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[B-198876.3]

Contracts — Specifications — Tests — Benchmark — Deficiencies—Notice of Failure to Pass

When otherwise-qualified offeror—who asserts failure to demonstrate technical capability in one area of benchmark was due to human error (other than deficiency in software)—is not advised of failure until month after benchmark, agency has not met duty to obtain maximum competition. Evaluators supervising benchmark either knew or should have known of failure at time it occurred, and question of capability could have been resolved immediately by re-running exercise in question.

Contracts—Specifications—Tests—Benchmark—Second Opportunity—All or Part Re-Run Basis

When offeror has demonstrated ability to meet all but one mandatory requirement for teleprocessing system, General Accounting Office recommendation that offeror be allowed second attempt to successfully complete benchmark requires re-running only exercise in question, not entire benchmark.

Contracts—Specifications—Tests—Benchmark—Pass/Fail Basis—Propriety

Benchmark tests should not be run on "pass/fail" basis. In rare instances where agency can justify such a test, evaluators supervising benchmark have duty to point out failures at time they occur. If these can be corrected during benchmark, offeror should be afforded opportunity to do so.

Matter of: The Computer Company—Reconsideration, January 2, 1981:

The Department of Energy requests reconsideration of our decision in *The Computer Company*, B-198876, October 3, 1980, 80-2 CPD 240. For the reasons indicated below, we affirm that decision.

The protest involves procurement of the computer-based message service by DOE through the General Services Administration's Teleprocessing Services Program (TSP). Under this program, approved user agencies may place orders for teleprocessing services against GSA Multiple Award Schedule contracts. See *ADP Network Services, Inc.*, B-196286, May 12, 1980, 59 Comp. Gen. 444, 80-1 CPD 339.

Seven offerors who responded to a *Commerce Business Daily* announcement were invited to participate in a benchmark, designed to demonstrate capability of their systems to meet more than 30 mandatory requirements. Those found technically qualified were then to participate in a second phase of the benchmark, designed for cost evaluation purposes.

DOE eliminated The Computer Company during the first phase for failure to demonstrate a reply capability. Specifically, each vendor was required to show that it could provide "a command to compose a reply to a message without creating a new message address." According to DOE, in the benchmark step which tested this capability, The Computer Company's system had generated a new message and had failed to enter the specified reply text, "Agenda is fine, see you at noon."

According to The Computer Company, its operator mistakenly used the "CONFIRM" rather than the "REPLY" command in completing this exercise. This was human error, not a technical failure, the firm asserts, and therefore should not have resulted in a failure of a benchmark which was to measure the technical capability of the software.

The benchmark occurred on May 8, 1980; DOE notified The Computer Company that it had been eliminated from the competition by letter dated June 3, 1980. The firm argues (1) that under applicable regulations, DOE's benchmark team, on the scene, should have pointed out the error immediately, so that the "REPLY" capability could have been demonstrated during the benchmark, or (2) that it should be permitted to run a second benchmark.

In our October decision, we noted that GSA's TSP Handbook (October 1979) (expected to be codified in Federal Procurement Regulations Subpart 1-4.12) states that a vendor should not automatically be denied a second benchmark if a non-machine-dependent change appears on the initial benchmark, and should not be disqualified unless the benchmark contains an unreasonable number of such changes. We also noted, as The Computer Company had pointed out, that the handbook states that a vendor should be notified of any failure at the completion of the benchmark.

We found that DOE had not met its duty to obtain maximum practicable competition in excluding The Computer Company on the basis of failure to meet one of more than 30 mandatory requirements, particularly since the firm insisted that its system had the reply capability. We sustained the protest and recommended that DOE permit The Computer Company to attempt the benchmark a second time.

In its request for reconsideration, DOE states that its decision to eliminate The Computer Company was based on a failure which had been observed by several evaluators, and that its subsequent examination of the firm's technical manual (which we had indicated was not sufficient to support a determination that the firm lacked the required reply capability) merely confirmed the fact that The Computer Company's software was inadequate.

DOE argues that "substantial" compliance is not the same as meeting all mandatory requirements, and that to permit The Computer Company to run another benchmark would be allowing it a "second bite at the apple." This action also would be contrary to the policy requiring equal treatment of all offerors and would significantly prejudice other offerors, DOE contends.

DOE also states that GSA's handbook requires the capability being evaluated to be referred to in an offeror's master contract or in a technical manual referenced by that contract, which was not the case here.

Finally, DOE argues that since GSA's handbook is not mandatory, a vendor has no right to a second benchmark unless the solicitation expressly promises it. DOE further points out that The Computer Company's failure was not one of four types listed in the handbook as justifying a second benchmark.

We have reexamined the record, and find nothing in it which supports DOE's conclusion that the failure to demonstrate a reply capability was due to inadequancies in The Computer Company's software.

DOE states that the failure was observed by several members of its technical evaluation team. Thus, evaluators either knew or should have known that The Computer Company had generated a new message and that the required reply, "Agenda is fine, see you at noon," was missing.

If this apparent lack of a reply capability had been pointed out to The Computer Company during or immediately after the benchmark, and the firm had asserted that it was due to mere operator error, rather than a deficiency in its software, the question could easily have been resolved by re-running the exercise in question. As we stated in our October decision, The Computer Company had "passed" all other mandatory requirements. DOE's duty to maximize competition required giving the firm the opportunity to show whether it was technically qualified in this remaining area. That duty was not met by advising The Computer Company—nearly a month after the benchmark—that it had failed.

(While DOE has informally advised us, some 2 months after the request for reconsideration was filed, that the operator was informed at the time the "CONFIRM" command was entered that the benchmark instructions called for a "REPLY," we are basing our decision solely on the written record, including DOE's submissions, which contain no such indication. Cf. *Afghan Carpet Cleaners*, B-175895, April 30, 1974, 74-1 CPD 220 [involving a claim].)

DOE appears to believe our recommendation requires re-running the entire benchmark. However, it should only be necessary to repeat that section which will test The Computer Company's reply capability. See *Federal CSS, Inc.; Martin Marietta Data Systems*, B-198305, October 29, 1980, 80-2 CPD 327 at 17. In our opinion, this should require a minimum investment of time and energy by DOE, and will not be tantamount to allowing The Computer Company a "second bite" which will not be available to other offerors.

Finally, we do not believe that a benchmark should be run on a "pass/fail" basis. *See generally* 47 Comp. Gen. 29 at 53 (1967), in which we stated:

> * * * [T]o give effect to the statutory and regulatory requirement for discussions and for such discussions to be meaningful, failure to pass a benchmark test should not automatically preclude the necessity for further discussions.

In the rare instances where an agency may be able to justify such a test—which DOE has not done here—evaluators who are supervising the benchmark should point out failures at the time they are observed. If these can be corrected during a benchmark, an offeror should be given the opportunity to do so.

Our prior decision is affirmed.

[B-199233]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Eligibility—Different From That for Family Separation Allowance

The statutory purpose of the basic Allowance for Quarter authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. The Family Separation Allowance, Type II–R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance.

Military Personnel—Allowances—Husband and Wife Both Members—Dependent Children—Different Allowances Claimed by Each Parent—Dual Payment Prohibition—Inapplicability

When two service members marry, neither may claim the other as a "dependent" for military allowance purposes, but if they have a child, that child becomes their joint "dependent" for purposes of establishing entitlement to allowance payments. Although both parents may not claim their child as a dependent for the same allowance payment where dual payments would result, it is permissible for one parent to claim the child as a dependent for the purpose of one allowance and for the other parent to claim the child for other allowances. 37 U.S.C. 401, 420.

Family Allowances—Separation—Type 2—Wife Also Member of Uniformed Services—Mother's Entitlement—Other Parent Receiving BAQ "With Dependent" Rate

Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance. Type II–R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances—each for a separate purpose—would not improperly result in dual payments of the same allowance for the same dependent.

Matter of: Gunnery Sergeant Victoire E. McDonald, USMC, January 7, 1981:

This action is in response to a request for an advance decision from the Disbursing Officer, Marine Corps Base, Camp Pendleton, California, concerning the propriety of crediting Gunnery Sergeant Victore E. McDonald, USMC, 224–54–1692, with a Family Separation Allowance, Type II–R (FSA–R), while she is serving an overseas tour of duty away from her child and her husband, who is also a Marine and who is receiving a quarters allowance on behalf of their dependent child. The question has been assigned Control Number DC–MC–1346, by the Department of Defense Military Pay and Allowance Committee. We have concluded that Sergeant McDonald is entitled to FSA–R in these circumstances.

It is indicated that Sergeant McDonald has been required by military orders to serve a tour of duty overseas unaccompanied by her husband and child. Her husband is stationed in the United States and is residing in offpost non-Government housing with their child. He is receiving a Basic Allowance for Quarters at the "with dependent" rate on account of their child.

The Disbursing Officer questions whether Sergeant McDonald may be credited with FSA–R in these circumstances. Essentially, he notes that the law authorizes FSA–R to be paid only to a "member with dependents." He notes that Sergeant McDonald may not claim her husband as her "dependent" for military allowance purposes, since her husband is also an active duty member of the uniformed services. The Disbursing Officer points out that Sergeant McDonald is therefore eligible for FSA–R only if her child may properly be regarded as her "dependent." He indicates that doubt has arisen in the matter because the child is already the "dependent" of her husband for quarters allowance purposes, and he therefore questions whether Sergeant McDonald may also claim the child as her "dependent" for other military allowance purposes, including entitlement to FSA–R.

Provisions of law governing the payment of allowances to members of the uniformed services are contained in chapter 7 of title 37, United States Code. Generally, a member's eligibility for a particular allowance, and the rate at which an allowance is payable, may vary depending upon whether or not the member has any dependents. Concerning the definition of a "dependent," 37 U.S.C. 401 provides in pertinent part that:

> In this chapter, "dependent," with respect to a member of a uniformed service, means—
> (1) his spouse;
> (2) his unmarried child * * *.

However, 37 U.S.C. 420 provides that:

A member of a uniformed service may not be paid an increased allowance under this chapter, on account of a dependent, for any period during which that dependent is entitled to basic pay under section 204 of this title.

The Basic Allowance for Quarters authorized by 37 U.S.C. 403 is designed to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government living quarters "adequate for himself, and his dependents," are not furnished. The quarters allowance is paid at "without dependent" and higher "with dependent" rates. When two service members marry, neither may claim the other as a dependent for quarters allowance purposes due to the operation of 37 U.S.C. 420. See 53 Comp. Gen. 148, 152 (1973); 41 id. 334 (1961). If those married service members have a child, either one of the members—but not both of them—may claim the child as a dependent for quarters allowance purposes. 54 Comp. Gen. 665 (1975); B-180328, October 21, 1974.

The Family Separation Allowance, Type II–R (FSA–R), here in question, is authorized by 37 U.S.C. 427(b)(1), which provides in pertinent part that:

(b) Except in time of war or of national emergency hereafter declared by Congress, and in addition to any allowance or per diem to which he otherwise may be entitled under this title * * * a member of a uniformed service with dependents * * * is entitled to a monthly allowance equal to $30 if—

(1) The movement of his dependents to his permanent station or a place near that station is not authorized at the expense of the United States * * * and his dependents do not reside at or near that station.

We have previously expressed the view that FSA–R under 37 U.S.C. 427(b)(1) is, in effect, an additional quarters allowance authorized under specified conditions and, in similar circumstances, the rules applicable to payment of the Basic Allowance for Quarters are for use in determining entitlement to FSA–R. See 51 Comp. Gen. 116, 118 (1971); B–185813, July 13, 1976. We have therefore previously concluded that when two service members marry, neither can claim the other as a dependent for FSA–R purposes—just as neither can claim the other as a dependent for quarters allowance purposes—due to the operation of 37 U.S.C. 420. See 51 Comp. Gen. 116, *supra.*

However, although we may have previously referred to FSA–R on occasion as an "additional quarters allowance," we have also recognized that FSA–R authorized by 37 U.S.C. 427(b)(1) and the Basic Allowance for Quarters authorized by 37 U.S.C. 403 are separate and distinct. As mentioned, the Basic Allowance for Quarters is intended to reimburse a member for the costs of private living quarters when he is not furnished with Government quarters adequate for himself and his dependents. On the other hand, FSA–R is intended to reimburse service families to some extent for miscellaneous extra out-of-pocket expenses incurred for running a split household when a member is separated from his dependents due to military orders. Such miscellaneous expenses include duplicatory expenses for magazines and newspapers; extra postage, local transportation, and laundry expenses; baby-sitting fees; etc. See Senate Report No. 91–1347, dated November 19, 1970, concerning the purpose of Public Law 91–533, approved December 7, 1970, 84 Stat. 1392. This act amended 37 U.S.C. 427(b) to remove the requirement that a member be entitled to a Basic Allowance for Quarters in order to be eligible for FSA–R. Hence, FSA–R is payable to a member separated from his dependents by military orders under the circumstances set forth in 37 U.S.C. 427(b)(1), regardless of the residence of the primary dependents and independent of the member's eligibility for a Basic Allowance for Quarters on their behalf. 51 Comp. Gen. 97, 100 (1971).

Furthermore, we have previously recognized that if two service members marry and have a child, then it may be entirely proper for one member-parent to claim the child as a dependent for the purpose of one allowance, and for the other parent to claim the same child as a dependent for purposes of establishing entitlement to other military allowances. See, e.g., B–183176, November 18, 1975, involving one member receiving Basic Allowance for Quarters at the with dependent rate and the other receiving a dislocation allowance at the with dependent rate. Also in 54 Comp. Gen. 665, *supra*, at page 667, we held that a child of two service members properly claimed by one member-parent as a dependent for quarters allowance purposes may be claimed by the other parent as a dependent for travel allowance purposes. It is only objectionable for both parents to claim their child as a dependent for the same allowance payment since that would improperly result in dual payments of the same allowance being made on behalf of the same dependent. See, e.g., B–180328, *supra*.

In the present case, Sergeant McDonald and her husband may not claim one another as "dependents" for military allowance purposes due to the operation of 37 U.S.C. 420, since both of them are active duty members of the uniformed services. They do, however, have a child who qualifies as their joint dependent for military allowance purposes under 37 U.S.C. 401. Sergeant McDonald's husband has claimed their child as his dependent for quarters allowance purposes, and Sergeant McDonald is therefore precluded from also drawing a quarter's allowance on behalf of the child since, as mentioned, dual payments of the same allowance for the same dependent may not be permitted. Nevertheless, in our view it would be consistent with the statutory purpose of the military allowance system and permissible under 37 U.S.C. 401 for Sergeant McDonald to claim their child as her dependent for the purpose of establishing her eligibility for and entitlement to other military allowances, including FSA-R. In that connection, we note that the quarters allowance paid to her husband on account of the child is for the purpose of providing shelter for the child; FSA-R paid to her because of her separation from the child would serve the separate and distinct purpose of defraying in some measure the extra miscellaneous split-household expenses resulting from her involuntary separation from her family. We therefore conclude that Sergeant McDonald is entitled to FSA-R as a "member with dependents" on the basis of her involuntary separation from her dependent child due to military orders.

Payment may issue accordingly.

[B-200579]

Property—Public—Surplus—Federal Property and Administrative Services Act—Donations for Historical Preservation—Developer's Payments in Lieu of Taxes

We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly owned subsidiary of the New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes.

Property—Public—Surplus—Federal Property and Administrative Services Act—Donations for Historical Preservation—State, etc. Urban Development Corporations—Cost Reimbursement

New York Urban Development Corporation may be reimbursed fee representing costs it has incurred in participating in the development and implementation of plan for restoration and maintenance of Federal Archives Building in New York City pursuant to 40 U.S.C. 484(k)(3) if the Secretary of the Interior deems the fees to be reasonable (and we have no information that they are not) since it is UDC's custom to recover these costs from developers under projects it sponsors and these are valid costs of the project.

Property—Public—Surplus—Federal Property and Administrative Services Act—Donations for Historical Presevation—Participating Nonprofit Corporations—Cost Reimbursement

New York Landmarks Conservancy, a nonprofit corporation which participated at the request of the General Services Administration and New York City in preparation of plan and selection of developer to implement plan for repair and maintenance of Federal Archives Building in New York City following donation to States pursuant to 40 U.S.C. 484(k)(3), may be paid a fee to reimburse the Conservancy its costs if the Secretary of the Interior finds it reasonable. Reimbursement may properly be considered project cost and not "incomes in excess of costs."

Property—Public—Surplus—Federal Property and Administrative Services Act—Donations for Historical Preservation—No Ceiling on Excess Income Generated

Nothing in 40 U.S.C. 484(k)(3) serves to limit amount of "incomes in excess of costs" which could be generated by revenue-producing activities. Legislative history indicates that Secretary of the Interior is to use as an important criteria, in approving financing plans under the statute, whether the plan will generate significant amount of income. It also indicates that strict limitations should not be placed on the amount of income which could be generated by a plan. Thus, the bill was amended to indicate that excess income in whatever amount generated be used primarily for public historic preservation purposes. This furthers the purpose of the law by permitting projects susceptible to generating income to assist in restoring and maintaining projects that are not.

Matter of: Donation of Federal Archives Building, New York, under 40 U.S.C. 484(k)(3), January 7, 1981:

This decision to the Administrator of General Services (Administrator) is in response to questions raised concerning an application from the Archives Preservation Corporation (APC) requesting the conveyance of the Federal Archives Building (Building) in New York City for historic monument purposes, pursuant to § 203(k)(3) of the Federal Property and Administrative Services Act of 1949 (1949 Act), as amended (40 U.S.C. § 484(k)(3)). He questions whether the various provisions in the application relating to the disposition of payments to be made by the Teitlebaum-Starrett Group, the project's developer (Developer), to the State are in conformity with the requirements of the law.

Under 40 U.S.C. § 484(k)(3), the Administrator is authorized to convey all of the right, title and interest of the United States in and to any surplus real and related personal property which the Secretary of Interior (Secretary) has determined is suitable and desirable for use as a historic monument for the benefit of the public. Conveyance may be to any State or municipal government. The APC is a wholly owned subsidiary of the New York Urban Development Corporation (UDC), a corporate governmental agency of the State of New York.

The Administrator may authorize the use of the property conveyed for revenue-producing activities if the Secretary first determines that the revenue-producing activities are compatible with the use of the property for historic monument purposes and approves the grantee's plan for conducting and financing the repair, rehabilitation, restoration and maintenance of the property.

However, the Secretary may not approve a financial plan unless it provides that:

* * * incomes in excess of costs of repair, rehabilitation, restoration, and maintenance shall be used by the grantee only for public historic preservation, park, or recreational purposes. 40 U.S.C. § 484(k)(3)(A).

Also, the deed of conveyance disposing of the property must provide that the property shall be used and maintained for historic monument purposes in perpetuity, and that, should it cease to be used for these purposes, all or any portion of the property shall, at the option of the Government, revert to the United States.

Although the Secretary has found that the proposed use of the Building is consistent with the requirements for a listing in the National Register of Historic Places, and has approved the APC's application, the Administrator has asked this Office to review the application. He notes that under the application, the Developer is required to make the following payments.

Ground Rent. The Developer would pay the APC an amount equal to $10,000, multiplied by the total number of residential units constructed. Payment would be made:

—15 percent upon delivery of the lease;
—15 percent upon the earlier of the funding of the permanent mortgage or six months after the issuance of a temporary certificate of occupancy for 90 percent of the Building; and,
—70 percent over 10 years at 11 percent interest.
—If the Developer markets the Building as a cooperative, all payments with respect to each residential unit would fall due when the unit is sold.

Gross Rent. The Developer would pay APC an amount equal to 8 percent of all income, rent, fees, payments and other charges paid under all commercial subleases, licenses and occupancy agreements.

Payments in Lieu of Real Estates Taxes. The Developer would make payments to APC in amounts equal to the New York City real estate taxes that would otherwise have been payable if the property were not exempt from taxation by virtue of UDC's ownership. The APC would then deposit these payments in the general revenues of the City.

No payments in lieu of real estate taxes would be required on the building's semi-public space. Semi-public space will be rented by the developer to nonprofit groups, educational institutions and community services at subsidized rates calculated at the break-even point to the Developer—$4 per square foot per year, compared with the $6 to $8 commercial value of the space.

Payments in Lieu of Sales Taxes. The Developer would pay APC an amount equal to the New York State and New York City sales taxes (each equalling 4 percent) otherwise payable if UDC was not the fee owner, but not less than $600,000. The amount paid would be held in trust in an interest bearing account to be applied towards public space projects within the Manhattan Community District

Number 2 (the project's location), as approved by Manhattan Community Board Number 2.

Fee Payments. The Developer would also be required to pay a fee of 1 percent of the overall development costs (estimated at approximately $30,000,000) to UDC to cover its direct overhead costs. The Developer would also be required to pay a fee of 1/3 of 1 percent of the overall development costs to the New York City Landmarks Conservancy (Conservancy) to cover its costs.

The Administrator notes that because of GSA's oversight responsibility, it is vitally concerned with the proposed action. He then states:

> * * * The absence of criteria for determining "cost" and "incomes in excess of costs" with regard to: (1) the in lieu of real estate taxes; (2) the in lieu of sales taxes; and (3) the development fees, has prompted our request for your review and advice. However, the proposal raises larger questions involving the legal propriety of using the income from revenue producing activities for nonhistoric public purposes and the programming of such income to exceed the amount necessary to maintain the historic character of the property so that the excess can be used to finance public historic recreational programs of a particular city generally.

For the reasons set forth below, we find the payments set forth in the proposed agreement to be unobjectional from a legal standpoint.

Analysis

The term "cost" is not a technical one having at all times the same meaning, but a general or descriptive term which may have varying meanings according to the circumstances in which used. *Boston Molasses Co.* v. *Molasses Distributors Corporation*, 175 N.E. 150, 152 (Mass., 1931). Since the terms "costs" and "incomes" as used in 40 U.S.C. § 484(k)(3)(A) were left undefined, we must look elsewhere for their meaning.

Prior to 1972, while excess Federal property could be donated for historic monument purposes, administrative interpretations equated historic monuments with museums. Income producing use of these properties was considered out of character with the museum concept, and therefore prohibited. Since the cost of rehabilitation and maintenance of the property as a historic monument could be quite high, preservation of the site as a historic monument was in some cases feasible only if productive use could be made of the property or some portion of it. Consequently, S. 1152, 92d Congress and a companion bill, H.R. 6769, were introduced in the Congress for the principal purpose of allowing recipients of historic monuments to use them for compatible revenue-sharing activities. See H.R. Rep. No. 92–1189, accompaning S. 1152, p. 2 (1972). S. 1152 was adopted by the Congress to amend section 203(k)(3) of the 1949 Act to read as it does now.

While the nature of the revenue producing activities permitted is not spelled out in the language of S. 1152 as adopted, reference to the legislative history indicates that shops or other commercial activities were mentioned as possibilities. The only reservation expressed concerning revenue producing activities was that whatever use was made of the property, it must be tasteful and compatible with the use of the property as a historic monument. See H.R. Rep. No. 92–1189, p. 3 (1972); *Hearing before a Subcommittee of the House Committee on Government Operations, 92d Congress, 2nd Sess., on S. 1152*, pp. 32, 35, 47, 49–50, 57, and 61 (1972); S. Rep. No. 92–377, accompanying S. 1152, p. 2 (1971); *Hearings before the Subcommittee on Parks and Recreation of the Senate Committee on Interior Insular Affairs*, 92d Congress, 1st Sess., on S. 1152, p. 73 (1971); and statements of Rep. Buchanan and Senator Percy (sponsor of S. 1152) during debate on adoption of S. 1152, 118 Cong. Rec. 24018 (1972) and 117 Cong. Rec. 33580 (1971), respectively.

It is clear that since the term "revenue-producing activities" included shops or other commercial activities conducted on a profit making basis, the income and cost to the proprietors of these activities were not to be considered among the income or costs of the grantee. Furthermore, it is clear that some kind of agreement between the grantee and the proprietors was contemplated whereby use of the property by the proprietor of the commercial activity would be authorized in return for some form of fee or monetary remuneration to the grantee. It was this remuneration, less any costs incurred by the grantee for repair, rehabilitation, restoration and maintenance, which would constitute "income" for purposes of the law.

Under the arrangement proposed in APC's application, the Developer would, in return for the Ground Rent, Gross Rent, and other fees paid to the State, assume the actual responsibility for repairing, restoring, renovating, and maintaining the Building as a historic monument for a period of from 75 to 99 years. In return, the Developer would receive the right to develop the interior of the property in accordance with the approved achitectural and use plan, and sublease the property to users. While he would incur the development costs, he also would receive any profits to be made from use of the restored property, and will have, of course, assumed the risk of loss as well.

We find nothing in the law that prohibits this kind of arrangement. The UDC has indicated that it chose to use the Developer to restore and maintain the Building since it does not normally handle this aspect of a project it sponsors. Under these circumstances, the use of the Developer seems practical and reasonable. Unless it can be shown that the payments in lieu of taxes and fees being assessed on the developer somehow circumvent the requirements of 40 U.S.C. § 484(k)(3)(A), we are unaware of any basis for legally objecting to the Secretary's approval of the application requiring their payment.

Payment in Lieu of Real Estate Taxes

UDC has indicated that although it is exempt by law from the payment of real estate taxes, it is its well-established policy to make payments in lieu of real estate taxes on all of its projects so local municipalities will not be deprived of needed tax funds which would otherwise have been payable. This policy was initiated as part of UDC's effort to fulfill its statutory mandate to cooperate with local municipalities in the planning and development of projects. Also, UDC does not wish to alienate municipalities by exacerbating their financial problems.

In keeping with its policy, UDC has entered into a Memorandum of Understanding with the City of New York, dated July 13, 1977. Under the memorandum, UDC has agreed to pay to the City an amount approximately equal to the taxes which would have been payable under the established New York incentive programs for similar properties, had they been privately owned. Furthermore, the payments are also required to be paid to the City under the New York City Board of Estimates Amended Resolution (Cal. No. 81, dated December 6, 1979) as a condition of the Board's approval. We have been informally advised by representatives of UDC that this is a customary requirement of the Board.

Further, we have been provided copies of other agreements containing provisions similar to that set forth in the proposed agreement in which payments in lieu of real estate taxes were required of project developers (for example, the Hanover Square Project and the St. George Project), which make it clear that such payments are customarily required of developers as a condition for UDC sponsorship of a project. Thus, there is nothing to indicate that the requirement that the Developer make payment in lieu of real estate taxes was imposed solely to circumvent the requirements of 40 U.S.C. § 484(k)(3)(A). We therefore find that payments in lieu of real estate taxes are a legitimate UDC project cost and the moneys from the Developer paid to defray that cost do not constitute "excess income" for purposes of the law.

Payments in Lieu of Sales Taxes

UDC has explained its requirement that the Developer make these payments as follows:

> As a state agency, UDC is exempt from the payment of sales taxes, including those payable on materials incorporated into any project owned by UDC. It is UDC's policy, however, that when a private developer is involved in the develop-

ment of the UDC Project he nevertheless pays to UDC an amount equivalent to the taxes that otherwise would have been payable. UDC does not retain such amounts; rather, they are used to fund a public benefit project pursuant to the UDC Public Spaces Program.

Other existing projects where these payments have also been required include:

—St. George Hotel Arcade Project—payments in lieu of sales tax used to renovate 7th Avenue IRT subway arcade;

—Hotel Commodore Project—payments in lieu of sales tax used to renovate Grand Central Terminal;

—Hanover Square Project—payments in lieu of sales taxes used to improve parks;

—Albee Square Industrial Project—payments in lieu of sales taxes used to improve subway lighting, painting, benches, and trash receptacles.

Although payments by UDC in lieu of sales taxes are not required by statute, they have for some time consistently been made as a matter of policy. Therefore, the payments may be properly considered costs to UDC which may be passed on to the Developer. We find nothing to warrant a conclusion that these payments are being required merely to circumvent the requirements of the law.

UDC Development Fee

UDC has explained its requirement that the developer pay a one percent fee to it as follows:

UDC, as a public benefit corporation, relies on the State Legislature to fund general and administrative expenses. To minimize the use of state funds, UDC requires all entities requesting UDC assistance to pay a Development Fee. This Development Fee is considered a capital cost of the project, conceptually equivalent to the fees for other professional services such as legal, architectural and engineering.

At the time that the basic business terms were negotiated with the Developer and presented to the UDC Directors (June 1, 1979), it was UDC's policy to require of developers the payment of both a fee of 1% of the total cost of the project to cover the related general and administrative expenses of UDC, plus reimbursement for all out-of-pocket expenses such as operational permits, plan review and inspection during construction when UDC acts as the building department and reimbursement for all outside legal and consulting expenses. These fees and reimbursables are payable only if the project is eventually implemented and thus, UDC bears a large upfront risk for which it is not compensated unless the project proceeds. The fee that the Developer has agreed to pay to UDC reflects this policy, and is estimated to be $300,000. However, it should be noted that it is presently UDC's policy to obtain a much larger fee, depending on the nature of the project, with a minimum of 1½% to 2% often structured to capture the upside potential of a project in compensation for UDC's risk. This is true especially in cases where profits accrue to the entrepreneur as a result of UDC participation.

A great deal of general and administrative expenses are incurred by UDC in executing a project such as the Federal Archives Building, and most expenses must be borne whether or not a project is eventually implemented and UDC receives its Development Fee. For the Federal Archives Building, members of the Economic Development Department have already spent a considerable amount of time in project analysis and in the financial structuring of the project, including negotiation of the business terms with the developer and the retaining of outside consultants to determine the fair market value of the building. UDC's Corporate Finance Department has performed an analysis assessing the credit of the developer. Our Engineering and Construction Department has worked extensively with the developer in creating the plans and specifications for the renovation, including reviewing the proposals for building code compliance and preparing independent cost estimates of the project. In addition to work on the preparation and revision of the Application for transfer of the property from the General Services Administration, UDC's Legal Department has worked on an agreement-in-principle with the developer spelling out the terms of the proposed transaction.

As the transaction progresses, the Economic Development and Legal Department will invest much time preparing and negotiating the terms of the lease and many related documents (e.g. the Project Agreement, the Deed, the Three Party Agreement, the Fund Agreement, Construction and Permanent Financing Documents, etc.). The Construction Department will conduct a final review of the construction plans including drawings and specifications, revise the cost estimate for the project, and examine the construction contracts and other documents to determine if UDC procedures and all other governmental and contractual requirement[s] have been satisfied. UDC's Affirmative Action Office will work with the Developer to create an acceptable affirmative action plan which promotes the participation of minority business enterprises in the performance of all contracts entered into in connection with the construction and continued maintenance and operation of the project. UDC will work with the community and implement the Public Spaces Program of UDC whereby the sales tax savings realized by the Developer during the construc[tion] of the project will be used by UDC, together with any available grants, for a project benefiting the community. During construction, the Project manager, Construction Representative and Affirmative Action Officer will monitor the construction activity for conformance to the project agreement and the affirmative action plan; and finally, the Director of Project Administration will establish and implement adequate systems and controls to assure compliance with the terms of all agreements with all parties during the entire term of the lease (75 years), including collecting rents and inspecting the building to ensure that it is being maintained. In addition to these tasks UDC's staff would undertake any actions necessary in connection with any default of the Developer under its lease or other agreements. [Letter from Linda Sidhoum, Assistant Vice President for Economic Development, UDC, to Leonard Wasserman, Esq., Office of the Regional Counsel, GSA, dated August 6, 1980.]

Additionally, we have been provided a list of 16 projects under which developers have been assessed a fee by UDC as described above.

In view of the foregoing, we see no basis for objecting to the payment of the fee in question since it appears to be a legitimate cost to the UDC which it has passed on to the Developer. While, as a matter of policy and good accounting practice it might be better if reimbursements were based on actual costs rather than a fixed percentage rate, this does not warrant a recommendation that the application be rejected.

We informally requested that UDC provide us its actual costs related to this project. Although UDC was unable to provide this information, we have nothing to indicate that the fee was unreasonable. In this regard, developers on other projects have paid the fee and in fact UDC's cost experience has resulted in an increase to 1½ or 2 percent on more recent projects. In any event, if the Secretary is satisfied that the fee is reasonable, we see no basis for objecting to the approval of the application because of the inclusion of the Development fee.

Conservancy Fee

The APC application requires a payment of 1/3 of 1 percent of total project costs to the New York Landmarks Conservancy to compensate the conservancy for its expenses in assisting in the planning of the project and the selection of a Developer. The New York Landmarks Conservancy is a private nonprofit corporation organized in 1973 to further the preservation and continuing use of architecturally, historically, and culturally significant buildings in New York City. The Conservancy has indicated that it was invited by GSA in 1974 to initiate a plan for the preservation and reuse of the Building. We note that the "Blue Book" compiled by the New York City's Office of Economic Development for submission to the Board of Estimates indicates the following in its analysis of the Building project:

> In 1976, the Conservancy presented its plan to the City of New York and received the City's support and aid in effecting the transfer. In order to retain a project manager and other consultants to carry out the project, the Conservancy raised funds from sources such as the Exxon Corporation, the Fund for the City of New York, and the National Endowment for the Arts. In March, 1977, in keeping with agreements reached with the City and the local community board, the Conservancy prepared and distributed a Request for Proposal which was sent to firms experienced in the rehabilitation of older buildings. The request called for a proposal generally in keeping with the principles of the Columbia [University] study which had recommended that the building be converted to a mixture of commercial/residential and semi-public uses in a way that would preserve the architecture of the building and reflect the character of the community.
>
> The City and the Conservancy set several parameters for re-use plans which entailed substantial extra project costs such as enlarging the building's courtyard to increase light and air and providing central air conditioning.
>
> Nine development proposals were received and evaluated by the Conservancy, with special consideration given to the plan's commercial feasibility, architectural treatment, area impact and mixture of uses.
>
> Other criteria considered were the development team's ability to implement the plan and the amount of sublease rentals and other considerations proposed.
>
> Three finalists were chosen and, from them, the Rockrose Development Corporation was selected.
>
> In late 1978, the Rockrose Development Corporation withdrew from the project because of difficulty in working with the local community board and in negotiating the final lease arrangements with the Conservancy and the City. The Conservancy and the City then invited the two finalists in the earlier selection process, the Teitlebaum Group and Corland Corporation, to submit new proposals for the redevelopment of the Archive Building.
>
> The Teitlebaum Group was finally selected based on a plan closer to the desires of the Community Board and greater flexibility regarding the business terms.

Thus it is clear that the Conservancy has incurred expenses directly related to the development of the plan and selection of the Developer to implement the plan for the repair, rehabilitation, restoration, and maintenance of the Building. These appear to be legitimate costs to the developer, even though its participation in the project was initiated first by GSA and then by New York City.

None of the payments made to the Conservancy ever flow to State coffers and therefore, normally the payments would not be considered income to the grantee. However, the Administrator assumes that were not the Conservancy reimbursed, there would be higher payments in the form of Ground and Gross Rents payable to UDC and, in turn, there would have been more funds available for public historic preservation purposes. In our view, whether or not more funds would have been realized for these purposes is merely speculative, in view of the relatively small amount involved. Moreover, the negotiated rentals were based on comparability studies.

In any event, if the Secretary is satisfied that the 1/3 of 1 percent fee for payment to the Conservancy is reasonable and a legitimate cost to the developer, we have no reason to conclude that the payments are artificially inflated for costs incurred only to indirectly reduce the amount of income to the State.

Generation of Income

Finally, we see no reason to object to APC's application simply because it contemplates generation of income far in excess of the amounts needed for restoration of the Building. There is nothing in the legislation imposing a limit on the amount of income in excess of costs which is authorized. Nor does 40 U.S.C. § 484(k)(3) preclude the establishment of revenue-producing activities operated on or in property conveyed under the statute. We note that the legislative history of S. 1152 indicates that congressional concern was expressed on this issue. Thus, in addressing this point the report of the House Committee on Government Operations states:

> The Secretary of the Interior is required to approve the grantee's accounting and financial procedures, and has the authority to make periodic audits of the records of the grantee that directly relate to the property conveyed. The committee anticipates that the Secretary will regularly and thoroughly exercise this authority to audit, and will regularly oversee management of the property.
>
> In this connection, the committee was troubled by the provision in S. 1152 relating to income which a particular property might produce that is in excess of the cost of repair, rehabilitation, restoration and maintenance. Representatives from the Department of the Interior testified at the subcommittee's hearing that a proper plan of repair, rehabilitation, etc., should not generate a significant amount of excess income. *The committee agrees and urges the Secretary of the Interior to use this as an important criterion in approving the grantee's plan of financing.* H.R. Rep. No. 92–1189, 3 (1972). [Italic supplied.]

However, we also note that the report indicates that the committee took specific action directed at addressing this problem as follows:

> In this respect, the committee has amended the excess income provision of S. 1152. Originally, S. 1152 provided that any income in excess of that necessary for repair, rehabilitation, restoration and maintenance shall be used by the grantee for public park or recreational purposes. The committee amended this provision to provide that any excess income should be used for public historic preservation, park or recreational purposes. By inserting historic preservation, the committee intends that any excess revenues from these properties should be di-

rected primarily toward the type of activity that generated it—namely, public historic preservation. H.R. Rep. No. 92–1189, 3 (1972).

From the foregoing, it is clear that the Secretary was expected to use as an important criterion in his approval of financing plans the amount of excess income expected to be generated (with the hope that this amount would not be significant). However, it is also clear that rather than impose a strict limitation on the Secretary on the amount of income that could be generated, the committee chose to indicate its intent that any income be used primarily for public historic preservation projects, after deducting costs to the grantee.

This is in keeping with the purpose of the legislation which recognized the financial burden imposed on State and municipal governments which maintain property for historic monument purposes. Also while some properties might well be susceptible to use for revenue-producing activities, the potential of other properties to generate revenue could be limited. Consequently, the committee sought to have any excess income from successful projects shifted to help restore other properties. In fact, this is what the APC proposal contemplates as is indicated by the following:

> The Archive Building income will be used to preserve other historic structures in New York City by making loans and awarding grants in situations where private mechanisms and existing public programs and controls are not sufficient by themselves to ensure the long-term preservation of the historic structure. The fund will be spent for activities such as rescuing landmarks from impending destruction, providing analysis necessary to show that adaptive re-use is feasible and making subsidies for re-use of projects unable to attract adequate private financing. The intent is that the fund should intervene to allow significant buildings to survive and be re-used and then should recover at least a portion of its investment. To some extent, the Archive Building income will function as a revolving fund to be re-used in similar ways. *Blue Book*, page 7.

Furthermore, whether incomes are considered significant in relation to any specific proposal must be weighed against other factors which of necessity affect the scope of the proposed project. Thus the size of the building to be restored, the compatible uses which can be made of the property which can generate the amounts necessary to undertake the restoration and maintenance, and the need to assure that persons using the property for profit making activities do not receive a windfall at the expense of the public generally (which would occur if such persons were not required to pay their full fair share for benefits bestowed upon them for the use of the property) must be considered when reviewing the propriety of any financing plan proposed.

In the present case, a ten story warehouse which is historically significant primarily because of its exterior architectural appearance is being converted to a number of uses, all of which have been determined to be compatible with its use as a historic monument. However, because of the magnitude of the project, there is the potential for the

Developer to earn a significant return on his investment. Thus the payments required of the Developer should be commensurate with the benefits bestowed. In turn the Developer, by passing on his costs plus an allowance for profits to various users under subleases, assures that these users do not receive an unintended windfall. In explaining how the UDC established the amounts it would charge the Developer, we were informed that:

> * * * These rental payments, together with fees to be paid to UDC and the Conservancy, represent what UDC staff, working in conjunction with Eastdil Realty and C. A. Frank and Company, determined to be the fair market value of the building. A purchase price equivalency representing the market value of the building under the peculiar programmatic and preservation constraints on development was felt to most accurately reflect what the development market perceives as the associated potential risks and rewards, adjusting itself to produce a "fair" return to the developer. The rental payment schedule corresponds to the anticipated need for funds, recognizing the limited investment potential of any unused funds by the Trust.
>
> The purchase price equivalency, and thus the fair market value of the property, was determined based on analysis of comparable sales, of the anticipated income and expenses to be generated from the specific areas and uses involved, and of the potential risks to the developer. A comprehensive survey of the Federal Archives Building Comparables was prepared to determine the purchase price commanded by buildings of comparable size and scope convertible to Class A Multiple Dwelling Units and eligible to receive benefits under Section J51–25 of the New York City Administrative Code. The marketability of the Federal Archives Building's location was assessed, the adaptability of its physical structure was analyzed, and the financial effect of the mandated and other constraints which effect the economics of the project, and thus the purchase price, was determined. Included in this analysis was:
>
> —the potential effect on the ability to finance the project and on the cost of financing that the property being subject to a reverter might have.
>
> —the negative impact on the cost of development and on the annual operating costs of landmark and other mandates such as creation of the required atrium and the provision of central air-conditioning over what would otherwise have been required in the absence of such requirements.
>
> —the relative impact of the Developer's position as a lessee versus the value of a fee position, and
>
> —the special tax preference created by the accelerated depreciation allowable for designated landmarks such as the Federal Archives Buliding. [Letter from Barbara Moore, Vice President, Economic Development Department, UDC to Richard Rosen, Office of Development dated November 27, 1979.]

Thus, it would appear that UDC has undertaken to assure that the payments of the Ground Rent and Gross Rent are proper under the circumstances. We are not in a position to judge the reasonableness of the amounts being charged the Developer, and therefore defer to the judgment of the agencies which have negotiated this agreement. In any event, the use of income over costs for the purposes specified is squarely within the contemplation of 40 U.S.C. § 484(k)(3), even if substantial income is generated.

Since all the competing interests seem to have been adequately considered and protected, we cannot say it is an abuse of the Secretary's discretion to approve the financing plan proposed in the APC's application. Even though significant amounts of income will be generated, it will be expended for public historic preservation projects as called for under the law.

[B-198661]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Children—Adopted—Adoption Not Finalized

Where children are placed with a member of the uniformed services for adoption in the State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of competent jurisdiction.

Matter of: Lieutenant Charles Tyahur, Jr., USN, and Lieutenant Commander Per L. Okey, USNR, January 8, 1981:

This case involves the question of the effective date for entitlement to quarters allowance at the with-dependent rate for members of the uniformed services on account of children who have been placed with them for adoption in the State of California but where a final order of adoption has not been entered. Under California law the parents' assumption on full financial responsibility and care of the child after entering into the adoption placement agreement without court sanction is not sufficient to meet the dependency definition of 37 U.S.C. 401(2) (1976).

The Director, Navy Family Allowance Activity, Cleveland, Ohio, requested a decision concerning the effective date for entitlement to increased quarters allowance on account of children placed for adoption in the State of California in the cases of Lieutenant Charles Tyahur, Jr., USN, and Lieutenant Commander Per L. Okey, USNR. The matter was referred here through the Department of Defense Military Pay and Allowance Committee and was assigned submission number DO-N-1344.

The factual situation in each case is very similar. In the case of Lieutenant Tyahur, a child born September 15, 1979, was placed for adoption in the member's home on November 1, 1979, by the Adoption Services of San Diego County, California.

An adoption placement agreement was entered into by Lieutenant Tyahur and his wife on November 1, 1979, in which they agreed to assume full financial responsibility and care of the child.

An adoption placement agreement was entered into by Commander Okey and his wife on July 15, 1976, for a child "Jonathan" born May 29, 1976. On the same date, the member and his wife signed an "Addendum to Adoptive Placement Agreement" which contains a statement that "possible potential rights of the father have not been legally terminated and a court action may be necessary. Final decision in this regard has not been made and a certain risk exists." A final adoption decree has not been submitted. On September 6, 1979, Commander Okey entered into another adoption placement agreement for another child "Benjamin Shane" born on May 11, 1977. To date, a copy of the final adoption decree for Benjamin has not been submitted.

In both Lieutenant Tyahur's and Commander Okey's case it appears that the children were placed in their custody for adoption purposes by the San Diego County Department of Public Welfare and that during the placement period the adoptive parents share joint custody with the San Diego County Department of Public Welfare. While that agency may terminate the agreement at any time prior to the final adoption decree, the adoptive parents provide full financial support and care, the agency being there for family counseling and guidance.

It appears that under California law the prospective adoptive parents obtain certain rights to the continued custody of the child after entering into an adoption placement agreement. However, no interlocutory order of adoption is issued in California and the child may be removed at anytime prior to the entry of a final order of adoption. See Deerings California Codes, C.C.A. Sections 221–230.5.

Section 401, Title 37, United States Code, provides that "dependent" with respect to a member of a uniformed service, includes his unmarried legitimate child, including a stepchild, or an adopted child, who is in fact dependent on the member.

In 30 Comp. Gen. 210 (1950), we held that in order for an officer to be entitled to increased allowances authorized to be paid to him on account of "adopted children" there must be shown to be a legal adoption, that is, one accomplished according to statute.

In 44 Comp. Gen. 417 (1965), we held that basic allowance for quarters as a member with dependents was authorized on account of an adopted child effective upon the issuance of an interlocutory order of adoption. The pertinent statute provided that subject to a probationary period and the provisions of the final order of adoption, the adopted child would be for all intents and purposes the child of the adopting parent from the date of entry of the interlocutory order.

The rule was further extended in 52 Comp. Gen. 675 (1973) where we held that children provisionally adopted by a Navy member while stationed in Great Britain are considered dependents of a member under 37 U.S.C. 401, so as to entitle him to a dependent's allowance and all other benefits incident to the dependency status while the member resides in Britain. This is based on the fact that although the provisional adoption order only authorizes custody and removal of the children from Great Britain for adoption elsewhere, the law also provided that the rights, duties, obligations, and liabilities prescribed in other sections of the Act for an adopter shall equal those of natural parents or those created by an adoption order.

In each of the cases cited above the children were placed in a home by an order of a court of competent jurisdiction pursuant to the state laws involved.

Section 224n, Deerings California Codes, C.C.A. provides for the placement of potentially adoptable children in homes without court action. This action may lead to a legal adoption but it does not have the sanction of a court.

In the present cases, the placement of the children in the members' homes by an agency of the State of California government and the assumption by them of the full financial support and care during a temporary period before adoption gave the prospective adoptive parents certain parental rights. However, this is done without any court approval. It is our view that without court approval or sanction such placement does not constitute an adoption for the purposes of 37 U.S.C. 401(2) nor is such action tantamount to an interlocutory adoption decree entered by a court.

Accordingly, Lieutenant Charles Tyahur, Jr. and Commander Per L. Okey are not entitled to basic allowance for quarters at the with-dependent rate until an order of adoption has been issued by a court of competent jurisdiction.

[B-200008]

Contracts—Negotiation—Requests for Proposals—Cancellation—Administrative Discretion—Reasonable Exercise Standard

Decision to cancel and resolicit procurement lacks sound basis where based on conjecture without reference to available evidence and clearly available alternative which would have preserved procurement was rejected. Since low prices have been disclosed, solicitation should be reinstated to preclude auction.

Contracts—Protests—Court Solicited Aid—Revival of Related (Mooted) Protests

Related prior protests, mooted by cancellation of solicitation but which form large part of purported bases for cancellation, will be considered in connection with protest by low offeror against cancellation. Parties to prior protests have participated actively in present matter and have had fair opportunity to present arguments.

Contracts—Protests—Procedures—Bid Protest Procedures—Time For Filing—"Court Interest" Exception

Because of interest by court, protests against solicitation and conduct of procurement will be considered even though untimely under General Accounting Office Bid Protest Procedures, 4 C.F.R. Part 20 (1980).

Contacts—Negotiation—Offers or Proposals—Time Limitation for Submission—Effect on Competition

Contention of inadequate time to prepare initial proposal is unpersuasive in view of lack of objection by other offerors and adequacy of competition. Allegation that solicitation provision is "confusing," raised after receipt of initial proposals, is not a basis for finding of prejudice, particularly where protester took no action to obtain clarification. Contention of unequal negotiations, based on request for clarification of protester's proposal to which protester did not respond in substance, leading to elimination from competitive range, is without merit.

Contracts—Negotiation—Offers or Proposals—Best and Final—Time Limit—Sufficiency

Allegation by incumbent of prejudice attributable to unequal and inadequate time to prepare best and final offer is denied where record indicates other offerors used about equal or less time without objection. Allegation that contracting officer failed to verify low offer and took no action to preclude "buy-in" is without merit where low offeror's costs were questioned during negotiations and use of multi-year fixed-price contract is specific measure against possible "buy-ins" contemplated under regulations.

Matter of: Apex International Management Services, Inc., January 16, 1981:

On September 8, 1980, Apex International Management Services, Inc. (Apex), filed a protest with us and an action in the United States District Court for the District of Columbia, *Apex International Management Services, Inc.* v. *Clifford L. Alexander*, *et al.*, Civil Action No. 80–2274. Essentially, Apex contests a decision by the United States Army to cancel a request for proposals for fixed-price multi-year contractor operation of Government-owned laundry facilities in the Federal Republic of Germany. On September 12, 1980, the court issued a preliminary injunction prohibiting the resolicitation of this requirement until 10 days after our resolution of Apex's protest.

We find Apex's protest to have merit.

Related Protests and Court Action

Apex's challenge to the cancellation followed two related prior controversies involving this same procurement. In the first of these, on August 18, 1980, Dyneteria filed a protest (B–200008) with us in which Dyneteria charged that it had not been afforded adequate time to respond to the solicitation and that the application of German labor laws to the procurement was "confusing." Subsequently, on August 20, 1980, Jets Services, Inc. (Jets), the incumbent contractor for the preceding 4 years, also filed a protest (B–200008.2) in which Jets argued that it was denied adequate time to prepare its best and final offer; Jets also contested the propriety of the contracting officer's decision to award the contract to another offeror whose offer was "25–27" percent lower than the Army's fair cost estimate. On August 22 and 27

Jets supplemented its protest with additional charges. On August 29 Dyneteria, after examination of the Jets protest, expanded its own protest to challenge the Army's conduct of negotiations.

On August 29 these protests culminated in a lawsuit in the United States District Court for the District of Columbia entitled *Jets Services, Inc.* v. *United States Department of the Army, et al.*, Civil Action No. 80–2226. Dyneteria participated in this action. On that day the court granted a temporary restraining order prohibiting award of the contract until September 5, 1980, the date set for hearing on Jets' motion for a preliminary injunction. Jets' lawsuit was withdrawn by stipulation on September 2, 1980, after the Army canceled the solicitation on August 30. On September 5 the Army and Jets signed a 6-month extension to Jets' current contract.

Background

The solicitation for these services was issued on June 2, 1980, with performance to begin on October 1, 1980, with a minimum 30-day mobilization period for the awardee to prepare for performance. A preproposal conference was held on July 9, 1980, during which the contracting officer advised offerors that the awardee would have a 39-day transition period, based on an anticipated award date of August 22. Site visits to each of the laundry facilities covered by the solicitation were conducted during the week of July 14–18. Dyneteria neither attended the preproposal conference nor participated in the site visits. Six offers were submitted by the closing date of July 23.

During the evaluation of proposals the Army sent a telegraphic message to Dyneteria requesting clarification of both its cost and technical proposals and advising Dyneteria that if the requested information were not submitted by August 7, 1980, Dyneteria's proposal would be declared "non-responsive." The Army's message asked for Dyneteria to submit its materials by special delivery mail and also requested telephonic advice of Dyneteria's position. Dyneteria responded to this request with a message stating: "Due to short time given for response to your message, it will be necessary to be declared non-responsive. Thank you."

Negotiations with the five firms remaining in the competitive range were conducted during the week of August 11. The contracting officer negotiated with Jets on the afternoon of August 14. Best and final offers were due at 9 a.m. on August 15. All five offerors in the competitive range submitted best and final offers prior to the deadline. On the Army's advice that it was the low offeror, Apex initiated mobilization, including such steps as forming a German company and getting firm commitments from suppliers. Jets, the third low offeror, attempted after the deadline to submit a further price revision which was rejected by the contracting officer.

The contracting officer, by telex message dated August 21, sought authority to award the contract to the low offeror despite the pending protests of Dyneteria and Jets to which we referred above. This message generally indicated that the procurement was entirely proper and that all offerors had been made aware of and accepted the short time available for the procurement. The request for authority to award the contract was granted in messages from the Office of the Principal Assistant for Contracting (OPAC) and the Assistant Secretary of the Army for Research Development and Acquisition (SARDA), subject to the condition that Apex document its responsibility.

Despite continuing contact between the contracting officer and Apex's representatives, Apex had not furnished sufficient evidence of its responsibility as of August 29, on which date the contracting officer was advised that a preaward survey at Apex's home office had resulted in a negative finding of financial capability. On that date, the United States District Court for the District of Columbia issued the temporary restraining order in *Jets Service, Inc.* v. *Department of the Army, et al., supra.*

On the morning of August 30, the contracting officer again met with Apex's local representative to discuss the subject of Apex's responsibility. At that meeting, Apex's representative agreed to travel to Apex's home office in Florida and return on September 2, 1980, with performance bonds in response to the contracting officer's suggestion that he would accept these bonds as evidence of Apex's financial capacity. The contracting officer did not advise Apex of the restraining order.

Later in the day on August 30, the contracting officer canceled the solicitation. The determination and findings cites the following seven factors as supporting a finding that there was a compelling reason to cancel the solicitation:

(a) The solicitation closing date, the evaluation, the negotiations, and the best and final were compressed.

(b) The time was further curtailed by the oral assurances of award by 22 or 24 August 80.

(c) The urgency of the 39-day mobilization may not have been necessary.

(d) The low offeror has a negative preaward.

(e) The nature of the JETS protest leads me to believe that sensitive procurement information has leaked perhaps giving one or more offerors an unfair advantage.

(f) The nature of the protest leads me to believe that certain parts of the RFP are subject to being interpreted as ambiguous.

(g) The injunction precludes the Government from awarding and allowing a 30-day mobilization period for contractor commencement of work effective 1 October 1980.

Apex argues that none of these factors is a reason to cancel the solicitation and also contends that the Army was obligated to find it responsible and award it the contract because Apex had responded to all of the Army's requests for information. The Army argues that the cumulative effect of the various bases for cancellation cited in the determination and findings cast such uncertainty over the award of the contract that the contracting officer had no viable alternative course of action which would ensure the uninterrupted continuation of these vital services.

GAO Analysis

We find no sound basis for the cancellation of this solicitation in the circumstances existing on the date of cancellation. We think that no matter what action the contracting officer determined to take with respect to the solicitation, whether to cancel, reopen negotiations, or merely extend, he had no viable option on August 30 but to extend Jets' contract if the 30-day mobilization period guaranteed by the solicitation were to be preserved. We do not agree with the Army, however, that cancellation and resolicitation of the procurement was necessary. On the contrary, we are convinced that the contracting officer, by arranging an extension of Jets' contract on August 30, could have preserved this procurement and that the cancellation of the solicitation was unnecessary on that date.

The Army had a clear opportunity to extend Jets' contract without cancellation of the solicitation. Jets specifically offered to extend its contract in a letter to the Army dated August 22; during the oral hearing on August 29 on Jets' application for a temporary restraining order, Jets represented to the court that "* * * we have offered to extend the contract, to do whatever can be done to smooth any transition and also to make sure that the services the Army needs continue to be performed" and "* * * we have made the offer to extend our performance, to continue our performance, for whatever period is necessary."

The first two justifications for the cancellation both relate to the compression of the time available to conduct this procurement. We perceive no basis for a finding that the competition was unduly prejudiced by the time constraints here. On the contrary, the extent of the competition without timely objection to the schedule by any offeror or potential offeror suggests that the time available did not unduly influence the competition, *Serv-Air, Inc.*, B-194717, September 4, 1979, 79-2 CPD 176; *Dyneteria, Inc.*, B-181589, October 29, 1974, 74-2 CPD 230, and there is no evidence that the constraints may have been unjustified.

The reference in the determination and findings to the "39-day mobilization" is an outgrowth of the oral assurances to offerors at the preproposal conference that the awardee would have 39 days to mobilize prior to the October 1, 1980, beginning of performance, based on the expected award date of August 22. The solicitation, as we pointed out above, provides for a minimum 30-day transition period and also provides that it cannot be modified except in writing. The contracting officer indicates that he was concerned that he could not tell whether the proposals were predicated on a 30- or 39-day mobilization period and that reopening negotiations to clarify this question might be improper because of Jets' apparent knowledge of its competitors' prices. The Army has suggested no way in which an offeror's anticipation of an extra 9 days to prepare for performance might have prejudiced the competition and we can identify none from the record before us. And, to the extent that any offeror may actually have required 39 days to mobilize, we see no reason why this period could not have been included in the extension of Jets' contract.

Neither Apex's negative preaward survey nor Jets learning of its competitors' prices provides a reasonable basis for the cancellation of this procurement. Apex was still actively trying to demonstrate its financial capability and Jets' knowledge of the other offers does not appear to have prejudiced the competition. Jets was the third low offeror and even if Apex were unable to establish its capability, the second low offeror was still available.

The contracting officer's concern with the possibility of ambiguities in the solicitation originated in the Jets and Dyneteria protests and certain remarks in the OPAC and SARDA messages granting authority to award the contract while these two protests were pending. These problems primarily relate to the offerors' understanding of the wage scales required under German law. Dyneteria's allegations of "confusing" information in the solicitation were not raised until long after the date set for receipt of initial proposals and only after Dyneteria was threatened with elimination from the competitive range. Jets' various suggestions of ambiguities or shortcomings in the solicitation were not made until after Jets fully participated in the procurement without complaint and only after Jets obtained the information that there were two lower offers; Jets made these comments largely in the context of attempting to explain how the two lower offerors might have been misled into miscalculating their prices. We are particularly concerned that the contracting officer relied on the unsupported allegations in these protests without turning to the offerors' cost proposals to ascertain whether there was actually a problem. We note in this connection that Apex's proposal was in fact examined in response to Jets' allegations and was found to contain satisfactory wage scales.

The OPAC message granting authority to award the contract while the Jets and Dyneteria protests were pending also referred to an error in Apex's proposal in responding to the economic price adjustment clause contained in the solicitation. Apex did not follow the specified format and was not totally clear in indicating what costs Apex might seek to adjust under the clause. The contracting officer apparently relied on OPAC's statements for his suspicion that this clause may have been ambiguous. The other remark which concerned the contracting officer was advice that specific sections of German law should not be cited in solicitations.

We have two principal objections to the contracting officer's suspicions here: (1) OPAC's concern was with Apex's response, not the solicitation which appears clear to us on its face; and (2) the contracting officer did not refer to the offeror's proposals to ascertain whether anyone may in fact have been materially misled by the clause. Apex's deviations were relatively insignificant and we find no evidence here of any prejudice to the competition.

We have long recognized that contracting officials have broad discretion to determine whether a solicitation should be canceled and the requirement reprocured. *See*, *e.g.*, 36 Comp. Gen. 364 (1956); 49 Comp. Gen. 244 (1969); *Colonial Ford Truck Sales, Inc.*, B-179926, February 19, 1974, 74-1 CPD 80. Our review of discretionary determinations is limited to the question of the reasonableness of the exercise of discretion. *See, e.g., Sperry-Univac*, B-195028, January 3, 1980, 80-1 CPD 10; *Tracor, Inc.*, B-195736, January 24, 1980, 80-1 CPD 69; *BEI Electronics, Inc.*, 58 Comp. Gen. 340 (1979), 79-1 CPD 202. To be sustainable, a contracting officer's discretionary decision must reflect the reasoned judgment of the contracting officer based on the investigation and evaluation of the evidence reasonably available at the time decision is made. *Fairfield Scientific Corporation* v. *United States*, 611 F. 2d 854 (Ct. Cl. 1979); *General Electric Company* v. *United States*, 412 F. 2d 1215 (Ct. Cl. 1969); *Schlesinger* v. *United States*, 390 F. 2d 702 (1968); *John A. Johnson Contracting Corp.* v. *United States*, 132 Ct. Cl. 645, 132 F. Supp. 698 (1955). We think the determination to cancel this solicitation falls short of this standard.

The Army's decision appears to have been reached on the basis of conjecture as to potential prejudice without reference to available evidence which might have dispelled these concerns and without recourse, for which no reasonable justification has been offered, to a clearly available alternative which would have preserved the competition. In our opinion, the decision to cancel this procurement lacked a sound basis.

The Apex protest is sustained.

Jets has argued that if we were to sustain Apex's protest, as we do here, we would also have to consider independently the Jets and Dyneteria protests mentioned above which would require obtaining reports from the Army in response to these protests and affording the parties time to comment. Apex filed a statement in opposition to Jets' argument in which Apex contends that our consideration of the related protests would go beyond the scope of the court's request.

The Army's justifications for the cancellation of this solicitation in large degree rest on and are identical to the bases of protest presented by Jets and Dyneteria. Consequently, we find that these matters are so inextricably intertwined that, as a practical matter, there is no alternative but to consider the three protests together. Furthermore, since both Jets and Dyneteria were aware that their protests were at issue in this case, and both firms participated actively in the present proceeding, we believe both Jets and Dyneteria have had a fair and reasonable opportunity to present their case. In conclusion here, we believe the court should have the benefit of our views.

Dyneteria's Protest

After its elimination from the competitive range, Dyneteria protested that it had not had sufficient time to prepare its initial proposal and that certain provisions of the solicitation were "confusing." All of the bases underlying these protests were apparent in the solicitation, as amended. Dyneteria's protest of these factors was therefore untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), because Dyneteria did not raise these objections prior to the date set for receipt of initial proposals. Nonetheless, we will consider these questions on the merits because of the court's interest. *See, e.q., Informatics, Inc.*, B-194734, August 22, 1979, 79-2 CPD 144.

We find Dyneteria's objections to the time for preparation of proposals to be without merit for the reasons set forth above in our discussion of the contracting officer's reasons for cancellation. As for Dyneteria's objections to the solicitation, while we agree that the specific provision to which Dyneteria refers requires close reading, we do not think this affords any basis for a conclusion of prejudice, particularly when Dyneteria failed to seek timely clarification.

Dyneteria's other objections, couched in terms of an unequal opportunity to negotiate, rest on an erroneous factual basis because the Army did not negotiate with Dyneteria, but only requested clarification of Dyneteria's initial proposal. Dyneteria responded to this request with a timely message seemingly accepting its impending elimination from the competitive range. The Army had no obligation to negotiate with Dyneteria after it was eliminated from the competitive range. *Western Design Corporation*, B-194561, August 17, 1979, 79-2 CPD 180.

Dyneteria's protest is denied.

Jets' Protest

Some aspects of Jets' protest are clearly untimely filed under our Bid Protest Procedures. However, consistent with our consideration of similarly untimely aspects of Dyneteria's protest, we will discuss the merits of these contentions.

Jets' protest was based in part on the assertion that it did not have sufficient time to prepare its best and final offer. Jets argued that the short time available was both inadequate and prejudicial because other offerors had more time. We note, however, that Apex's best and final offer is dated August 14, the day after its negotiations, and that a third offeror was able to conduct its negotiations on the morning of August 14 and submit its best and final offer by 4:00 p.m. that same afternoon, in considerably less time than that afforded Jets. Jets in fact submitted its best and final offer at 7:30 a.m. on the 15th. And, despite Jets' assertions that it objected to the lack of time within which to submit its best and final offer, we find no evidence of any written complaint and the August 21 telex requesting authority to award the contract while the protests were pending indicates that all best and final offers, including presumably Jets', were submitted without qualification. We find no merit in Jets' contentions.

Jets also contended that the contracting officer failed to verify Apex's "apparently mistaken bid" as required by DAR § 2-406.3 and did not take steps to preclude buying-in as required by DAR § 1-311. Neither of these arguments has any merit. With respect to the first contention, we note first that Jets' assertion of a mistake in Apex's offer is speculative, and second, that the Army did question Apex's low costs during negotiations, to which Apex responded satisfactorily. Concerning the second contention, we note only that the use of multi-year, fixed-price solicitations, as here, is a step specifically recommended under DAR § 1-311 to preclude buy-ins.

Jets also protested that in evaluating proposals the Army ignored a wage increase which Jets promised to its employees and which a follow-on contractor would be obligated to pay under German law. There are two elements to this assertion: the first is an implied objection to other offerors' wage scales and the second to the likelihood of compliance by other offerors with German law. We note, however, that in response to Jets' complaints about Apex's wage scales, Apex's proposal was examined and found to have wage scales higher than those of the other offerors. And, the solicitation bound the awardee to comply with German law.

Jets also argued belatedly that (1) the solicitation was defective because the workload estimates and equipment descriptions were faulty and (2) the Army, during the preproposal conference, stated that an estimated 495 workers were required, whereas Jets states the number is actually 515–520. However (1) the site visits and inspections would have cured any substantial errors in the equipment descriptions and the solicitation provided for adjustments in price for variations in workload from the estimates, and (2) no offeror was bound by the Army's workforce estimate. In this latter connection, we find no evidence that any variations in proposed workforce were the product of anything other than the permissible exercise of business judgment by the competitors. We find these contentions also to be without merit.

Jets' protest is denied.

Recommendation for Remedial Action

In view of the foregoing, we see no impediment to award under a reinstated solicitation accompanied by any necessary termination of Jets' contract. Therefore, since the low prices have been disclosed and to avoid giving rise to an auction, we are of the view that the solicitation should be reinstated and that award be made as soon as practicable after completion of new responsibility evaluations in accordance with DAR § 1–905.2.

The parties have also argued whether the Small Business Administration's certificate of competency procedures applied to this procurement. We did not address this question in our decision because Apex, a small business, was not found to be nonresponsible by the Army and the question was premature.

[B–195133]

Travel Expenses—Temporary Duty—Lodgings and/or Meals—Procured by Contracting Officer—Appropriations Limitation

A Government contracting officer may contract for rooms or meals for employees traveling on temporary duty. Appropriated funds are not available, however, to pay per diem or actual subsistence expenses in excess of that allowed by statute or regulations, whether by direct reimbursement to the employee or indirectly by furnishing the employee rooms or meals procured by contract. Because of the absence of clear precedent, the appropriations limitation will be applied only to travel performed after the date of this decision.

Travel Expenses—Temporary Duty—Lodgings and/or Meals—Procured by Contracting Officer—Furnished Without Charge—Per Diem Rate Establishment

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance.

Subsistence—Per Diem—Rates—Lodging Costs—Average Cost—More Than One Trip on Voucher

When an employee submits a travel voucher which includes three different trips, the average cost of lodging is determined by dividing the total amount paid for lodging by the traveler during the three trips by the number of nights lodging that was or would have been required.

Matter of: Bureau of Indian Affairs—Procurement of Lodgings and Meals for Employees on Temporary Duty, January 19, 1981:

This action is in response to a request from Donald M. Gray, an authorized certifying officer of the Department of the Interior, Bureau of Indian Affairs (BIA), Albuquerque, New Mexico, for an advance decision concerning various questions raised by six vouchers. These questions arise because contracting officers of the BIA have directly procured rooms or meals from hotels for travelers during the performance of the travelers' temporary or authorized training duty. We shall discuss the three main general issues and then answer the specific questions raised by each voucher.

1. May a Government contracting officer contract for rooms and meals for employees on temporary duty?

Normally, an individual employee on temporary duty is responsible for obtaining and paying for his own lodging and meals. The employee then submits a voucher which details his expenses and he is reimbursed on the basis of the voucher. This is the usual method of incurring and paying for travel expenses.

We have found no express prohibition that would prevent an agency from contracting for lodgings or meals, other than the restriction in 40 U.S.C. § 34 (1976) on the rental of space in the District of Columbia. Thus, a Government contracting officer may enter into a contract with a commercial concern for rooms or meals, or both, for employees on temporary duty. However, since it is well established that officers of the Government may not do indirectly that which a statute or regulation forbids doing directly, we conclude that the statutory and regulatory limitations on per diem rates or actual expense rates are equally applicable to contracts or purchase orders entered into by agencies for lodgings or meals. Thus, appropriated funds are not available to pay for subsistence expenses in excess of the amounts authorized by statute or the implementing regulations, regardless of whether the employee is reimbursed for such expenses or the agency has procured lodgings or meals by contract. Because of the lack of precedent in this area, the above-stated limitation on the use of appropriated funds for travel expenses will only be applied to travel performed after the date of this decision.

2. Should the amount paid by the Government by contract with a vendor for lodging or meals for an employee on temporary duty be applied to the $35 per diem limitation contained in 5 U.S.C. § 5702?

At the time in question, the statute which establishes a per diem rate, 5 U.S.C. § 5702, provided in pertinent part:

> (a) Under regulations prescribed under section 5705 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $35, * * *.

The applicable regulations promulgated pursuant to this statute provided:

> Reimbursement for official travel within the limits of the conterminous United States shall be a daily rate not in excess of $35 except when actual subsistence expenses travel is authorized or approved due to the unusual circumstances of the travel assignment or for travel to a designated high rate geographical area as provided in 1–8.1.

Federal Travel Regulations (FTR) 1–7.2a, FPMR 101–7, Temp. Reg. A–11, Supp. 4, April 1977.

Both the statute and regulation quoted above imposed a $35 limitation on the amount of money to which an employee is entitled or may be reimbursed while in a per diem status on temporary duty.

The regulations also provided that, in order to establish a per diem rate, the average amount which the traveler pays for lodging should be used. See FTR para. 1–7.3c(1)(a). The regulations do not specifically address the issue as to how to treat the amount paid under a contract with a commercial concern for lodging and/or meals in determining the proper per diem or actual expense entitlement. If a Government contracting officer procures food and/or lodgings for an employee on temporary duty either no per diem should be allowed or a reduction should be made from the amount otherwise allowable to the employee as appropriate. FTR para. 1–7.6f.

In instances where it is known in advance that rooms will be furnished to the employee under a contract for the entire trip the lodgings plus system is normally inappropriate in such cases. Rather, a specific per diem rate appropriately reduced should be established in advance under FTR para. 1–7.3c(3), FPMR 101–7, Temp. Reg. A–11, Supp. 4, May 1, 1977. In that regard, it is pertinent to note that the training act, 5 U.S.C. § 4101 *et seq.* specifically provides for direct arrangements with a school or other institution sponsoring training courses for lodgings, meals and other necessary costs of training. If the training cost charges include lodging and meal costs as an integral part of the charges they would be considered a "necessary cost of training" payable by the Government. A reduced per diem rate, if appropriate, still would be allowed to the employee. If charges submitted by sponsor for the training course do not include lodging or subsistence costs the per diem rate or subsistence charges should be treated as indicated above for temporary duty travel.

3. Should lodging procured by a Government contracting officer be considered Government furnished quarters?

If such a reduced per diem rate is not established in advance, the Federal Travel Regulations provide that when meals or lodging are furnished without charge or at a nominal cost by a Federal Government agency at a temporary duty station, an appropriate deduction shall be made from the authorized per diem rate. FTR para. 1-7.6f, FPMR 101-7, May 1973. Hence we conclude that when the Government rents rooms, and/or meals by purchase order for employees on temporary duty, these rooms or meals should be treated as Government furnished quarters or meals. Thus, a reduction in per diem otherwise due is required in such cases. In the case of actual expense travel no reimbursement would be made for meals or lodgings furnished by the Government.

We will now answer the specific questions raised by the certifying officer which pertain to the six vouchers submitted.

INDIVIDUAL VOUCHERS

A. Emil Kowalczyk, an employee of the BIA, traveled on temporary duty between Juneau, Alaska, Seattle, Washington, and Denver, Colorado, from February 19, 1979, to February 28, 1979. For 6 of the 9 nights he traveled, the Government procured lodgings for him by purchase order at a total cost of $147.52. For the days he procured his own lodgings he did not provide receipts nor did he claim to have spent any specific amount. In his travel voucher, Mr. Kowalczyk claimed $35 per diem for the portions of the trip which involved his securing his own lodging and $16 per diem for the portions of the trip in which the lodgings were paid by the BIA. The certifying officer determined that this method of computing reimbursement was inappropriate because it could result in charges to the BIA in excess of the $35 limitation in 5 U.S.C. § 5702 (1976). The BIA computed reimbursement by combining all costs of lodging, including the amounts paid by purchase order by the BIA, and divided that total by the number of nights which lodgings were required. To complete the lodging plus computation the certifying officer added $16 a day to the lodging cost, and a $33 per diem rate was established and applied according to the appropriate regulation. After the computation of the per diem allowance, the certifying officer deducted the exact amount paid by the BIA for Mr. Kowalczyk's lodgings. We find no objection to the certifying officer's method for computing per diem in these particular circumstances as there are apparently no excess costs chargeable against Mr. Kowalczyk.

B. The second travel voucher was submitted by Mr. Peter Soto who traveled to Denver, Colorado, on temporary duty from April 16–19, and secured lodgings by a Government purchase order for $28 per night. Mr. Soto claims per diem expenses of $16 a day for 4¾ days. Since the combination of the costs of lodging and other expenses would exceed the limits set by 5 U.S.C. § 5702 the certifying officer refused to certify this amount and asks us who should bear the excess cost. Any excess costs resulting from hotel accommodation charges normally in the future will be regarded as being in violation of the above stated rule limiting the availability of appropriations. However, as stated above, since there has been some confusion in this area and no decision of this Office has stated a clear rule, the limitation on the availability of appropriations for such excess costs will only be applied to travel performed after the date of this decision. Accordingly, the amounts claimed are allowable, if otherwise proper.

The certifying officer also asks what documentation should support the traveler's vouchers regarding the cost of lodging supplied by the purchase order. Regulations state that lodging receipts may be required at the discretion of each agency. FTR para. 1–7.3c(1)(a) *supra*. Therefore it is up to BIA to decide if employees should supply receipts.

C. The third voucher covers three separate trips made by Mr. Daniel Sadongei, whose official duty station was Anadarko, Oklahoma. On the first trip, from Anadarko to Oklahoma City, from February 28 to March 2, 1979, Mr. Sadongei claimed only a mileage allowance and turnpike tolls since lodging and meals were paid by Government purchase order. Mr. Sadongei's second trip was from Anadarko to Horton, Kansas, from March 4 to 9, and his final trip included on the voucher was to Pawnee, Oklahoma, from March 13 to 14. In computing his per diem, he figured out the average cost of lodging to be $13.42 for the two trips together. The issue is when an employee includes three trips on one voucher should per diem for each trip be computed separately or should per diem for the three trips be computed together.

The Federal Travel Regulations clearly state that in order to compute the average cost of lodging, the total amount paid for lodging during the period covered by the voucher should be computed. FTR para. 1-7.3c(1)(a). The General Services Administration has informally advised us that the purpose of this regulation is to allow an employee some latitude if he is faced with a situation in which the cost of lodging in one area is more expensive than another. In this way the employee can average in less expensive trips with others that cost more. However, when an employee exercises his option and includes more than one trip on a travel voucher, all the trips must be counted together in order to compute per diem expenses. This rule would normally apply to Mr. Sadongei's case. However, in view of the confusion in this area, referred to above, we will not object to payment for subsistence as claimed by the employee, notwithstanding any excess cost that may have resulted from the use of the purchase order.

COMMERCIAL VOUCHERS

The next three vouchers which the certifying officer has sent to us concern billing from commercial vendors directly to the Government for services rendered employees of the Government. None of the vouchers cover a situation in which the lodging costs or meal cost is part of a training course package under which such costs are a part of necessary costs of training. Accordingly, these vouchers will be treated as if they were for travel on regular temporary duty.

D. Three employees of the BIA traveled to Tempe, Arizona, from March 18 to March 30, 1979, to attend a training conference at Arizona State University. On March 6, 1979, Duane Marion, contracting officer for the BIA, issued an order for supplies or service (Standard Form 147) to the Holiday Inn in Tempe, Arizona, for lodging and meal costs for these employees. BIA was billed $493.65 for each employee which included $312 for room and $181.65 for food. The certifying officer has not paid this bill since he states that the average cost per day per employee is $41.11 and this is in excess of the limitation contained in 5 U.S.C. § 5702.

The certifying officer asks whether the voucher should be paid in full and if the voucher is paid, who should bear the cost of payment. If the employee must pay back some money, the certifying officer also asks whether the employees should submit a travel voucher, even though there might not be an additional claim. The certifying officer asks if the voucher could be treated on an actual subsistence basis in a per diem area. Finally, the certifying officer inquires into the itemization necessary by the vendor to determine the correctness of the claim.

Earlier in this decision we held that a Government contracting officer may procure rooms or meals from a commercial concern for employees on temporary duty, provided the cost is not in excess of that authorized by statute to be paid for per diem or actual subsistance expenses. The second issue which must be decided before the Government may pay Holiday Inn is whether the Government entered into a contract with the Holiday Inn for hotel accommodations or whether the agency personnel just reserved a room on behalf of an employee. We have examined this issue in cases where a room reserved by an agency was not used and the employees and the agency failed to cancel the reservation. We have held that if a contract existed between the Government and hotel, then the Government is liable to pay for the rooms, 51 Comp. Gen. 453 (1972) and 41 *id.* 780 (1962), but if there is no contract then the Government is not obligated to pay. *Richard E. Cunningham*, B-192804, December 18, 1978; B-181266, December 5, 1974.

In this situation Standard Form 147 establishes the fact that a contract existed between the Government and the hotel. Since Holiday Inn supplied the services as requested, the Government is liable to pay for the rooms and meals on the basis of the contract. In the future, agencies are not authorized to expend appropriated funds for any such excess costs.

The next question that the certifying officer asks is whether or not the travelers should submit a travel voucher even though there may be no additional claim. Federal Travel Regulations provided that agencies are authorized to prescribe the manner of submitting vouchers for travel. FTR para. 1-11.4. We believe BIA must decide for itself whether the proper administration of its official travel requires that vouchers be submitted where no reimbursement is claimed.

The certifying officer inquires into what type of itemization is required when the vendor submits a bill. Since the vendor is paid on the basis of the contract established by the purchase order, the vendor must show that the services rendered are covered by the contract.

In this regard we have held that coffee, soft drinks and similar refreshments are in the nature of entertainment and are not payable from appropriations for necessary expenses in absence of specific statutory authority. 47 Comp. Gen. 657 (1968); B-188078, May 5, 1977. We have also held that where an employee is authorized actual subsistence incident to official travel, expenditures made by him for coffee during coffee breaks may not be reimbursed since such expenditures are not necessary expenses of subsistence under the Federal Travel Regulations. *Samuel S. Rey*, B-197830, April 22, 1980. It is incumbent upon the hotel to itemize its bill so that the agency uses appropriated funds only for necessary items of subsistence. Therefore, this voucher should be paid if the goods and services provided were reimbursable under the Federal Travel Regulations.

E. An acting procurement officer for the BIA issued Standard

Form 147 to a Holiday Inn in Oklahoma City for meals and lodging for BIA employees to attend a Social Services Staff Meeting and Motivation Seminar from March 22 to 23, 1979. The only restriction on Standard Form 147 was that the cost was not to exceed $2,500. There also was a statement on Standard Form 147 that the Holiday Inn was the only hotel having conference space and sleeping rooms available on the dates of the meeting. The total bill submitted to the certifying officer for payment was $1,077.36, for a total of 25 people. This bill comes out to a total of approximately $21.50 per person for each day.

The certifying officer asks if this type of Blanket Authorization is legal because of the potential that some employees would exceed the $35 per diem limitation established in 5 U.S.C. § 5702.

As we have previously stated, a contracting officer can contract for rooms and meals for employees on official travel only within the limitations of the per diem and actual subsistence expenses authorized by statute or regulations. Here the total cost divided by the number of employees came out to about $21.50 per day. Since this is less than the per diem maximum, the certifying officer need not examine individual costs to make sure that each employee was under the per diem or subsistence maximum.

F. The last voucher concerns a commercial bill submitted by employees and students and teachers on a field trip. The certifying officer asks if this is the proper method for covering the expenses of teachers and students on a field trip. The certifying officer also asks if students are subject to the per diem limitation established in 5 U.S.C. § 5702 under the circumstances.

We believe that a contracting officer may procure rooms for employees and students on a field trip as long as it is necessary to conduct official business. The determination as to whether the trip is necessary to conduct official business should be made by an appropriate agency official. Under these circumstances, we would not object to this type of procurement. The per diem limitation set forth in 5 U.S.C. § 5702 is applicable in this situation and the amount due shall be computed consistent with the discussion in the other situations covered in this decision.

The certifying officer asks if a traveler on temporary duty may be required to eat and lodge at a specific place. The general rule is that agencies may not require its employees to use Government quarters while on temporary duty without making the finding that use of such quarters was necessary to accomplish the employee's mission. *Federal Aviation Administration*, B-195859, March 18, 1980. The "necessity" determination cannot be made on a blanket basis but must be tailored to each particular situation. We are not aware of any similar requirement in law for such a determination in the case of meals. However, agencies should only require meals at a specific place when it is clearly required by the circumstances and only after consideration of both the Government's and employee's interest. Generally, we would not object to the use of the same test, namely, whether it is "necessary to accomplish the employee's mission." This would place quarters and meals on the same basis. An example of a situation requiring furnished meals and quarters is certain training courses.

[B-195341]

Bids—Mistakes—Judgmental Errors—Correction or Withdrawal of Bid Precluded—Supplier Costs—Estimated

Judgment error, i.e., where bidder makes knowing judgment and assumes known risk at time it submits bid such as computing bid on basis of estimate of supplier's costs instead of obtaining actual quotation, is not a mistake for which relief may be granted. 58 Comp. Gen. 793, B-162379, October 20, 1967, and other decisions allowing relief where the bid was so low so as to raise presumption of error regardless of whether bidder established existence of mistake, as opposed to judgment error, will no longer be followed.

Matter of: Handy Tool & Manufacturing Co., Inc., January 19, 1981:

Handy Tool & Manufacturing Co., Inc. (Handy) requests rescission of contract No. DAAK01-77-C-5362 alleging it erroneously estimated subcontractor costs when computing its bid for item 1, and that it mistakenly assumed the availability of certain supplies upon which it based its bid for item 2.

On December 13, 1976, the Army Troop Support and Aviation Materiel Readiness Command (Army), St. Louis, Missouri, issued invitation for bids (IFB) No. DAAK01-77-B-5131 for 20 mechanical drive housings (item 1) and 21 vertical housings (item 2). The bids received were as follows:

	Item 1	Item 2
Dunrite Tool & Die Corp. (Dunrite)	$995.00	$395.00
Handy	1,495.00	1,035.00
Hoether Tool & Machine Co	2,758.82	1,925.00
Alton Iron Works	4,500.00	3,965.00

Handy was the low bidder for items 1 and 2 after the Army permitted Dunrite to withdraw its bid due to a mistake in bid. Because the processing of Dunrite's mistake claim delayed award, the Army requested Handy to extend its bid acceptance period from March 15, 1977, to April 14, 1977. On March 7 Handy refused, stating that it did not want the contract award. Handy alleges, and the Army denies, that

Handy notified the contracting activity of an alleged "mistake" in its bid. In any event, the contracting officer accepted Handy's bid and awarded the contract to Handy on March 10, 1977.

On March 14, 1977, Handy sent the Army a telegram formally alleging a "mistake" in its bid, and on April 4, 1977, Handy submitted written details describing two errors. The first error involved item 1 and consisted of Handy's having formulated its bid on the estimated cost of obtaining certain castings from a foundry instead of requesting actual quotations from potential subcontractors prior to submitting a bid. After bid opening, Handy requested such a quotation and discovered it to be significantly higher than Handy had estimated. The second mistake involved item 2 and consisted of Handy's having assumed the availability of 7¾ inch alloy steel tubing. Handy alleged that after award it was unable to obtain the tubing from any source and would have had to use 8 inch tubing, resulting in greater costs.

Handy refused to perform the contract and the Army terminated the contract for default.

Regardless of whether Handy claimed a mistake in bid prior to award, no remedial action is available unless a mistake has been made. The Navy reports that 7¾ inch alloy steel tubing is generally available and has identified at least one source for the tubing. Handy has not contested the existence of that source. Thus, we do not find any basis for Handy's claimed second mistake. With respect to the first mistake, we agree with the Army that Handy's error is not the type of mistake for which relief may be granted.

The bidder must bear responsibility for the preparation and submission of a bid, including ascertaining the exact cost of any supplies to be obtained from its supplier. If the bidder does not obtain a firm price from its suppliers on which to compute its bid, any post-bid opening increase in the price relied upon by the bidder does not afford a basis for relief. 31 Comp. Gen. 323 (1952).

Prior to 1970, and on some occasions since, we allowed relief in cases where the bidder was ignorant of the supplier's costs, and the bid was so low as to raise a presumption of error in the mind of the contracting officer. *See, e.g.*, B–162379, October 20, 1967. The basis for relief was the basic principle that if a material mistake is made by one party to a contract and the mistake is known by the other party, or because of accompaning circumstances the other party had reason to know of the mistake, the party making the mistake has the right to rescission. 44 Comp. Gen. 383, 386 (1965). Under such circumstances, we did not allow the contracting officer to overreach the bidder by snapping up an offer that was too good to be true. *See Wender Presses, Inc.* v. *United States*, 343 F. 2d 961, 963 (Ct. Cl. 1965). A valid contract resulted only where the Government notified the bidder of the nature and extent of a suspected mistake and obtained the bidder's verification of the bid. 44 Comp. Gen., *supra*, at 386.

However, in 1970 the Court of Claims made clear that:

> * * * The mistake, to invoke such principles, must be * * * a clear cut clerical or arithmetical error, or misreading of specifications, and * * * [does] not extend to mistakes of judgment.

Ruggiero v. *United States*, 420 F. 2d 709, 713 (Ct. Cl. 1970); see also *National Line Co., Inc.* v. *United States*, 607 F. 2d 978 (Ct. Cl. 1979). We take this to mean that the Government does not overreach a bidder who makes knowing judgments and assumes known risks at the time it submits a bid, since the bidder bid exactly what it intended to bid. See generally *Tony Downs Food Co.* v. *United States*, 530 F. 2d 367, 373 (Ct. Cl. 1976). Therefore, to the extent B-162379, *supra*, and other decisions allowed relief without requiring the bidder to establish the existence of a mistake as opposed to a judgment error, they will no longer be followed.

Recently we had occasion to consider a pre-award mistake-in-bid claim submitted by a bidder that had been unable to obtain price quotations from a supplier, and therefore computed its bid on estimated costs. Relying in part upon B-162379, *supra*, we allowed the bidder to withdraw its bid because the contracting officer suspected the possibility of mistake since the bid was significantly lower than the other bids received. *Department of the Navy—Advance Decision*, 58 Comp. Gen. 793 (1979), 79-2 CPD 215. We believe that decision does not accord with our decision here and it also will no longer be followed.

The correct rule is that the bidder generally must bear responsibility for the submission of a bid, including ascertaining the exact cost of any supplies to be obtained from a supplier. Where the bidder knows it lacks a firm price from its suppliers but elects to submit a bid based upon the bidder's own estimate, the bidder (in this case, Handy), must bear the risk that the actual supplier's costs will be higher than the bidder's estimate. *See* 31 Comp. Gen., *supra*, and *Bill Bouska Construction, Inc.*, B-196786, December 2, 1980, 80-2 CPD 411, where we viewed a bidder's reliance on a supplier's price quote that by its own terms was not firm as a judgmental error rather than a mistake for which relief was available under the mistaken bid rules. Consequently, we consider Handy to have made a judgment error here rather than a "mistake" for which mistake-in-bid relief can be obtained.

In recent years our Office has also permitted relief, where otherwise proper, in cases where the bidder's claim for relief was based upon a firm, but erroneous quotation from a subcontractor. *MKB Manufacturing Corporation*, 59 Comp. Gen. 195, 197-8 (1980), 80-1 CPD 34; B-169901, June 19, 1970. Since the subcontractor's error precluded the bidder from making a knowing judgment, we believe these cases still represent good law.

Of course, if under any circumstances the actual prices are such that an award to the bidder would mean that the Government was obviously getting something for nothing, then relief should be allowed on the basis that it would be unconscionable for the Government to accept the bid. *See Porta-Kamp Manufacturing Company, Inc.*, 54 Comp. Gen. 547, 552 (1974), 74–2 CPD 393. We recently held that, in itself, the fact that a second low bid was 130 percent more than the awardee's bid is insufficient to find a contract unconscionable. *Andy Electric Company*, 59 Comp. Gen. 363 (1980), 80–1 CPD 242. Handy's bid was not so low that the Government knew or should have known it was getting something for nothing. In fact, Handy's prices for the two items were higher than the prices paid in the prior year's procurement as increased to reflect inflation.

The claim is denied.

[B-200668]

Contracts—Specifications—Restrictive—Geographical Location—"Home Port Policy"

Navy's general use of geographic restriction to preclude firms in one district from competing for overhaul of ships home-ported in other districts in order to preserve overhaul capacity of those firms is unduly restrictive, although in given case it may be shown that restriction is necessary.

Matter of: Norfolk Shipbuilding and Drydock Corporation, January 27, 1981:

Norfolk Shipbuilding and Drydock Corporation (NORSHIPCO) protests the restriction in request for proposals (RFP) N62665-80-R-0061 issued by the Naval Sea Systems Command for the overhaul of the USS MULLINNIX to firms on the "East and Gulf Coasts, Exclusive of States of North Carolina, Virginia, Delaware, Maryland and Pennsylvania." These states comprise the Fifth Naval District (ND), which is the home port of 55 percent of all Navy vessels home-ported on the East and Gulf Coasts. The USS MULLINNIX is home-ported in Charleston, South Carolina, part of the Sixth ND. NORSHIPCO, located in Norfolk, Virginia, contends that the geographic restriction unduly limited competition for the contract award.

The protest is sustained. However, for the reason noted below we do not recommend any corrective action with respect to this particular procurement.

Background—The Home Port Policy

The RFP's geographical restriction is related to the Navy's "Home Port Policy," established by the Chief of Naval Operations in 1971.

The Policy calls for the maximum possible amount of ship maintenance to be performed in a vessel's home port in order to minimize disruption to Navy families in an effort to eliminate problems regarding personnel retention. The Policy is implemented by section 7–3.4 of the Naval Sea System Command's Master Ship Repair Manual, which provides that except in certain limited circumstances "the performance of work shall be restricted to the home port to which such ships and craft have been assigned, and bids or proposals shall be solicited only from qualified firms within the home port area." The section and accompanying instructions also provide that where adequate competition or reasonable prices cannot be obtained the geographical area is to be expanded, with the areas closest to the home port examined first until those criteria are met. The intention behind first considering the areas closest to the vessel's home port is to make it feasible for crew members to commute home on weekends. If the competition must include areas outside of weekend commuting distance, and a contractor in one of these areas wins the competition, the Navy offers to move the crew's families to the overhaul area for the duration of the work. In this connection, a major overhaul such as the USS MULLINNIX will undergo can take over six months.

We considered the propriety of Home Port Policy geographical restrictions in our decision in 53 Comp. Gen. 102 (1973). We set out the following Navy statement in support of the Policy:

> The intent of this policy is not to favor the award of overhaul contracts to any particular area but, instead, to minimize disruption to Navy families. While family separation has always been, and will always be, an expected part of Navy life, unnecessary separations must be avoided if the Navy is to retain the trained manpower necessary for the future.* * *
>
> * * * Family separation is a hardship and is one of the more compelling reasons cited for not adopting a Navy career. With the advent of an all volunteer Navy, and with strenuous competition for manpower from the other Armed Forces and from the civilian sector, it is imperative that the quality of Navy life be maintained at an acceptable level. One important way we can improve the average Navy man's life is to allow him time with his family; one way chosen to do this is to accomplish the maximum possible amount of ship maintenance in the home port.

We concluded:

> * * * [W]hile it is clear that this policy may sometimes result in increased costs to the Government and may prevent some bidders who are otherwise qualified from competing for an award, we cannot agree that the Home Port Policy is unduly restrictive of competition so as to contravene the statutory requirement for competitive procurements. We think the record in this case adequately shows that the Navy's restrictive requirement "serves a useful or necessary purpose" in meeting its needs, * * * since personnel morale and retention will be better served by minimizing the occasions on which its ship crew personnel must be separated from their families. Furthermore, as the Navy points out, home port restrictions are not to be applied if they would "prevent the obtaining of adequate competition" or would result in unreasonably high costs. * * * Accordingly, we do not believe that application of Home Port Policy to Federal procurements is illegal.

Instant RFP and Protest

Because the Navy did not anticipate adequate competition for the contract to overhaul the USS MULLINNIX within the Sixth ND, it broadened the area of competition pursuant to section 7–3.4 of the Repair Manual, ultimately including all East and Gulf Coast Districts except the Fifth. The Navy reports that as a matter of Naval Sea Systems Command unwritten policy it generally will not solicit firms in the Fifth ND to work on ships home-ported elsewhere. The Navy's rationale is that it is necessary that the Fifth ND not be "saturated" with work on ships from other Districts in order to insure that there will be contractors available in the District to overhaul any of the great number of ships home-ported there consistent with the Home Port Policy, should any such overhauls be needed. In this respect, as stated above, Fifth ND is the home port of 55 percent of the Navy vessels home-ported on the East and Gulf Coasts; the Navy states that the percentage includes 36,000 people on 39 percent of all combatant ships, 67 percent of all auxiliary ships, and all amphibious ships.

NORSHIPCO's position essentially is that while it supports the Home Port Policy as described in our 1973 decision, the "Fifth ND exclusionary rule" simply is not consistent with the Policy. NORSHIPCO points out that the exclusion of Fifth ND firms from competing for contracts to overhaul vessels home-ported elsewhere may well result in more of a disruption of the crews and their families than if the firms were allowed to compete. For example, the USS MULLINNIX may end up being overhauled in New York (Third Naval District) or Boston (First Naval District) instead of in Norfolk, which is much closer to the vessel's home port.

Further, NORSHIPCO asserts that there simply is no possibility that the Fifth ND will be "saturated" in 1981 with work on ships home-ported there so that the overhaul of the USS MULLINNIX in Norfolk would necessitate the overhaul of a Fifth ND vessel in another location.

Decision

The Policy that we considered in our 1973 decision did not include the Fifth ND "exclusionary rule"; the rule was not instituted until approximately three years ago. In condoning the Home Port Policy we stated:

> The basic principle underlying Federal procurement is that full and free competition is to be maximized to the fullest extent possible, thereby providing qualified sources an equal opportunity to compete for Government contracts. *See*

> 10 U.S. Code 2305; Armed Services Procurement Regulation (ASPR) [now Defense Acquisition Regulation] 1-300.1. However, it is well established that legitimate restrictions on competition may be imposed when the needs of procuring agencies so require. 42 Comp. Gen. 102 (1962). Many of these restrictions are specifically provided for in the ASPR (*see*, for example, ASPR 1-1101, *et seq.*, regarding qualified products lists). Others, which are not specifically mentioned in ASPR are imposed in accordance with the particular need of the Government, and may involve such things as product experience, 48 Comp. Gen. 291 (1968); ability to demonstrate a complex system having specified performance features, 49 Comp. Gen. 857 (1970); and geographic requirements, B-157053, August 2, 1965, and B-157219, August 30, 1965.
>
> Our Office has taken the position that these various solicitation provisions, while obviously restrictive of competition in the broadest sense, need not be regarded as *unduly* restrictive when they represent the actual needs of the procuring agency. 52 Comp. Gen. 640 (1973); B-157053, *supra*. Further the fact that one or more bidders or potential bidders cannot comply with the requirements of particular solicitation provisions does not automatically make those provisions unduly restrictive. 52 Comp. Gen. 640, *supra*. [Italic supplied.]

That quotation, as well as the others from our 1973 decision set out above, reflects the importance to Government procurement of maximizing competition to the greatest extent practicable; generally, the benefit to both the public and the Government, in terms of price and other factors, is directly proportional to the extent of the competition. It is for that reason that a contracting agency may impose on the competition a geographical or other restriction only if, after careful consideration of all relevant factors, the restriction is deemed necessary to meet the agency's actual minimum needs. *Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry*, 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

We have no reason to alter our view that the Home Port Policy as originally conceived certainly has applicability *whenever* a ship is to be overhauled—with few exceptions (such as the need for special facilities) the concern with the disruption of Navy families is one legitimate enough to warrant the Policy's geographical restriction in almost all situations.

However, we do not view the Fifth ND "exclusionary rule" as similarly for general application. The record shows that it is the Navy's experience that notwithstanding that it affords families of crew members of vessels being overhauled in other than their home ports the opportunity to move to the overhaul location, the families as a general matter in reality simply choose to remain in the home port area during the overhaul. Thus, the Fifth ND "exclusionary rule" as a practical matter must be viewed as causing the crew members of a vessel home-ported in a District often near the Fifth ND to locate a considerable distance away from their families for the duration of a particular overhaul in the expectation that the crews of Fifth ND vessels that *may* be overhauled in the future will be able to locate in the home port.

Because of the large number of ships home-ported in the Fifth ND relative to other Districts, this may be appropriate in terms of furthering the Home Port Policy in some circumstances. The reason is that there may be fewer non-Fifth ND crew members that would be relocated than there are Fifth ND crew members that would be able to stay in their home port.

However, in circumstances where overhaul scheduling is such that there may be no real danger that award to a Fifth ND firm for the overhaul of a vessel from another District would result in no Fifth ND contractors to overhaul Fifth ND ships, the Navy's policy to exclude Fifth ND shipyards from these procurements simply would cause a greater disruption of Navy families than would otherwise be the case. This is so because ships home-ported in districts adjacent to the Fifth ND will be overhauled much further from the home port area than would be necessary. As such, it would run directly afoul of the Navy's stated purpose behind the Home Port Policy—to minimize the disruption of Navy families—which caused us to condone the Policy in 1973.

Accordingly, and in view of the statutory mandate to maximize competition, we believe that the propriety of the Fifth ND "exclusionary rule's" implementation must, in contrast to the general applicability of the Home Port Policy restrictions *per se*, depend on the reasonableness in each particular situation of the Navy's actual plans as to future overhauls of Fifth ND vessels that might be adversely affected by including Fifth ND firms in a competition for vessels outside the Fifth ND. Thus, a general application of this restriction may under the circumstances of a particular procurement be viewed as unduly restrictive of competition.

The Navy states that it is the agency's "projected forecast that ships home-ported in the Fifth ND requiring overhauls during fiscal year 1981 will fill the capacity of the Fifth ND."

We first note that the overhaul of the USS MULLINNIX is scheduled to begin on February 20, 1981, and to be completed in September of the same year. The record indicates that there presently is only one Navy ship being overhauled in the Fifth ND, and that overhaul is to be completed shortly. There apparently are four firms in the Fifth ND, including NORSHIPCO, with major overhaul capability, some with multiple capacity—the protester asserts that it has facilities to overhaul four ships at a time—and NORSHIPCO alleges that none of the four firms has a major overhaul scheduled for fiscal year 1981. Accordingly, it would appear that there is considerable capacity in the District for 1981 overhauls of Fifth ND vessels. In this respect, we are concerned only with work that we anticipate would be bid on by the firms with major overhaul capacity, as opposed to "minor" overhauling for which that capacity could not logically be viewed as being adversely affected if the USS MULLINNIX were overhauled in the Fifth ND.

In any case, the record does not clearly support the Navy's "projected forecast" in that there is no indication in the agency's submissions of any specific major overhauls of Fifth ND vessels firmly scheduled. On the other hand, the record does show that because of an increased Navy presence in the Indian Ocean fewer ships will be overhauled (major and minor) in the Fifth ND in 1981 than in other years. In addition, even if a major overhaul were to be scheduled for the Fifth ND immediately, the overhaul of the USS MULLINNIX might be substantially completed by the time an award could be made and work begun. With regard to this last point, we note that the contract to overhaul the USS MULLINNIX was awarded to a non-Fifth ND firm, notwithstanding NORSHIPCO's protest, over three months after the issuance of the solicitation for the work, and that in accordance with Navy policy the overhaul is not to begin for another three months after that date. Using a similar time frame, no work on an as yet unscheduled major overhaul would begin until the second half of 1981.

Nonetheless, the record shows that in addition to filing this bid protest, NORSHIPCO filed suit in the matter in the United States District Court for the Eastern District of Virginia, Norfolk Division (Civil Action No. 80–1083–N), requesting a preliminary injunction against the award of a contract under the RFP. The court denied NORSHIPCO's request, stating that the General Accounting Office was the proper forum to consider the issue. However, the court also ordered NORSHIPCO to submit to the Navy a timely proposal for the work. While the Navy apparently never opened NORSHIPCO's proposal, the firm has informally advised our Office that the offer exceeded the contract price.

Assuming that the Navy confirms that NORSHIPCO's price exceeded the contract price, and since work on the USS MULLINNIX is to begin shortly, we do not believe that termination of the awarded contract would be appropriate even if we were to conclude that the record in support of the Navy's forecast for 1981 was insufficient. However, by separate letter, we are advising the Secretary of the Navy of our views.

The protest is sustained to the extent that it concerns the general application of the Fifth ND "exclusionary rule."

[B-200058]

Compensation—Aggregate Limitation—Maximum Scheduled *v.* Maximum Payable Rate

Section 5547, title 5, U.S. Code, limits aggregate biweekly basic pay plus premium pay covered by that section to biweekly rate for maximum rate for GS-15. PATCO's contention that maximum rate for GS-15 is maximum scheduled rate ($57,912), rather than maximum payable rate ($50,112.50), must be rejected. Recent appropriation acts require that, in administering a provision of law such as section 5547 which imposes a limitation on the basis of a rate of basic pay, the rate of basic pay must be construed to be the rate payable.

Matter of: Donald Bodine—Effect of Pay Ceiling on Title 5 Premium Pay, January 28, 1981:

This action is in response to a request for a decision filed by Robert H. P. Finnegan, Special Assistant to Regional Vice President George W. Kerr, Professional Air Traffic Controllers Organization (PATCO), on behalf of Donald Bodine, an air traffic controller employed by the Federal Aviation Administration (FAA). Pursuant to 4 C.F.R. Part 21, as amended, 45 F.R. 55689-92 (August 21, 1980), FAA was served with a copy of PATCO's submission but has filed no written comments or response. 4 C.F.R. § 21.4.

The issue here is what is the limit imposed by 5 U.S.C. § 5547 on aggregate biweekly pay. As used here aggregate pay means basic pay plus premium pay, and premium pay means overtime, night, standby, Sunday, and holiday pay authorized for General Schedule employees by subchapter V, chapter 55, title 5, United States Code. 5 U.S.C. § 5547 provides:

> An employee may be paid premium pay under section 5542 [overtime rates], 5545 (a)-(c), [night, standby, and irregular overtime differentials], and § 5546 (a), (b) [Sunday and holiday pay], of this title only to the extent that the payment does not cause his aggregate rate of pay for any one pay period to exceed the maximum rate for GS-15.

PATCO argues that "maximum rate for GS-15" in this provision of law means the maximum scheduled rate, step 10—currently $57,912. Executive Order 12248, October 16, 1980, 45 F.R. 69199, 69201, October 20, 1980. It is their contention that 5 U.S.C. § 5308 and recent appropriations acts which limit the maximum rate payable for GS-15 to the rate payable for level V of the Executive Schedule—currently $50,112.50—apply to basic pay only and do not limit premium or aggregate pay.

The maximum rate payable for GS-15 is limited by 5 U.S.C. § 5308, which reads:

> Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Finally, level V of the Executive Schedule is presently limited to $50,112.50, section 101(c) of Public Law 96–536, December 16, 1980, 94 Stat. 3166 (H.J. Res. 644)—the current continuing resolution authorizing expenditures—which provides:

> * * * the provisions of section 306 (a), (b), and (d) of H.R. 7593 (providing salary pay cap limitations for executive, legislative, and judicial employees and officials) shall apply to any appropriation, fund, or authority made available for the period October 1, 1980, through June 5, 1981, by this or any other Act.

H.R. 7593 is the Legislative Branch Appropriation Act, 1981, as passed by the House of Representatives on July 21, 1980. Section 306 provides:

> (a) No part of the funds appropriated for the fiscal year ending September 30, 1981, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1980, if the rate of salary or basic pay for that office or position is—
>
> (1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or
>
> (2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title V, United States Code, or any other provision of law or congressional resolution.
>
> * * * * * * *
>
> (d) For purposes of administering any provision of law, rule, or regulation * * * which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after application of this section shall be treated as the rate of salary or basic pay.

While section 5308 and recent appropriations acts, including Public Law 96–536, above, do apply directly to basic pay, section 5547 is a limitation on aggregate pay (basic pay plus premium pay) prescribed in terms of basic pay (maximum rate of GS–15) which is derived through these provisions.

Clearly section 306(a), through 5 U.S.C. 5308, limits the maximum rate payable for GS–15 to the rate payable for level V of the Executive Schedule—currently $50,112.50. It is equally clear in our view that section 306(d) requires that in administering 5 U.S.C. § 5547—a provision of law which imposes a limitation on the basis of a rate of basic pay—the maximum rate for GS–15 be construed to be the maximum rate payable under section 306.

Accordingly, the maximum aggregate biweekly basic and premium pay allowable under 5 U.S.C. § 5547 is the maximum biweekly rate payable for GS–15 (currently $1,927.20) and claims for amounts in excess thereof may not be allowed.

[B-198934]

Statutes of Limitation—Claims—Ten Year Period for Filing—Reduced to Six

Member performed active duty from June 30, 1970, to September 30, 1970, and filed claim with Navy for basic allowance for quarters for this period on September 14, 1979. The claim was forwarded to General Accounting Office (GAO) on September 24, 1979, as a possible time barred claim. Under provisions of 31 U.S.C. 71a as amended in 1975, member had 6 years, not 10 years, from date claim accrued to file in GAO. Accordingly, claim is barred.

Statutes of Limitation—Claims—General Accounting Office—Vietnam Conflict

Member whose claim arose during active duty from June 30, 1970, to September 30, 1970, filed claim with Navy on September 14, 1979. Claim was forwarded to GAO on September 24, 1979. Member contends that claim is not barred as it arose during time of war (Vietnam conflict) and under the proviso in 31 U.S.C. 71a he has 5 years after peace is established to file claim. Even under that proviso a decision of when peace is established is dependent on political acts and, for Vietnam conflict, a political act which established peace took place on January 27, 1973. Therefore, proviso would not operate to alter untimeliness of this claim.

Matter of: Captain Herbert E. Tuttle, Jr., USNR (Retired), January 29, 1981:

Captain Herbert E. Tuttle, Jr., USNR (Retired) appeals the denial of his claim for basic allowance for quarters by the Claims Group of this Office. We concur with the Claims Group that Captain Tuttle's claim is barred under 31 U.S.C. 71a because it was not filed in the General Accounting Office within the time period specified in that provision.

Captain Tuttle was on active duty from June 30, 1970, to September 30, 1970. For this period, he indicates that he received basic pay and basic allowance for subsistence. He further indicates that he received no basic allowance for quarters. It was not until September 14, 1979, that the member, who retired on April 6, 1971, forwarded his claim to the U.S. Navy Finance Center. The Finance Center forwarded the claim to our Claims Group where it was received on September 24, 1979.

The Claims Group informed Captain Tuttle that the claim was barred under the provisions of the act of October 9, 1940, c. 788 §§ 1, 2. 54 Stat. 1061, as amended by Public Law 93-604, title VIII, § 801, 88 Stat. 1965 (1975), codified at 31 U.S.C. § 71a, which requires that a claim cognizable by the General Accounting Office must be filed in that Office within 6 years after it first accrues or be forever barred. That act provides in pertinent part as follows:

> (1) Every claim or demand * * * against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within 6 years

after the date such claim first accrued. Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

In his letter requesting reconsideration, Captain Tuttle, in effect, sets forth three bases upon which he questions whether the barring act is for application in his situation. The first basis is that the amendment of January 2, 1975, Public Law 93–604, 88 Stat. 1965, which shortened the period for filing claims from 10 years to 6 years, is the date from which he had 6 years to file his claim and his filing with the Navy on September 14, 1979, satisfied this. Next, he questions how individuals were given notice of the amendment. Finally, he questions whether the provision in the act, which gives an individual serving in the military or naval forces whose claim accrued in time of war, 5 years after peace is established to file a claim in the General Accounting Office, is applicable to his claim. He raises this question as the Vietnam conflict was ongoing when his claim arose.

We note first that the effective date for tolling the running of the limitation period in the act is the date the claim is received in the General Accounting Office and not the date the member submits his claim to his agency. B–170443, November 25, 1974. Therefore, Captain Tuttle's date of filing his claim is September 24, 1979, the date it was received in this Office. Prior to the amendment of the barring act, a claimant had 10 years from the date his claim first accrued to file it in the General Accounting Office. The amendment merely shortened the period to file from 10 years to 6 years after the claim accrued. Thus, the accrual date of Captain Tuttle's claim was not changed but rather the period in which he had to file his claim was changed. His claim accrued on September 30, 1970, so he originally had until September 29, 1980, to file his claim. However, the amendment shortened this time for him to file to September 29, 1976. See 58 Comp. Gen. 738 (1979); and B–185748, July 12, 1976.

As to Captain Tuttle's question regarding how individuals were given notice of the amendment, we point out that the act is part of the laws of the United States and it is presumed in law that each individual who might be affected by such a statute has knowledge of its provisions. The fact that one may not be aware of a law or an amendment does not defeat its effect. See: B–165383, November 29, 1968, and October 25, 1968.

Mr. Tuttle's final basis for reconsideration relies on the proviso to the barring act which extends the period for filing a claim for an individual serving in the military or naval forces in time of war to 5 years after peace is established.

While we have not previously considered whether the Vietnam conflict was a war for purposes of the proviso, we did consider the proviso to be operative for claims arising during the Korean conflict. See B-173514, August 9, 1971. Also, several Federal courts have held that the Vietnam conflict was a war for purposes of applying the wartime provisions of certain Federal statutes to military members. See *Broussard* v. *Patton*, 466 F.2d 816 (9th Cir. 1972); and *Rotko* v. *Abrams*, 338 F. Supp. 46 (D. Conn. 1971).

Assuming, then, that the proviso is for application here, the relevant question becomes when was peace established. To determine this, we must look to a political act of the Congress or the President which may be, among other things, a treaty, legislation, or presidential proclamation. *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); *Cf. Lee* v. *Madigan*, 358 U.S. 228 (1959).

For the Vietnam conflict, the political act which ended the conflict was the signing of the cease fire agreements and implementing protocols on January 27, 1973, in Paris, France. This ended the United States' active participation in the conflict and by April 1, 1973, all American combat troops were withdrawn from South Vietnam and all American prisoners of war were released. See *Drinan* v. *Nixon*, 364 F. Supp. 854, "Appendix" at 866 (D. Mass. 1973); and Proclamation No. 4373, 40 F.R. 20257 (May 7, 1975).

Thus even under the proviso Mr. Tuttle's claim was to be filed within 5 years from January 27, 1973. Since he did not file his claim until September 24, 1979, the proviso would not operate to alter the untimeliness of his filing and his claim is barred.

[B-199550.2, B-199550.3, B-199550.4]

Contracts—Protests—Certificate of Competency Denial

Protest of award to low bidder is moot where Small Business Administration declines to issue Certificate of Competency after agency finds bidder nonresponsible.

General Accounting Office—Jurisdiction—Contracts—Small Business Matters—Responsibility Determination by SBA—Conclusiveness

General Accounting Office will not question issuance of Certificate of Competency unless fraud is shown or Small Business Administration fails to consider vital information bearing on small business bidder's compliance with definitive responsibility criteria.

Bids—Options—Level Option Pricing Provision—Deviation—Option Price Higher Than Basic Bid—After Lump-Sum Price Reduction for Basic Quantity

Although protester literally complied with invitation for bid's level option pricing provision (LOPP) that line item unit prices for option quantities not exceed unit prices for basic quantities, lump sum price reduction for basic quantity effectively circumvented LOPP and bid may not be considered for award since manner of bidding prejudiced other bidders.

Matter of: Sentinel Electronics, Inc.; E-Systems, Inc.; Cincinnati Electronics Corp., January 29, 1981:

Sentinel Electronics, Inc. (Sentinel), Cincinnati Electronics Corporation (Cincinnati) and E-Systems, Inc. protest the proposed award of a contract to any bidder other than themselves under invitation for bids (IFB) DAAB07–80–B–0116, issued by the Department of the Army. The IFB solicited bids for a range of quantities of radio set AN/PRC–77, contract line items (CLINS) 0001 and 0002, and a range of quantities for receiver transmitter RT–841, CLINS 0003 and 0004. CLINS 0002 and 0004 are for the Army's Foreign Military Sales requirements. The Sentinel and E-Systems protest against award to Cincinnati is sustained; the Cincinnati protest against award to any other bidder is denied; the E-Systems protest against award to Sentinel is dismissed.

The IFB provided that award would be based on, among other factors, the total price quoted for all items. The IFB required a bidder to enter a unit price for each item and provided spaces in the schedule so a bidder could enter a unit price for each item's three range quantities. At bid opening, the Army announced the award quantities for each item and multiplied the award quantities within each range by the item's unit price for that quantity range.

The ranking of the bidders from the low bidder to the high bidder was as follows:

Hallicrafters	$10,175,056
Cincinnati	11,836,514
Sentinel	12,312,332
E-Systems	12,554,856
Tardisan Limited	14,098,524

Cincinnati's aggregate price, *i.e.*, including option quantities was higher than Sentinel's aggregate.

The IFB also contained a level option pricing provision (LOPP). This provision allowed the Government to increase the quantity of CLINS 0001–0004 up to but not exceeding 100 percent "at the unit prices no higher than the lowest unit price bid for these CLINS," and cautioned bidders "that an offer containing an option price higher than the lowest basic price for the same item may be accepted only if such acceptance does not prejudice any other offeror." The IFB further advised that bids would be evaluated on the basis of the award quantity, exclusive of option quantity. The Army proposes to reject

Cincinnati's bid as nonresponsive for violation of the LOPP provision to the prejudice of other bidders. We agree.

1. Protest Against Award To Low Bidder

Sentinel's protest with respect to the low bidder, Hallicrafters Company, is moot because the Army determined that the firm was nonresponsible and the Small Business Administration (SBA) declined to issue the firm a Certificate of Competency (COC). E-Systems has withdrawn its protest regarding Hallicrafters. There is, therefore, no issue with respect to this portion of the protest which requires consideration by this Office.

2. Protest Against Award To Sentinel

E-Systems' protest against award to Sentinel is not for consideration because it is based on E-Systems' contention that Sentinel (the third low bidder) cannot meet the IFB's definitive responsibility criteria. The Army agreed but referred the matter to SBA for the possible issuance of a COC. In this connection, we have been informally advised by SBA that it informed the Army that a COC would be recommended for Sentinel. Since by law, SBA conclusively determines the matter of a firm's responsibility by issuing or refusing to issue a COC, 15 U.S.C. § 637(b)(7)(A) (Supp. I 1977); *Old Hickory Services*, B–192906.2, February 9, 1979, 79–1 CPD 92, we will not question SBA's issuance of a COC unless the protester shows either fraud on the part of Government officials or that SBA did not consider certain vital information bearing on the small business bidder's compliance with the definitive criteria. *J. Baranello and Sons*, 58 Comp. Gen. 509 (1979), 79–1 CPD 322. In this regard, no such fraud has been shown, and SBA has advised us that it carefully considered Sentinel's compliance with the definitive responsibility criteria. Under the circumstances, we have no basis to now question SBA's proposed action should such a COC be issued. *See Baxter & Sons Elevator Co., Inc.*, B–197595, December 3, 1980, 60 Comp Gen. 97, 80–2 CPD 414. We dismiss E-System's protest in this respect.

3. Protest Against Award To Cincinnati

Sentinel and E-Systems maintain that the second low bidder, Cincinnati, which is in line for award because SBA did not issue a COC to Hallicrafters, submitted a nonresponsive bid because the bid violated the LOPP. Inasmuch as the Army agrees with the protesters in this regard, we need only decide whether the Army properly rejected Cincinnati's bid as nonresponsive.

In accordance with the LOPP, Cincinnati bid the same unit price for both the basic and option quantities, but attached to its bid a cover letter which provided:

> * * * If the award is made in a timely manner, *i.e.*, within the 90 day validity period of this bid or at such time that continuity of production remains unbroken, whichever is later, reductions in costs of up to $1,029,600, depending on quantity, can be realized as a result of manufacturing continuity * * *. However, because of the nature of the procurement, the quantity to be awarded during the life of the contract cannot be ascertained. Therefore, in order not to prejudice other offerors, we have chosen to offer the total savings as a one time, non-recurring lump sum reduction in amounts based on the total quantity of AN/PRC-77 and RT-841 units of CLIN Items 0001, 0002, 0003 and 0004.
>
> In view of the above, therefore, Cincinnati Electronics offers, as part of this bid, a total contract price reduction, as follows:
>
> 1. $694,800 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is 11,003 or less;
>
> 2. $859,980 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is no greater than 13,003 and no less than 11,004; and
>
> 3. $1,029,600 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is no less than 13,004.

The ranges alluded to above are:

ITEM		FROM	TO
0001	Range A	6001	6500
	B	6501	7000
	C	7001	7500
0002	A	1001	1500
	B	1501	2000
	C	2001	2500
0003	A	2001	2500
	B	2501	3000
	C	3001	3500
0004	A	1	500
	B	501	1000
	C	1001	1500

(Bidders were to insert separate unit prices for each of the ranges.)

The Army decided to award 7,460 of item 0001; 2172 of item 0002; 2456 of item 0003 and 164 of item 0004. Since the sum of the "higher" quantities of the ranges was 13,000 (range C for item 0001 (7500);

range C for item 0002 (2500); range A for item 3 (2500); and range A for item 4 (500)), the Army reduced Cincinnati's total price for the basic quantity by $859,980. As a result, Cincinnati became the second low bidder and in line for award. However, the Army rejected Cincinnati's bid as nonresponsive because it concluded that the firm's price reduction in effect violated the LOPP to the prejudice of other bidders.

Citing numerous GAO decisions, Cincinnati takes the position that a lump sum price reduction is an acceptable method of bidding which does not render a bid nonresponsive. *See* 42 Comp. Gen. 746 (1963); *Shamrock Five Construction Company*, B-191749, August 16, 1978, 78-2 CPD 123; *LML Corporation*, B-184046, June 25, 1975, 75-1 CPD 387. Since Cincinnati bid the same unit price for each item for both the basic and option quantities, and only reduced its total contract price for the basic quantity, the protester believes it did not contravene the LOPP and its bid therefore is responsive. For this reason, the protester maintains that the Army cannot proportionately reduce its unit prices for the *base* quantity to reflect the percentage reduction in its *total* contract price and thereby determine that Cincinnati deviated from the LOPP.

In this respect, the Army recognizes that the protester's use of a lump sum price reduction, by itself, does not render a bid nonresponsive. The offer of a lump sum "bottom line" price reduction *per se* is not the issue, however. Rather, the question to be resolved is whether Cincinnati's bidding method in effect violated or otherwise circumvented the LOPP to the prejudice of other bidders in this circumstance, see *ABL General Systems Corporation*, 54 Comp. Gen. 476 (1974), 74-2 CPD 318, even though option prices were not part of the evaluation for award. We think that it did.

ABL, *supra*, involved a bidder whose bid was low on the base quantity and whose price was higher than the next low bidder on the option quantity *still remained low for the aggregate* (basic plus option quantities) *of all items*. We held that "where a bidder is low on the base quantity, but higher than the next low bidder on the option quantity, *notwithstanding the fact that the bid remains low in the aggregate*, such bid is not properly for acceptance under the terms and conditions of the IFB." The reason for this rule is that the manner of bidding conceivably could have worked to the prejudice of other bidders because other bidders could have underbid the low bidder on the basic quantity if they too had disregarded the ceiling imposed on the option price. *ABL*, *supra*, at 479.

Although we recognize Cincinnati's manner of bidding literally complied with the LOPP, the practical effect of Cincinnati's lump sum or bottom line price reduction was the same as a direct reduction of its individual unit prices for the basic quantity. Thus, insofar as the Government is concerned, Cincinnati's lump sum price reduction effectively reduced its per unit cost for the basic quantity substantially below that for the option quantity, thereby circumventing the LOPP requirement, *i.e.*, that the Government pay the same price for the basic and option quantities. We are not suggesting that this was Cincinnati's intent, but it nonetheless was the result.

In the cases decided before *ABL*, *supra*, we held that a clear violation of an LOPP or similar provision could be waived if the offending bidder was low in the aggregate for the basic and option quantities because no other bidder could be prejudiced by acceptance of the low bid. 44 Comp. Gen. 581 (1965); B–176356, November 8, 1972. It was always our view, however, that a bid could not be accepted if, as here, the bid prices for the basic quantity plus higher option prices *exceeded* the sum quoted by the next low bidder. 51 Comp. Gen. 439 (1972).

Therefore, while in *ABL*, *supra*, and its predecessor cases, the offending bidders expressly violated the terms of the LOPP or similar provisions, *i.e.*, they submitted unit prices for the option quantity higher than their unit prices for the basic quantity, we think that where the result, as here, is the same as would obtain by an actual lower unit price bid for the basic quantity, the bid should not be accepted, notwithstanding a bidder's method of bidding.

Finally, contrary to the protester's contention, its lump sum price reduction is not the same as a prompt payment discount. For purposes of bid evaluation, a prompt payment discount must be deducted from the total bid price because it is assumed that the discount will be taken. Defense Acquisition Regulation 2–407.3(b) (1976 ed.). Thus, we previously have recognized that where the option year will be evaluated, discounts would be deducted from the gross price. See *Linolex Systems, Inc., and American Terminals & Communications, Inc.*, 53 Comp. Gen. 895 (1974), 74–1 CPD 296. In this case, even though the option year was not evaluated for purposes of award, presumably if the Government ordered the option quantities it would take any discount offered. Therefore, a prompt payment discount would not necessarily violate the LOPP. This is unlike the situation here where the protester offered the price reduction only for the basic quantity. Moreover, we could not ignore the relationship between Cincinnati's price reduction and the price for the option quantities because *ABL*, *supra*, requires an examination of the price for the option quantity to determine possible prejudice to other bidders even though the option prices are not evaluated for purposes of award.

The protests are denied in part, sustained in part and dismissed in part.

[B-201546]

Payments—Advance—Authority—Grant Funds—Urban Mass Transportation Administration

Urban Mass Transportation Administration (UMTA) grant authority under 49 U.S.C. 1602(h) is sufficient to avoid the restrictions of 31 U.S.C. 529 on advance payments. 41 Comp. Gen. 394 (1961). Accordingly, UMTA can make advance payments to grantee under this authority before disbursement of required non-Federal matching share of grant costs.

Matter of: Urban Mass Transportation Administration—Advances of Grant Funds before Disbursement of Local Matching Share, January 29, 1981:

The Chief Counsel of the Urban Mass Transportation Administration (UMTA) has asked if the Administration is authorized to advance grant funds under circumstances where the required non-Federal matching share is contractually committed but not yet disbursed by the grantee. For the reasons given below we conclude that it has such authority.

The Chief Counsel has provided us with the following summary of the proposed transaction:

> Briefly stated, the project application submitted to UMTA by the New Jersey Transit Corporation (NJTC), to be funded under two combined projects (NJ-03-0034 and NJ-05-0004), is for approximately $40 million. Of this amount, $32 million is to acquire the tangible assets of a private bus company, Transport of New Jersey (TNJ) and $8 million is the value of new buses to be acquired. Under Project No. NJ-03-0034, the federal share is $19,666,212 and the purchase of up to 36 buses valued at $4,916,553 using funds provided by the Port Authority of New York and New Jersey (PA) is the local share. For Project No. NJ-05-004, $12,444,788 constitutes the federal share with the purchase of 22 buses valued at $3,111,197 using PA funds as the local share.
>
> The entire local share will be provided to the NJTC by the PA which has been authorized by State legislation to expend $120 million for buses and related improvements in New Jersey, as this is the only type of expenditure permissible under its bond covenant. Pursuant to Section 3(h) of the Urban Mass Transportation Act of 1964, as amended, UMTA is authorized to approve projects which utilize funds available under sections 3 and 5 of the Act for any purpose so long as the combined project includes bus related elements the cost of which is at least equal to the total amount which could have been provided for bus purposes under Section 5(a)(4). The basic Congressional intent of Section 3(h) * * * was that UMTA should be flexible "in assisting jurisdictions to mold balanced capital improvements programs around local share funds whose use is restricted to bus purposes." (H. Rep. No. 95-1485, 95th Cong., 2d Sess., p. 56).
>
> NJTC purchased the assets of TNJ with a loan from the State without prejudice to future federal reimbursement not to exceed the eligible project cost of $32,111,000 which NJTC is applying for under this project application. The commitment to provide the local share for the project is represented by a signed contract for $8,027,750 with the Gruman Flexible Corporation for the manufacture of buses, and NJTC's assignment to the PA in return for the PA's promise to pay for the buses upon delivery.

The grant, as noted in the summary, is to be made under section 3(h) of the Urban Mass Transportation Act of 1964 as added by Pub. L. No. 95–599, 92 Stat. 2735, 49 U.S.C. 1602(h), and is subject to the matching non-Federal share requirements of that act. 49 U.S.C. 1603 (1976). Specifically, the Federal share of a section 3 grant is 80 percent of the net project cost with the remainder to be provided "from sources other than Federal funds."

The single question presented by the Chief Counsel is whether UMTA has authority to make an advance of grant funds prior to disbursement of a proportionate amount of the required local or non-Federal share of the project. In this case, the grantee would receive the entire Federal share at a time when the non-Federal share has not been disbursed, because the buses to be purchased with the non-Federal share have not yet been delivered. The local share is committed however, in the sense that a binding contract requires payment for the buses upon delivery. Although an advance payment as proposed will be an exception to internal UMTA guidance, the Chief Counsel of UMTA is of the opinion that such a transaction is within UMTA's authority. We agree.

Section 529 of Title 31, United States Code, provides generally that "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." However, the system of funding programs, such as those supported by UMTA, through Federal grants to State and local governments and other organizations has always to our knowledge included the authority to made advances of grant funds. See 41 Comp. Gen. 394 (1961). The policy of payment upon receipt of goods or services is simply inconsistent with assistance relationships where the Government does not receive anything in the usual sense. Advance payments are a fundamental part of the present Federal assistance system. (See Treasury Department Circular No. 1075 which is based on the assumption of authority to make advances to grantees.)

Accordingly, unless the program legislation or the appropriation from which the advance is made restricts this authority, UMTA has authority to make advances by virtue of its grant authority. This authority alone is enough to satisfy 31 U.S.C. 529 (1976). 41 Comp. Gen. 394 (1961).

We are unaware of any basis for limiting UMTA's otherwise unrestricted authority to advance grant funds where a non-Federal share is required of the grantee. A grant agreement usually includes an agreed-upon effort on the part of the grantee over a period of time. The non-Federal share is shown in the agreement as part of the total project cost and can consist of a number of cost items that may not be spread evenly over the life of the grant and may not correspond to the times at which the Federal funds are needed. See OMB Circular A-102, Attachment F. Non-Federal share requirements are met where there are sufficient allowable grant costs from non-Federal sources to meet the percentage required at the end of the grant.

Exhibit 3 to Attachment H of OMB Circular A–102, cited by the Chief Counsel as possibly tending to support the contrary conclusion, is a standard form for grantees to use to request advances. While it includes a place for reporting the non-Federal share of costs for which an advance is requested, we fail to see how this may be construed as placing a restriction on the cost sharing policy expressed in Attachment F.

UMTA's guidelines (UMTA Circular 500.1A) require grantees to demonstrate that they have a proportionate non-Federal share available at the time of each advance of Federal funds. According to the Chief Counsel, this is a long standing administrative practice of UMTA, reflecting a judgment that the management of the large sums of money involved in the program requires tangible commitments from grantees. Since this is an internal administrative guideline, we see no reason why the Administrator may not make exceptions to it in his discretion where he is able to determine, as would appear to be the case here, that the contractual commitment of local funds to pay for the buses on delivery adequately protects the Government's interest in assuring that the local share will be forthcoming.

As previously noted, there is no indication in UMTA's program and appropriation legislation that its grants must be subject to restrictions on the advance of funds not commonly applied to other grant programs. Moreover, as memoranda from the chief counsel's office indicate, UMTA legislation expressly authorizes grant advance (49 U.S.C. 1603(b)). Accordingly, we agree that the administrator of UMTA has authority to make an advance payment of the Federal share of project cost before the disbursement of the non-Federal matching share.

[B-197439]

Small Business Administration—Investment Companies—Authority to Invest in—Minority Enterprise Small Business Investment Companies (MESBICS)—Leveraging Propriety—Non–Private Fund Matching

Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5305(a)(15), authorizes Small Business Administration to leverage (match) Community Development Discretionary (Block) Grant funds invested in minority enterprise small business investment companies.

Matter of: Authority of SBA to leverage Block Grant funds invested in minority enterprise small business investment companies, January 30, 1981:

Recently, the Small Business Administration (SBA) turned down an application from Square Deal Venture Capital Corporation, a minority enterprise small business investment company (MESBIC) for leveraging (matching) funds under the Small Business Investment Act, citing our decision 59 Comp. Gen. 635 (1980) as the reason. SBA explained that the July 29, decision prohibited it from leveraging Federal funds invested in small business investment companies. Since Square Deal's application was based on Federal investments (from Community Development Discretionary (Block) Grant funds under Title I of the Housing and Community Development Act of 1974, as amended), SBA said it had no alternative but to return the application. Square Deal has asked us whether our earlier decision applies to its situation. In addition, we have had informal discussions with officials of SBA and the Office of Management and Budget concerning the applicability of our July 29 decision to various MESBICs that have different sources of Federal funding. Therefore, we are issuing this decision to assist SBA in interpreting our earlier decision.

Our decision of July 29, 1980, held that SBA did not have authority to leverage funds invested in MESBICs by the Minority Business Resource Center of the Department of Transportation because section 303(c)(2)(iii) of the Small Business Investment Act, 15 U.S.C. § 683(c)(2)(iii), authorizes SBA to leverage only "private" money. Since the Minority Business Resource Center uses Federal money, we held that its investments in MESBICs could not be leveraged. We also said, however, that where a statute such as section 742(a)(1) of the Community Services Act, 42 U.S.C. § 2985a(a)(1), authoirzes it, Federal money may be leveraged. We think section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5305(a)(15), the pertinent statute in the present case, is such a statute—i.e., it authorizes leveraging of Block Grant funds (Federal money) invested in MESBICs. Therefore, our decision does not provide a basis for denying Square Deal's application.

Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, provides that Community Development Programs assisted under Title I (Community Development) of that Act may consist only of certain enumerated activities, including:

(15) grants to neighborhood-based nonprofit organizations, local development corporations, or entities organized under section 301(d) of the Small Business

Investment Act of 1958 [MESBICs] to carry out a neighborhood revitalization or community economic development project in furtherance of the objectives of section 101(c).

While this provision appears on its face to do no more than authorize the investment of Community Development money in MESBICs, the legislative history indicates that it was intended that these funds be eligible for leveraging. The words "or entities organized under section 301(d) of the Small Business Investment Act of 1958" were added by amendment to both the House and Senate bills after they were reported out of their respective committees. In offering the amendment, both Congressman Mitchell, in the House, and Senator Brooke, in the Senate, explained that the amendment would qualify the funds for SBA leveraging. Congressman Mitchell, after pointing out the difficulties in securing bank loans, said:

A partial solution to this problem is to allow localities to use some of their Community Development funds to capitalize viable MESBICs, *therefore, allowing their qualification for 3 to 1 leverage* * * * from the Small Business Administration. 123 Cong. Rec. 14117 (1977).

In the same vein, Senator Brooke said:

A partial solution to this problem is achieved by this amendment. This minor classification [*i.e.* specific authorization for investment of Community Development money in MESBICs] would allow MESBIC's to benefit from the more favorable 3 to 1 leverage * * * from the Small Business Administration. 123 Cong. Rec. 17851 (1977).

It seems clear that the specific reference to MESBICs in section 105(a)(15) was intended, by those who introduced that language, to permit leveraging by SBA. And it is reasonable to assume that the Congress, in adopting that language, shared the views of Congressman Mitchell and Senator Brooke. See Sutherland on Statutory Construction, sections 48.10 and 48.12. Unlike the circumstances involved in our earlier decision, concerning the Department of Transportation funds, the statute involved here specifically refers to financial assistance to MESBICs and its legislative history clearly shows that the legislators had leveraging in mind when they enacted it. Therefore, we conclude that section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5305(a)(15), authorizes SBA to leverage Block Grant funds invested in MESBICs.

[B-199418]

Indian Affairs—Sioux Benefits—Proposed Regulation Revision—Head of Family Determination—Sex-Neutral Standard Adopted

Sioux benefits are farm equipment and stock (or cash equivalent) granted by law to Sioux Indians who are heads of families. Interior Department proposes sex-neutral standard for determining head of family status. General Accounting Office (GAO) agrees that change is constitutionally required. Therefore, following decisions, insofar as they hold that Sioux woman married to non-Sioux man is conclusively presumed to be head of family and that Sioux woman married to Sioux man cannot be head of family, are overruled: A-19504, February 1, 1929; A-98691, October 28, 1938; 11 Comp. Gen. 469 (1932). This decision also overrules in part 9 Comp. Gen. 371 and A-61511, July 15, 1935.

Indian Affairs—Sioux Benefits—Proposed Regulation Revision—Double Benefits Prohibition—Sex-Neutral Standard Adopted

Eligible recipient of Sioux benefits—farm equipment and stock (or cash equivalent) granted by law to Sioux Indians—is entitled to only one allowance of benefits. Interior proposes sex-neutral standard of eligibility. GAO agrees with Interior, that rule in A-19504, February 1, 1929—that a formerly married Sioux woman's entitlement to benefits in her own right was exhausted when her then-husband received benefits as head of family—is impermissibly discriminatory on basis of sex and overrules that portion of A-19504.

Indian Affairs—Sioux Benefits—Proposed Regulation Revision—Vesting of Rights—Same Standard Under All Four Benefits Statutes

Four statutes—1889, 1896, 1928, and 1934—govern award of Sioux benefits, farm equipment and stock (or cash equivalent) granted by law to eligible Sioux Indians. Under 1928 and 1934 statutes, applications must be approved during applicant's lifetime, or right lapses. Two GAO decisions (9 Comp. Gen. 371 (1930) and A-61511, July 15, 1935) held that limitation did not apply to benefits under 1889 law. Interior interprets 1928 and 1934 laws as making limitation applicable to *all* Sioux benefits. Language is ambiguous so GAO defers to administering agency's preferred interpretation and overrules cited decisions.

Indian Affairs—Sioux Benefits—Proposed Regulation Revision—Eligibility Determination—Date of Original Application *v.* Date of Application's Approval

Where application for Sioux benefits—farm equipment and stock (or cash equivalent) granted to Sioux Indians—was disapproved on grounds now recognized as improper (for example, sex discrimination), and Indian now reapplies, Interior Department proposes to determine eligibility based on applicant's status at time of original application. Department suggests that two GAO decisions (A-19504, February 1, 1929, and 11 Comp. Gen. 469 (1932)) prevent implementation of proposal. Decisions, which require that eligibility be determined not as of date of application but as of date of approval, are overruled to extent they conflict with proposed exception.

Matter of: Department of the Interior—Sioux Benefits, January 30, 1981:

The Department of the Interior (Department) wishes to revise the policies and regulations of its Bureau of Indian Affairs which govern the payment of certain benefits to Sioux Indians. The impetus for this proposed revision was a suit against the Department challenging the constitutionality of the present regulations. Because these regulations are based on a number of Comptroller General decisions, the Department asks us to modify or withdraw those decisions which are inconsistent with the proposed regulations. Inconsistencies arise in four areas: head of family status; double benefits prohibition; vesting of rights; and timing of eligibility determinations.

Background

"Sioux benefits" are articles of farming equipment and stock or, more commonly today, the commuted cash value of such articles, payable to certain Sioux Indians under the provisions of four Federal statutes: the 1889 Sioux Allotment Act (Act of March 2, 1889, ch. 405, § 17, 25 Stat. 888); an 1896 amendment to that act (Act of June 10, 1896, ch. 398, 29 Stat. 321, 334); a 1928 statute which continued those benefits (Act of May 21, 1928, ch. 662, 45 Stat. 684); and section 14 of the Indian Reorganization Act (Act of June 18, 1934, ch. 576, § 14, 48 Stat. 987, 25 U.S.C. § 474). Under each of these statutes, only Sioux Indians who are single persons over the age of 18 or heads of a family are eligible. In addition, the applicant must have received an allotment of land to be eligible for benefits under the 1889 or 1928 statutes. The 1934 law continued eligibility for certain benefits for "unallotted" Indians—that is, those who had not received land allotments although otherwise eligible—on the Pine Ridge, Rosebud, and Cheyenne River Reservations, with provision for a gradual phase-out of such benefits.

Head of Family Status

Neither the 1889 Act nor any of the subsequent acts relating to Sioux benefits defines the term "head of a family." Under the current regulations, an adult Sioux woman married to a man who is not a Sioux Indian is conclusively considered to be head of a family, but a Sioux woman married to a Sioux man is held not to be the head of a family and is therefore ineligible for Sioux benefits.

The Department has concluded that these regulations are unconstitutional in that they discriminate against women on the basis of sex. It proposes to revise the regulations to provide a sex-neutral standard for determining who is the head of a family.

The proposed regulations provide, as a general rule, that a married person shall be deemed a head of a family if so designated by both parties to the marriage. Where the applicant and his or her spouse cannot agree or are not living together as a family, and in cases where the applicant's spouse has previously received Sioux benefits as the head of a family, an economic contribution test is used to determine head of family status. Under the standard, either the husband or the wife could qualify as a head of the family.

We concur in the Department's determination that these proposed changes in the regulations are necessary to meet constitutional requirements. Therefore, the following decisions on which the current regulations are based are overruled insofar as they hold that a Sioux woman married to a non-Sioux is conclusively considered to be the head of a family and that a Sioux woman married to a Sioux man cannot be the head of a family: A–19504, February 1, 1929; 11 Comp. Gen. 469 (1932); A–98691, October 28, 1938. (Other decisions cited by Interior as forming the basis for current regulations (2 Comp. Gen. 13 (1922) and A–96643, August 9, 1938) are in our view not inconsistent with the proposed regulations and need not be overruled.)

Double Benefits Prohibition

The 1928 act which continued the allowance of Sioux benefits contained the following prohibition:

> No person shall receive more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Act of May 21, 1928, ch. 662, 45 Stat. 684.

In a 1929 decision, we held that this prohibition precluded payment of Sioux benefits to a Sioux woman if her husband had previously received an allowance as head of the family, even if the woman (though once married) was unmarried, single, divorced, or widowed at the time of her application. Under this reasoning, the right of a Sioux woman was deemed merged with that of her husband by virtue of her marital status and her entitlement to Sioux benefits was deemed exhausted by the allowance of benefits to her husband. A–19504, February 1, 1929. The Department of the Interior believes that this rule impermissibly discriminates against women on the basis of sex and is not required by the governing statutes, which speak in terms of an allowance of benefits to each individual who qualifies either as a head of a family or single adult, and not in terms of an allowance per family.

We concur in the Department's determination that the above rule is impermissibly discriminatory. Therefore, our decision A–19504, February 1, 1929, is overruled insofar as it holds that a formerly married Sioux woman's entitlement to Sioux benefits in her own right was exhausted when her then-husband received Sioux benefits as head of the family.

Vesting of Rights

Both the 1928 Act continuing the allowance of Sioux benefits and the Indian Reorganization Act of 1934 provided that "application [for Sioux benefits] must be made and approved during the lifetime of the allottee or the right shall lapse." Act of May 21, 1928, ch. 662, 45 Stat. 684; Act of June 18, 1934, § 14, 48 Stat. 987; 25 U.S.C. § 474. The 1889 Sioux Allotment Act did not contain such a provision, and the Comptroller of the Treasury in 1915 held that eligible allottees under the 1889 act had a vested right to Sioux benefits which would descend to their heirs if the decedent remained eligible for such benefits at his/her death and had not received the allowance. 21 Comp. Dec. 806.

The Department's proposed regulations would require that *all* applications for benefits be made and approved during the lifetime of the applicant, regardless of the statute under which benefits are sought. This proposed regulation conflicts with several Comptroller General decisions (9 Comp. Gen. 371 (1930) and A–61511, July 15, 1935) interpreting the 1928 and 1934 statutes relating to Sioux benefits, and therefore the Department requests that we withdraw or modify those decisions. The decisions held that the restriction in the 1928 and 1934 acts against paying benefits to an allottee's heirs if the allottee's application had not been approved during his lifetime did not apply to benefits under the 1889 act.

The 1928 act directs the Secretary "to continue the allowance of the articles enumerated in" the 1889 Act to all Sioux Indians who have taken or may take allotments under the 1908 act (and who are heads of families or single persons over 18). It goes on to say, as quoted above in part, that "No person shall receive more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse." Similar language appears in the 1934 act. We concluded that this limitation was intended to apply "only to the benefits and persons dealt with" in the 1928 and 1934 acts (9 Comp. Gen. at 373; A–61511).

While the cited decisions are not inconsistent with the statutory language, we recognize that the references in the 1928 and 1934 acts to "allowance of the benefits" are ambiguous and could be read, as

Interior has consistently maintained, as referring to "all beneficiaries irrespective of the act under which they were allotted" (9 Comp. Gen. 271). Under the circumstances, we will defer to the administering agency's preferred interpretation. Accordingly, we overrule our decisions interpreting the 1928 and 1934 acts concerning vesting of Sioux benefits, 9 Comp. Gen. 371 and A-61511, July 15, 1935. (The same decisions, as the Department points out, stood for the proposition that the prohibition in the 1928 and 1934 acts against double benefits does not apply to the 1889 act.)

Timing of Eligibility Determinations

The Bureau's present policy, which is continued in the proposed regulations, is that eligibility for Sioux benefits is determined as of the date of application, so that if an applicant was "eligible" for benefits at some prior time, but not at the time of application, he or she is not entitled to the benefits. However, the draft regulations make an exception to this rule for living persons who previously applied for Sioux benefits and whose applications were disapproved under prior regulations. Where a prior application was disapproved on grounds which would no longer warrant disapproval under the revised regulations, the applicant could reapply and have his eligibility determined on the basis of his status at the time of the original application, rather than on the basis of his status at the time of reapplication. This exception would not extend so far as to allow benefits to be retroactively paid on behalf of deceased Indians whose applications were improperly denied.

The Department states that its general rule of determining eligibility as of the application date is based on our decisions A-19504, February 1, 1929, and 11 Comp. Gen. 469 (1932). Because it is concerned that the exception made by the proposed regulation may conflict with these decisions, the Department asks that we withdraw or modify them as necessary.

We agree that the cited decisions enunciate the principle that an alloted married woman is not entitled to benefits merely because she would have been eligible for benefits as a single person if she had applied before her marriage. The proposed regulation exception would not change this principle. However, we do not agree that our decisions require eligibility to be determined as of the date of application for benefits. Rather, as the following quotation demonstrates, our 1929 decision held that an applicant may not receive benefits unless she possesses the required status at the time her application is *approved*:

The fact that a single Sioux woman over 18 years of age has an approved allotment and may have applied for the benefits does not operate to give her a vested right to receive such benefits. The allowance of benefits is contingent upon the existence of certain conditions which may vary or change from time to time. Taking into consideration the nature of such benefits, which are substantially gratuities, no vested right is acquired until the application for benefits has been approved for payment, such approval under the act of 1928 being tantamount to a payment of same. 21 Comp. Dec. 806. Thus while a Sioux Indian woman may have been entitled to the benefits provided by law as a single person over 18 years of age, her status as such is changed by her marriage prior to the approval of her application and her right to such benefits lapses, unless she may be recognized under the law as a head of a family. A–19504, February 1, 1929.

Since an applicant's status as a single person or the head of a family may change between the filing of the application and the actual grant of benefits, administrative convenience dictates that an applicant's status at some point in time be final for the purpose of determining eligibility. The statutory scheme governing Sioux benefits does not prescribe this time. Therefore, we believe it is appropriate to leave the matter to the discretion of the agency charged with administering the provision of benefits. The Department's proposed rule is designed to prevent an inequity, the denial of benefits based on regulations then in effect but now recognized to have been improper, and is within the scope of its discretion. Accordingly, our decisions A–19504, February 1, 1929, and 11 Comp. Gen. 469 (1932), are hereby overruled to the extent that they conflict with the Bureau's proposed rule governing the redetermination of eligibility for Sioux benefits for those whose applications were denied in the past under regulations now determined to have been improper.

Finally, the Department asks our assistance in locating and analyzing three decisions which are referred to in the manual of the Bureau of Indian Affairs: C.D., May 29, 1908; Comptroller General Decision A–19504, August 13, 1927; Comptroller General Decision A–61511, July 15, 1935.

We enclose copies of the two Comptroller General decisions referred to. Our decision A–19504, August 13, 1927, questioned the authority for the payment of Sioux benefits prior to enactment of the 1928 act continuing these benefits. This decision does not appear to be inconsistent with the Department's proposed new regulations. Our decision A–61511, July 15, 1935, is discussed above under "Vesting of Rights." We have been unable to locate a May 29, 1908, decision dealing with Sioux benefits. In any case, any decisions of this Office are hereby overruled to the extent they are inconsistent with this decision.

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