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[B-198324]

Purchases—Small—Small Business Concerns—Certificate of Competency Procedures Under SBA—Applicability

Army contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration, although consistent with applicable regulation, is contrary to Small Business Act. While contract award is not disturbed, General Accounting Office recommends that Defense Acquisition Regulation 1-705.4(c), covering Certificate of Competency procedures, be promptly revised to eliminate exception to referral requirement for proposed awards not exceeding $10,000, since amended Small Business Act provides for no such exception.

Matter of: Z. A. N. Co., August 6, 1980:

The Z. A. N. Co. (ZAN) protests the award of a contract by the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), St. Louis, Missouri, for a total of 477 each ring assembly, engine, for the UH-1 helicopter. We are sustaining the protest.

The invitation for bids, No. DAAJ09-80-B-0009 (PFR), issued January 29, 1980, with an opening date of February 29, 1980, was a total small business set-aside. ZAN, offering to provide the rings for $19.90 each or a total of $9,492.30, was the low bidder; the L.O.M. Corporation (LOM), at $34.91 each for a total of $16,656.84, was second-low.

Although ZAN's bid was responsive, due to a poor performance record and a negative preaward survey of ZAN's plant which had been performed during January in connection with another TSARCOM procurement, the contracting officer determined that the firm was not responsible. He therefore awarded the contract to LOM without referring the question of ZAN's responsibility to the Small Business Administration (SBA) or requesting another preaward survey.

ZAN's primary basis of protest is the Army's failure to refer the matter to SBA. ZAN disputes the nonresponsibility finding, arguing that it was based on a preaward survey conducted without its participation and knowledge, and states that it has twice manufactured the identical item for the Government.

Section 8(b) of the Small Business Act, 15 U.S.C. 637(b)(7) (Supp. I 1977), was amended by Section 501 of Public Law 95-89, effective August 4, 1977, to empower the SBA to certify "all elements of responsibility, including but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity" of any small business seeking to receive and perform a specific Government contract. Under the Act, a contracting officer may not, for any of the above reasons, preclude a small business from award "without referring the matter for a final disposition" to the SBA.

Defense Acquisition Regulation (DAR) § 1-705.4(c) (DAC No. 76-19, July 27, 1979), however, states that the Certificate of Competency (COC) procedure applies only to proposed awards exceeding $10,000. For this reason, the Army maintains that its finding of nonresponsibility without referral to the SBA was proper. In addition, the Army notes that our Office previously has denied protests based on failure to refer questions of responsibility to the SBA when the regulations provided an exception.

The Army relies primarily on *Sigma Industries, Inc.*, B-195377, October 5, 1979, 79-2 CPD 242, a case which the Army states involved the same contracting officer, the same Command, and the same fact situation as the instant case. In *Sigma*, the contracting officer found the low bidder nonresponsible on the basis of a negative preaward survey completed a month before bid opening in connection with a different procurement.

We agree that the case stands for the proposition that a contracting officer may reasonably rely on such a survey; it is distinguishable, however, since in *Sigma* the SBA had refused to issue a COC 4 days before bid opening, in effect confirming the determination of nonresponsibility. In the instant case, there is no indication that the question of ZAN's responsibility was ever referred to or decided by the SBA.

The Army also cites *Orlotronics Corporation*, B-180340, May 14, 1974, 74-1 CPD 254, and *Solar Laboratories, Inc.*, B-179731, February 25, 1974, 74-1 CPD 99, in which we held that under DAR (then the Armed Services Procurement Regulation), the procuring agency was not required to obtain a COC when proposed awards did not exceed $10,000. These cases, however, were decided before the effective date of the Small Business Act amendments, and we do not believe they are controlling here.

In two recent decisions involving Forest Service procurements, our Office has sustained protests based on failure to refer when proposed awards did not exceed $10,000. See *J. L. Butler*, 59 Comp. Gen. 144 (1979), 79-2 CPD 412, involving a procurement conducted according to the small purchase procedures; *The Forestry Account*, B-193089, January 30, 1979, 79-1 CPD 68. In the latter case, we recommend that the contracting officer immediately refer the matter to appropriate SBA officials, and if a COC was issued and the protester was still willing to accept award under the invitation for bids, that the contracts otherwise awarded be terminated for the convenience of the Government. In both cases we noted that the Federal Procurement Regulations (FPR) Subpart 1-3.6 (1964 ed. amend. 153) had been amended to reflect the Small Business Act amendments and to require the contracting officer to refer all questions of responsibility to the SBA.

In the 3 years since the effective date of Pub. L. 95–89, the DAR also has been revised in part to reflect those amendments. Defense Acquisition Circular (DAC) 76–18, March 12, 1979 at 26, for example, deleted the urgency exception previously provided by DAR § 1–705.4(c)(iv). But the exemption for proposed awards of $10,000 or less has not been removed.

The SBA has issued final rules, effective October 19, 1979, which cover the COC procedure. They require contracting officers to notify SBA of nonresponsibility determinations, and indicate that the SBA will conclusively determine all elements of responsibility by issuing or refusing to issue a COC. 13 C.F.R. § 125.5 (1980). These regulations permit no exception to the referral requirements.

The record in this protest includes correspondence which indicates that SBA regards the current DAR as contrary to statute. As we have informed the Army, by letter dated November 23, 1979, the SBA advised our Office that it concurred with our decision in *The Forestry Account*, *supra*, stating:

> * * * We know of nothing in either the Small Business Act * * *, as amended * * *, or legislative history which suggests exempting Government small purchases of less than $10,000 from the SBA COC Program.

This same position had been expressed by the SBA in a June 4, 1979, letter to the DAR Council in which the SBA recommended eliminating the $10,000 exception from § 1–705.4(c), stating:

> * * * Denying COC consideration to many small firms by arbitrarily establishing a $10,000 threshold cannot be justified.

In an August 17, 1979, letter to the Department of Defense (DOD), the Deputy Administrator of the Small Business Administration stated:

> * * * [W]hen a small business concern is to be denied the award because the contracting officer has found the concern is not responsible, said concern has a legal right to request referral of the matter to the Small Business Administration *regardless of the monetary value of the contract.* * * * [Italic supplied.]

The August letter, however, indicated that SBA might agree to preclude the use of COC procedures on DOD procurements of $10,000 or less where the relatively informal small purchase procedures were used. This matter is not in issue here since this procurement was conducted pursuant to normal formal advertising procedures.

We have independently reviewed the legislative history of the 1977 Small Business Act amendments, and we agree that there is no indication that Congress intended to limit the authority of the SBA to proposed awards of more than $10,000. *See* H.R. Rep. No. 95–1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95–535, 95th Cong., 1st Sess. 21 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 838, 851.

The protest is therefore sustained.

We believe this decision should apply only prospectively, however, since the contracting officer acted reasonably and in good faith and in reliance on the existing DAR provision and on decisions of our Office which indicated that the SBA was primarily responsible for clarifying apparent conflicts between the statute and the regulation. *See*, for example, *What Mac Contractors, Inc.*, 58 Comp. Gen. 767 (1979), 79-2 CPD 179. We are, by letter of today to the Secretary of Defense, recommending that DAR § 1-705.4(c) be promptly revised to eliminate the exception to the COC procedure for proposed awards of $10,000 or less, and that in the interim, contracting activities be advised to follow the holding of this decision.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committees on Appropriations concerning the action taken with respect to our recommendation.

[B-191013, B-191013.2]

Contracts—Protests—Procedures—Bid Protest Procedures—Time For Filing—Initial Adverse Agency Action Date

Once agency denies protest, fact that protester believes agency will reconsider protest does not toll time for filing a protest to General Accounting Office (GAO) since GAO Bid Protest Procedures require protest to be filed within 10 working days of when protester learns of initial adverse agency action.

Contracts — Protests — Timeliness — Solicitation Improprieties — Benchmarking — Proposed Structure *v.* Results

Results of benchmark do not provide proper basis for reconsideration of prior decision dealing with proposed benchmark procedure since benchmark results do not constitute evidence which should have been considered.

Contracts — Protests — Timeliness — Solicitation Improprieties — Benchmarking—Proposed Procedure, etc.

Protest of methods used to compute costs from benchmark results is untimely where methods used were defined in request for proposals but protest was not lodged before benchmarking was completed.

Contracts — Specifications — Tests — Benchmark — Adequacy — Life Cycle Cost Evaluation

Since record suggests agency's benchmark-based life-cycle cost approach might not have been sufficiently accurate to support selection of awardee's rather than protester's equipment, and since agency's needs appear to have changed, GAO recommends that agency conduct market survey to determine, before further contract options are exercised, if reliance on awardee's equipment is justified.

Matter of: Information International, Inc., August 8, 1980:

Information International, Inc. (III) protests Social Security Administration (SSA) procurement SSA–RFP–78–0001, for multi-font optical scanning equipment designed to machine "read" or "scan" W–2, W–2P, and W–3 forms. The equipment was leased (with an option to purchase) from Recognition Equipment, Inc. (REI), the low evaluated offeror. We sustain a portion of III's protests and dismiss or deny the remainder.

The same procurement was the subject of our decision in *Information International, Inc.*, B–191013, May 31, 1978, 78–1 CPD 406. III also seeks reconsideration of that decision, in which we dismissed as untimely two of III's objections to the benchmark that was required as part of proposal evaluation and found no abuse of discretion by SSA with respect to its use of an "offset printed test deck" to be "read" during the benchmark.

Proposals were evaluated by means of a life-cycle cost method in which various "Bid Equalization Factors" were added to depreciated equipment costs. An estimated cost to the Government was computed for each system configuration evaluated. The amount of each of the bid equalization factors was calculated from data produced during the benchmark.

The systems proposed by III and REI differ in complexity and sophistication. REI offered what is called a "direct paper system," which reads the original documents. III's system reads a microfilm copy and includes an error correction process which permits computer generated images of doubtful characters to be queried, displayed and manually corrected by keyboard operators working in an adjacent terminal room.

Benchmark timing data was used to compute production (throughput) rates which in turn were used to calculate the amount of each vendor's equipment needed to meet SSA's projected workload, Calculation of REI's equipment requirements was relatively straightforward. III, however, qualified proposals for use of two different microfilm cameras (using 16 mm and 35 mm film) and submitted three basic scanning equipment configurations for each. All of III's configurations share a common process but utilize resources differently, providing a range of potential capability at differing costs. Proposals were submitted on lease, full payment lease, lease with option to purchase and purchase terms. While REI was required to offer six units initially and options to furnish two additional units, III's lowest cost evaluated proposal (35 mm systems on purchase terms) offered three initial so-called dual scanner installations.

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III's benchmark performance largely overcame its significantly higher equipment cost and brought its lowest evaluated proposal within approximately $2.55 million (9 percent) of the REI proposal accepted for award.

Essentially, III says that its proposals should have been evaluated as lowest in cost, that SSA made a number of errors in computing the evaluation factors, that SSA improperly made other "adjustments" to life-cycle costs which improperly penalized III, and that III equipment would have been shown to have been least costly had the benchmark been representative of SSA's actual requirements. III also believes SSA improperly refused to evaluate several III lower cost alternate and "unsolicited" proposals.

I. Reconsideration

III's major objection in its original protest concerned SSA's decision to limit benchmark scanning to the most easily read forms—approximately 70 percent of the total. Our prior decision concluded that III knew or should have known shortly after December 1, 1977, when it received a letter of that date from SSA, that SSA had rejected the objections which it had raised against this "70 percent limitation." Because III did not file its complaint with us within 10 days thereafter, we viewed the complaint as untimely.

III contends that the December 1 letter should not have been regarded as controlling because it had reason to believe that SSA would still consider the matter in conjunction with consideration of III's other complaint concerning the benchmark. III has now submitted additional evidence regarding a telephone conversation between its General Counsel and SSA's Associate Commissioner for Management and Administration, as well as a letter from its General Counsel to the Associate Commissioner dated February 14, 1978. According to III, this demonstrates that SSA was willing to consider the matter further.

SSA disagrees. It argues that III's evidence is not newly discovered evidence which could not have been considered earlier and denies that the Associate Commissioner at any time gave III's counsel reason to believe that SSA was contemplating reopening the 70 percent matter for reconsideration.

We find no merit to III's position. The fact that an agency may be willing to further consider a protest which it first rejects does not toll the time by which a protest must be lodged with this Office. Had SSA reexamined III's complaint after December 1, 1977, III's objection to the 70 percent limitation filed here after that reexamination would still have been untimely because our protest procedures require a protest

to be filed here within 10 days of *initial* adverse agency action. 4 C.F.R. § 20.2(a) (1980).

III also argues that its prior protest of the benchmark is inextricably bound to issues raised by its subsequent protest and should be considered at this time because the results achieved by the benchmark are now known.

Our prior decision dealt with a protest filed before benchmarking. The protester sought our review of the proposed benchmark procedure. We were not asked to review other aspects of SSA's evaluation of proposals, or REI's selection, which had not then been made.

We do not believe reconsideration of our decision regarding III pre-benchmark assertions to be appropriate because even if we agreed with III in retrospect that SSA's benchmark assumptions were faulty, we would not agree that its earlier complaints should be considered at this point simply because the test results are now known. The record does not show that our decision dismissing two of the allegations and denying the validity of the other was founded on any error of law or any misunderstanding of the facts existing during the timeframe with which our decision was concerned. See, *eg.*, *Ordnance Research, Inc.—Reconsideration*, B–194043, June 26, 1979, 79–1 CPD 455.

Consequently, III's request for reconsideration is denied.

II. The Protest

A. Preliminary Matters

At the outset, we decline to consider certain aspects of the protest. First, we do not believe it appropriate to review III's objections to SSA's proposed post-scanning error corrections process. SSA's elaborate post-scanning correction process consisted of several steps including manually correcting data. III, however, believes errors experienced during actual operations of the equipment should not be corrected manually through a separate process long after scanning, but that errors due to individual misfilmed documents could be more effectively corrected by refilming documents containing errors during subsequent scanning. The dispute does not involve completely misfilmed batches of documents, which SSA would have refilmed in any event.

We view this issue as outside the purview of the bid protest procedure. It does not concern specification requirements or any other aspect of the procurement for this equipment, but rather the agency's plans for operating the equipment once it is in place. While SSA's application of its corrections process to the benchmark impacted on the life cycle cost evaluation, the validity of the process itself is not, in our view, a proper part of this protest.

Second, we also view as inappropriate for our consideration III's belief that SSA was biased against innovative technology. However wise III may believe SSA should have been in seeking a more technically advanced system, we are aware of no legal requirement that SSA obtain the most technologically sophisticated approach available. On the contrary, SSA's procurement decisions reflect a belief in the importance of proven performance—a particularly legitimate concern considering the consequences facing SSA if data entry using a scanning process proved unsuccessful. *See Pentech Division, Houdaille Industries, Inc.*, B–192453, June 18, 1980, 80–1 CPD 427; *cf. System Development Corporation*, 58 Comp. Gen. 475 (1979), 79–1 CPD 303.

We also find that some of III's post-benchmark complaints are untimely.

Section 20.2(b)(1) of our Bid Protest Procedures states that protests based upon alleged improprieties in any type of solicitation which are apparent prior to *any* closing date for receipt of initial or amended proposals must be filed by that date. This includes, for example, a date set for submission of additional technical data requested during discussions. In this regard, benchmarking is used for proposal evaluation to produce "descriptive" data which the Government believes is necessary to assess the capabilities and/or cost of equipment proposed. *See, e.g.*, 48 Comp. Gen. 320 (1968); *Computer Network Corporation*, 56 Comp. Gen. 245, 255–256 (1977), 77–1 CPD 31. We believe, therefore, that a date set for submission of an offeror's benchmark data should be treated as a closing date within the meaning of section 20.2(b)(1). Thus, protests concerning amendments to a solicitation which define how the benchmark and evaluation of benchmark results will be handled must be filed by the benchmark submission date. *Cf. Comshare, Inc.*, B–192927, December 5, 1978, 78–2 CPD 387.

It is in this light that we view III's objection that it should have been charged for costs associated with hiring only one rather than two operators per scanner for its dual scanner configuration. The solicitation provided that offerors would be charged operator costs based upon the number of operators actually used during the benchmark. SSA would have charged III with costs associated with one operator had only one been used for production tasks, but III used two, ostensibly because it did not have sufficient time (four weeks following an amendment deleting a mandatory minimum two operator requirement) to retrain its operators. III was reminded of this solicitation rule during the microfilming portion of the test. Conceding, therefore, that two operators were used, III nevertheless argues that other benchmark parameters were to be determined based on actual measurements of

resources required and that operator requirements should be, too. In our view, III should have protested SSA's requirement before benchmarking, or complained then that the time allowed for retraining was not sufficient. Because the objection was raised after evaluation, it will not be considered.

III also complains that SSA improperly computed certain so-called residual error rates by arbitrarily assuming that only one percent of manually corrected data would contain errors which would require correction a second time and by making its calculation by counting "fields" rather than individual character errors. According to SSA, the one percent figure by fields is the only data available because it has not kept more detailed statistics in the past.

The 1 percent residual error rate was included in SSA's solicitation cost tables which indicated how the computation would be performed. Thus, III should have known from the RFP the basis on which the calculation would be made and should have protested this matter also prior to the benchmark.

B. Life Cycle Cost Adjustments and Evaluation

III raises a number of objections to specific adjustments which SSA made, or which III believes should have been made, but were not. III also questions various other aspects of the evaluation. Collectively, SSA's adjustments and other scoring assumptions had a significant impact on its calculation of REI's and III's evaluated life-cycle cost so that III's questions must be addressed before its broader concerns—attacking the meaningfulness of SSA's cost evaluation as basis for selection—can be considered.

A number of III's complaints relate to SSA's evaluation of the benchmark results, or to its refusal after benchmarking to consider untested alternate approaches.

For example, after benchmarking III first proposed its so-called "paired singles" configuration, one of the three basic equipment configurations III offered. Apparently, III did not conceive of the paired singles configuration until benchmarking had been completed.

SSA had placed no limit on what configuration could be benchmarked, and presumably would have allowed the paired singles configuration to be tested had it been proposed earlier. It refused, however, to consider the paired singles approach because it was proposed after benchmarking was completed.

III maintains that the paired singles proposal need not be benchmarked because all of its elements were tested and because the benchmark fully established that the equipment would operate at less than 70 percent of capacity even in the paired singles configuration.

We agree with III that SSA ordinarily could not require that the paired singles proposals be benchmarked without reason, just as a contracting activity cannot require unnecessary descriptive data or reject a proposal which fails to include such data. *Dominion Engineering Works, Ltd.*, B–186543, October 8, 1976, 76–2 CPD 324.

III admits, however, that there is a question as to whether sharing resources as proposed with the paired singles approach would limit performance. It attempts to meet this objection by presenting a worst case mathematical analysis showing that it is the computational capacity of the processor which is the critical limiting factor and that adequate capacity would be available.

Even assuming the reasonableness of III's technical argument, we believe SSA's refusal to consider the paired singles proposal without benchmarking is rationally founded. The financial risks facing SSA were substantial. It chose to use benchmarking because it wanted to base award on proven rather than theoretical performance. In this regard, SSA points out that during the course of this procurement III proposed several different approaches and made numerous performance claims, some of which were not borne out in practice. Not all of III's proposed approaches qualified by passing benchmark minimum performance requirements. In SSA's view, analytical abstract calculations predicting the behavior of interrelated system components may not necessarily correlate with actual results, imposing in effect unacceptable risks. SSA's decision therefore reflects its best judgment; that judgment has not been shown to be arbitrary.

Moreover, we note that III knew before it ran the benchmark that SSA would insist that each system proposed be benchmarked because III was told specifically that SSA would not agree to limit benchmarking to the double scanner system. None of the factors III cites to support its claim that the paired singles approach did not occur to it earlier because SSA's requirements were constantly changing involve matters which III would not have considered before benchmarking. Obviously, III, by not proposing this approach prior to benchmarking, ran the risk of not having that approach accepted.

III also complains that SSA improperly adjusted certain benchmark data, or failed to adjust all offerors' data equally, giving REI an unfair advantage. For example, SSA found that in some instances character and field substitution and reject rates did not correspond. REI's proved to be especially sensitive to the location of characters within prescribed areas on the test forms. Where characters appeared outside the box assigned to a specific field, the equipment placed them in the wrong field. SSA says it disregarded such errors if the characters printed on the form were read correctly but were placed in

an incorrect field. III believes, however, that the adjustment favored REI and was unfair because edit functions were tested during the benchmark.

SSA admits that REI obtained a larger adjustment in substitution rate than did III but argues that this was proper in the circumstances, noting that:

> Since these types of errors are easily corrected through field editing and because editing of the data was not part of the [benchmark] requirement, it was decided that the properly read but dislocated characters should not be counted as substitutions. III had a smaller amount of adjustment because its scanning parameters were established differently than REI's.

In this regard, we see no basis for protest if an agency adjusts benchmark data in evaluating it, provided the adjustments made are reasonably related to the announced evaluation criteria and provided the basis on which benchmarks were run or evaluation criteria used are not altered. We find nothing improper with the adjustments made which are based on SSA's belief that dislocated characters would be improperly counted if they were treated as substitution characters which appears to be overall consistent with the life-cycle costing evaluation criterion. *Cf. AEL Service Corporation*, 53 Comp. Gen. 800 (1974), 74–1 CPD 217. Unless III could establish, as it has not, that (1) it set its machine parameters for benchmarking in reliance on the included edit requirement; (2) these parameters were set to minimize the kinds of errors which SSA later corrected; and (3) III otherwise could have adjusted its parameters to better optimize performance, it has no basis for complaint.

Further, III complains that SSA arbitrarily imposed: (1) a 30-second penalty for job set-up; and (2) a 3-percent penalty for operation of output edit software, which was tested but not required to be used compiling benchmark data.

III has not presented evidence establishing that these adjustments were unreasonable, *per se*. Job set-up time was not measured by the benchmark because only one work unit (5,000 documents) was tested. A similar penalty was applied in computing REI throughput. The effect of the penalty was to downgrade throughput somewhat to afford SSA assurance that the quantity of equipment acquired would provide some margin for set-up time. Likewise, the 3 percent was assessed to account for system degradation while editing functions were being performed. A 10-percent degradation was observed during the benchmark, but SSA agreed to the lower figure to account for expected enhanced performance once the higher level language used during the benchmark was converted to the DEC–10 machine language which would have been used if III had received award. Consequently, III's objections to these adjustments are without merit.

We agree with III, however, that several of SSA's adjustments, and its refusal in one instance to consider an adjustment, were inappropriate.

For example, we agree with III that SSA improperly applied the 30 second penalty to magnetic tape changes by arbitrarily adding 30 seconds to the processing time required for each 5,000 document unit. As III points out, a 2,400 foot reel of magnetic tape will hold the information recorded on 35 batches of documents, or approximately 175,000 documents. SSA insists that the requirement is necessary, nevertheless, because the 5,000 page limitation is required to meet subsequent operational steps which SSA would use in annual reporting.

Imposing a 5,000 page limit is not the only way information in 5,000 page blocks could be handled. Data can be "blocked" electronically in 5,000 page units even though many 5,000 page units are recorded on one tape, and we understand such a procedure is possible for use on the equipment SSA planned to use, which would significantly reduce the number of tapes needed. SSA's approach appears to be based on its experience with REI type equipment. III's in-line correction process, however, would have reduced significantly the amount of post-scanning processing which might be required otherwise. SSA's evaluation of III's approach on the basis of what SSA would require by use of REI's system is unreasonable.

In addition to the 30 second and 3 percent penalties, SSA added a 90-second allowance for film changes at the scanner. III agrees that 90 seconds is a reasonable time for the changes, but questions the manner in which it was applied, pointing out that one scanner in a dual scanner configuration normally continues to operate while film is being changed in the other.

SSA states that it:

> * * * is aware of the situation cited by III * * * . However, SSA could not accept the premise that there would be no situations in which both films would not have to be changed simultaneously. The quality of the scanner input and the number of fonts involved would be among the various factors which will affect the read rate of the scanners. Regardless of attempts taken to preclude such simultaneous changing of the film in both scanners in a dual-scanner system during full operations, there will be random occasions when both film transports run out of film at, essentially, the same time.

Believing that it would be speculative to attempt to gauge the rate that this would occur, SSA nevertheless estimates that III would require about 1,100 film changes per month using 35 mm film, or 560 changes if 16 mm film were employed.

To the extent that film changes are statistically meaningful, changes in both scanners of a dual scanner system should be counted. Knowing approximately what number of film changes are required, SSA could have estimated statistically the likelihood that two film changes

would be required within any 90 second period. Although probably *de minimus*, the extent to which film changes in a dual scanner system are not statistically independent events could have been evaluated by measuring any changes in throughput of one scanner while the other was not operating.

III also believes that some kind of factor should have been applied in evaluating REI's benchmark results to account for possible paper jams just as III was penalized for costs associated with manually reprocessing individually misfilmed documents. SSA views III's complaint as untimely. We disagree. Although III knew that numerous adjustments were made to its scores, it was entitled to assume that comparable appropriate adjustments were being made to other proposals. Accordingly, we treat III's complaint as timely since it was filed within 10 days of the date it knew no such adjustments had been made.

SSA argues that both the effect of paper jams on REI's direct paper systems and misfilmed documents on the III process were evaluated. They were evaluated differently, SSA asserts, because the processes differ. REI ran the benchmark as a single continuous process. Paper jams or other technical problems in its system would have showed up directly in reduced throughput, because problems would have to be corrected as they arose. This could not occur with the III process, since until the microfilm used was developed there could be no determination as to misfilmed documents. Since SSA could not measure misfilming errors during the III benchmark it compensated by applying an adjustment based on experience with other microfilm uses.

As a result, III was evaluated using so-called "real world data"; REI was evaluated on this item on the basis of actual benchmark results. SSA does not address whether this was equitable. How much of a difference would have resulted from use of actual forms received by SSA rather than the neatly stacked offset printed forms actually used is unclear but it seems apparent that the difference should have had an effect on REI's evaluation. Thus we believe a "real world" adjustment should also have been applied to REI's test results.

III raises several complaints whose relationship to SSA benchmark is less direct, but which are important nevertheless in laying a foundation on which we may review SSA's life-cycle cost evaluation.

For example, III maintains that microfilm purchase and processing costs were evaluated improperly. Except for III's full service plan offering to set up contractor-owned contractor-operated (COCO) processing facilities, III's proposals assumed that the Government would furnish film and processing. III maintains, however, that by considering only Eastman Kodak Film and processing, SSA overestimated III's life-cycle cost by at least $500,000. In III's view, SSA should have surveyed potential film and processing suppliers to deter-

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mine pricing, using the Federal Supply Schedule (FSS) as a starting point.

SSA states that it used Kodak pricing because III specified Kodak film in its proposal and used it during the benchmark. SSA admits that III proposed Rochester Film products as an alternate source, but states that the Rochester Film proposal was received after the closing date for receipt of best and final offers.

III admits that it identified two types of Kodak film by number and used Kodak film in the benchmark. We believe that by failing to indicate that other film might be acceptable, III ran the risk that SSA would believe the film chosen might be critical to contract performance and evaluate on that basis. Consequently, we do not object to this aspect of the evaluation.

III also objects to SSA's rejection of its so-called best and final "zero preventive maintenance" proposal, in which it entered "zero" for scheduled daily preventive maintenance time. Arguing that the concept of preventive maintenance is made obsolete by modern semiconductor technology, III maintains that maintenance should be scheduled only as required. III says daily scheduled maintenance down time is unnecessary, because modern equipment, *e.g.*, memory, is constantly monitored and shows gradual degeneration, thereby permitting planned replacement. In III's view, it is unrealistic to deduct one or two hours from available working time to allow time for maintenance which will not be performed.

SSA asserts that III's complaint is untimely, and rejects III's view that preventive maintenance time and down time are conceptually interchangeable. Noting that offerors were required from the outset to state how much time was to be set aside for preventive maintenance, SSA asserts that III's protest on this issue should have been filed before the closing date for receipt of initial proposals. Arguing that "prescheduled maintenance" is preventive maintenance regardless of what III wishes to call it, SSA questions how III could achieve a 92 percent (or for that matter, a 90 percent) availability rate without scheduling some kind of maintenance.

III counters that the issue is timely and that, moreover, its equipment achieves a 97 to 98 percent availability rate.

We do not view III's complaint as untimely because nothing in the RFP prevented consideration of an offer proposing zero time for preventive maintenance. SSA may not have meant to allow a zero time proposal. It did not preclude one, however, and III protested as soon as it learned its zero time offer had been rejected. The rule SSA relies upon applies only to defects which are apparent on the face of a solicitation. 4 C.F.R. § 20.2(b)(1).

With respect to the merits of the issue, we point out that the burden is on the offeror in submitting his best and final offer to affirmatively demonstrate its merits. The contracting officer need not reopen negotiations, or speculate as to whether an unsubstantiated proposal could be supported with adequate technical data, but may downgrade or reject the proposal as the circumstances warrant. Here, III's zero preventive maintenance proposal marked a significant departure from its earlier approach, and SSA did not find anything convincing in III's proposal with respect to the validity of this approach. We find no basis for taking exception to SSA's rejection of this approach.

From SSA's answer to this allegation, however, we have some doubt regarding SSA's consistency in applying its life cycle costing technique. In explaining its position, SSA argues that downtime and time allocated for preventive maintenance:

> were never envisioned as, nor should they be considered, interchangable elements. The 90 percent up time [10 percent possible downtime] requirement is only a threshold factor. *SSA does not plan for the OCR system to be down for 10 percent of the time, in addition* to preventive maintenance. The 90 percent criterion is the level below which the contractor must pay penalties. [Italic supplied.]

Interchangeable or not, III correctly notes that downtime and time for preventive maintenance were treated as cumulative. SSA added their separate contribution together, in effect, by deducting both from total available time to compute monthly operating time and production figures. Moreover, an offeror naturally is induced to trade preventive maintenance for availability to maximize the calculated cost effectiveness of its equipment. We note that REI submitted an alternate proposal, also rejected, offering 75 minutes daily preventive maintenance (down from 2½ hours) plus 6 hours of weekly [weekend] maintenance.

We agree with SSA that unscheduled downtime and time during which the equipment will be shut down for scheduled servicing are different. We see no basis either for objecting to SSA's use of a threshold figure for determining when liquidated damages should apply, or for that matter, to its use of a 90 percent figure for computing throughput and equipment requirements, provided the contracting activity reasonably believes that a 10 percent downtime rate will be experienced.

Our concern is that SSA did not believe that a 10 percent downtime figure will occur. In its own words, it did "not plan for the * * * system to be down 10 percent of the time." Based on the experience of other users of III equipment, SSA seems to accept a 92 percent rate as achievable. SSA, III says, included planned downtime for preventive maintenance in computing the 92 percent figure from III experience data at other installations in effect discounting it twice. Correctly calculated, the data shows that 97 to 98 percent is achievable. Thus, we

think there is some question as to the reliability of SSA's costing approach as it impacts on the overall cost evaluation.

At this point, we turn to examine the impact which errors in SSA's adjustments could have had on its evaluation of the REI and III proposals, and in this light, to examine III's complaint that SSA's methodology did not in fact provide a valid analytical measure of the relative cost of its and REI's probable life cycle costs. Our review of the accuracy of SSA's methodology will focus on III's 35 mm purchase proposal, because that proposal was evaluated as lowest in cost and because our analysis indicates that no evaluating error made by SSA would permit any other III proposal to displace the 35 mm purchase as least costly.

SSA did not attempt to differentiate through the benchmarking between the vendors' ability to read a particular portion of SSA's projected workload. If we understand its intended methodology correctly, it assumed that REI and III would be able to process the projected 70 percent workload. Contrary apparently to III's view of what should have been done, SSA instead attempted to compute the cost impact which could be expected due to random sources of error, in effect introducing a source of "noise" (randomly formed characters) and measuring system response to it.

REI produced significantly higher figures, and received correspondingly greater cost penalties. The difference in magnitude of the REI and III's scores, however, is of little importance, because the accuracy of SSA's cost evaluation depends upon the precision with which these projected figures were measured in calculating the cost difference.

It is difficult in this regard to understand how the benchmark results could bear any rational relationship to projected comparative costs—at least to within an accuracy of better than $2.55 million, the original difference separating the III and REI proposals. Our calculations indicate that costs were extremely sensitive to numeric balance field substitution errors while the cost of processing rejected balance fields or reinstatement items was of comparatively negligible importance. One single numeric (balance field) substitution "error" has a $24,000 cost impact. A single "error" in SSA's construction of test set reproduced ten fold would have had an impact of almost a quarter of a million dollars. A minimum of one hundred seven individual SSA character "errors" in a 5,000 page test deck could account for the entire difference SSA calculated between REI and III life-cycle costs.

By attempting to use a single test deck to measure throughput and accuracy, rather than multiple test decks and appropriately adjusted weighting factors, SSA had to assure that the deck would be meaningful for two quite different purposes. To the extent that processing

time might reflect the difficulty of the material read, the test deck had to be representative of the total projected annual reporting workload, leaving only a very small portion of the benchmark to have any effect on accuracy.

SSA's methodology, however, included virtually no checks in the benchmark process. Apparently, SSA lacked any quality controls save visual inspection of portions of the test materials and the standards imposed on the offset printing process. It would have us believe that it nevertheless could distinguish test results to an accuracy approaching one part in ten thousand, the accuracy required to measure the impact of balance field substitution errors with the precision needed to support SSA's cost justification for selecting REI. SSA evaluated test results by comparing each vendor's data with what SSA "knew" had been typed on the original 500 page test set. So far as we are aware, SSA did not attempt to manually keyboard the test deck contents to determine what if any minimum (residual) error rate it had introduced. SSA, moreover, found that offset printing produced changes, eliminating fine lines.

Forced by III to admit that it did not budget for post-scanning processing costs at rates determined by the benchmark, SSA argues that its representation in III's prior protest that the benchmark would produce meaningful results was not meant to convey the notion that there would be an exact correspondence between benchmark and actual performance—only that the results would be representative. It did order the quantity of equipment which its benchmark based throughput calculations indicated would be needed.

This, however, amounts to applying a double standard—one to compare accuracy and a second for calculating equipment requirements. Meaningful results consistent with a life cycle costing approach are obtained regardless of the scale chosen to measure costs. Scoring will not be meaningful or rationally founded, however, if disproportionate weights are assessed different elements making up the total. A rational relationship is not maintained where any one significant contribution to total costs—here, out-of-pocket equipment cost—is keyed to a fixed unit of measure while other equally significant costs are not. Nor is it enough that SSA believes the accuracy portion of the benchmark produced relative performance data. III won that round, but lost because its equipment was more expensive than REI's. A weighting factor error of two in the accuracy, *i.e.*, if SSA's test should have been twice as difficult, makes a $12 million difference ($7 million for balancing alone) in the parties' relative standing.

Further, we question the adequacy of SSA's throughput results. SSA did not use the entire test deck to determine III scanner through-

put rates. Evaluation was based on a 1,000 page microfilm sample for the single scanner system. A 4,000 page sample (divided into four 1,000 page subsamples) was used to time throughput for the III dual scanner system. III's scanners read the material in 12 (single scanner) to 18 (dual scanner) minutes per 1,000 page subsample. Using SSA's 435.6 usable hours per month estimate, the 8 year evaluation period consists of 1,672,704 usuable minutes—a magnification of more than one hundred thousand times the (15 minutes) average scanner test period. Timings of the four subsamples included in the dual scanner test varied in extreme by more than one-half percent. Moreover, to test a hypothesis that no deterioration would be experienced, some disk and core were removed, and one 16 mm single scanner configuration was tested, twice. Oddly, performance using less equipment *improved* by 2.28 percent.

The effect of a variation of but a few percent can have disproportionate impact where as here offeror's cost proposals are evaluated based on an integral number of units, by rounding any calculated fractional equipment to the next whole number. Use of a quantified evaluation procedure can, and indeed in this case did, skew the relationship between a change in scanner throughput rates and equipment costs.

Calculating the potential impact of scanning throughput error is somewhat complex because III was free to propose any combination of single or dual scanning systems it wished, provided that SSA's peak monthly workload figures were met.

Raw and adjusted throughput rates for III's 35 mm equipment are as follows in pages per minute:

Configuration	Raw	SSA Adjusted	GAO Adjusted
Single Scanner	78. 6	72. 46	72. 97
Dual Scanner	115. 1	103. 62	108. 08

In this connection, SSA adjusted III's throughput rate downward by including time for tape and film changes as well as the three percent edit program degradation factor. (The GAO adjusted figure includes a 30 second tape change factor only once every 175,000 pages and does not assume that the dual scanner stops each time a film change is needed for either scanner.)

Our review indicates that SSA's minimum throughput requirement would have been met by a III proposal offering less equipment, if the corrected SSA throughput rates are too low by as little as three percent. A comparable increase in REI's computed throughput rates has no such effect, however, because REI's equipment requirements are

altered downward only by a 10 percent variation and then only in years 1 through 3.

If, instead, SSA's benchmark procedure produced faulty throughput rates so that the calculated throughput rates are too high, the difference is more easily absorbed by the equipment proposed by III than that offered by REI. A decrease of only 1.5 percent in REI throughput would require that an additional machine be added during years 4 and 5 because REI met SSA's requirement by furnishing only 8 units because SSA did not require that it furnish document numbering during those two years. (REI is required to furnish document numbering during years 1 through 3 and after year 5 while III was required to propose microfilming equipment with numbering throughput the evaluation period. Evidently, SSA viewed automatic numbering as merely a matter of convenience.)

C. Incidental Issues

The protester has stated several complaints which we consider to be only incidental to our decision.

For example, III complains that SSA required that microfilming throughput rates be computed using a so-called "document flipper" because the III TDC (planetary) cameras otherwise would invert the sequence in which the documents are arranged. SSA says it expects to hire poorly qualified temporary personnel to retrieve and process documents for correction during reinstatement processing, and consequently, needs to assure that a consistent document sequence is maintained. The cost of the flipper itself is insignificant. We find this issue to be inconsequential.

Throughput rates for 35 mm microfilming equipment were determined by running two 500 page samples. Times of 13 minutes, 22 seconds and 11 minutes, 42 seconds were produced for the III proposed 35 mm camera using the document flipper. Although equipment requirements were based on the total time required for the two runs, the 6.6 percent difference between each of them and their average alone is enough to account for one camera of the eight SSA required that III offer to meet year 1 through 3 requirements.

SSA's computations, in this regard, showed that its initial workload could be processed if 7.3 cameras, and supporting staff and facilities, were provided. This 7.3 camera figure, however, includes a five percent degradation SSA estimated would result from use of the document flipper. Adjusting SSA's figures to eliminate this factor, but considering the 6.6 percent spread, shows a requirement for between 6.5 and 7.4 cameras with slightly less than 7 cameras the most likely estimate. The years 4 and 5 figures would be 9.8 and 11.4 with 10.5 cameras most

likely. The effect of a one camera savings for years 1 through 3 thus has a limited effect on SSA's calculation of III's evaluated cost reducing the difference in III and REI pricing by less than $100,000, to almost inconsequential proportions.

III further complains of SSA's refusal to consider its so-called "full service proposal" in which III offered to establish a COCO facility to process all SSA machine readable forms. Conceding evidently that the full service proposal could not be considered under the RFP, III states that it was offered as an unsolicited proposal and that SSA's failure to consider it "is simply another piece of evidence that SSA's purpose was to obtain familiar technology, not to save cost." Although SSA tenders a multitude of reasons supporting its decision to reject this proposal, it is enough to point out that SSA could not accept it because it was clearly outside the scope of the procurement and because the Federal Procurement Regulations (FPR) do not anticipate acceptance of an unsolicited proposal to furnish supplies *or services* which would normally be procured by competitive methods. FPR § 1–4.901. To have accepted this proposal would have amounted to a sole-source award without justification.

III also believes SSA counted existing SSA-owned or leased REI equipment in computing REI equipment requirements, but not in determining how much equipment III would have to furnish. Nothing in the record supports III's concern. At the outset of the procurement SSA owned one REI scanner and leased another, using them to process Quarterly Report requirements. The second machine was leased in part to meet excess requirements until the current procurement was completed. The lease since has been terminated, while the first REI machine continues to be used to meet other SSA scanning requirements. There would have been no proper basis for III to have objected, however, if SSA had advised offerors that existing surplus capacity would be considered or if SSA were to use any surplus capacity for annual reporting purposes.

Finally, III raises various questions regarding actual performance under the REI contract. The possibility, of course, that a contract does not work out as expected is not material to a bid protest, because the reasonableness of the assumptions made during the procurement process must be judged by examining the circumstances as they were then believed to exist. Performance, moreover, is ordinarily a matter of contract administration which is not considered by this Office.

D. Conclusion and Recommendations

Although we believe the benchmark methodology used may have provided a reasonable basis for determining the competitive range,

we agree with III that the validity of the benchmark as an analytical tool for distinguishing between its and REI's proposals is questionable. Great precision is required of the accuracy portion of the benchmark if it is to serve as a basis for drawing a rational distinction between the III and REI proposals based on differences in indirect costs. Moreover, because indirect costs were added to direct (equipment and equipment related manpower, space and facilities) costs, it would not have been sufficient had SSA managed, as it believes it did, to measure a "relative difference" in III and REI performance. The two types of costs must be measured using a standard which permits them to be compared. SSA's use of validation methods—specification of off-set printing standards coupled with visual inspection of but a fraction of the test materials—appear on their face inadequate to assure that anything close to the necessary degree of accuracy was maintained. Its evident lack of concern that all factors (*e.g.*, actual anticipated availability and the effect of 200 rather than 26 typefonts, as discussed in the SSA technical evaluation) be considered and its belief that relative accuracy data was sufficient leave us without any foundation from which to conclude that the comparatively close cost data computed for III and REI necessarily reflects a measured difference in the life cycle cost of either the REI or III system. The record thus suggests to us that the life cycle cost evaluation was inconclusive with respect to measuring the costs the Government could reasonably assume it would incur.

However, we are aware of no evidence indicating SSA acted other than in good faith, or that SSA would not have awarded III a contract had III been able to establish that its approach would be more cost effective than REI's. We believe this result occurred because the procurement was structured for direct paper systems using a benchmark that was conceived to discriminate between relatively similar equipment. SSA restructured its solicitation, allowing microfilm based processes, once it became clear that III might be able to compete. The benchmark was adapted to permit comparison of microfilm and direct paper systems, but was pressed beyond its limits not as a result of any SSA desire to preclude III but because III's performance and higher equipment costs focused the competition along lines which the benchmark methodology was incapable of handling.

In view of the uncertainty and difficulty SSA faced, and the inconclusive nature of the evaluation scores it computed, we believe it would be appropriate for SSA to validate its initial procurement decision. Thus, we believe SSA should conduct a market survey to determine whether continued reliance on REI equipment actually serves the Government's best interest, providing in connection with the

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survey an opportunity for further testing, using statistically representative samples selected from actual annual reporting data. In this connection we note that while SSA professes to be satisfied with the REI equipment, SSA's anticipated working environment has changed since the procurement was conducted. For example, although SSA had microfilmed earnings documents for more than 20 years, it viewed microfilming as an unnecessary expense with scanning and as a unique cost to be charged to III. Since making award, SSA has entered into an agreement with the IRS which requires that SSA microfilm all forms for the IRS. We also understand that original documents are being retained on site until the microfilm copy is developed, altering in part the assumptions on which SSA states its approach to post-scanning processing was based. Since microfilming costs alone contributed more than five million dollars to the cost of the III proposal, a quite different result might be achieved were the procurement conducted today. Moreover, a test conducted today should suffer few of the difficulties SSA faced, because SSA knows what its experience has been and has actual forms from which a statistically representative workload sample could be selected. A much larger sample could be used, reducing the statistical significance of any one individual anomoly.

By separate letter to the Secretary of Health and Human Services, we are recommending such action be considered before any decision is made to exercise further REI contract options. *See B & W Stat Laboratory, Inc.*, B–195391, March 10, 1980, 80–1 CPD 184.

[B–195773]

General Accounting Office—Decisions—Reconsideration—Additional Information Submitted—Available But Not Previously Provided to GAO—Agency Justification for Award

Where interested party and procuring agency, in request for reconsideration, come forward with facts which they contend require overturning prior decision, and such facts were in their possession during development of protest, evidence of interested party will not be considered. In future, procuring agency's late submission will be treated similarly but will be considered in instant matter.

Contracts—Negotiation—Commingling of Sole-Source and Competitive Items—Effect on Competition

While agency contends other firms could have offered computer system, independent investigation reveals firms only could furnish hardware, not required software. Therefore, prior decision concerning sole-source nature of item is affirmed.

General Accounting Office—Recommendations—Contracts—Prior Recommendations—Modified—Termination Action Postponement

Recommendation in prior decision (59 Comp. Gen. 438) that contract be terminated and requirement resolicited is modified in view of agency contention that such action would disrupt critical computer services and current contract may continue during resolicitation effort and then be terminated if incumbent is not successful offeror under new solicitation.

Matter of: Interscience Systems, Inc.; Cencom Systems, Inc.—Reconsideration, August 11, 1980:

The Environmental Protection Agency (EPA) has requested reconsideration of our decision in the matter of *Interscience Systems, Inc.; Cencom Systems, Inc.*, 59 Comp. Gen. 438 (1980), 80-1 CPD 332, which involved a contract awarded to Sperry Univac (Univac) under request for proposals (RFP) No. WA79-D169.

The RFP was for various items of automatic data processing equipment to expand EPA's National Computer Center. The prior decision held that EPA had improperly included two items (central processing systems expansion and maintenance of Government-owned Sperry Univac equipment, subsections 2.1 and 2.5, respectively) in the RFP, for which there was no reasonable expectation of competition. We recommended that Univac's contract be terminated under Article XXV of the contract which permitted the Government to discontinue rental payments on 30 days' notice. We recommended that sole-source negotiations be commenced with Univac for subsections 2.1 and 2.5 and that subsections 2.2 and 2.3 be recompeted in a separate procurement.

EPA states that it had a reasonable expectation of obtaining competition for subsections 2.1 and 2.5 and that our decision, which concluded the opposite, was based on circumstantial evidence because EPA only made a general statement as to that expectation during the protest proceedings. EPA now submits evidence which, it argues, shows the existence of potential competition. According to EPA, this evidence was not submitted previously because GAO had never required an agency to justify why it was not making a sole-source award, and at no time during the course of the protest did GAO request supporting findings or evidence from EPA regarding the expectation of competition.

We think EPA has misinterpreted our prior decision. What we held in the May 8 decision was that by commingling sole-source items with competitive items and permitting multiple-award discounts, EPA had precluded competition on items 2.2 and 2.3 and, in effect, awarded sole-source contracts for 2.1 and 2.5 under the guise of competition. In other words, Univac could have lowered its prices on items 2.2 and 2.3 to meet the competition and "get well" on items 2.1 and 2.5 without concern as to the competition or the need to justify its prices to the agency. This award was made without the normal protection available in such an award of securing cost and pricing data. Our recommendation for corrective action was aimed at EPA curing the defect in the procurement, i.e., a sole-source award without any assurance that it had obtained a reasonble price.

The issue of EPA's basis for expecting competition for subsections 2.1 and 2.5 was clearly raised by the protesters and at the bid protest

conference held on the protest attended by all the parties. EPA came forward with no evidence to support its general statement that it expected competition. This applies to Univac's submission on EPA's request for reconsideration citing past instances of procurements which, it contends, shows it competed under fear of competition. Univac contends it has "long been aware of this evidence." Univac, as the awardee and an interested party to the protest, received copies of all submissions and attended the conference. No substantive submissions or comments were made by Univac during the protest.

Parties or agencies which withhold or fail to submit all relevant evidence to our Office in the expectation that our Office will draw conclusions beneficial to them do so at their own peril since it is not the function or province of our Office to prepare, for parties involved in a protest, defenses to allegations clearly raised. Accordingly, we will not consider the Univac evidence since, previously, it had knowledge of and was presented ample opportunity to submit that evidence. See *Decision Sciences Corporation—Request for Reconsideration*, B–188454, December 21, 1977, 77–2 CPD 485. As we have not previously so ruled concerning a procuring agency, we will consider the matters raised by EPA. But, in the future, submissions containing such evidence available to an agency will be treated in the same manner as that submitted by a protester or interested party.

As concerns the expectation of competition for subsection 2.1, EPA states that Southwestern Bell Telephone was soliciting a buyer for the Univac Series 1100 System required by subsection 2.1 at the time the RFP was issued and has forwarded a classified advertisement from a trade paper announcing the sale of the unit. EPA further states that such units were also available from third party brokers.

We have ascertained through independent investigation, which EPA could have but did not, that none of the items for sale included software which was required by subsection 2.1 and much of the software, such as Level 36 of Univac 1100 Operating System software, is proprietary to Univac. Therefore, the "new" evidence submitted by EPA does not present a basis to alter our prior conclusion that no reasonable expection of competition existed for subsection 2.1.

Regarding subsection 2.5, EPA has listed six computer installation sites where firms other than Univac are maintaining Univac 1100 systems, which EPA argues shows there are firms capable of maintaining Univac equipment; therefore, competition was expected on subsection 2.5. Interscience has responded that it has critically examined these sites and that none of the maintenance contracts were operating at the levels of staffing or experience required under this RFP.

We find it unnecessary to resolve this dispute. Even if EPA is correct about subsection 2.5, the fact that subsection 2.1, the most costly

of all subsection items, was a sole-source item, was enough to taint the procurement in view of the allowability of multiple-award discounts in the RFP which commingled sole source and competitive items.

Because of the above, we see no need to discuss EPA's objections to our observations concerning post-proposal receipt matters which, in our view, confirmed that no reasonable expectation of competition existed prior to the solicitation.

EPA takes issue with our conclusion that Univac's awareness of its sole-source position without competition or cost or pricing data did not assure reasonable prices. EPA contends that (1) competition existed (which we have concluded was not the case); (2) the discounts offered by Univac were substantial and reflect the fact that Univac was offering prices under the threat of competition because the discounts offered on the uncontestably competitive subsections were comparable to those offered on those subsections found to be noncompetitive by our Office; and (3) Univac's prices were reasonable based on a price analysis and comparison of the prices with established Univac commercial prices.

Univac offered two separate discounts for each subsection. One discount figure applied if Univac were awarded one, two or three subsections and the other applied if Univac was awarded all four subsections. These discounts more than tripled on the noncompetitive subsections if Univac was awarded all four subsections. However, for the competitive subsections the discount declined. Accordingly, the pricing pattern employed lends no support to EPA's position and despite EPA's assurances that reasonable prices were obtained because of its price analysis, the lack of competition and the commingling of competitive and noncompetitive items did not assure the most favorable discounts from Univac.

EPA has questioned the remedy we recommended—termination of the Univac contract, recompetition of subsection 2.2 and 2.3, and sole-source negotiations with Univac for subsections 2.1 and 2.5. According to EPA, the termination without a replacement contractor ready to perform, will adversely impact on the National Computer Center. Therefore, to assure continuity of service, the recommendation is modified so that the Univac contract may continue during the recompetition and sole-source negotiations. Then if the successful offeror is other than Univac, the Univac contract should be terminated when performance is imminent. We expect that EPA will reprocure in a timely fashion.

EPA contends that there is no need to disturb the award of subsections 2.1 and 2.5 since these were not protested. As we recognized in our prior decision and our above discussion, without adequate competition there is no assurance of the reasonableness of the price. Therefore, cost and pricing data should be obtained for 2.1 and if this data does not support the price offered then negotiations should be commenced with Univac on 2.1.

Finally, EPA should investigate thoroughly whether competition exists for subsection 2.5, considering Interscience's position. If competition exists, then our Office would have no objection to that subsection's inclusion in the solicitation being issued for subsections 2.2 and 2.3. (Our comments in the May 8 decision regarding the experience requirements in drafting such a solicitation are still applicable.) If no competition is expected, the same procedures outlined for 2.1 should be followed.

Accordingly, our prior decision is affirmed and the recommendation is modified in part.

[B-197206]

Details—Compensation—Higher Grade Duties Assignment—Excessive Period—Transferred Position—Reclassification by New Agency

Federal Power Commission (FPC) employee was transferred with her position to Department of Energy (DOE) where she continued to perform same duties until detailed to a transferred higher-grade position. During detail the higher-grade position was reevaluated and reclassified without significant change as DOE position. The employee is entitled to a retroactive temporary promotion and backpay for period of detail beyond 120 days. Detail was not one to unclassified duties merely because former FPC position had not been reclassified as DOE position and was not interrupted by reclassification, but was a continuous detail to same position.

Details—Compensation—Higher Grade Duties Assignment—Excessive Period—Prior Office of Personnel Management Approval—Special Agency Agreements

By special agreement Civil Service Commission authorized Department of Energy to detail some employees for up to 1 year during organization of the Department, subject to certain specified conditions. Agreement does not apply to employee's detail to higher-grade position because Department of Energy did not comply with conditions of agreement.

Details—Extensions—Office of Personnel Management Approval—Delegation of Authority

By FPM Bulletin 300-48, effective February 15, 1979, Office of Personnel Management (OPM) delegated authority to agencies to detail employees to higher-grade positions without prior OPM approval (1) for up to 1 year during major reorganizations as determined by the agencies; and (2) for up to 240 days in other situations. Where detail exceeded 120 days and right to backpay vested under *Turner-Caldwell* decisions prior to effective date of bulletin, employee is entitled to backpay up to effective date of bulletin. On and after effective date, however, entitlement to backpay is governed by bulletin's provisions.

Matter of: Joyce R. Morrison—Backpay—Detail to Higher Grade, August 12, 1980:

This decision is rendered in response to a request by the Director, Headquarters Personnel Operations Division, Department of Energy (DOE), concerning the claim of Joyce R. Morrison for retroactive temporary promotion with backpay for the period from July 16, 1978,

to October 7, 1979. Her claim is based on *Turner-Caldwell*, 55 Comp. Gen. 539 (1975), affirmed 56 *id.* 427 (1977), and a line of implementing decisions. These decisions hold that when an employee is detailed to a classified position in a higher-grade position for a period in excess of 120 days without prior Civil Service Commission (CSC) or Office of Personnel Management (OPM) approval the employee is entitled to a retroactive temporary promotion and backpay for such period provided he or she meets the qualification and other requirements for such a promotion.

FACTS

Ms. Morrison was employed by the Federal Power Commission (FPC) as a Public Information Officer GS–1081–14, FPC Position No. 5486. The organizational title of her position was Assistant Director of Public Information. Her immediate superior was Mr. William L. Webb who occupied the position of Public Information Officer GS–1081–15, FPC Position No. 5074. The organizational title of his position was Director of Public Information. On October 1, 1977, Ms. Morrison and Mr. Webb, along with their positions, were transferred to the Federal Energy Regulatory Commission, Department of Energy, by the Department of Energy Organization Act, Pub. L. 95–91, approved August 4, 1977, 91 Stat. 565, 42 U.S. Code 7101 note. Among other things, this Act transferred most of the functions and personnel of FPC to the new commission. (See sections 402 and 701 of the Act.) The Personnel Action (Standard Form 50) transferring Mr. Webb contained this notation under Item 30: Remarks: "TYPE OF APPOINTMENT, POSITION, OCCUPATION CODE GRADE AND SALARY REMAIN UNCHANGED." However the organizational title of his position was changed from Director of Public Information to Director of the Office of Public Information.

On July 16, 1978, Mr. Webb vacated his position and, effective that same date, Ms. Morrison was appointed Acting Director of the Office of Public Information by the Executive Director of the Federal Energy Regulatory Commission (FERC). Ms. Morrison contends that she performed the duties of the grade GS–15 Director's position from that date, July 16, 1978, until she transferred to another agency, effective October 7, 1979. During this period, on June 20, 1979, the grade GS–15 Director's position was redescribed and reclassified without substantive change as a DOE position. The Executive Director has certified that Ms. Morrison "performed the full range of duties of the position of Acting Director, Office of Public Information, GS–1081–15" during this period.

DOE acknowledges that Ms. Morrison served as Acting Director of the Office of Public Information for the period claimed. However, it

seems to be DOE's position that she was detailed to a classified position in higher grade only from June 20, 1979, the date the grade GS-15 FPC position was reclassified as a DOE position, to her separation on October 6, 1979, or 110 days. While this is not entirely clear, DOE's position appears to be predicated on a theory that all employees transferred with their positions to DOE at its inception on October 1, 1977, were in effect detailed to unclassified duties until their positions were reclassified as DOE positions.

DOE also contends that Ms. Morrison's detail was covered, at least in part, by a special agreement whereby CSC, to facilitate the initial organization of DOE, authorized the detail of some employees for up to 1 year. This agreement required, among other things, that DOE periodically report to CSC the names of those being detailed for more than 120 days with an overall justification and that details be recorded in employees' personnel records. This agreement applied only to details ending not later than October 31, 1978.

While not mentioned by DOE, another matter which must be considered is the issuance, during the running of Ms. Morrison's detail, of Federal Personnel Manual (FPM) Bulletin No. 300-48, dated March 19, 1979. In this bulletin OPM delegated authority to agencies, *effective February 15, 1979*, to detail employees to higher-grade positions without prior OPM approval (1) for up to 1 year during major reorganizations as determined by the agencies; and (2) for up to 240 days in other situations.

DISCUSSION

Ms. Morrison's detail was not covered by the special agreement between CSC and DOE. As has been pointed out DOE's authority under this agreement was limited by a number of specified requirements, including the requirement that the names of those being detailed for more than 120 days be periodically reported to CSC. There is no evidence that Ms. Morrison's name was ever reported to CSC in connection with this agreement or that any of the other terms of the agreement were complied with in her case. Moreover, this agreement did not cover details after October 31, 1978, and Ms. Morrison's detail extended nearly a year beyond that date. As a result, Ms. Morrison's detail was not subject to the provisions of the agreement.

In the circumstances of this case we find that Ms. Morrison was detailed to a classified position in higher grade from July 16, 1978, to June 20, 1979, for the following reasons. When General Schedule (GS) FPC positions were transferred to DOE on October 1, 1977, they did not lose their status as classified positions, notwithstanding the fact that they were not formally designated as DOE positions until later.

The employees who were transferred to DOE with their positions continued to be assigned to classified positions. Employees must occupy positions classified in accordance with the provisions of chapter 51 of title 5, United States Code, in order to be paid under the General Schedule. See FPM Chapter 511, paragraph 1-6a, and 5 U.S.C. § 5107. The grade GS-15 position which had been transferred from FPC therefore existed as a classified position in DOE until it was reclassified and, as had been noted, Mr. Webb occupied this position in DOE from October 1, 1977, to July 16, 1978, and was paid on the basis of its classification.

Ms. Morrison's original detail was not terminated and a new one begun by the reclassification of the grade GS-15 FPC position as an FERC/DOE position on June 20, 1979, for the following reasons. As has been previously indicated, the position was redescribed and reclassified without change in title, series, or grade, and without substantive change in duties and responsibilities. Thus, throughout the period from July 16, 1978, to October 7, 1979, Ms. Morrison performed the same classified duties—albeit classified during that period in two separate but substantially identical positions. In somewhat analogous situations it has been held that substance and not form should control and that the continuity of the detail is to be determined by the duties performed. See *Marvin R. Dunn*, B-192437, September 30, 1978, and *William D. Yancy*, B-183086, September 7, 1977.

Finally, we must consider the effect of FPM Bulletin No. 300-48. The bulletin is dated March 19, 1979, and states that it is effective February 15, 1979. It does not purport to have any effect earlier than that date. Moreover, FPM Bulletin 300-48 must be considered in light of the nature of the remedy provided by our *Turner-Caldwell* decisions for overlong details to higher-grade positions. The remedy is a retroactive temporary promotion for the detailed person beginning on the 121st day of the detail. Thus, in the circumstances of Ms. Morrison's case, we conclude that where her continuing detail had exceeded 120 days without prior CSC or OPM approval and a right to backpay under *Turner-Caldwell* had vested prior to the effective date, the employee is entitled to backpay up to the effective date of the bulletin. However, since the key to *Turner-Caldwell* is the lack of authority by the agency to detail beyond established limits, entitlement to backpay after the effective date of the bulletin must be based on the new broader limits it established.

Therefore, applying the foregoing to Ms. Morrison, we find that she is entitled to a temporary retroactive promotion with backpay beginning with the 121st day of the detail which began on July 16,

1978, and continuing through February 14 1979. Her entitlement for the remainder of her detail—February 15 through October 6, 1979, is governed by the provisions of FPM Bulletin No. 300–48. As we have indicated, the issuance of FPM Bulletin 300–48 had a direct and controlling application on Ms. Morrison's status under the continuing detail. In addition, in our discussion of the legal authority under the *Turner-Caldwell* line of cases, we noted that an employee's entitlement to a retroactive promotion and backpay for an overlong detail is premised on a finding that the agency actually violated Civil Service Commission regulations governing the permissible duration of a detail. In accordance with this reasoning, and in view of the revised regulatory standards contained in the FPM Bulletin No. 300–48, effective February 15, 1979, DOE had the authority to detail employees to higher-grade positions for up to 1 year during a major reorganization. As a result, from and after February 15, 1979, Ms. Morrison's detail would not have violated Civil Service Commission regulations since the detail was under a major reorganization. We find no better evidence of this latter finding than the very descriptive language appearing at the beginning of the Department of Energy Organization Act, Pub. L. 95–91, approved August 4, 1977, 91 Stat. 565, which states as follows:

AN ACT

To establish a Department of Energy in the executive branch *by the reorganization of energy functions within the Federal Government* in order to secure effective management to assure a coordinated national energy policy, and for other purposes. [Italic supplied.]

Therefore, after February 15, 1979, DOE had the authority to detail Ms. Morrison to the higher-grade position for an additional 245 days without prior OPM approval (1 year or 365 days less the 120 she had already performed the same higher grade duties without compensation) and no additional compensation is due Ms. Morrison.

Ms. Morrison's claim is to be settled in accordance with the foregoing.

[B–196978]

Unions—Federal Service—Dues—Allotment For—"Exclusive Recognition" Requirement—Revocability of Authorization For Allotment

The Department of the Army received from an employee a signed authorization to have union dues allotted directly to a union. The employee then requested that the authorization be returned to her before any dues had been allotted to the union and the agency agreed. The union filed a grievance and the agency settled the grievance in favor of the union and the dues were alloted to the union. Under the Civil Service Reform Act, 5 U.S.C. 7115(a), an agency must honor a written authorization for allotment of union dues when it is received and the employee may not have the union dues returned to her.

Matter of: Margaret Jackson—Withdrawal of Allotment of Union Dues, August 14, 1980:

This is in response to a request for an advance decision by Lieutenant Colonel A. T. Holder, Chief, Finance and Accounting Division, Department of the Army, concerning the request of Mrs. Margaret Jackson to have her dues allotment cancelled.

On May 24, 1979, Margaret Jackson signed a Request and Authorization for Voluntary Allotment of Compensation for Payment of Employee Organization Dues (Standard Form 1187). This form was signed by a Ms. Kilgore of the American Federation of Government Employees (AFGE) on May 25, 1979, and was sent to payroll for processing where it was received on May 30, 1979. The form provided that the allotment would become effective the first full pay period following its receipt in payroll and in this case the allotment would have been effective on June 10, 1979.

On May 31, 1979, Mrs. Jackson changed her mind and decided to withdraw from the Union and requested that her allotment not be processed and that the form be returned to her. Initially, payroll complied with these requests. The Union then filed a grievance and on July 31, 1979, the Union and agency agreed that upon receipt of Standard Form 1187, the Civil Service Reform Act (5 U.S. Code 1101 note) mandated that the agency honor the assignment and make an appropriate allotment. Therefore, the agency and Union agreed that Standard Form 1187 should not have been returned to the employee and allotments were made to the Union. Mrs. Jackson then requested that the deduction of Union dues from her pay be discontinued and that she be refunded all monies deducted.

The provision of the Civil Service Reform Act, Public Law 95–454, which covers allotments to representatives is contained in 5 U.S.C. § 7115 and provides in part:

> (a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. * * * Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

The clear language of this statute requires an agency to honor the written assignment once it is received and make an appropriate allotment. Standard Form 1187 states that it will become effective the pay period following its receipt in the agency's payroll office. This statement only shows when the dues allotment will start to be withheld from the employee's salary and does not mean that the authorization

can be withdrawn before that time. Although Mrs. Jackson argues that Standard Form 1187 was not effective until June 11, 1979, the statutory language plainly indicates that the agency must honor the authorization upon receipt. The statute does not permit withdrawal after the form is received in the payroll office. After that time, the employee can revoke the allotment only after 1 year.

The only exception to the 1-year revocation rule is contained in 5 U.S.C. § 7115(b) which provides:

> (b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—
> (1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
> (2) the employee is suspended or expelled from membership in the exclusive representative.

Obviously, section (b)(2) does not apply since Mrs. Jackson was neither expelled nor suspended from the Union. Section (b)(1) applies to situations where the employee is promoted to a management position or leaves the employ of the agency. See H.R. Rep. No. 1403, 95th Cong., 2d Sess. 49 (1978). In this situation Mrs. Jackson was still a member of the bargaining unit but chose to leave the Union. In that regard, 5 U.S.C. 7114 states that "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employee in the Union it represents and is entitled to act for, and negotiate collective bargaining agreements, covering all employees in the unit." Section (b)(1) does not apply to Mrs. Jackson under these circumstances. Therefore Mrs. Jackson could not revoke the allotment once it was received by the agency for 1 year. Compare 5 U.S.C. 7115(c), applicable where a labor organization is not an exclusive representative.

Therefore, we hold that Mrs. Jackson may not be refunded any monies properly allotted to the Union.

[B-197351]

Coastal Zone Management Act—Grants to States, etc.—Matching Fund Requirements—Statutory Conflict

Local recipient of a grant under sections 305 and 306 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, may use community development block grant funds to pay the required local matching share even though section 318(c) of the Coastal Zone Management Act specifically prohibits use of Federal funds to meet local matching requirements. B-167694, May 22, 1978, modified.

Matter of: Use of Community Development Block Grant Funds to Pay Local Matching Share of Coastal Zone Management Grant, August 18, 1980:

This decision is in response to a request from the Department of Commerce as to whether community development block grant funds

may be used to pay the local matching share required for Federal grants to States as authorized by sections 305 and 306 of the Coastal Zone Management Act of 1972, as amended. 16 U.S.C. §§ 1454 and 1455. Our consideration of the question is premised upon the proper inclusion of coastal zone projects within community development programs meeting all requirements of the community development act.

The question arises because of two apparently conflicting provisions of law.

The coastal zone act, which provides for Federal grants on a sharing basis, specifically precludes the use of Federal funds from other sources to meet the grantee's cost share. On the other hand, the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.*, which authorizes grants on an entitlement basis, specifically provides for payment of non-Federal shares required in connection with Federal grant-in-aid programs undertaken as part of a community development program. How are we to reconcile the prohibition of the one with the authority of the other?

Specifically, section 105(a)(9) of the Housing and Community Development Act of 1974 provides that:

> (a) A Community Development Program assisted under this title may include only—
>
> * * * * * * *
>
> (9) payment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of the Community Development Program. Pub. L. 93-383, Aug. 22, 1974, 88 Stat. 641; 42 U.S.C. § 5305.

And section 318(c) of the Coastal Zone Management Act provides that:

> Federal funds received from other sources shall not be used to pay a coastal state's share of costs under section 305, 306, 309, or 310. Pub. L. 94-370, July 26, 1976, 90 Stat. 1019, 1031; 16 U.S.C. 1464(c).

The usual rules of statutory construction are not of much help in defining which of the two acts must bend to the other. The legislative histories provide little guidance. The legislative history of the coastal zone act shows a firm intention to assure local interest and involvement through financial participation in grant projects. The history makes clear that the prohibitory language was used to assure in a general sense achievement of the desired local participation. We perceive nothing to suggest that the prohibition was adopted to overcome any other Congressional enactment under which program funds might be provided pursuant to a concept compatible with the practice of applying federally derived funds to meet local non-Federal matching requirements. See H. R. Rep. No. 1049, 92d Cong., 2d Sess. 17 (1972).

If the coastal zone act prohibition against using any Federal funds for matching is specific, the authority provided in the community development act to do just that is no less so. And it is no answer to say

that the prohibition is in mandatory terms while the authority is provided in permissive terms; for the "permission" to use Federal grant funds is for the express purpose of overcoming the very requirements for local fund matching inherent in the prohibited use of Federal funds.

The prohibition against using Federal funds to meet grant matching requirements is generally applicable even though not expressly stated. See, for example, 57 Comp. Gen. 710 (1978). With this in mind, we have considered whether expression of the prohibition through statutory language serves to elevate it beyond its ordinary application. We find nothing in the statutory statement to suggest any meaning beyond that of emphatically requiring non-Federal funds to meet the requisite matching.

We also have considered the sequence in which the two provisions at issue were passed. We find instances in connection with differing coastal zone programs where the prohibition preceded community development act authorization and other instances where the authorization came first. Without any pertinent legislative history for guidance, we do not under such circumstances consider the time of enactment a reliable indicator of Congressional intent.

We, therefore, approach the issue of legislative intent on the basis of reaching the most reasonable result consistent with the purposes of both acts.

Section 106 of the Housing and Community Development Act of 1974, 88 Stat. 642, 42 U.S.C. § 5306, provides an elaborate formula scheme under which "* * * each metropolitan city and urban county (subject, to be sure, to various limitations) *shall* * * * *be entitled* to annual grants * * *;." It is clear in the context of the act that funds granted thereunder are available to meet all approved project elements, and the act provides that the Secretary of Housing and Urban Development "*shall approve*" applications for funds to be applied to such purposes. 42 U.S.C. § 5304(c). [Italic supplied.] Section 105 referred to above lists the permissible uses of grant funds. One of these permissible uses is for payment of the non-Federal share required in connection with Federal grant-in-aid programs undertaken as part of the grantee's approved community development program. The question is whether the coastal zone act prohibition should be read as being paramount or subservient to this authority.

Given the broad scope of the Community Development Act, we see no reasonable basis upon which to limit its clearly stated authority to use community development funds to satisfy the coastal zone ace requirement for non-Federal matching, when the coastal project involved is incorporated as a part of a larger community development program. On the other hand, the terms of the prohibition in the coastal

zone act need not be read so broadly as to encompass those few formula entitlement programs, the legislative scheme of which explicitly permits the Federal funds authorized thereunder to be used in satisfaction of non-Federal matching requirements.

The prohibition need not be so construed, in our view, in light of its essential design solely as a mandate for achieving local participation through local matching funds, and the obvious intention that community development funds are to be viewed as local resources for the purpose of satisfying the local matching requirements of other Federal grant-in-aid programs. Based on this reading, the coastal zone prohibition would apply to all Federal programs that do not otherwise require program funds to be treated as local resources for matching purposes. The ban consequently would apply to the vast majority of Federal grant programs, but not to Federal community development grant funds provided pursuant to formula entitlements. Those funds effectively lose their character as "Federal funds" insofar as that term is used in the Coastal Zone Management Act, and therefore are available as local resources to satisfy the match required in connection with a project properly incorporated as part of the grantee's community development programs.

The question presented is answered accordingly.

Our decision of May 22, 1978, B-167694, is modified to the extent of non-Federal matching requirements.

[B-199532]

Foreign Service—Home Leave—Entitlement—Panama Canal Zone—Status as Home Residence

Department of State Foreign Service employee requests home leave in Panama Canal Zone. Home leave may not be authorized in Canal Zone since home leave may only be granted in continental United States or its territories and possessions and Panama Canal Treaty of 1977, effective October 1, 1979, provides that Republic of Panama has full sovereignty over Canal Zone. Since home leave for purposes of "re-Americanization" is compulsory under 22 U.S.C. 1148, employee should designate an appropriate location for this purpose.

Matter of: Nereida M. Vazquez—Home leave, August 21, 1980:

The Department of State requests a decision regarding whether one of its Foreign Service personnel serving overseas, Nereida M. Vazquez may take home leave in the Panama Canal Zone. Since home leave may only be authorized in the United States or its territories and possessions, Ms. Vazquez may not be authorized home leave in the Canal Zone which became part of the Republic of Panama under the Panama Canal Treaty of 1977, effective October 1, 1979. She must, however, be granted home leave in an appropriate place within the United States or its territories and possessions.

On or about January 3, 1978, Ms. Vazquez became an employee of the Department of State, Foreign Service. Prior to reporting to her overseas duty post in Rome, Italy, she filled out a Department of State biographical data form indicating, among other things, that her legal residence at the time of employment was Arlington, Virginia; her home leave residence would be the Panama Canal Zone; and her residence for service separation would be Washington, D.C., or Arlington, Virginia. The record reveals that Ms. Vazquez' designation of the Panama Canal Zone for home leave was because she was born there and lived there with her immediate family until she attended college in the Washington, D.C. area and subsequently became an employee of the Department of State.

Having completed approximately 2 years of overseas service, Ms. Vazquez was eligible for home leave and was asked to fill out the official form for agency processing. Again, as in her biographical data form, Ms. Vazquez indicated she wished to take home leave in the Canal Zone. She also changed her legal residence and residence for service separation to the Canal Zone. Ms. Vazquez signed this form on January 4, 1980.

On June 2, 1980, some 2 months before Ms. Vazquez' scheduled home leave, the Department of State informed her that she could not designate the Canal Zone as her home leave residence. The reason given was that the applicable Department of State regulations only authorized an employee to take home leave in the United States, the Commonwealth of Puerto Rico, or territories or possessions of the United States. The employee was advised to change her residence for home leave.

Ms. Vazquez did not designate a new residence for home leave as she felt she could not meet the criteria set forth for such a change in the applicable agency form. Specifically, the form stated that:

> * * * Your designation [of a home leave residence] must show a definite family tie or other compelling interests rather than merely a desire to visit a particular location and/or relative or for travel for personal convenience. When you change your home leave residence, you must indicate (in block 10) the specific reason for your choice of the location and your intent for its future permanent use. * * *

Ms. Vazquez filed a grievance with the agency and the grievance staff proposes to allow her to take home leave in the Canal Zone. We are informed that this decision is based on Department error in not informing Ms. Vazquez more expeditiously of the noneligibility of the Canal Zone and because the Canal Zone is the only place which would meet the standards set forth above for designation of a home leave residence.

Foreign Service personnel's entitlement to home leave arises from the Foreign Service Act of 1946, c. 957, Title IX, Part D, Section

933(a), 60 Stat. 1028, as amended, 22 U.S.C. 1148 (1976). It provides that:

> (a) The Secretary [of State] may order to the *continental United States, its territories and possessions,* on statutory leave of absence any officer or employee of the Service who is a citizen of the United States upon completion of eighteen months' continuous service abroad and shall so order as soon as possible after completion of three years of such service. [Italic supplied.]

The statute is clear on its face and expressly states that home leave may only be taken in the United States or its territories and possessions. Leave of absence for this purpose accrues under 5 U.S.C. 6305 which similarly provides for the granting of home leave for use in the United States, "its territories or possessions." Implementing regulations consistent with this express statutory limitation are found in Volume 3 of the Foreign Affairs Manual (3 FAM), Section 454.5–1 (August 13, 1968). Travel expenses for home leave purposes are payable under the related authority of 22 U.S.C. 1136.

Prior to October 1, 1979, there is no question that Ms. Vazquez would have been entitled to take home leave in the Canal Zone as it was considered to be a territory or possession of the United States for home leave purposes. See 53 Comp. Gen. 966, 970–971 (1974). On October 1, 1979, the Panama Canal Treaty went into effect and under its provisions the Republic of Panama regained full sovereignty over the Canal Zone. Therefore, the Canal Zone can no longer be considered a territory or possession of the United States.

Because of this change in status of the Canal Zone, the area no longer can be considered a place which an individual can designate as a residence for home leave. Thus, Ms. Vazquez may not be authorized to travel to the Canal Zone for home leave. While the situation is regrettable, no other result can be reached in view of the express language of 22 U.S.C. 1148.

We have examined the legislative history of 22 U.S.C. 1148 to see if it is consistent with that conclusion. Home leave was authorized by Congress so that a "re-Americanization" of Foreign Service personnel could be accomplished by having them "renew their knowledge of developments in the United States and their feelings for the American way of life." H. Rept. No. 2508, 79th Cong., 2d Sess., p. 10 (July 12, 1946), accompanying H.R. 6967 which became the Foreign Service Act of 1946 referred to previously. Thus, the purpose of home leave is to assure that the employee is "re-Americanized" and not merely to enable him to visit with friends and family. Home leave in the Republic of Panama would be inconsistent with this concept of "re-Americanization."

As a possible basis to authorize Ms. Vazquez' home leave, we have also examined the applicable provisions of the Panama Canal Treaty (Article XI) and the Panama Canal Act of 1979, Pub. L. 96–70,

Title II, §§ 2101 *et seq.*, 22 U.S.C. 3831, which provide for a transition period of 30 months for certain functions. Our examination of the treaty and the enabling legislation reveals that the Republic of Panama is immediately vested with full sovereignty over the Canal Zone but that the United States retains certain of its law enforcement and judicial functions for 30 months to enable an orderly transition. Except for these limited functions, the Republic of Panama has plenary jurisdiction over the Canal Zone and the Canal Zone is clearly part of the Sovereign Republic of Panama. See the Department of State, *Selected Documents*, No. 6C, January 1978, "The Meaning of the New Panama Canal Treaties," for a discussion of this and other points of interest regarding the treaty. Therefore, the treaty and statutory provisions for transition do not provide a basis to treat the Canal Zone as a United States possession for purposes of 22 U.S.C. 1148 and 5 U.S.C. 6305.

In deciding that Ms. Vazquez may not be authorized home leave in the Canal Zone, we do not hold that she is precluded from being authorized home leave. The home leave provisions of 22 U.S.C. 1148 are compulsory. See *Hitchcock* v. *Commissioner*, 578 F. 2d 972, 973 (4th Cir. 1978). Accordingly, Ms. Vazquez is entitled to home leave and indeed failure to provide her with this leave would be violative of the compulsory provisions of the statute.

Under 3 FAM, section 124.3a(2) (May 8, 1970), a change in home leave address should be supported by a showing of definite family ties or "other compelling interests" rather than merely a desire to visit a particular location. We believe that a change of home leave address by Ms. Vazquez, under the circumstances of this case, which indicates her reasons for wishing to spend her time there for "re-Americanization" would be allowable. In this regard we note that Ms. Vazquez' original Biographic Data Sheet listed Arlington, Virginia, as her legal residence and residence for service separation. While her subsequent form of January 4, 1980, changing this to the Canal Zone cannot be recognized, the designation of some location in the United States, such as Arlington, would appear to be permissible in the circumstances of this case. See generally 3 FAM, Section 124.3 (May 8, 1978), particularly subsections 114.3b(1 and 3); and 6 FAM, Section 125.9 (October 8, 1974).

Accordingly, while Ms. Vazquez may not be authorized home leave in the Canal Zone she should designate an appropriate home leave residence for "re-Americanization" purposes.

[B-195644]

Travel Expenses—Private Parties—Attendants—Handicapped Employees—Permanent Change of Station

Blind employee of Internal Revenue Service who was transferred from Jackson, Mississippi, to Atlanta, Georgia, claims travel expenses of attendant who accompanied him and his wife, who is also blind, on househunting trip and on permanent change of station travel. Travel expenses of attendant may be paid as necessary expenses of employee's travel since such payment is consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. *H. W. Schulz*, B-187492, May 26, 1977; *John F. Collins*, 56 Comp. Gen. 661 (1977).

Matter of: E. Breland Collier—Travel expenses of attendant for transferred handicapped employee, August 22, 1980:

Mr. C. J. Pellon, Chief of the Accounting Section, Southeast Region, Internal Revenue Service, requests an advance decision concerning the propriety of paying the travel expenses of an attendant who accompanied a handicapped employee on a househunting trip and on a permanent change of station move.

Both Mr. E. Breland Collier, the employee in question, and his wife are blind. In connection with his transfer from Jackson, Mississippi, to Atlanta, Georgia, Mr. Collier was authorized travel expenses for an attendant. The attendant, who was not a Government employee, drove the Colliers to Atlanta on both the househunting trip and the permanent change of station move. For the househunting trip Mr. Collier is now claiming per diem for the attendant at three-fourths of the rate to which he is entitled. That rate is the allowance prescribed for a spouse accompanying an employee on a househunting trip under paragraphs 2-4.3b and 2-2.2b(1)(a) of the Federal Travel Regulations (FPMR-101-7 (1973)). He is also claiming a per diem allowance of $12 incident to the permanent change of station travel ($6 for the trip to Atlanta and $6 for the return trip). In connection with the househunting trip and the permanent change of station trip Mr. Collier is seeking reimbursement for mileage at the rate payable for three occupants in a car. For the attendant's return from Atlanta to Jackson, following the change of station trip, Mr. Collier has requested reimbursement at the rate allowed for one occupant of the car.

In our decisions, *H. W. Schulz*, B-187492, May 26, 1977, and *John F. Collins*, 56 Comp. Gen. 661 (1977), we held that when an agency determines that a handicapped employee, who is unable to travel without an attendant, should perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be

paid. The travel involved in those cases was temporary duty travel, and Mr. Pellon has asked whether these decisions may be applied and travel expenses paid where an attendant accompanies an employee on a permanent change of station move. We believe that the rationale of our above-cited decisions is equally applicable to travel in connection with a transfer of station.

In *Collins*, *supra*, and *Schulz*, *supra*, we pointed out that there is a commitment within the Federal Government to employ the handicapped and to prohibit discrimination because of handicap. Executive branch agencies are required by 29 U.S.C. 791 (Supp. III, 1973) to submit to the Office of Personnel Management an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals and 5 U.S.C. 7153 (1976) provides for the President to prescribe rules prohibiting, as nearly as conditions of good administration warrant, discrimination because of physical handicap in the competitive service. In *Collins* and *Schulz* we stated that requiring a handicapped employee to bear the additional expenses of an attendant might create a financial burden that could prevent the employee's travel on official business which would frustrate the above-cited Government policies with regard to employment of the physically handicapped. Neither Dr. Collins, serving without compensation on the Department of Commerce Advisory Board, nor Mr. Schulz who was serving as a consultant to the Energy Research and Development Agency, could travel without an attendant.

Even though 5 U.S.C. 5703, which governs per diem, travel, and transportation expenses of consultants and individuals serving without pay, does not specifically provide for reimbursement of the travel expenses of a handicapped employee's attendant, we held that in light of the Government's policies towards handicapped employees, the attendant's travel expenses were payable as "necessary travel expenses" incident to the employees' travel under 5 U.S.C. 5703. In *Schulz* we pointed out that in situations where an employee is on temporary duty and becomes ill to such an extent that the services of an attendant are necessary for the employee's return travel to his permanent duty station, we have permitted reimbursement for the transportation expenses of the attendant under the authority of 5 U.S.C. 5702(b). B–176128, August 30, 1972; B–174242, November 30, 1971; and B–169917, July 13, 1970.

Although Mr. Collier was traveling in connection with a permanent change of station, we see no reason to vary his or any other handicapped employee's entitlement to reimbursement for an attendant's travel ac-

cording to the type of travel performed. Requiring the handicapped employee to bear the costs of an attendant for permanent duty travel could have the same adverse effect on the Government's effort to employ handicapped individuals which we pointed out in connection with our decisions concerning the reimbursement of the travel expenses of an attendant for a handicapped employee on temporary duty travel.

Also, we have allowed reimbursement for the air fare of an attendant who accompanied a transferred employee's infant child on a flight to the new duty station where airline regulations required an adult to accompany children under 2 years of age. *Harold R. Jordan*, B–191284, September 22, 1978.

In our decisions involving reimbursement of the travel expenses of attendants accompanying handicapped employees on temporary duty travel, it was clear that the employees in question could not travel without assistance. It was also clear in the *Jordan* case cited above that the transferred employee's child could not travel without an attendant. The same finding should be made in cases of handicapped employees who perform permanent change of station travel. In connection with its determination concerning whether such an employee requires an attendant, an agency should consider whether an employee's spouse or other family member is traveling with the employee. In such a situation, it is less likely that an employee would need an attendant. However, this should not be interpreted to require the spouse or other family member to accompany the employee. The Federal Travel Regulations clearly contemplate that the spouse and other family members may perform permanent duty travel at a different time than the time that the employee travels.

Mr. Pellon has also requested our advice concerning the method of reimbursement. Although Mr. Collier has requested per diem for his attendant on the househunting trip at three-fourths the rate to which he himself is entitled, we would have no objection to payment of the full rate. That reduced rate is prescribed by paragraph 2–2.2b(1)(a) for a spouse travelling with an employee. One of the major expenses intended to be covered by the per diem allowance is lodging. While members of the same family could share rooms and thus reduce lodging expenses, this may not be possible when an employee travels with an attendant. As a result, we feel that Mr. Collier's attendant may be paid full per diem. Likewise we believe an attendant may be paid an appropriate per diem rate, not to exceed the full per diem rate, for the time he spent on the permanent change of station travel.

In accordance with the foregoing, the travel expenses of Mr. Collier's attendant may be allowed as necessary travel expenses incident to his relocation travel. In connection with Mr. Collier's claims for reimbursement of mileage, we believe they are proper and may be paid.

[B-199307]

Contracts—Buy American Act—Brand Name or Equal Procurement—Foreign Brand Name in Solicitation—Legality

Use of foreign brand name supplies as basis for brand name or equal procurement does not violate Buy American Act since Act does not totally preclude purchase of foreign equipment and in any event, Act has been waived for equipment manufactured in foreign countries in question.

Contracts—Buy American Act—Defense Department Procurement—Waiver of Act—Memorandum of Understanding—Implementation by Secretary

Allegation that DOD Determination & Findings exempting purchase of defense materials from Denmark and United Kingdom from application of Buy American Act cannot take precedence over Act of Congress is without merit where exemption is based on statutory authority conferred by Buy American Act and DOD Appropriation Authorization Act, 1976, as amended.

Contracts — Protests — Allegations — Burden of Proof — On Protester

Protester has not met burden of affirmatively proving its case that Determination & Findings exempting foreign materials from Buy American Act do not apply to instant procurement when Determination & Findings by their terms apply to all items of defense equipment other than those specifically excluded and protester has provided no evidence to support bare allegation that equipment is excluded from coverage.

Contracts—Specifications—Restrictive—Particular Make—Invitation Sufficiency

Allegation that specifications in brand name or equal procurement lack sufficient detail to enable protester to submit bid is without merit where solicitation clearly sets forth salient characteristics of brand name equipment and protester has not identified any specific portions of such specifications which it considers lacking in detail.

Matter of: Air Plastics, Inc., August 22, 1980:

Air Plastics, Inc. (Air Plastics) protests invitation for bids (IFB) No. DLA-700-80-B-1157 issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, Columbus, Ohio. Specifically, Air Plastics contends that the IFB violates the Buy American Act (Act) because it calls for a product manufactured virtually

entirely in a foreign country. In addition, Air Plastics argues that the specifications are lacking in sufficient detail to enable it to submit a bid.

The IFB was issued on April 1, 1980, and requested bids on 14 Vacuum Dust Collectors, Nilfisk Asbesto-Clene System Model No. GA–73 or equal. The original bid opening date of May 1, 1980, was extended to May 15, 1980, at Air Plastics' request. Award is being withheld pending resolution of the protest by this Office.

With regard to Air Plastics' first basis of protest, DCSC points out that the Act has been waived for supplies manufactured in both Denmark and the United Kingdom (U.K.) where portions of the Nilfisk Asbesto-Clene System are manufactured. Air Plastics asserts, however, that a Defense Department determination to waive the Act cannot take precedence over an Act of Congress and that the exception determination does not apply to the instant procurement.

The Act requires that only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use, unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a (1976). Executive Order No. 10582, December 17, 1954, as amended, which establishes uniform procedures for determinations, provides that materials (including articles and supplies) shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used therein. The order further provides that the price of domestic articles is unreasonable if it exceeds the cost of like foreign articles plus a differential. The Act and Executive order are implemented within the Department of Defense (DOD) by section VI of the Defense Acquisition Regulation (DAR), which provides for a percentage additive factor for evaluation purposes to be applied to offers of nondomestic source end products. DAR § 6–104.4 (1976 ed.).

Thus, we note at the outset that the Act as implemented does not, as Air Plastics suggests, absolutely prohibit the procurement of foreign supplies. Rather, it establishes a preference for domestic supplies by requiring that a differential be added to the price bid on any equipment of foreign origin. Furthermore, we are unaware of any provision of the Act, Executive order or regulations which would prohibit basing a brand name or equal procurement upon foreign brand name supplies.

In any event, as DCSC states, the Act has been waived for equipment manufactured in Denmark and the U.K. where portions of the Nilfisk system are manufactured (For purposes of argument, DCSC has assumed that the Nilfisk system is a foreign end product.) Pursuant to Memoranda of Understanding (MOU) with Denmark and the U.K., dated January 30, 1980 and September 24, 1975 respectively, DOD has issued Secretarial Determination & Findings (D&F) dated May 9, 1980, and November 24, 1976, exempting the purchase of defense materials from Denmark and the U.K. from application of the Act.

The determinations in the D&F are based on the statutory authority conferred upon department heads by the Buy American Act to exempt from the application of the Act those products for which it is determined such exemption would be in the public interest. They are further based on the authority of the Secretary of Defense under section 814(a) of the DOD Appropriation Authorization Act, 1976 (89 Stat. 540), as amended by section 802 of the DOD Appropriation Authorization Act, 1977 (90 Stat. 930), authorizing the Secretary of Defense to determine that waiver of the Act would be in the public interest when it is necessary to procure equipment manufactured outside the United States in order to acquire NATO standardized or interoperable equipment for the use of the United States in Europe. Therefore, we find no merit to Air Plastics' argument that the DOD determination to waive the Act is unauthorized. See *Self-Powered Lighting, Ltd.*, 59 Comp. Gen. 298 (1980), 80-1 CPD 195.

In addition, we are unable to conclude that the exception determinations do not apply to the instant procurement, as Air Plastics asserts. The subject D&F's cover all items of Danish or U.K. produced or manufactured defense equipment other than those excluded under the MOUs or subject to legally imposed restrictions on procurement from non-national sources. Air Plastics has provided no evidence to support its bare allegation that the equipment being procured is not within the coverage of the D&Fs and we know of nothing in the MOUs or any law or regulation which would exclude this equipment from coverage. In this regard, we note that the protester has the burden of affirmatively proving its case and we cannot conclude that Air Plastics' allegation meets its burden in that regard. *The Nedlog Company*, B-195963, January 10, 1980, 80-1 CPD 31.

Air Plastics' second basis of protest is that the specifications are deficient. Specifically, Air Plastics alleges that DCSC would not provide it with sufficient information on which it could submit a bid.

In this regard, DCSC points out that this is a brand name or equal procurement and that it complied with the applicable regulation for such procurements, DAR § 1–1206.2, by clearly listing the salient characteristics of the brand name product in the solicitation. DCSC also indicates that, at Air Plastics' request, the bid opening date was extended by an additional 10 days in order to allow Air Plastics time to obtain additional commercial data which Air Plastics believed was needed in order to submit its bid.

We have held that bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. 48 Comp. Gen. 441 (1968).

In this case, the salient characteristics of the relevant Nilfisk system are clearly set forth in Section F of the solicitation. For example, Section F advises potential offerors that the desired equipment is a vacuum dust collector and enclosure for automotive brake work controlling air-borne asbestos fibers in the work area equal to Nilfisk Asbesto-Clene System Model No. GA–73, 400 cylinder and 600 cylinder. Section F further advises that the system must be equipped with high efficiency air filters having a specified retention efficiency and that it must have a specified minimum exhaust rate and an exhaust hood capable of effectively preventing the escape of asbestos during compressed air cleaning of brake assemblies. The means by which such effectiveness must be tested and demonstrated are also stated. Section F goes on to describe several other features of the system which are deemed to be essential.

Air Plastics has not identified any portion of these specifications which it considers lacking in sufficient detail and thus has provided no support for its general allegation. Thus, we must conclude on the basis of the record before us that there is no merit to the contention that the specifications are inadequate.

The protest is denied.

[B–196840]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children From Prior Marriage—Parent Not Occupying Government Quarters

A military member married to a military member occupies Government quarters with their dependent child. Upon a permanent change of station of the male

member, the female member remains in Government quarters with the dependent child. Male member is not provided Government quarters at new station and claims a basic allowance for quarters (BAQ) at the with-dependent rate since he is paying child support to a former non-military spouse not residing in Government quarters with dependent children. The male member is entitled to BAQ at the with-dependent rate since his BAQ entitlement is determined independent of his military spouse where they do not reside in the same household.

Matter of: Sergeant Harold L. Sandkulla, Jr., USAF, August 25, 1980:

In this case a military member married to a military member occupied Government family quarters with their dependent child. The male member also has a child by a previous marriage for whom he pays child support and who is in the custody of the former spouse who is a civilian not occupying Government quarters. The male member upon a permanent change of station vacates Government family quarters. The female member remains in the Government family quarters with their dependent child. The question presented is may the male members be paid basic allowance for quarters (BAQ) at the with-dependent rate based on the dependency of the child of his former marriage. In the circumstances described we find that the male member should be paid BAQ at the with-dependent rate.

The question was presented upon a request for an advance decision from an Air Force Accounting and Finance Officer, 24th Composite Wing, APO Miami, on a claim by Sergeant Harold L. Sandkulla, Jr., assigned submission number DO–AF–1335 by the Department of Defense Military Pay and Allowance Committee, and forwarded here by Headquarters Air Force.

Under 37 U.S.C. 403 (1976) entitlement to BAQ accrues to every member regardless of sex or grade by virtue of his or her status as a member of the uniformed services if quarters are not provided by the Government. 56 Comp. Gen. 46, 48 (1976).

Where a member is married to a member and they are living in the same household, we have determined that if one of the members is receiving BAQ at the with-dependent rate on account of minor children from a previous marriage not residing in the household, a child born of the marriage of the two service members does not authorize the payment of another BAQ at the with-dependent rate, since the child of the present marriage is automatically included in the class of dependents for which one of the members is already receiving BAQ at the with-dependent rate. 54 Comp. Gen. 665, 667 (1975). Both members are not permitted to claim the same dependent to qualify for BAQ at the with-dependent rate and where a member is married

and residing with a member only one may draw BAQ at the with-dependent rate even though some dependents may live outside the household and others live within the household. 54 Comp. Gen. 665, *supra.*

However, as in the present case, where married members are living separate and apart due to their military assignments, though married to each other, BAQ entitlement should be determined on an individual basis. In this case, the female spouse and dependent child occupy Government quarters. Therefore, she is not entitled to BAQ. The male member is living in non-Government quarters and therefore qualifies for BAQ. Since the male member, Sergeant Sandkulla, has a dependent for whom he provides support who is not residing in Government quarters, he is entitled to BAQ at the with-dependent rate.

Accordingly, the Military Pay Order submitted is being returned for payment, if otherwise correct.

[B-197476]

Compensation—Premium Pay—Standby, etc. Time—Regularly Scheduled—Leave Periods—Extended Sick Leave Pending Disability Retirement

Federal Aviation Administration employee is not entitled to premium pay for standby duty while on extended sick leave pending disability retirement because there is no reasonable expectancy that he will perform standby service in the future. Moreover, since he is not entitled to such pay at date of separation and he would not have received it had he remained in the service, such pay may not be included in his lump-sum annual leave payment.

Matter of: Standby Premium Pay—Sick Leave Pending Disability Retirement—Lump-sum Annual Leave Payment, August 26, 1980:

The Assistant Secretary for Administration, Department of Transportation, has requested a decision as to whether a Federal Aviation Administration (FAA) employee on extended sick leave expected to terminate with disability retirement (possibly for 8 months) is entitled to premium pay for regularly scheduled standby duty and whether such premium pay should be included in his lump-sum annual leave payment. Based upon the following discussion, this Office concludes that the employee's entitlement to premium pay for standby duty on an annual basis terminates when he goes on sick leave under these circumstances and that such premium pay may not be included in his lump-sum annual leave payment.

Under 5 U.S.C. § 5545(c)(1) the head of an agency, with the approval of the Office of Personnel Management (OPM), may provide that an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Paragraph (2) of this subsection authorizes annual premium pay for administratively uncontrollable overtime.

OPM's implementing regulations are contained in part 550 of title 5, Code of Federal Regulations. Section 550.162(a) of these regulations provides that except as otherwise provided in this section, an employee's premium pay on an annual basis under 5 U.S.C. § 5545 (c) (1) or (2) begins on the date that he enters on duty in the position concerned for the purposes of basic pay, and ceases on the date that he ceases to be paid basic pay in the position. Paragraphs (b) and (c) are exceptions to paragraph (a). Paragraph (b) provides for the payment of annual premium pay on a seasonal basis. Paragraph (c) limits annual premium pay during temporary assignments to other duties and training. Paragraph (e) provides that an agency shall continue to pay an employee premium pay on an annual basis while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraphs (a), (b), and (c) of this section.

As noted in the submission, the entitlement of an employee on extended sick leave pending disability retirement to premium pay on an annual basis for administratively uncontrollable overtime under these provisions of law and regulations was considered in 43 Comp. Gen. 376 (1963) and B–175788, June 1, 1972. These decisions hold in substance that in this situation section 550.162(e) of the regulations pertaining to leave with pay status is not conclusive as to entitlement, that this regulation does not contemplate a situation where there is no reasonable expectation that the employee will return to work, and that an employee on leave with pay no longer is entitled to receive premium compensation when it is administratively determined that there is no basis for anticipating that his irregular, unscheduled overtime work will continue.

While, as the submission points out, there are some differences between annual premium pay for administratively uncontrollable over-

time and such pay for regularly scheduled standby duty, we can find no basis for concluding that such differences justify a different result with regard to the issue here involved. One difference mentioned no longer exists. Formerly section S1–5(b) of FPM Supplement 752–1 defined the reduction or discontinuance of premium pay for standby duty (but not for administratively uncontrollable overtime) as an adverse action within the purview of part 752 of the Civil Service regulations. However, FPM Supplement 752–1 was revoked by FPM Bulletin No. 752–8, February 2, 1979, and this premium pay is no longer considered basic pay for the purposes of adverse actions under chapter 75 of title 5, United States Code, as amended by the Civil Service Reform Act of 1978, and the revised regulations in part 752 of title 5, Code of Federal Regulations (1980).

Accordingly, it is our opinion that the holdings in 43 Comp. Gen. 376 and B–175788, *supra*, apply with equal force to premium pay on an annual basis for regularly scheduled standby duty and that an employee on extended sick leave expected to terminate with disability retirement is not entitled to such premium pay. This may be viewed as another exception to the previously cited section 550.162(a) which is required by a reasonable interpretation of 5 U.S.C. § 5545(c)(1). While during the period of sick leave the employee remains on the rolls and technically continues to be assigned to his position, he in fact is not, nor is he expected in the future to be "in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantive part of which consists of remaining in a standby status."

The remaining question is whether this employee is entitled to have premium pay on an annual basis for standby duty included in his lump-sum payment for annual leave under subsection 5551(a) of title 5, United States Code. This subsection provides that an employee who is separated from the service is entitled to receive a lump-sum payment for accumulated and current accrued annual leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee would have received had he remained in the service until expiration of the period of the annual leave.

As the submission indicates, this question was considered in 36 Comp. Gen. 18 (1956) and 38 *id.* 161 (1958). In the former it was held that an employee who was receiving premium pay for administratively uncontrollable overtime at the time of his separation was entitled to have such premium pay included in his lump-sum payment to the ex-

tent he would have received such pay had he remained in the service for the period covered by the lump-sum payment. In the latter it was held that employees who received premium pay for either administratively uncontrollable overtime or standby duty for "selected periods" and who were receiving such pay at the time of their separations occurring within a "selected period" were entitled to have such pay for the duration of the "selected period" included in their lump-sum payments.

However, as we have indicated, it is our view that the employee in the case at hand is not entitled to this premium pay during the period of extended sick leave terminating in disability retirement and he is not entitled to it at the time of separation. In these circumstances we can perceive no sound basis for concluding that he would have received it had he remained in the service until the expiration of the annual leave. Accordingly, it is our opinion that this employee is not entitled to have premium pay on an annual basis for standby duty included in his lump-sum payment for annual leave.

[B-197842]

Leases—Negotiation—Evaluation of Offers—Undisclosed Factors

Solicitation provided that award would be based on rental price per square foot (not overall annual price) and other disclosed award factors. Where agency reports that its evaluation of disclosed factors showed protester's and awardee's proposals were equal and protester's price per square foot was lower than awardee's, agency's award determination based on undisclosed award factors (including lowest overall life-cycle cost) was improper because principles of negotiated procurement require agency to advise offerors when disclosed basis of award is changed.

Contractors—Responsibility—Administrative Determination—Nonresponsibility Finding—Based on Prior Unsatisfactory Performance

Firm submitting best proposal when properly evaluated in accord with solicitation's evaluation criteria is not entitled to award of lease when agency determines that firm is nonresponsible. Further, nonresponsibility determination is reasonably based where agency cites firm's recent prior unsatisfactory performance on similar lease contract even though firm disputes agency's prior default termination and matter is still pending.

Contracts—Protests—Allegations—Not Supported by Record

Contention—that awardee was not eligible for award because it did not satisfy solicitaton's zoning requirement—is without merit where awardee had proper zoning on adequate portion of property to perform on contract.

Contracts—Awards—Propriety—Price Reasonable—Unreasonably Low Prices

No legal basis exists to preclude award of lease to firm merely because it might lose money in performing.

Contracts—Performance—Ability to Perform—Administrative Responsibility to Determine

Whether awardee could deliver building for occupancy by scheduled date is matter of responsibility and General Accounting Office does not review affirmative determinations of responsibility except in circumstances not present here.

Matter of: H. Frank Dominquez d.b.a. Vanir Research Company, August 27, 1980:

H. Frank Dominguez, doing business as Vanir Research Company (Vanir), protests the award of a lease to Shane Realty and Construction Company (Shane) by the General Services Administration (GSA) under solicitation for offers (SFO) GS-09B-08296 for office space and parking for the Social Security Administration in San Bernardino, California. Vanir contends that it should have received the award since it is the responsible firm which submitted the best proposal, and Shane should not have received the award for certain reasons. In response, GSA recognizes that some errors were made in the award determination but GSA contents that termination of the lease would not be in the best interest of the Government. We conclude that there was a valid basis not to award to Vanir, and that Shane was eligible for award. Thus, Vanir's protest is denied.

The SFO provided that GSA needed 16,361 square feet of contiguous general office space, plus or minus 5 percent, and 12 reserved off-street parking spaces, for a 5-year period commencing June 13, 1980. The SFO also provided that for purposes of determining the lowest price, an annual square foot rate for the amount of space offered and not an overall yearly rate would be used; in determining which offer will be the most advantageous to the Government, several listed award factors—in addition to the rental proposed and the conformity of the space offered to the SFO's specific requirements—would be considered. GSA reports that since its evaluation of the listed factors resulted in a determination that Vanir's offer and Shane's offer were equal, the only remaining disclosed evaluation factor was price per square foot. Vanir's price was $9 for 16,725 square feet and Shane's was $9.35 for 16,361 square feet. Therefore, based on disclosed evaluation factors, it appears that Vanir submitted the best proposal.

In addition to the disclosed award factors, however, GSA considered "other factors": (1) life-cycle cost, (2) seismic safety, (3) Vanir's ability to perform, and (4) the comparable age of the two buildings. The life-cycle cost analysis showed that Vanir's price per square foot was still lower than Shane's ($9.84 vs. $9.79) but the esti-

mated total cost to the Government was higher with Vanir than with Shane ($818,859.65 vs. $805,614.89). GSA was not satisfied with Vanir's certification regarding seismic safety but Shane's was acceptable. GSA was not confident in Vanir's ability to perform on this award because it was involved in a dispute with Vanir on another project, which ended in GSA terminating that contract for default shortly after the award here. Lastly, GSA believed that the new, energy efficient building offered by Shane was better than the older building that Vanir proposed.

First, GSA recognized that offerors were not notified that life-cycle costs would be evaluated in the award determination but GSA states that (1) overall cost to the Government should be considered in making the award, and (2) on a prior lease procurement, Vanir was advised that overall costs had been considered. Vanir states that is disregarded the information on overall cost consideration relative to the prior procurement because of the specific language used in this SFO.

In our view, the use of life-cycle cost as the method of evaluating price (as compared with rental price) is an acceptable method either on or overall cost basis or on a per square foot basis, provided that offerors are notified in advance of the basis for evaluation. The best interest of the Government will be served when offerors can tailor their proposals to the precise needs of the Government as the relative importance of those needs are reflected in the disclosed evaluation scheme. The principles of negotiated procurement require an agency to advise offerors when the disclosed basis of award is changed. *Eastman Kodak Company*, B–194584, August 9, 1979, 79–2 CPD 105. Here, the method of proposal evaluation was not only changed from rental price evaluation to life-cycle cost evaluation but also from a per square foot basis to an overall basis, the latter of which was directly opposed to the SFO's stated basis of evaluation.

In our view, it was not proper to switch to an overall cost basis without advising offerors. Further, since Vanir was still lower on a per square foot of life-cycle costs basis, we do not believe that this "other factor" would provide a basis to award to Shane.

Second, we can understand why GSA was dissatisfied with the carefully worded statement from Vanir's Registered Engineer regarding the seismic safety of the proposed building. Vanir appears to have recognized this since it sent in a letter offering to make any modifications necessary to the building to bring it in compliance with the ap-

plicable building code. If GSA was still dissatisfied with Vanir's certifications, then GSA could have used the negotiation process to give Vanir an opportunity to satisfy the certification requirement. Therefore, we do not believe that this "other factor" would provide a basis to award to Shane.

Third, the SFO required a modern office building with certain specific features; this represented the Government's minimum needs. Since it appears that Vanir's proposed building met these needs, it would be improper to award to Shane based on Shane's proposal to provide a new building. Thus, this "other factor" would not provide a basis to deny Vanir the award.

Fourth, GSA recognizes that the final "other factor"—Vanir's ability to perform—concerns responsibility and it should not have been considered as an award factor.

In sum, we must conclude that Vanir's proposal was better than Shane's when properly evaluated in accord with the SFO's evaluation criteria; however, we are not aware of any obligation on GSA's part to award a lease to a firm that it determines is nonresponsible, which is essentially what GSA did. As GSA points out, in our decision at 51 Comp. Gen. 565 (1972), we stated that an offeror's past performance should be considered in determining responsibility and past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility. Here, relying on our decision in *Howard Electric Company*, 58 Comp. Gen. 303 (1979), 79-1 CPD 137, and other decisions, GSA has determined that Vanir's prior inadequate performance justifies a finding of nonresponsibility even though Vanir disputes GSA's view of its prior performance and the dispute is still pending. Since GSA nonresponsibility determination is reasonably based on Vanir's alleged recent unsatisfactory prior performance on a similar contract, we have no basis to question GSA's determination not to award to Vanir. See *United Office Machines*, 56 Comp. Gen. 411 (1977), 77-1 CPD 195, *aff'd*, B-187193, May 2, 1977, 77-1 CPD 297.

Vanir further argues that GSA's nonresponsibility determination violates 15 U.S.C. § 637(b)(7) (Supp. I, 1977)—which empowers the Small Business Administration (SBA) to certify the responsibility of a small business—since GSA did not refer the matter to SBA prior to making award to Shane. This basis of protest was untimely raised as it was first made more than 10 days after Vanir received GSA's report on the protest, 4 C.F.R. § 20.2(b)(2) (1980), and after the record in

this matter was closed in accordance with our Bid Protest Procedures, 4 C.F.R. § 20.3(d) (1980). There also is a question as to the applicability of the COC procedures to lease procurements, which we need not address in view of the foregoing, since such procurements are not listed in the applicable SBA regulations, 13 C.F.R. § 125.1 (1980).

We note, however, that GSA initially considered Vanir's responsibility as an award factor; therefore, GSA apparently believed that it had no obligation to consider referring a nonresponsibility determination to SBA. After award, in its report on Vanir's protest, GSA recognized that a nonresponsibility determination should have been made instead of considering responsibility as an undisclosed award factor but at that point preaward referral to SBA under the certificate of competency (COC) program was impossible.

Vanir contends that Shane was not eligible for award because it did not satisfy the SFO's zoning requirement and its schedule was unrealistic and the building costs were so high that Shane could not perform realistically. Vanir refers to the zoning provision of the SFO, which provides that the failure to provide satisfactory evidence that the property is zoned in conformance with the Government's intended use will automatically make the "bid nonresponsive." Vanir points out that one portion of Shane's proposed property was not properly zoned. GSA and Shane respond that Shane could have performed by building on the properly zoned portion of the property. They explain that the improperly zoned lot was for parking only and the parking requirement could have been satisfied with an underground area. In our view, Shane's proposal did not violate the SFO's zoning requirements and this aspect of Vanir's protest is without merit.

Vanir also contends that Shane's underground parking suggestion is "absurd" because of the additional cost that would be entailed. This contention is dismissed, however, because the fact that Shane may have lost money in performing is not a legal basis to deny Shane the award.

Finally, Vanir contends that Shane could not and cannot deliver the building for occupancy by the scheduled date. GSA notes that this aspect of Vanir's protest concerns Shane's responsibility. This aspect of Vanir's protest will not be considered because we do not review affirmative determinations of responsibility except in circumstances not present here. See *Ira Gelber Food Services, Inc.*, B-196868, February 27, 1980, 80-1 CPD 161.

Vanir's protest is denied in part and dismissed in part.

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