to attract attendees to the Environmental Protection Agency (EPA) exhibit on the Resource Conservation and Recovery Act. An expenditure therefor does not constitute a necessary and proper use of EPA's appropriated funds because these items are in the nature of personal gifts---------- 385

ENERGY Page

Energy Policy and Conservation Act
Strategic Petroleum Reserve Program
Leases
Limitations on expenditures
Rent and improvements

40 U.S. Code 278a (1970) (section 322, Economy Act of 1932), prohibits paying more than 35 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual rent. However, the Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. General Accounting Office will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved 316

Time limitation on authority
Leases extending beyond
Propriety

The Energy Policy and Conservation Act establishes the Startegic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States 316

EQUIPMENT
Automatic Data Processing Systems
Computer service
Evaluation propriety

Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that *it determined* which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire" of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning 217

FEES
Attorneys
Traffic offense cases

Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility 270

FEES—Continued Page
Professional examinations
Military personnel
Air Force medical officer who performed temporary duty under orders issued at his personal request that he be temporarily assigned to San Francisco, California, to take Part II of the American Board of Pediatrics examination, and who was released from active duty several weeks later, is not entitled to payment of examination fees which he paid prior to taking Part I of the examination before entry on active duty, since applicable service regulations limit payment of such expenses to "career" officers 201
Travel of Reserve officers, serving limited active duty periods, to take medical board examinations shortly before their release from active duty should not ordinarily be authorized at Government expense nor should their examination fees be reimbursed since such trips are primarily a matter of personal convenience and benefit, unrelated to service requirements 201
FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Post differentials
Computation
Agency for International Development properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552 299
FOREIGN SERVICE
Home service transfer allowance
Temporary lodgings
"Reasonable expenses"
Guidelines in 52 Comp. Gen. 78 applicable
Employee transferred from Athens, Greece, to Washington, D.C., was authorized home service transfer allowance under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). Employee submitted claim of $33 per day for lodging portion of home service transfer allowance for days that he and family resided with relatives. Since section 251.1a of Standardized Regulations authorizes only "reasonable expenses," this Office applied ruling of 52 Comp. Gen. 78 (1972) which established guidelines for determining reasonableness of employees' claims for subsistence while occupying temporary quarters when they resided with relatives 256
Retirement
Postponement of return to U.S.
Foreign Service employee who retired overseas has delayed return travel more than 7 years even though State Department travel regulations require that such travel must begin not later than 18 months after separation. State Department regulation granting exceptions to travel regulations where allowances are exceeded or excess costs are incurred provides no basis for granting exceptions to time limitation on return travel, and former employee may not be granted any further time extensions 387

FOREIGN SERVICE—Continued Page
Temporary lodgings
Home service transfer allowances. (*See* FOREIGN SERVICE, Home service transfer allowances, Temporary lodgings)

FUNDS
Appropriated. (*See* APPROPRIATIONS)
Federal grants, etc., to other than States
Change of grantee
Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital. Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed ---------- 205
Replacement contracts
Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application ---------- 205

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Non-appropriated fund activities
Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled ---------- 311
Protests generally. (*See* CONTRACTS, Protests)
Small business matters
GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business ---------- 277

GENERAL ACCOUNTING OFFICE—Continued Page
Manuals
Policy and Procedures
Statistical sampling procedures
Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b–1(a) (Supp. V, 1975); 3 GAO 44, as amended by B–153509, August 27, 1976 ---------- 321
Procedure
Statistical sampling
Policy and Procedures manual. (*See* GENERAL ACCOUNTING OFFICE, Manuals, Policy and Procedures, Statistical sampling procedures)
Protests
Contracts. (*See* CONTRACTS, Protests)
Recommendations
Contracts
Disqualification of proposal
Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. *Cf. The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75–2 CPD 1940. Thus, recommendation is made under Legislative Reorganization Act of 1970 that selected concern's proposal be excluded from consideration for award ---------- 217
Requests for proposals
Issuance
Follow-on phases of research projects
While protester was not misled as to evaluation factors for award of follow-on phase of competitive parallel procurement, GAO suggests that agency issue request for proposals prior to selection of contractors for each succeeding phase ---------- 328
Termination
Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirements, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters ---------- 285

GIFTS
Donations. (*See* DONATIONS)

GRANTS
Federal
Grantees
Alternate
Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not

GRANTS—Continued Page
Federal—Continued
Grantees—Continued
Alternate—Continued
properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application 205

HEALTH, EDUCATION, AND WELFARE DEPARTMENT
Employees
Establishment of day care centers
Space
The Secretary of Health, Education, and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located 357
Grants-in-aid
Transfer between grantees
Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital. Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed 205

HUSBAND AND WIFE
Dual rights when both in military or Federal service
Quarters
Temporary quarters subsistence allowance
Incident to transfer. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters, Subsistence expenses, Husband and wife both civilian employees)

INTERIOR DEPARTMENT Page
Employees
Overtime
Prevailing rate employees who negotiate their wages
Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work 259

INVOICES (*See* VOUCHERS AND INVOICES)
JOINT VENTURES
Bids
Multiple
Bidding as subcontractor and as member of joint venture
Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations 277
Status
Small business status
GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business 277

LEASES
Oil and gas. (*See* OIL AND GAS, Leases)
Rent
State lands
Advance payments. (*See* PAYMENTS, Advance, State lands, Leased by Federal Government, Rent)

LEAVES OF ABSENCE
Annual
Forfeiture. (*See* LEAVES OF ABSENCE, Forfeiture)
Forfeiture
Administrative error
Restored leave
Internal Revenue Service employee on August 26, 1975, submitted a Standard Form 71 application for annual leave which was denied by his supervisor due to an exigency of public business. Employee forfeited 152 hours of annual leave at close of 1975 leave year. Leave may be restored under 5 U.S. Code 6304(d)(1)(A) (Supp. III, 1973) because the employee timely requested the leave and the agency failed to approve and schedule the leave or present case to proper official for determination of a public exigency. This administrative error caused the loss of leave which, but for the error, could have been restored under 6304 (d)(1)(B), as caused by exigencies of public business 325

LEGISLATION Page
Construction. (*See* STATUTORY CONSTRUCTION)
Statutory construction. (*See* STATUTORY CONSTRUCTION)

MILEAGE
Travel by privately owned automobile
Between residence and headquarters
Portal-to-portal mileage allowance
Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee must bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement ---- 379
Rates
Administrative determination of rate payable
Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires the Department of Agriculture to authorize the maximum mileage rate for meat grader employees who use their privately owned vehicles in connection with their work. The Federal Travel Regulations (FTR) require agency and department heads to fix mileage rates in certain situations at less than the statutory maximum. Hence, the proposed provision is contrary to the FTR ---- 379

MILITARY PERSONNEL
Dependents
Education
Transportation
Member of armed services stationed overseas whose dependent son returned to the United States for his second year of college is not entitled to reimbursement for such travel notwithstanding orders issued subsequent to the travel stated that the travel was in accordance with paragraph M7103–2, item 7, 1 JTR, and the Base Commander certified that the delay in publishing the orders was through no fault of the member. Even if orders had been timely issued, there is no legal basis for such travel at Government expense because the law and regulations authorize such travel only if there is a lack of overseas educational facilities which arose after the dependent's arrival at the overseas station, and that was not the case ---- 345
Transportation. (*See* TRANSPORTATION, Dependents, Military personnel)
Examinations for professional recognition
Fees
Air Force medical officer who performed temporary duty under orders issued at his personal request that he be temporarily assigned to San Francisco, California, to take Part II of the American Board of Pediatrics examination, and who was released from active duty several weeks later, is not entitled to payment of examination fees which he paid prior to taking Part I of the examination before entry on active duty, since applicable service regulations limit payment of such expenses to "career" officers ---- 201

MILITARY PERSONNEL—Continued Page
Reservists
Active duty
Hospitalization, medical treatment, etc.
Termination
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(2) because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 40 Comp. Gen. 664, modified ---- 305
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified ---- 305
Status
During hospitalization, etc.
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a causal relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status. 40 Comp. Gen. 664, modified ---- 305
NATIONAL GUARD
Death or injury
While on training duty
Illness beyond termination date
A member of the Army National Guard or Army Reserve called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitzliaed due to an in-line-of-duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204. 40 Comp. Gen. 664, modified ---- 305
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who

NATIONAL GUARD—Continued Page
Death or injury—Continued
While on training duty—Continued
Illness beyond termination date—Continued
suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified ---------- 305

OFFICERS AND EMPLOYEES
Compensation. (*See* COMPENSATION)
Foreign differentials and overseas allowances. (*See* FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES)
Moving expenses
Relocation of employees. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Overtime. (*See* COMPENSATION, Overtime)
Per diem. (*See* SUBSISTENCE, Per diem)
Portal-to-portal mileage allowance
Travel by privately owned automobiles. (*See* MILEAGE, Travel by privately owned automobile, Between residence and headquarters, Portal-to-portal mileage allowance)
Prevailing rate employees
Compensation. (*See* COMPENSATION, Wage board employees, Prevailing rate employees)
Subsistence
Per diem. (*See* SUBSISTENCE, Per diem)
Traffic offenses
Attorney fees for defending
Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility ---------- 270
Transfers
Foreign Service personnel
Home service transfer allowances
Temporary lodgings
Staying with relatives, etc.
Employee transferred from Athens, Greece, to Washington, D.C., was authorized home service transfer allowance under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). Employee submitted claim of $33 per day for lodging portion of home service transfer allowance for days that he and family resided with relatives. Since section 251.1a of Standardized Regulations authorizes only "reasonable expenses," this Office applied ruling of 52 Comp. Gen. 78 (1972) which established guidelines for determining reasonableness of employees' claims for subsistence while occupying temporary quarters when they resided with relatives ---------- 256

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses
Temporary quarters
Subsistence expenses
Husband and wife both civilian employees
Husband and wife, both civilian employees of Marine Corps in Philadelphia, where authorized temporary quarters subsistence expenses incident to transfer to Albany, Georgia. Where transfers were approximately 2 weeks apart, wife was entitled to temporary quarters subsistence expenses as employee as of date husband departed shared temporary quarters at old station for new duty station. While Federal Travel Regulations para. 2–1.5c provides that where members of immediate family are entitled to allowances incident to transfer only one is eligible as employee, restriction is only applicable to transfers which occur at same time ---------- 389
Travel expenses. (*See* **TRAVEL EXPENSES**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)

OIL AND GAS
Leases
Rent and improvements
Limitations on expenditures
Applicability
Strategic Petroleum Reserve Program
40 U.S. Code 278a (1970) (section 322, Economy Act of 1932), prohibits paying more than 35 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual rent. However, the Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. General Accounting Office will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved ---------- 316
Storage
Strategic Petroleum Reserve Program
Leasing authority
The Energy Policy and Conservation Act establishes the Strategic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States ---------- 316

ORDERS
Amendment
Retroactive
Travel completed
Where employee was authorized subsistence on actual expense basis for temporary duty in Washington, D.C., a designated high-rate geographical area, and he failed to maintain daily record of subsistence expenses, his travel orders may not be retroactively amended to provide reimbursement on per diem basis. Travel orders may not be revoked or

ORDERS—Continued Page
Amendment—Continued
Retroactive—Continued
Travel completed—Continued
modified retroactively so as to increase or decrease rights that have accrued and become fixed under law and regulation except to correct error apparent on face of orders or when facts demonstrate a provision previously definitely intended has been omitted through error or inadvertence. Record shows no such error or omission in original orders.. 367

OVERTIME
Compensation. (*See* COMPENSATION, Overtime)

PAY
Active duty
Reservists
Injured in line of duty
Requirement for pay entitlement
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(2) because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 40 Comp. Gen. 664, modified---- 305
Injury or death
During hospitalization
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified---- 305
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a causal relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status. 40 Comp. Gen. 664, modified---- 305
Additional
Parachute duty
Active duty for training status
Under current regulations member of Reserves receiving parachute pay while assigned to parachute duty on inactive duty status is not entitled to receive such incentive pay while assigned to active duty for training where the latter position is not designated as parachute duty. Secretary of Defense advised that regulations may be changed to provide parachute pay in appropriate circumstances---- 392

PAY—Continued Page
Additional—Continued
Sea duty
Unusual circumstances
When a member of the uniformed services is assigned on a permanent change of station to sea duty and the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e). 43 Comp. Gen. 639, modified 266
Civilian employees. (*See* **COMPENSATION**)
Retired
Survivor Benefit Plan
Spouse
Alternate rights
Monthly Survivor Benefit Plan annuity payable to a widow age 62 under 10 U.S. Code 1451 shall be reduced by Social Security survivor benefit to which she would be entitled based solely upon the deceased husband's military service, notwithstanding fact that the Social Security Administration may allow her an alternative of receiving the higher of Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage 339
Social Security offset
Monthly Survivor Benefit Plan annuity payable to a widow under 10 U.S. Code 1451 and Section 401a(2) of Department of Defense Directive 1332.27 should not be offset by Social Security mother's benefit when entitlement is denied administratively by the Social Security Administration 339
Sea duty. (*See* **PAY, Additional, Sea duty**)

PAYMENTS
Advance
State lands
Leased by Federal Government
Rent
The advance payment of rent, on annual basis, under proposed lease of land with the State of Idaho is not in contravention of the prohibition against advance payments in 31 U.S. Code 529 since possibility of loss is remote where a State is the recipient 399

PERSONAL SERVICES
Contracts
Mess attendant services
Contract for mess attendant services is not a personal services contract since there is no direct Federal supervision of contractor personnel 271

POST EXCHANGES, SHIP STORES, ETC.
Commissary store operations
Surcharge on sales of goods
Authorized by statute
Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting

POST EXCHANGES, SHIP STORES, ETC.—Continued Page
Commisiary store operations—Continued
Surcharge on sales of goods—Continued
Authorized by statute—Continued
Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled 311

PROPERTY
Private
Lease
Oil and gas storage. (*See* **OIL AND GAS, Leases**)

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

REGULATIONS
Compliance
Mandatory *v.* permissive
Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91-114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distinguished ... 281
Constructive
Agency determination
Acceptance
Agency's determination that provisions of one of its regulations are not applicable to particular situation is clearly correct. Moreover, even if regulation was less than clear and subject to being construed to cover situation, agency intepretation of its own regulation would be entitled to "great deference." 347

RELOCATION EXPENSES
Transfers
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

REPORTS
Administrative
Contract protest
Report not requested by GAO
Reconsideration request
Error of law basis
General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto 395

REPORTS—Continued Page
Administrative—Continued
Contract protest—Continued
Timeliness of report
Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period---- 251

RETIREMENT
Foreign Service personnel. (*See* FOREIGN SERVICE, Retirement)

SMALL BUSINESS ADMINISTRATION
Contracts
Awards to small business concerns. (*See* CONTRACTS, Awards, Small business concerns)

SOCIAL SECURITY
Military personnel
Retired
Survivor Benefit Plan
Offset
Formula
Monthly Survivor Benefit Plan annuity payable to a widow age 62 under 10 U.S. Code 1451 shall be reduced by Social Security survivor benefit to which she would be entitled based solely upon the deceased husband's military service, notwithstanding fact that the Social Security Administration may allow her an alternative of receiving the higher of Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage---- 339
Mother's Social Security benefit
Monthly Survivor Benefit Plan annuity payable to a widow under 10 U.S. Code 1451 and Section 401a(2) of Department of Defense Directive 1332.27 should not be offset by Social Security mother's benefit when entitlement is denied administratively by the Social Security Administration---- 339

STATES
Lands
Leased by Federal Government
Advanced payments. (*See* PAYMENTS, Advance, State lands, Leased by Federal Government, Rent)

STATUTES OF LIMITATION
Claims
Date of accrual
Per diem
Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91–114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accured. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distinguished---- 281

STATUTORY CONSTRUCTION Page

"Plain meaning" rule

Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on top of overtime" which is not authorized by 5 U.S.C. 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Hence, it may not be paid 259

SUBSISTENCE

Per diem

Actual expenses

Itemization of actual food expenses

Requirement

Employee of National Oceanic and Atmospheric Administration on temporary duty in Washington, D.C., a designated high-rate geographical area, was authorized actual expenses of subsistence. Employee failed to itemize actual subsistence expenses and claims reimbursement on a flat-rate basis. Claim on a flat-rate basis may not be allowed since employee may not be reimbursed on per diem basis and voucher does not identify daily expenditures for meals so that such expenses may be reviewed by the agency to determine that they are proper subsistence items 367

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

Rates

Increases

Administrative implementation

Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91-114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accured. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179 distinguished 281

TELEPHONES

Long distance calls

Government business necessity

Effect of area code procedures on certifications

Where a telephone company does not utilize a local message unit system in its billing operation, but lists all calls as "long distance," even within the same metropolitan area, and the tolls charged for calls are not sufficient to qualify for use of the Federal Telecommunications System, all calls must be certified as being "necessary in the interest of the Government." 31 U.S. Code 680a (Supp. V, 1975) 321

TELEPHONES—Continued Page
"Short haul" toll calls
Random sampling
Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b–1(a) (Supp. V, 1975); 3 GAO 44, as amended by B–153509, August 27, 1976 ---- 321

TRANSPORTATION
Dependents
Employees on temporary duty
Use of Government vehicles. (*See* TRANSPORTATION, Dependents, Government vehicles, Employees on temporary duty)
Government vehicles
Employees on temporary duty
Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable ---- 226
Military personnel
Advance travel of dependents
School facilities lacking, etc.
Member of armed services stationed overseas whose dependent son returned to the United States for his second year of college is not entitled to reimbursement for such travel notwithstanding orders issued subsequent to the travel stated that the travel was in accordance with paragraph M7103–2, item 7, 1 JTR, and the Base Commander certified that the delay in publishing the orders was through no fault of the member. Even if orders had been timely issued, there is no legal basis for such travel at Government expense because the law and regulations authorize such travel only if there is a lack of overseas educational facilities which arose after the dependent's arrival at the overseas station, and that was not the case ---- 343
Vessel and port changes
Same port
When a member of the uniformed services is assigned on a permanent change of station to sea duty and the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e). 43 Comp. Gen. 639, modified ---- 266

TRAVEL EXPENSES Page
Military personnel
Medical board examinations. (*See* TRAVEL EXPENSES, Military personnel, Personal convenience, Travel to take professional examinations)
Personal convenience
Travel to take professional examinations
Travel of Reserve officers, serving limited active duty periods, to take medical board examinations shortly before their release from active duty should not ordinarily be authorized at Government expense nor should their examination fees be reimbursed since such trips are primarily a matter of personal convenience and benefit, unrelated to service requirements 201
Official business
Military personnel
Personal convenience travel. (*See* TRAVEL EXPENSES, Military personnel, Personal convenience)
Permanent change of station
Relocation expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Relocation expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Transfers
Relocation expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Vouchers and invoices. (*See* VOUCHERS AND INVOICES, Travel)

UNIFORMS
Civilian personnel
Requirements
Administrative determination
Agriculture Department
Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide frocks as uniforms for meat grader employees. If the Secretary of Agriculture determines that these employees are required to wear frocks as uniforms, appropriated funds may be expended for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

UNIONS
Agreements
Legality
Bargaining proposals
Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379
Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat

UNIONS—Continued Page
Agreements—Continued
Legality—Continued
Bargaining proposals—Continued
grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee must bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement ---- 379
Negotiability of proposals
Mileage rates
Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires the Department of Agriculture to authorize the maximum mileage rate for meat grader employees who use their privately owned vehicles in connection with their work. The Federal Travel Regulations (FTR) require agency and department heads to fix mileage rates in certain situations at less than the statutory maximum. Hence, the propcsed provision is contrary to the FTR ---- 379
Transportation in Government vehicles
Dependents of employees on temporary duty
Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable ---- 226

VEHICLES
Government
Transportation of dependents of employees on temporary duty
Criteria
Length of assignment and Government interest
Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes". However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable ---- 226

VOUCHERS AND INVOICES
Sampling procedures
Use of statistical sampling
Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b-1(a) (Supp. V, 1975); 3 GAO 44, as amended by B 153509, August 27, 1976 ---- 321

VOUCHERS AND INVOICES—Continued Page
Travel
Administrative correction of errors
Limitation on amount correctible
Agencies may administratively correct travel vouchers with underclaims not exceeding $30. Overclaims in any amount may be administratively reduced. 36 Comp. Gen. 769 and B-131105, May 23, 1973, modified ---- 298

WORDS AND PHRASES
"Award amount" fee
Use of "award amount" (fee) provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose ---- 271
Day care centers for children
The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located ---- 357
Follow-on phase of research project
Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied ---- 328
Portal-to-portal mileage allowance
Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee must bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement ---- 379
"Short haul" toll calls
Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b-1(a) (Supp V, 1975); 3 GAO 44, as amended by B-153509, August 27, 1976 ---- 321

U. S. GOVERNMENT PRINTING OFFICE : 1978 O - 264-939