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[B-198427.2]

Contracts—Protests—Timeliness—Solicitation Improprieties—Apparent Prior to Bid Opening

To extent protester objects after bid opening to inclusion and evaluation of option periods as set forth in invitation for bids, protest is untimely under General Accounting Office (GAO) Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), which require protests based on alleged solicitation improprieties apparent prior to bid opening to be filed before such time. This decision modifies B-193843, et al., Aug. 2, 1979.

Contracts—Protests—Timeliness—Significant Issue Exception—Military Procurement of Food Services—Regulation Change

Question whether revised Defense Acquisition Regulation (DAR) 1-1502 permits inclusion of option provisions in solicitation for mess attendant services is significant issue within meaning of GAO Bid Protest Procedures. Issue is of widespread interest to procurement community because of prior GAO decision in *Palmetto Enterprises, Inc.*, B-193843, et al., which held prior DAR provision prohibited inclusion of option provision in food service contracts and thus any evaluation of option period.

Contracts — Options — Limitations on Use — Military Procurements—Mess Attendant Services—Regulation Change

Current DAR provision 1-1502 permits inclusion of options in solicitations for food services. On this basis, GAO decision in *Palmetto Enterprises, Inc.*, B-193843, et al., Aug. 2, 1979, is modified.

Bids—Unbalanced—Evaluation—Options

Bid for base period approximately $180,000 greater than bids for two one-year options is not mathematically unbalanced where there is no evidence that bid is based on nominal prices for some work and enhanced prices for other work and bid for base period represents 36.7 percent of total bid price with each option year representing 31.6 percent of total price.

Bids—Unbalanced—Not Automatically Precluded

Mathematically unbalanced bid is not materially unbalanced and may be accepted where there is no reasonable doubt that award would result in lowest ultimate cost under solicitation's evaluation criteria.

General Accounting Office—Jurisdiction—Labor Stipulations—Service Contract Act of 1965

Question regarding affiliation of individual on debarred bidders list for violation of Service Contract Act is not for review by GAO, because Service Contract Act provides that Federal agency head and Secretary of Labor are to enforce Act.

Matter of: K.P. Food Services, Inc., October 3, 1980:

K.P. Food Services, Inc. (K.P.) protests the proposed award of a contract to Military Services, Inc., of Georgia (Military) under invitation for bids (IFB) N00600-80-B-4988 issued by the Navy. The

IFB is for mess attendant services at the U.S. Naval Academy, Annapolis, Maryland. K.P. argues that Military's bid for the basic one year term and two options years is mathematically and materially unbalanced and must be rejected by the Navy as nonresponsive. In this connection, the protester maintains that the Navy cannot properly evaluate or exercise the options and that it should receive an award based on its low bid price for the basic one year period. Finally, the protester questions the affiliation of Military with an individual on the debarred bidders list.

We deny the protest.

Preliminary Considerations

K.P.'s allegation regarding the propriety of evaluating the option periods, filed after bid opening, is untimely. The IFB provided that bids would be evaluated for purposes of award by adding the prices bid for the option years to the price bid for the base year. Our Bid Protest Procedures require that protests based upon alleged improprieties which are apparent prior to bid opening must be filed before bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Thus, to the extent K.P. objects to the inclusion of the option provisions, its protest is untimely.

However, we think that the related question concerning the applicability and interpretation of DAR § 1-1502(c) falls within the significant issue exception to our timeliness rules. 4 C.F.R. §20.2(c). We have previously held that under DAR § 1-1502(b)(i) an agency could not properly include option provisions in an IFB for food services and that any exercise of those option provisions would be improper. *Palmetto Enterprises, Inc., et al.*, B-193843, B-193843.2, B-193843.3, August 2, 1979, 79-2 CPD 74. The Navy now argues that DAR § 1-1502(c) subsequently was promulgated largely in response to our decision in *Palmetto Enterprises, Inc., et al., supra*, and now permits the inclusion of option provisions in solicitations for food services. We believe this matter may properly be viewed as one of widespread interest to the procurement community. *Wyatt Lumber Company*, B-196705, February 7, 1980, since the defense agencies award numerous food services contracts each year. Thus, we will treat this aspect of the protest on the merits.

In a memorandum dated December 18, 1979, the Navy representative to the DAR Council forwarded to the Naval activities the newly revised DAR 1-1502. Specifically, this provision precludes the inclusion of option provisions in solicitations in certain situations and provides in 1-1502(c):

In recognition of (i) the Government's need in certain service contracts for continuity of operation and (ii) the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period. * * *

K.P. cites our decision in *Palmetto Enterprises*, *supra*, for the proposition that our Office "specifically prohibited options in food service contracts because the industry is so highly competitive."

Our conclusion in *Palmetto Enterprises, Inc.*, *supra*, that the agency improperly included option provisions in the solicitation was based on prior DAR § 1–1502(b)(i) which stated that option provisions shall not be included in solicitations if "the supplies or services being purchased are readily available on the open market." It was on this basis that we recognized in *Palmetto* the highly competitive nature of the food service industry. DAR now has been revised to eliminate the reference to "services" in 1502(b)(i) and to add the new section "c." In accordance with § 1–1502(c), the Navy found that there is an anticipated need for food services beyond the first contract period and therefore included options in the IFB. Our review of the minutes of the DAR Council and other background information concerning the revision of DAR § 1–1502(b)(i) and new section "c" indicates that these changes were designed to permit options in, among other things, contracts for food services. Inasmuch as the revised DAR provision has eliminated the prohibition in 1502(b)(i) concerning service contracts, we think that the Navy properly included the options in this IFB. Accordingly, *Palmetto Enterprises, Inc.*, *supra*, is modified to the extent it is now inconsistent with the current regulatory provisions governing options in food service contracts.

Nonetheless, K.P. believes that the Navy did not make the appropriate "findings" under 1–1502(c)(i) and (ii) concerning the need for "continuity of operation" and the "potential cost of disrupted support" before including the option provision in the IFB. Contrary to K.P.'s belief, DAR § 1–1502 does not require that findings be made concerning the "continuity of operation" or the "potential cost of disrupted support" before including an option period in a solicitation: it merely *recognizes* that these factors are present in "certain service contracts." The relevant findings required to be made before an option quantity can be *evaluated* for award are set forth in DAR § 1–1504. DAR § 1–1502 only concerns the inclusion of options in solicitations. Moreover, the Navy made the requisite findings under DAR 1–1504 that the option periods could be evaluated for award.

Unbalancing

The IFB requested bids for each yearly period—the basic year, option year 1 and option year 2—and designated each period as Lot I, Lot II and Lot III, respectively. The bids of Military and K.P., excluding support costs and including discounts, are as follows:

	Lot I	Lot II	Lot III
Military	$1, 323, 054. 00	$1, 140, 183. 00	$1, 140, 183. 00
K.P	1, 249, 660. 40	1, 249, 660. 40	1, 249, 660. 40

As K.P. points out, its bid for Lot I is almost $74,000 less than that of Military; Military's bid is low only if Lot II and/or Lot III are evaluated.

Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect, material unbalancing, involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Only a bid which is materially unbalanced cannot be accepted. *Propserv Incorporated*, B-192154, February 28, 1979, 79-1 CPD 138; *Mobilease Corp.*, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

K.P. maintains that Military's bid is front loaded in that its bid for Lot I is significantly greater than that for Lot II or Lot III even though all lots contemplate performance of identical services. With this in mind, the protester argues that Military's bid is mathematically unbalanced because its bid for Lot I is $182,871 or 14 percent higher than Military's bid for Lots II and III. Adhering to the second prong of the test for unbalanced bids, K.P. argues that Military's bid raises more than a reasonable doubt that its acceptance will result in the lowest cost to the Government. This doubt exists, according to K.P., because under the applicable Defense Acquisition Regulation (DAR) 1-1502(c)(ii) (1976 ed.) the Navy cannot properly include the option provisions and thus cannot properly evaluate option prices or exercise the options. However, in view of the above discussion. we find nothing improper in the use and evaluation of the options included in the solicitation.

With regard to whether Military's bid is mathematically unbalanced, while it is true that Military's bids for Lots II and III are approximately $180,000 less than its bid for Lot I, there is no evidence that its bid prices for Lots II and III represent nominal prices for these lots. As Military points out, its bid for Lots II and III each represent 31.6 percent of its total bid price while Lot I represents 36.7 percent of the total. We do not find the difference in Military's bid prices so great as to render its bid mathematically unbalanced. In

Properserv, *supra*, the questioned bid was $18,000 per month for the basic term (three months) and $14.000, $13,000 and $12,000 per month respectively for the three option years. In that case, even though the bid for the basic term was approximately 30 percent greater than the option I bid price and was 50 percent greater than the third year option bid price, we did not find the bid to be mathematically unbalanced. *Compare Reliable Trash Service*, B–194760, August 9, 1979, 79–2 CPD 107, where the questioned bid was mathematically unbalanced because the first option year bid price of $530,468 exceeded the bid prices for the second and third option years by approximately 90 percent and the bid price for the basic period was substantially greater than other bidder's prices for the same period. Even though, as the protester points out, all lots here contemplate the performance of identical services, that alone does not render the bid unbalanced, and we will not look behind a bid in an attempt to ascertain the business judgment that went into its preparation. *See e.g. Reliable Trash Service, supra; S.F. & G., Inc., dba Mercury*, B–192903, November 24, 1978, 78–2 CPD 361.

Even if we assumed Military's bid is mathematically unbalanced, we do not find Military's bid to be materially unbalanced. The IFB provided that for purposes of award the total price for all option quantities would be added to the total price for the basic quantity. The record shows that the requirement for mess attendant services is certain to exist during the option period and that there is a reasonable expectation that funds will be available to exercise those options because of the nature of the service involved. Thus, because the Navy expects to exercise their options, it can evaluate the options. Military's bid is not materially unbalanced because it offered the lowest ultimate cost to the Government. *Reliable Trash Service, supra.*

In this connection, K:P. cites our decision in *Safemasters Company, Inc.*, 58 Comp. Gen. 225 (1979), 79–1 CPD 38, for the proposition that a "mathematically unbalanced bid is materially unbalanced unless it is 'low * * * under all possible situations.'" We believe that the protester has misinterpreted our decision in that case. *Safemasters* involved the improper termination of Safemaster's contract because of improprieties in the award process. We stated that even though the solicitation improperly contained option provisions, that fact did not justify termination because none of the bidders including Safemasters submitted unbalanced bids or otherwise attempted to benefit in the event the Government failed to exercise the options and, additionally, because Safemaster's was the "low bidder under all possible situations." That statement was meant to explain our finding that no bidder would be prejudiced by award to Safemaster's despite the improper inclusion of the option provision in the solicitation. Our statement that Safemaster's was low under "all possible situations" was not a new definition of a materially unbalanced bid.

Debarred Bidder

Finally, K.P. maintains that an individual (X) who is on the debarred bidders list for violation of the Service Contract Act, 41 U.S.C. § 351 *et seq.* (1976) has a substantial interest in Military, and, therefore, Military is ineligible for award. K.P. argues that circumstances have changed since the Department of Labor (DOL) ruled in 1979 that X did not have a substantial interest in Military, and, in fact, X now does have a substantial interest in Military. However, we will not consider the question of whether this individual has a substantial interest in Military because the Service Contract Act provides that the Federal agency head and the Secretary of Labor are to enforce the Act. *Enviro-Development Company*, B-195215, July 12, 1979, 79-2 CPD 30. This enforcement power includes making determinations regarding affiliations with debarred individuals or firms. *See Integrity Management International, Inc.*, B-187555, December 21, 1976, 76-2 CPD 515. Thus this matter should properly be pursued with the Navy or the Department of Labor.

The protest is denied.

[B-199206]

Officers and Employees—Hours of Work—Flexible Hours of Employment—Federal Employees Flexible and Compressed Work Schedules Act—Credit Hours *v.* Overtime Hours

Under Title I (flexible schedules) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, credit hours are hours of work performed at the employee's option and are distinguished from overtime hours in that they do not constitute overtime work which is officially ordered in advance by management. Therefore, since an employee was ordered to work 5 hours at the end of the pay period when she was scheduled to take off, and since she had already accumulated 10 credit hours, and since she had already worked 40 hours that week, the 5 hours of work are overtime.

Officers and Employees—Hours of Work—Flexible Hours of Employment—Federal Employees Flexible and Compressed Work Schedules Act — Compensatory Time Limitation — Overtime Adjustment

An employee on a flexible schedule who is ordered to work 5 hours which are overtime hours at the end of a pay period may, on her request, receive compensatory time off for such time so long as she does not accrue more than 10 hours of compensatory time in lieu of payment for regularly or irregularly scheduled overtime work.

Matter of: Sharon E. Jenkins—Flexible Work Schedules—Credit Hours *vs.* Overtime Hours, October 7, 1980:

Wayne B. Leshe, Chief Accountant and an authorized certifying officer with the Federal Communications Commission, has asked whether and in what manner an employee may be compensated in circumstances where, as the result of exigencies of the service, she is precluded from using scheduled credit hours under Title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95–390, September 29, 1978, 5 U.S. Code 6101 note.

Facts

On November 16, 1979, the Federal Communications Commission executed a Memorandum of Agreement on Alternate Work Schedules with the National Treasury Employees Union for the purposes of participating in an alternate work schedule experiment under the Federal Employees Flexible and Compressed Work Schedules Act of 1978 (hereinafter called the Act). Incident to this ongoing program the following claim has arisen. On May 28, 1980, Ms. Sharon E. Jenkins, a GS–6 employee of the agency, applied for approval to use 5 credit hours on May 30, 1980, during the hours of 12:30 p.m. to 5:30 p.m. The application for the use of 5 credit hours was approved by Ms. Jenkins' supervisor on May 28, 1980. On the morning of May 30, 1980, Ms. Jenkins scheduled use of her credit hours was cancelled by her supervisor as a result of exigencies of Government business. Ms. Jenkins worked the 5 hours she was scheduled to take off and these hours were in excess of 40 hours which she had already worked that week.

Section 106(a) of the Act restricts credit hour accumulation to a maximum of 10 hours per pay period. Since May 30th was the last work day of the pay period, and in view of the 10 credit hour maximum permissible balance she was already maintaining, Ms. Jenkins could not carry over 15 credit hours into the next pay period.

The submission points out that Section 4–A6 of the Memorandum of Agreement referenced above provides the following in regard to credit hours:

> If an employee will have accumulated more than ten credit hours by the end of a bi-weekly pay period and has failed to obtain prior supervisory approval to use the credit hours within that pay period, the excess credit hours will be lost without compensation. However, if the use of credit hours has received prior supervisory approval and the employer subsequently places a work requirement on the employee which prevents the employee from using the excess credit hours during the pay period, the employee shall be compensated for the loss of these excess credit hours in accordance with applicable laws and regulations.

The agency promulgated a directive, FCCINST 1253 to implement the above section of the Memorandum of Agreement. Part III A, Section D3(a) of the directive further defines the procedures to be used to pay excess credit hours and reads as follows:

> If the total credit hours exceed 10 credit hours at the end of the pay period, the excess amount will be recorded as follows—
>
> "(a) If the use of credit hours has received prior supervisory approval and the employee was precluded from taking the credit hours as a result of orders of supervisor, the number of hours will be shown on the line paid this period" The number of hours shown will be preceded by a minus sign. The following statement will be typed in the remarks section "Payment for —— credit hours to be made." The supervisor must sign this statement. (See Illustration No. 7.)

Question No. 1

The first question presented for our consideration is as follows:

> Can the FCC pay Ms. Jenkins for the excess credit hours at the end of the pay period since the excess hours were caused by a supervisory cancellation of the approval to use the credit hours in question and they could not be rescheduled.

Section 101 of the Act defines credit hours and overtime hours respectively as follows:

> (1) the term "credit hours" means any hours, within a flexible schedule established under this title, which are in excess of any employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek, or a workday; and
>
> (2) the term "overtime hours" means all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but does not include credit hours.

As a result, an employee who is covered by a flexible schedule which permits him or her to vary the length of the workday (i.e., variable day, variable week, and maxiflex schedules) may be ordered by management to work hours that are in excess of the number of hours which the employee planned to work on a specific day. If the hours ordered to be worked are in excess of 8 in a day or 40 in a week at the time they are performed, those hours are compensable as overtime hours.

Accordingly, Ms. Jenkins is entitled to overtime compensation for the 5 hours worked in the week ending May 30, 1980, since those hours were ordered by her supervisor due to the exigencies of Government business and since they were in excess of 40 hours in a week at the time they were performed.

Question No. 2

The second question presented for our consideration is as follows:

> Could Ms. Jenkins be paid overtime or be given compensatory time off for the 5 credit hours in question?

The agency's ability to grant Ms. Jenkins compensatory time off in lieu of payment of overtime compensation for the 5 hours worked in excess of 40 hours in the week ending May 30, 1980, is limited both by statute and regulation. In accordance with section 103(a)(1) of the act, granting compensatory time off in lieu of payment for the irregular overtime hours which Ms. Jenkins worked would be permissible only upon her request. Moreover, the Office of Personnel Management regulation contained at section 620.104 of title 5, Code of Federal Regulations (1980) provides that an employee on a flexible schedule may earn up to, but no more than, 10 hours of compensatory time off in lieu of payment for regularly or irregularly scheduled overtime. If an employee enters a flexible schedule program with more than 10 hours of compensatory time to his or her credit, that employee may earn no further compensatory time until his or her compensatory time balance is less than 10 hours.

Accordingly, the agency may grant compensatory time off to Ms. Jenkins so long as (1) the grant of compensatory time off does not violate the maximum accrual provisions of 5 C.F.R. 620.104, thereby resulting in simultaneous acquisition and forfeiture of any hours of compensatory time off; and (2) the grant of compensatory time off is at Ms. Jenkins' request. If Ms. Jenkins does not request compensatory time off or cannot be granted it under 5 C.F.R. 620.104, then she is entitled to receive overtime compensation under section 103(a)(2) of the Act.

In conclusion we note that Part III A Section D3(a) of FCCINST 1253 may be read to provide payment at the employee's regular hourly rate for credit hours scheduled and approved but not used as a result of orders of a supervisor. Consistent with our decision here, where such hours are in excess of 8 in a day or 40 in a week, that payment procedure would be contrary to the provisions of sections 103 and 106 of the Act. Rather, overtime compensation or compensatory time off where appropriate, must be provided for such hours of work.

[B-199121]

Travel Expenses—Air Travel—Reservation Penalties v. Voluntary Space Release—Compensation—Employee v. Government's Entitlement—Travel Before September 3, 1979

Employee, while traveling on official business on May 23, 1976, received $174.07 for voluntarily vacating his seat on an overbooked air flight. Our decisions which allow an employee to keep voluntary payments do not apply prior to September 3, 1978, the effective date of the Civil Aeronautics Board regulations encouraging payment for voluntarily vacating a seat on an overbooked flight. The payment, which was turned over to the Government, may not be returned to the employee.

Matter of: William J. Gournay—Payment to Employee for Voluntarily Vacating Seat on an Overbooked Airplane, October 10, 1980:

This action is in response to a request for an advance decision by H. Larry Jordan, an authorized certifying officer of the Department of Agriculture, concerning a reclaim voucher submitted by William J. Gournay, for compensation which was paid to him incident to travel on official business when he vacated his seat on an overbooked flight.

Mr. Gournay, an employee of Agriculture, states that on Sunday, May 23, 1976, he was scheduled to leave Dulles International Airport near Washington, D.C., on a United Airlines flight for Portland, Oregon. On the shuttle bus to the airplane an employee of United Airlines announced that the flight was overbooked and requested volunteers who would be willing to take another flight which would arrive in Portland 2 hours later. After no one had volunteered at first, Mr. Gournay volunteered because he was not scheduled to start work until the next day. United Airlines gave Mr. Gournay a check for $174.07 which he turned in to the Government when he submitted his travel voucher.

After reading our decisions in *Charles E. Armer*, 59 Comp. Gen. 203 (1980), the *Edmundo Rede, Jr.*, B-196145, January 14, 1980, which allowed an employee to retain payments received for voluntarily relinquishing his seat on an overbooked airplane, Mr. Gournay submitted a reclaim voucher for the payment he received for voluntarily leaving his airplane seat. The certifying officer has submitted the case to our Office to determine whether our *Armer* decision has retroactive effect.

The Federal Travel Regulations (FTR) state that penalty payments made by air carriers, for failure to furnish accommodations for confirmed, reserved space are due the Government, and not the traveler, when the payments result from travel on official business. FTR (FPMR 101-7) para. 1-3.5b (May 1973). Our Office has applied this provision to circumstances where the traveler is denied boarding on a scheduled flight even if the Government incurs no extra expense due to the denied boarding. See 41 Comp. Gen. 806 (1962); *Tyronne Brown*, B-192841, February 5, 1979.

However, in *Armer* and *Rede* our Office ruled that airline payments to volunteers are distinguishable from denied boarding compensation and therefore may be retained by the employee. We also held that if the employee incurs additional travel expenses by voluntarily relinquishing his seat, these expenses must be offset against the payment received by the employee.

The major rationale behind the *Armer* and *Rede* decisions was to avoid frustration of the intent of the regulations adopted by the Civil

Aeronautics Board (CAB) on May 30, 1978, and effective September 3, 1978, which require the airlines to seek volunteers to give up their seats before the airlines deny boarding to any passengers on an overbooked flight. The policy behind these regulations is to insure that the smallest practicable number of people holding confirmed, reserved space on a flight would be denied boarding involuntarily. See 14 C.F.R. § 250.2a (1979). Making our decisions in *Armer* and *Rede* applicable prior to September 3, 1978, would not serve the same purpose since prior to the issuance of these regulations, airlines were not required to seek volunteers before passengers were denied boarding.

In addition, our decisions in *Armer* and *Rede* created an exception to the general rule that payments from airlines for denied boarding are due the Government, not the employee, and those decisions modify prior decisions which have been relied upon by employees, certifying and disbursing officers, and agency officials involved in the travel of Federal employees. To give retroactive effect to our *Armer* and *Rede* decisions prior to September 3, 1978, would we believe, be too disruptive of settled claims and, as noted above, would not serve the purpose of the CAB regulation. Therefore, we conclude that our *Armer* and *Rede* decisions should only be applied to travel occurring on or after September 3, 1978, the effective date of the CAB regulation. See also our decision of today, *William R. Stover*, B-199417, involving travel performed after the issuance of the CAB regulation but prior to our *Armer* and *Rede* decisions.

In the present case, Mr. Gournay performed the travel in 1976, more than 2 years before the effective date of the CAB regulation. In addition, there is some question in the record before us whether this payment was for voluntarily vacating the airline seat since the check from United Airlines was made payable to the Government for denied boarding. Accordingly, since we hold that our *Armer* and *Rede* decisions do not apply to travel performed before September 3, 1978, Mr. Gournay's claim may not be paid.

[B-199171]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Department of Defense—Protest Timeliness—Failure to Set Aside

Where agency does not issue solicitation for Architect-Engineering (A-E) services but synopsizes procurement in *Commerce Business Daily*, and synopsis shows procurement will not be set aside for small business, protest that procurement should have been set aside is untimely unless filed prior to deadline specified in synopsis for receipt of qualification statement.

Contracts—Architect, Engineering, etc. Services—Contractor Selection Base—"Brooks Bill" Application—Evaluation Process—Documentation

Agency evaluators must document basis for evaluation and ranking of competing A–E firms to show judgments are reasonable and consistent with evaluation criteria even though such judgments may necessarily be subjective.

Matter of: Wadell Engineering Corporation, October 10, 1980:

Wadell Engineering Corporation (Wadell) protests the award of an architect/engineer (A/E) contract by the Western Division, Naval Facilities Engineering Command (Navy) to PRC–R. Dixon-Speas Associates (Dixon-Speas). The contract is for a comprehensive study to assure that development in and around the El Toro Marine Corps Air Station is compatible with the noise level and accident potential resulting from aircraft operations.

Wadell contends that the contracting officer erroneously decided not to designate the procurement as a small business set-aside and that the Navy did not properly apply the published evaluation criteria in its selection of the A/E contractor. Because we agree with the protester that the reasonableness of the agency's evaluation process is questionable, the protest is sustained.

Under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), Wadell's first contention is untimely. These procedures require that protests based upon alleged improprieties in any type of solicitation that are apparent prior to the closing date for receipt of initial proposals be filed before that date. 4 C.F.R. § 20.2(b)(1).

In this case, we believe that the *Commerce Business Daily* (CBD) synopsis is tantamount to a solicitation (since a separate solicitation for A–E services is not issued) and that it was apparent from the synopsis that the procurement was not being conducted as a small business set-aide. (See section 1–1003.9 of the Defense Acquisition Regulation (DAR) (1976 ed.) requiring that the synopsis state that the procurement is a set-aside.) Therefore, we believe Wadell was required to protest before the deadline specified in the synopsis for receipt of qualifications statements. *Cf. Information International, Inc.*, 59 Comp. Gen. ———— (1980), 80–2 CPD 100. Since Wadell did not protest until after it had learned of the proposed award to Dixon-Speas, this aspect of its protest is untimely and is dismissed.

Regarding Wadell's objection to the Navy's selection process, we note that this was a procurement of A/E services, and the Navy advises that it followed the selection procedures for such services set forth at DAR §§ 18–401 *et seq.*, and implemented by the Naval Facilities (NAVFAC) Contract Manual at paragraph 5–303. We are further advised that these procedures are all in accordance with the Brooks Bill, 40 U.S.C. §§ 541 *et seq.* (1976).

Generally, the Brooks Bill prescribes that the requirement for A/E services be publicly announced. The contracting agency then reviews statements of qualifications and performance data already on file and statements submitted by other A/E firms responding to the public announcement. Discussions must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternate methods of approach" for providing the services requested. The contracting agency then ranks in order of preference, based on established and published criteria, no fewer then three firms considered most qualified. Negotiations are held with the highest ranked firm. If the procuring agency is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. *Randolph Engineering, Inc.*, B-192375, June 28, 1979, 79-1 CPD 465.

DAR § 18-402.2(g) (1976 ed.) requires that the selection of A/E firms be in accordance with the policy established by the Brooks Bill and the evaluation criteria established in advance for the selection. The NAVFAC Contract Manual at paragraph 5-303.2 also requires that, in accordance with the Brooks Bill, A/E requirements be publicized in a notice setting forth the significant specific evaluation factors to be applied.

Here, notice of the project appeared in the CBD in an announcement which specified the following evaluation criteria:

> Professional qualifications of the staff to be assigned to the project; recent specialized experience of the firm in preparation of Air Installation Compatible Use Zones (AICUZ) reports; past experience of the firm with respect to performance on Department of Defense contracts; professional qualifications of the firm to accomplish the contemplated work within a minimum reasonable time limit; location of the firm in the general geographical area of the project; volume of work previously awarded to the firm by the Western Division Naval Facilities Engineering Command.

Nine firms responded by submitting statements of their qualifications on Standard Form 255, "Architect-Engineer and Related Services Questionnaire for Specific Project." Following evaluation of these forms, the Navy's Pre-Selection Board recommended that Wadell and three other firms be considered for the project.

The Navy's Selection Board then interviewed each firm and on that basis evaluated their experience and capabilities. After concluding individual reviews and evaluations, a secret ballot by the voting members of the Board resulted in the elimination of Wadell from the competition and the selection of Dixon-Speas as the most qualified of the three remaining firms. The recommendation of the Selection Board was approved on April 17, 1980.

Wadell maintains that the Navy improperly applied the evaluation criteria. In this regard, the protester questions the agency's judgment that Dixon-Speas is more qualified than Wadell in terms of experience, professional staff, ability to perform the work within the designated time period, and geographical location of the firm's offices in proximity to the project site.

Our review of an agency's judgment in these matters is limited to examining whether the selection of the A/E contractor is reasonable, based on published criteria and in accord with the policy expressed in the Brooks Bill. *See Gruzen/Gersin*, B–195439, November 19, 1979, 79–2 CPD 362. In this case, we agree with the protester that the Navy's evaluation process is subject to question.

Although the Navy reports that it has presented us with a complete description of the evaluation, and that the procedures employed by the Selection Board met the requirements for A/E procurements, the record does not demonstrate that the selection was reasonable and in accordance with the established and published criteria. While the contracting officer's "Determination and Findings" states generally that evaluation was based on the selection criteria, there is no documentation of the evaluators' reasons for selecting and ranking the firms which appear on the final slate.

We are advised by the Navy that since the slating and selection procedure involves individual evaluation of firms to be slated and a listing in order of priority of the firms for selection, all done by secret ballot, "scoring sheets" or documents of that nature will not be found. The Navy contends that because the slating and selection are done by architects and engineers who are called upon to exercise their professional judgment in applying the criteria announced in the CBD, the process is necessarily a highly subjective one which does not lend itself to reasoned statements of the basis on which the selection is made.

We have recognized that technical judgments by their nature are often subjective; nonetheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced evaluation criteria upon which competing offers are to be selected. *See Bunker Ramo Corporation*, 56 Comp. Gen. 712 (1977), 77–1 CPD 427. We fail to see the distinction between the exercise of these judgments in the selection of A–E contractors and the selection of other contractors where the subjective judgments of agency evaluators are necessarily involved.

Implicit in the foregoing is that these judgments must be documented in sufficient detail to show that they are not arbitrary. In this regard, we note that the NAVFAC Contract Manual at paragraph 5–303.5(e) requires that the Selection Board's recommendation of a particular firm for selection include an explanation of the reasoning on which such recommendation is based. We therefore find no merit to the Navy's position.

Where, as in this case, the record before us is devoid of any supporting rationale for the selection decision in a negotiated procurement, we are unable to conclude that the agency had any rational basis for its decision. *See, e.g., National Health Insurance, Inc.*, B-186186, June 23, 1976, 76-1 CPD 401. As noted above, the record contains nothing more than a statement that the evaluation was based on the published criteria; we see no explanation as required by the NAVFAC Manual and the Navy advises that there is in fact no documentation in existence which explains the evaluators' reasons for selecting and ranking the firms appearing on the final slate. We therefore have no basis to conclude that the agency's selection process was reasonable and based on the published criteria. Accordingly, this basis of protest is sustained.

Wadell has stated that the award of the contract, in its opinion, should have been made to it. However, the record has not established that Wadell would have been entitled to the award but for the Navy's failure to establish a rational basis for the selection that was made. It may be, for example, that an appropriately documented record would show that the selection was reasonable and consistent with the announced evaluation criteria. Moreover, there are a number of factors involved in our consideration of whether to recommend corrective action which might entail termination of an improperly awarded contract. *See Cohu, Inc.*, 57 Comp. Gen. 759 (1978), 78-2 CPD 175. These factors include the extent of contract performance and the cost to the Government which might result from a termination. *EMI Medical, Inc.*, 59 Comp. Gen. 269 (1980), 80-1 CPD 153. Here, approximately 40 percent of the performance period has already elapsed and thus a substantial portion of the $78,000 contract price has already been incurred. In addition, recompetition at this time could only delay the completion of the project, and would likely increase the costs as a result. We therefore do not believe that there is any practical way we can afford any meaningful relief in this case. *Cohu, Inc., supra.* We are, nevertheless, recommending to the Navy by letter of today that appropriate action be taken on the basis of this decision with respect to future procurements.

[B-200170]

Funds—Recovered Overcharges—Distribution—Department of Energy

In distributing funds it has received under consent order with alleged violator of petroleum price and allocation regulations, Department of Energy must at-

tempt to return funds to those actually injured by overcharges. Energy has no authority to implement plan to distribute funds to class of individuals not shown to have been likely victims of overcharges.

Regulations—Waivers—Agency Ignoring Own Regulations—Department of Energy

Department of Energy regulations, which create mechanism for persons injured by violations of price and allocation regulations to claim refunds, are mandatory. Department lacks authority to waive regulations in individual cases.

Energy—Department of Energy—Authority and Responsibility—Oil Price and Allocation Regulation—Recovered Overcharges—Status: Trust *v.* Miscellaneous Receipt Funds

To extent that Department of Energy receives moneys that it will return to victims of oil price and allocation regulations, it acts as trustee and funds need not be deposited in general fund of Treasury. However, to extent that Department seeks to distribute funds to class of individuals of its own choosing, rather than those overcharged, funds are not held in trust and must be deposited in Treasury as miscellaneous receipts.

To The Honorable John D. Dingell, House of Representatives, October 10, 1980:

You have requested that we review the legality of plans by the Department of Energy (Energy) to distribute $25 million it holds under the terms of a consent order with Getty Oil Company. The consent order resulted from allegations by Energy that Getty had violated Federal oil price and allocation regulations. Energy has announced that it plans to distribute $21 million of the Getty funds to 20 states in which Getty sells heating oil to be used to benefit low-income residents. The remaining $4 million will be distributed through the Department of Defense (Defense) to lower pay grade members of the armed services who reside off base in states where Getty does business.

On July 23, 1980, you wrote to the Secretary of Energy concerning the Getty fund, requesting, among other things, a legal memorandum by Energy's General Counsel, justifying the proposed plan for distribution. In the legal memorandum, dated August 20, 1980, Energy argues that it has implied power to order restitution as a remedy for violations of price and allocation regulations; that it has consistently interpreted its own enforcement powers as including any action necessary to eliminate or compensate for the effects of violations; that the Getty distribution plan is based on restitution and is therefore within Energy's powers; that the Getty funds are not moneys received for the use of the United States, and therefore need not be deposited into the Treasury as miscellaneous receipts; and that Energy's own regulation, which provides that when the victims of price regulation violations cannot be identified overcharge refunds may be made directly to the Treasury, is not mandatory and need not be followed in this case.

We conclude that, because Energy's distribution plan does not effect restitution, as we define that term, and because Energy has not followed its own regulations, Energy may not lawfully implement the Getty distribution plan.

The Facts

The Consent Order was approved by Getty Oil Company on November 26, 1979, and by Energy on December 3, 1979. By its terms the Order settled, with stated exceptions, all claims and disputes between Getty and Energy concerning Getty's compliance with oil price and allocation regulations during the period August 19, 1973, through December 31, 1978.

The Order provided that Getty would deposit $25 million into an escrow account with National Savings and Trust Company, Washington, D.C. The Order stated that "Getty will have no responsibility for, or participation in, the withdrawal, distribution or investment of funds from said escrow account." Such matters were to be subject to an escrow agreement between Energy and the bank. Under the Order Getty further agreed to surrender its entitlement to $50 million in future gasoline and propane price increases.

Under the terms of the Order, performance by Getty was to constitute full compliance with all Federal oil price and allocation regulations. The Order specifically provided that execution of the Order would constitute neither an admission by Getty nor a finding by Energy that Getty had violated any statutes or regulations.

The Order made no provision for the distribution of the $25 million nor did it state the purposes for which the money would be used. Further, the order contains no provision that Energy's procedural regulations would not apply with respect to these funds.

Energy announced the Getty Consent Order in a press release dated December 5, 1979. The release indicated that the $25 million in the escrow account would be "used to defray heating oil costs of low-income persons." The release further stated that details of the distribution of the funds would be announced after the Order became final.

On December 11, 1979, Energy published notice of the Order in the Federal Register and requested comments. *See* 44 Fed. Reg. 71453. This notice again indicated that the Getty fund would be used to defray heating oil costs of economically disadvantaged persons. Subsequently, on February 14, 1980, Energy published notice that the Getty Consent Order had become final. *See* 45 Fed. Reg. 9992. In this notice Energy indicated that the $25 million would be used "to mitigate energy costs of economically disadvantaged persons." The notice also stated that Energy would "determine how to distribute the funds."

Energy has considered various plans for distributing the Getty fund. Among these were distribution to states which had the greatest need for assistance in meeting the heating oil burden of the poor; distribution to states in proportion to Getty's total middle distillate sales in those states during the winter of 1978–1979, with the states using the money to assist the poor; distribution to states in proportion to Getty's nonindustrial sales of middle distillates, with the money being used to assist the poor; and a plan under which half the money would be used to reduce prices of Getty propane users and half would be paid to indigent servicemen living off base. Also under consideration were joint programs with the Department of Housing and Urban Development and the Community Services Administration to make grants for energy-related purposes.

The current plan for distributing the Getty money was announced July 11, 1980. Under this plan $21 million is to be distributed to 20 state governments in rough proportion to Getty's total heating oil sales in those states. Before receiving the money, each state must submit a plan for using the funds to defray heating oil costs of the poor. The remaining $4 million is to be distributed directly to lower pay grade servicemen in States where Getty sells heating oil.

Under the distribution plan as announced, the State of Missouri was to receive $1,344,000. On July 15, 1980, the Governor of Missouri proposed to Energy that Missouri's share of the Getty fund be made available immediately to provide assistance to low income individuals suffering the effects of a severe heat wave. In response to this request, on July 18, 1980, Energy agreed to make Missouri's share of the Getty money available:

a. To defray costs of purchase and installation of fans and other low-cost mechanisms, and lease or rental of air conditioners.

b. To pay for emergency transportation to temporary shelter, and for the shelter of, those severely affected by the heat.

c. To help defray higher than normal utility bills incurred by those affected by the heat.

I. Energy Cannot Implement Its Plan Because It Is Not Designed To Effect Restitution And Is Thus Beyond Energy's Remedial Authority

Energy's Statutory Enforcement Powers

Section 503 of the Department of Energy Organization Act, 42 U.S.C. § 7193 (Supp. I 1977) (Organization Act) authorizes the Secretary of Energy or his representative to issue a "remedial order" to any person believed to have violated any regulation, rule or order promulgated under the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 *et seq.* (Allocation Act). The remedial order is to be in writing and is to describe with particularity the nature of the violation, including a reference to the provision of the regulation alleged to have been violated. The remedial order become a final order of the Secretary unless contested within 30 days, which case the issue will be decided by the Federal Energy Regulatory Commission.

The Organization Act provides no guidance as to what a "remedial order" is intended to be. The legislative history indicates that section 503 of the act is not creating a new enforcement power, but rather is providing a means for those accused of violations to challenge the determination within the agency.

The bulk of the enforcement and remedial provisions concerning regulations issued under the Allocation Act is contained in section 5 of the Allocation Act itself, 15 U.S.C. § 754. Section 5 first provides that sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (Stabilization Act), shall apply to price and allocation regulations under the Allocation Act. Section 5 then provides for both civil and criminal penalties for violation of the price and allocation regulations.

Of the provisions of the Stabilization Act incorporated into the Allocation Act, sections 209 and 210 create enforcement powers. Section 209 authorizes the United States to bring suit against an alleged violator in a United States District Court and authorizes the court to enjoin a person from violating a regulation. Further, the court may order the person to comply with the regulation and may order restitution of moneys received in violation of the regulation. Section 210 authorizes those adversely affected by violation of the regulations to bring suit for declaratory judgment, injunction, or damages.

Energy's Power to Order Restitution

Energy acknowledges that it has no express statutory authority to order restitution as a remedy for violation of its price and allocation regulations. However, it argues that it impliedly has this power as necessary to enforce its regulations.

As we indicated above, the Allocation Act provides several methods for the enforcement of regulations issued under its terms. The Act provides for civil and criminal penalties; authorizes the United States to bring suit for injunctions; authorizes the United States district courts to enjoin violation and compel compliance with the regulations, and to order restitution of any overcharges; and authorizes private injured parties to bring suit for declaratory or injunctive relief or damages.

Although the Act specifically grants the power to order restitution to the district courts, and does not specifically grant this power to Energy, it has been determined that the Federal Energy Administration (Energy's predecessor) has implied power to order violators to refund overcharges. *Bonray Oil Co.* v. *Department of Energy*, 472 F. Supp. 9 (W.D. Okl. 1978), *aff'd per curiam*, 601 F. 2d 1191 (TECA 1979).

Energy interprets *Bonray Oil* as confirming that it has, by implication, a broad restitutionary power. However, the court in *Bonray Oil* did not go so far. In *Bonray*, Energy's predecessor issued a remedial order finding that *Bonray* had violated the price and allocation regulations, and ordering *Bonray* to make refunds to its overcharged customers. After affirming the determination that *Bonray* had violated the regulations, the District Court ruled that Energy's predecessor had the power to order a violator of its regulations to make direct refunds to the customers it had overcharged. *Bonray Oil* only confirms Energy's authority, as part of a remedial order which determines that violation have occurred, to order the violator to return overcharges directly to its customers.

In our opinion, under *Bonray Oil*, and the Organization and Allocation Acts, Energy's remedial authority is limited to ordering a violator to make refunds to overcharged customers.

Energy Regulations

In its regulations Energy has set forth the scope of the remedial action it may take as follows:

> (a) A Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation * * *. Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to purchasers of the products involved, notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the Order is issued maintain his prices at certain designated levels, notwithstanding the presence or absence of other regulatory controls on such person's prices. In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers. (10 CFR § 205.1991).

Energy's Interpretation of its Powers

Energy argues that it, and its predecessors, have for a long time applied a broad interpretation of its remedial authorities, including the concept of restitution. Energy claims that the regulations have always made clear that remedy includes any action *necessary to eliminate or to compensate for the effects of a violation.* Moreover, Energy asserts that, in reenacting authorizing legislation for Energy and its predecessors while this regulation was in effect, the Congress has approved this interpretation of the statutory powers.

As previously stated, we find nothing in the governing statutes which goes beyond remedial purposes including restitution. An examination of 10 CFR § 205.1991 (quoted above) shows that the underscored words upon which Energy relies are weak support, indeed, for the expansive authority it asserts. The regulation provides that remedial orders may require rollbacks of prices, refunds equal to the amount of actual overcharges, compensation to third parties for administrative expenses, as well as such other action as Energy determines is necessary. It further defines what "such other action" means by stating that it may require the creation of an escrow account or "other measures to make refunds directly to purchasers of the products involved," and may require the person to whom the order is directed to maintain prices at a certain level. The regulation finally states that, where overcharged purchasers cannot be identified or the amount each purchaser was overcharged cannot be determined, the amount of the refund may be deposited in the Treasury of the United States on behalf of the purchasers.

In our opinion, each of the specified remedies is designed to force the violator of the regulation to remit its unlawful gains and for the customers of the violator to recover the amounts they have been overcharged, if possible. The regulation does not permit Energy to order "any action," but rather only "such other action"—that is, action similar to the specified remedies—which will eliminate or compensate for the effects of the violation. The further definition of "such action" makes it clear that its purpose should be to force the violator to remit overcharges and, if possible, to return them to the customers who have actually been overcharged.

Energy also argues that, in reenacting authorizing legislation for Energy and its predecessors while the regulation on remedies was in effect, the Congress has approved Energy's interpretation of its powers. However, Congress has not approved or ratified any broad interpretation of Energy's remedial powers.

Ordinarily, the mere reenactment of an agency's authorizing legislation does not signify Congressional approval of the agency's administrative interpretations unless it is shown that the Congress was aware of these interpretations. *Mobil Oil Corp.* v. *Federal Energy Agency*, 566 F. 2d 87, 100 (TECA 1977). Ratification may be inferred only from a consistent administrative interpretation of a statute shown clearly to have been brought to the attention of the Congress and not changed by it. *Id.*

As we are not aware that Energy has ever communicated such a broad interpretation of its own regulations to the Congress, we do not interpret the inaction of the Congress as ratification.

Restitutionary Nature of the Getty Distribution Plan

Energy claims that the Getty distribution plan satisfies the statutory and regulatory requirements for restitution. It states that these requirements are met if the plan has as its purpose the elimination of the effect of alleged violations sustained by ultimate consumers. We do not agree that the Getty plan is designed to accomplish this purpose.

To determine whether the Getty plan is in fact restitutionary, it is first necessary to examine the nature of the violation, so as to determine who the injured parties were. The Getty Consent Order is devoid of any facts from which we can determine the nature of the violation. However, we accept Energy's assessment that some time between August 19, 1973, and the end of 1978, Getty charged prices in excess of those permitted to purchasers of petroleum middle distillates, including but not limited to home heating oils, and that the $25 million placed in escrow represents those middle distillate overcharges. Thus, those who suffered the effects of the violation were all purchasers or users of Getty middle distillates during the years in question.

In order for any distribution of the Getty funds to satisfy the statutory and regulatory requirements for restitution, it must be made in approximate proportion to the injury actually sustained to Getty customers and to ultimate consumers of Getty products who were the victims of the overcharges. In our view, Energy's plan does not meet this test.

With respect to the $4 million to be distributed to servicemen, the only connection is that these servicemen currently reside in states in which Getty did business during the winter of 1978–79. In all other respects distribution to these servicemen is unrelated to Getty's violation.

The terms of the distribution to servicemen are described in an agreement between Energy and Defense:

1. An eligible recipient is any enlisted member at or below grade levels designated by DOE who is on active duty in the U.S. Military Services on May

30, 1980, in any state designated by DOE as served by Getty Oil, and who, with one or more dependents, occupies non-government quarters in that state.

2. DOD will prepare a listing of potentially eligible personnel and will expeditiously distribute the entire sum transferred by the Office of Special Counsel on a equal per capita basis among eligible recipients deemed qualified by DOE in the manner and at the times most convenient to the DOD.

It is clear that any lower grade enlisted member of the services, with dependents, residing off base in a state in which Getty does business is eligible to receive a portion of the "refund." Energy has made no attempt to limit payments to individuals who were even likely to have been victims of the Getty overcharges. Although the Getty overcharges took place between 1973 and 1978, the date for determining eligibility is May 30, 1980. Considering the high mobility of enlisted members of the Armed Forces, it is questionable that those eligible to receive Getty payments under the plan would have been living in the same area during the period of violations. Moreover, eligibility is unrelated to use of Getty middle distillates. A service member may live in a residence heated by electricity, natural gas, propane, coal, or wood, and yet be eligible for a share of the "refund."

The plan of distribution to servicemen is not related to the Getty violations. Rather than being a plan to remedy the effects of violations, this proposed distribution is a plan for $4 million in assistance to individuals whom Energy considers to be in need.

The proposed distribution to 20 states is also not sufficiently related to the Getty violations to constitute a plan of restitution. Under the distribution plan, Energy will transfer a portion of $21 million to each of the states. The states will be required to formulate plans for use of the money. Under draft Energy criteria, the money will be provided to low income residents to defray heating oil costs, either through direct payments or by funding energy-related programs that will result in heating oil savings. Low income residents are defined as those at or under 150 percent of the poverty level.

Again there seems to have been no attempt to link the prospective recipients within the states to the Getty violations. Although the Getty violations took place between 1973 and 1978, recipients of the payments will be individuals residing within the states in 1980. Distribution will be limited (presumably) to users of home heating oil, but there has been no attempt to make payments only to Getty customers. Although the victims of the Getty violation were all users of Getty middle distillates, only users of home heating oil will benefit from Energy's distribution plan. And although all consumers of Getty home heating oil were victims of the Getty violations, only individuals with incomes at or below 150 percent of the poverty level are eligible to benefit under the Energy distribution plan.

Energy argues that illegal pricing by one supplier within a market affects pricing conduct by its competitors and thus all heating oil consumers are affected. The issue, however, is limited to distribution of the Getty overcharges to Getty customers and Energy's rationale is, in any event, highly speculative.

Energy asserts that agricultural and industrial users of middle distillates were excluded because, unlike residential users, they were able to pass through the added costs rather than having to absorb them. However, these nonresidential users were ultimate consumers of Getty middle distillates and thus victims of the overcharges. They are as much entitled to receive refunds as are other Getty customers or ultimate consumers. Moreover, it is not clear that market conditions would have permitted non-residential consumers to fully pass through the Getty overcharges.

Energy argues that low income consumers are entitled to receive the entire "refund" because they are likely to have been most harmed by overcharges and are least likely to be able to pursue private remedies. However, all ultimate consumers of Getty heating oil, regardless of income, were injured by the violations and should be enttiled to a portion of the refunds. The fact that an individual has a higher income than 150 percent of the poverty level does not deprive that individual of the right to receive restitution for overcharges, nor does it free Energy of the obligation to enforce its regulations on behalf of all consumers.

In short, although the Energy distribution plan may embrace persons who have been injured by the Getty violations, their inclusion results more by happenstance than by design. Fundamentally the plan provides assistance for groups of lower income energy users with a nominal but not very real connection to Getty. We do not question the merit or desirability of providing aid to these groups. We assert only that it is the Congress, not The Department of Energy which must initially determine the manner and the extent to which this should be done. Accomplishing such public policy objectives does not constitute restitution for unlawful overcharges.

In this connection, we recognize also that it is frequently not possible to identify each individual customer or consumer who has been overcharged nor is it always possible to make a precise determination of the amounts each individual has been overcharged. So long as a good faith effort was made to identify overcharged individuals, we would not view a distribution scheme which lacked dollar for dollar precision as unauthorized. However, the Energy distribution scheme in the Getty case does not sufficiently relate distributees to those injured to support a finding of restitution.

In the case of the distribution already made to the State of Missouri, it is difficult to postulate a rationale under which the use of

Getty funds to aid the victims of a heat wave can in any way be related to restitution for Getty overcharges.

II. Energy Cannot Implement Its Plan Because Energy Has Failed To Follow Its Own Regulations

Energy's regulations (10 CFR Part 205, Subpart V) set forth a procedure for distribution of overcharge refunds when Energy cannot readily identify those individuals entitled to refunds or the amount of refunds these individuals are entitled to receive. The scope and purpose of subpart V are set forth as follows:

> This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive. (10 CFR § 205.280.)

Under these regulations, an Energy enforcement officer files a petition with Energy's Office of Hearings and Appeals indicating that the officer has been unable to identify the victims of overcharges or the amounts these victims are entitled to receive. After considering the matter and soliciting comments from the public, the Office of Hearings and Appeals issues a decision and order setting forth the manner in which individuals may apply for refunds and in which the refunds will be distributed. After all applications have been processed and refunds made, and after deducting the costs of the proceeding, any remainder of the refund is to be deposited in the United States Treasury or distributed in any other manner determined by the Office of Hearings and Appeals.

Although Energy claims it has been unable to identify the victims of the Getty overcharges, it has not used the Subpart V procedure. Energy indicates that as part of the agreement which produced the Consent Order, it agreed with Getty that the Subpart V procedure would not be used in distributing the Getty fund. Therefore, it argues, the Subpart V procedure was not available to it in this case.

We have examined the Getty Consent Order and we find no indication that Energy has agreed to refrain from using its Subpart V procedure. Nor does the press announcement, or do public notices of the Order, indicate that the procedure established by regulation is not to be followed. We question whether Energy is bound by any unwritten agreement it may have had with Getty, particularly as we conclude that Energy is not authorized to forego use of its Subpart V procedure when called for.

In our view, it is clear that the regulation is designed for protecting the rights of overcharged customers and that the Subpart V procedure is mandatory.

Subpart V is a statutory regulation issued under the authority of section 644 of the Organization Act (42 U.S.C. 7254). Such a regulation, so long as it is in effect, is binding upon the agency which has issued it. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 694–96 (1974). An agency may not waive its statutory regulations in individual cases. *See* 57 Comp. Gen. 662, 663 (1978); 49 Comp. Gen. 145, 147 (1969).

We conclude that, because Energy's plan for the distribution of the Getty funds is not restitutionary and because Energy has not followed its regulatory procedures, Energy may not lawfully implement the plan.

Deposit of the Getty Funds in the United States Treasury

Energy raises the issue as to whether the Getty funds were received for the use of the United States and thus should have been deposited in the Treasury of the United States, as required by 31 U.S.C. § 484. Energy argues that, since the basic purpose of Energy's receipt of this money was its return to overcharged customers, it was not received for the use of the United States but rather for the use of others. Energy cites two cases for the proposition that not all funds received by a Federal agency are public funds which need be deposited in the Treasury (*Varney* v. *Warehime*, 147 F. 2d 238, 245 (6th Cir. 1945), and *Emery* v. *United States*, 186 F. 2d 900 (9th Cir. 1951)).

We agree that under 31 U.S.C. § 484, only moneys received for the use of the United States need be deposited in the Treasury as miscellaneous receipts. Moneys properly held by a Federal agency in a trust capacity are not required to be deposited as miscellaneous receipts of the Treasury. To the extent that Energy receives funds that it will return to overcharged customers, either directly when those customers can be identified or through the Subpart V procedure, it need not deposit them in the general fund of the Treasury.

In the Getty case, however, Energy has not attempted to distribute the funds to those who were overcharged and entitled to refunds. Rather, from the time that Getty agreed to place the funds in an escrow account, Energy has been seeking to use them to carry out energy policies unrelated to returning funds to overcharged persons.

Energy contends it is merely holding this money as trustee for its rightful owners. Yet with each formulated plan for distribution, Energy has constantly changed the beneficiaries of this so-called trust. Energy has not made it clear just exactly for whom it is holding this money in trust. In our opinion, by claiming for itself the unlimited right to determine (and to change the determination at will) who shall receive payment, in what amount, and the purposes for which the money shall be used, Energy may not be considered as acting as a trustee.

In sum, to the extent that Energy seeks to distribute the Getty funds to a class of individuals of its own choosing, rather than to the actual overcharged Getty customers, it is not holding the funds in trust and under 31 U.S.C. § 484 it must deposit them in the Treasury as miscellaneous receipts.

Payments to Servicemen

You have specifically requested that we determine whether the Department of Defense is authorized to supplement the salary of servicemen by making the payments under the Energy distribution plan. As we have already indicated, Energy may not lawfully implement its plan and therefore payments to servicemen cannot be made.

However, assuming that Energy's plan provided for reimbursement of overcharges to servicemen actually overcharged, we would not question the processing of payments by Defense on behalf of the Department of Energy. We have examined the legal memorandum prepared by the General Counsel of Defense, and we agree that these payments to servicemen would not violate any specific provision of law. We do not consider that these payments, unrelated to any Defense operation or expenditures, would constitute an augmentation of Defense's appropriations.

Conclusion

The current Energy plan for distribution of the Getty funds is unauthorized and Energy cannot lawfully implement it. Under Subpart V of Part 205 of its regulations Energy must use the procedures it has adopted for distributing refunds in instances where victims of violations cannot be readily ascertained. Any portion of the Getty funds which cannot be distributed under Subpart V must be deposited in the Treasury as miscellaneous receipts.

Enforcement

You have asked what action this Office would take to prevent DOE from implementing its distribution scheme in the event we determined that the plan is unlawful.

We will apprise the Department of Energy that we take issue with any failure to account properly for the funds involved either as reimbursement to appropriate persons or as deposits in the Treasury within a reasonable time after implementation of the Subpart V procedure. The authority of the Department of Energy to enter into Consent Orders on other than injunctive or restitutionary terms has been challenged in court. Under such circumstance we would not be inclined to take any further action, since the court will ultimately resolve the issues we have covered.

[B-196914]

District of Columbia — Contracts — Specifications — Descriptive Literature Requirement — Propriety — Services *v.* Supplies Procurement

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point.

Matter of: Biospherics, Inc.—Reconsideration, October 14, 1980:

Biospherics, Inc., the awardee of the contract under invitation for bids (IFB) No. 0060-AA-66-1-0-BM for onsite laboratory services for wastewater treatment for the District of Columbia (DC) requests reconsideration of our decision, *Lapteff Associates, Martel Laboratories, Inc., Kappe Associates, Inc.*, B-196914, B-196914.2, B-197414, August 20, 1980, 80-2 CPD 135. In that decision, we concluded that the solicitation was defective and the three low bids were improperly rejected as nonresponsive. We recommended that the contract award for 1 year not be disturbed, but recommended that the options for additional years of performance not be exercised and that the procurement be solicited on a proper basis.

Clause 28 of the IFB required that bidders submit a detailed outline and narrative indicating how they proposed to comply with required quality control and quality assurance requirements. The IFB clause also provided a bidder could be found nonresponsive for failure to comply with the requirement. The three low bids were rejected for failing to satisfactorily comply with the requirements of clause 28.

We determined that the solicitation was defective because the DC procurement procedures' descriptive literature requirement did not apply to services, but instead was limited by language and purpose to products. We also referred to the descriptive literature provision of the Federal Procurement Regulations § 1-2.205-5 (1964 ed. amend. 13). Further, we noted that our review of the case law cited by Biospherics did not provide support for the view that the term descriptive literature or descriptive data had been applied to information concerning how a bidder proposes to perform services, even of a technical nature such as laboratory services.

We stated that we knew of no regulation or decision of our Office which permits a contracting agency to determine bid responsiveness by requiring bidders to furnish with their bids a description of how they propose to perform the contract. We characterized such information as bearing on bidder responsibility, the proposed method of performance, not bid responsiveness which concerns whether the bidder has offered to do what is required by the solicitation. We concluded that a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation.

Biospherics asserts our decision is wrong as a matter of law. It states that the regulations and our decisions do not limit the use of a descriptive literature clause for the procurement of supplies and that only by happenstance have we never had a decision applying descriptive literature to services. In fact, Biospherics contends that our position is inconsistent with regulation and in support thereof quotes the following footnoted instruction to contracting officers in connection with the descriptive literature clause included in FPR § 1-2.202-5(d)(1):

Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate.

Since the instruction contemplates obtaining information relating to "methods of performance," Biospherics contends that the bids were properly rejected for failure to include the prescribed data relating to the method of performance. Biospherics also supports its position that the use of a descriptive literature requirement was proper in these circumstances, arguing, by analogy, that the Changes clause of standard form 32, which, by its language, applies only to supplies, has been extended by cited Board of Contract Appeals (BCA) cases to services.

Our bid protest procedures require that a request for reconsideration must specify any errors of law made or information not previously considered. 4 C.F.R. § 20.9(a) (1980). We do not believe Biospherics has met this requirement.

In our decision, we reviewed the purpose and language of DC's descriptive literature provision and the FPR's and concluded that by definition and purpose descriptive literature refers to information which describes products and explains their operations. We concluded that the quality control and quality assurances requirements of the subject solicitation were not that type of information within the meaning of the DC procurement procedures.

Under the DC procurement procedures, the term "descriptive literature" is defined to mean information, such as drawings and brochures, which shows the characteristics or construction of a *product* or explains its operation. Further, under the applicable provision, the term descriptive literature is explicitly defined to include *only* information required to determine acceptability of the *product* and explicitly excludes other information such as that furnished in connection with the qualifications of a bidder or used in operating or maintaining equipment. It is clear, therefore, contrary to Biospherics' contention, that our decision correctly stated that the bids of the three protesters were improperly rejected as nonresponsive pursuant to a requirement explicitly prohibited by regulations. It is also clear that the lack of any decisions of our Office applying descriptive literature requirements to services results not from happenstance, but from a proper application of the regulations. *See Hub Testing Laboratories*, B-199368, September 18, 1980, 80-2 CPD 204, which applied the rationale of our decision in this case to a recent procurement.

Whether the descriptive literature requirement may logically be applied to services, as Biospherics contends, need not be considered in view of the clear regulatory prohibition and Biospherics' failure to demonstrate any error of law in our prior decision in this regard. We also believe the analogy to the situation here which Biospherics attempts to draw from BCA cases is irrelevant since those cases involved the interpretation of a contract clauses, whereas we are concerned with a regulatory requirement applicable to the formation of a contract.

As a final matter, Biospherics requests a conference because of the importance of the case. Our bid protest procedures do not explicitly provide for conferences in connection with reconsiderations. 4 C.F.R. § 20.9 (1980). We believe a request for a conference should be granted only where the matter cannot be resolved without a conference. In light of the previous discussion, we do not believe this is such a case. *Serv-Air, Inc.—Reconsideration*, B-189884, March 29, 1979, 79-1 CPD 212.

Since Biospherics has not presented evidence demonstrating any error of fact or law in the original decision nor provided any substantive information not previously considered, our decision is affirmed.

[B-196042]

Transportation—Household Effects—Overseas Employees—Weight Limitation—Increases—Renewal Agreement at Same Post

When maximum weight allowance for transportation or nontemporary storage of household goods for transferred employees without immediate family is increased during overseas employee's tour of duty, employee who enters into renewal agreement at same post may be authorized increased weight allowance at time of renewal for nontemporary storage or shipment of household goods up to new maximum less initial shipment.

Transportation—Household Effects—Overseas Employees—Weight Limitation—Increases—Return Travel for Separation

Employee who fulfills period of service at overseas post or who is excused from this by agency is entitled to ship weight of household goods up to maximum weight under laws and regulations at time he separates. Travel and transportation rights and liabilities vest at time it is necessary to perform directed travel and transportation; therefore, laws and regulations in effect at time employee reports for duty have no applicability to return travel and transportation at a later date.

Transportation—Household Effects—Overseas Employees—Multiple-Location Shipments—Reimbursement Basis

Employee entitled to ship household goods to overseas duty post may ship goods from or to any locations he wishes but maximum expense borne by Government is limited to cost of a single shipment by the most economical route from employee's last official station to his new official station.

Matter of: Transportation of household effects, October 17, 1980:

The Assistant Secretary of the Army (Manpower and Reserve Affairs), requests an advance decision on four questions raised by the April 29, 1977 amendment to the Federal Travel Regulations which increased the weight allowance for transportation or nontemporary storage of household goods for employees without immediate family transferred overseas. Two of the questions are, basically, whether a renewal agreement for an employee serving overseas is tantamount to a transfer so as to entitle the employee to the increased weight allowance for storage or shipment of household goods. Another question is whether return to the United States from overseas duty for separation is tantamount to a transfer so as to entitle the employee to the higher weight allowance for shipment of household goods. The final question is whether an employee entitled to the increased weight allowance for transportation of household goods overseas may have his goods shipped from various locations other than his actual place of residence prior to the transfer. As will be explained, all questions are answered affirmatively.

This request for an advance decision was approved by the Per Diem, Travel and Transportation Allowance Committee and assigned Control Number 79-32.

The Assistant Secretary indicates that under paragraph C8002-2c of Volume 2 of the Joint Travel Regulations (2 JTR), the military services have allowed civilian employees working overseas, who initially ship less than their maximum weight allowance of household goods, to ship the balance of their weight allowance upon executing a renewal agreement. He points out that this regulation is consistent with our decision in 38 Comp. Gen. 653 (1959), wherein we approved such a practice.

The Assistant Secretary now raises the four questions because on April 29, 1977, the General Services Administration issued Temporary

Regulation A-11, Supplement 4, which contained many amendments to the Federal Travel Regulations (FTR). Among these amendments was one to FTR, para. 2-8.2a (FPMR 101-7, May 1973), which increased the maximum weight allowance from 5,000 pounds to 7,500 pounds for transportation or nontemporary storage of household goods for transferred employees without immediate family. The questions arise because paragraph 2b of the notice transmitting the revisions in the regulations specifies that an employee's entitlement to the increased relocation allowances accrues only if the "employee's effective date of transfer, i.e., the date the employee reports for duty at a new official station [is] on or after June 1, 1977."

The first question presented is:

1. May an employee's household goods in nontemporary storage, which were previously excess to the authorized maximum weight allowance, and which were being stored at an employee's personal expense, be converted to nontemoprary storage at Government expense upon execution of a renewal agreement to serve an additional tour of duty at the same overseas station, not to exceed the increased weight allowance?

The weight allowance of household goods for employees without immediate family was previously increased from 2,500 pounds to 5,000 pounds on October 12, 1966. At that time, the weight allowance in the applicable regulation, section 6.2 of Bureau of the Budget Circular No. A-56 (now FTR, para. 2-8.2) was increased under a transmittal notice which in paragraph g limited the increased weight entitlement to employees transferring after a certain date as was done in paragraph 2.b of the transmittal letter to Temporary Regulation A-11.

In response to a question as to when the increased limits under Circular No. A-56 of October 12, 1966, would apply to an employee whose goods in storage exceeded 2,500 pounds, we held that the employee would receive the increased allowance upon completion of his tour of duty and commencement "of a subsequent tour of duty at the same or some other overseas post." B-160901, April 6, 1967, citing section 6.7b(5) of Circular No. A-56 (now contained in FTR, para. 2-9.2d). Similarly, the increased weight allowance authorized by the April 29, 1977 amendment accrues to one entering into a renewal but only after his travel orders are appropriately amended. B-160901, April 6, 1967.

The following is the second question:

2. Is an employee, who was limited to the lower maximum household goods weight allowance while assigned overseas, entitled to the newly established higher maximum weight allowance upon return to the United States for separation? Is return travel for separation considered to be the same as permanent change-of-station travel from one duty post to another for weight allowance purposes?

Under 5 U.S.C. § 5724(d), an employee who transfers outside the continental United States is entitled to travel and transportation expenses to and from the post to the same extent within the same limitations as new appointees under 5 U.S.C. § 5722. New appointees' entitlement to return travel is limited by the requirement that they fulfill a required period of service or are separated for reasons beyond their control which are acceptable to the agency. 5 U.S.C. § 5722(c). This same limitation regarding entitlement to return travel is made expressly applicable to employees transferred overseas under FTR, para. 2-1.5g(4). For overseas employees, we have held that the fulfillment of this period of service is condition to the vesting of the employee's entitlement to travel. See 44 Comp. Gen. 767, 769 (1965). Accordingly, the employee has no entitlement to return travel and transportation for separation at the time he reports for duty overseas; and the applicable laws and regulations regarding travel at the time he reports have no application to this contingent right of return travel. Rather, the general rule applies that the employee's legal rights and liabilities in regard to travel and transportation allowances vest as and when the necessary travel and transportation is performed under competent orders. See 54 Comp. Gen. 638, 639 (1975); and 48 Comp. Gen. 119, 121-122 (1968).

Accordingly, an overseas employee who returns to the United States for separation after fulfilling his service obligation is entitled to ship the maximum weight of household goods under the laws and regulations in effect at the time of the return and, for this purpose, the return is treated the same as a transfer.

The following is the third question presented:

3. Is an employee without an immediate family, serving overseas, entitled to the new maximum weight allowance of 7500 pounds incident to the execution of a renewal agreement signed after 1 June 1977 for a tour of duty at the same duty station in which he had just completed the initial tour? In this situation, considering the absence of a different permanent duty station, has a transfer occurred for weight allowance purposes?

In B-160901, April 6, 1967 (discussed above), we also approved the increased weight allowances for shipment of household goods for employees without immediate family whose travel orders are amended upon completion of a period of overseas employment and commencement of a new period of duty at the same post under a renewal agreement. Therefore, employees without immediate family who enter into renewals may be authorized shipment of household goods up to 7,500 pounds (less the initial shipment) under the authority of 38 Comp. Gen. 653 (1959), as implemented by 2 JTR para. C8002-2c. Thus, for this increased weight allowance, the renewal satisfies the requirement of a transfer in the transmittal notice.

The fourth question presented is:

4. If an employee is entitled to ship an increased weight allowance of household goods to the same or a different overseas duty station, may such property

be shipped, at Government expense, from a geographical location other than the employee's place of actual residence prior to transfer overseas? For example, if an employee's place of actual residence was Washington, DC, but some of the employee's personal effects or household goods were left with relatives residing in Florida, or, during the interim, the employee had inherited or been given certain other property located in some different geographic area within the United States, could these various increments be shipped at Government expense to the employee's overseas station? If so, would there be any limitation, other than the maximum weight allowance, in the amount the Government would pay for such multiple shipments?

Paragraph 2-8.2d of the FTR and para. C8002-4 of 2 JTR authorize multiple shipments from different locations with the limitation that the total amount which may be paid or reimbursed by the Government shall not exceed the cost of a single shipment by the most economical route from the employee's last official station to the new official station. Therefore, in the example given the additional goods could be shipped but the amount payable by the Government may not exceed the cost of their shipment as one shipment from the place of actual residence, Washington, D.C.

[B-138942]

Travel Expenses—Air Travel—Foreign Air Carriers—Prohibition — Availability of American Carriers — First-Class Travel Restriction

With the limited exceptions defined at paragraph 1-3.3 of the Federal Travel Regulatons, Government travelers are required to use less than first-class accommodations for air travel. In view of this policy, a U.S. air carrier able to furnish only first-class accommodations to Government travelers where less than first-class accommodations are available on a foreign air carrier will be considered "unavailable" since it cannot provide the "air transportation needed by the agency" within the meaning of paragraph 2 of the Comptroller General's guidelines implementing the Fly America Act.

Matter of: Fly America Act—First-Class Accommodations on American Carriers *vs.* Travel on Foreign Carriers, October 20, 1980:

We have been asked to provide guidance on how the regulations limiting air travel to less than first-class accommodations affect implementation of the Fly America Act (49 U.S.C. § 1517). The specific issue to be addressed is whether paragraph 1-3.3 of the Federal Travel Regulations (FTR) (TPMR 101-7, as amended by Temporary Regulation A-11, Supplement 5) means that U.S. air carrier service would be considered "unavailable" under the Comptroller General's guidelines of B-138942, March 12, 1976, when U.S. air carriers are able to furnish only first-class accommodations.

The purpose of the Fly America Act is to ensure that Government revenues do not benefit foreign air carriers when service on certificated U.S. air carriers is available. 56 Comp. Gen. 209, 213 (1977). Under paragraph 2 of the guidelines, availability is defined as follows:

> Generally, passenger or freight service by a certificated air carrier is "available" if the carrier can perform the commercial foreign air transportation needed by the agency and if the service will accomplish the agency's mission.

Paragraph 3 states that certificated service is considered available even though "comparable or a different kind of service by a noncertificated air carrier costs less."

It has been suggested that the language of the guidelines indicating that cost is not a factor in determining U.S. air carrier availability is inconsistent with FTR para. 1-3.3 insofar as the latter prohibits use of first-class service except in very limited circumstances. Paragraph 1-3.3d states that it is "the policy of the Government that employees who use commercial air carriers for domestic and international travel on official business shall use less than first-class accommodations." Although that paragraph contains a parenthetical cross reference to the Fly America Act requirements incorporated at FTR para. 1-3.6b, it does not authorize first-class travel by U.S. air carriers when less than first-class service can be obtained aboard a foreign air carrier. It permits first-class air travel only in the following very limited circumstances: when less than first-class service is unavailable for travel that is so urgent that it cannot be postponed; when the employee is so handicapped or physically impaired that other accommodations cannot be used; when first-class travel is necessary for security purposes or other exceptional circumstances; or when less than first-class accommodations on foreign carriers do not have adequate sanitation or health standards. Authorization for first-class air travel is required to be made in advance by the agency head or his deputy and the employee's justification for using such accommodations must be certified on his travel voucher.

We find no inconsistency between the cited regulations and the Fly America Act guidelines. However, it does appear that the requirements of the Act need to be clarified insofar as they pertain to the situation in which a Government traveler is faced with the choice between less than first-class service by a foreign air carrier and first-class service aboard a U.S. air carrier. If the service provided by the two carriers is distinguished only by the class of accommodations available, and if there is no independent justification for first-class air travel, the employee's travel should be scheduled aboard a foreign air carrier.

The Fly America Act was not intended to redefine all conditions and requirements for Government travel. Within the general framework of the rules otherwise applicable to Government travel, the Act was, however, intended to shift expenditures of Government funds within the foreign air transportation market to U.S. air carriers to the extent practicable. For example our holdings in 56 Comp. Gen. 219 and 629 (1977) reflect an accommodation between the Fly America Act requirements and the general rule that employees should not be required to travel during periods normally used for sleep.

It has long been the Government's policy to limit its employees' use of first-class accommodations for air travel. The recent amendment to FTR para. 1–3.3 by Temporary Regulation A–11, Supplement 5, evidences a policy of even more stringent control over the use of first-class air service. In view of this policy, the "air transportation needed by the agency" is air transportation involving less than first-class accommodations, except in the limited circumstances described at FTR para. 1–3.3d(3). When a U.S. air carrier is unable to furnish less than first-class service, it is not considered "available" within the meaning of paragraph 2 of the guidelines. For this reason, the statement at paragraph 3 of the guidelines that U.S. air carrier service will be considered available even though "comparable or a different kind" of foreign air carrier service is less costly does not have reference to the cost differential between first-class service by U.S. air carrier and less than first-class service aboard a foreign air carrier.

[B–196100.2]

Contracts — Negotiation — Offers or Proposals — Preparation—Costs—Arbitrary and Capricious Government Action

Claim for proposal preparation costs is denied since record fails to establish agency's actions were fraudulent, arbitrary or capricious, but only that agency was mistaken in believing best and final offers could be requested without first conducting discussions concerning technical deficiencies in proposals.

Contracts — Negotiation — Offers or Proposals — Preparation—Costs—Recovery Criteria—Court Decision Effect

Recent decision of Court of Claims stating recovery of proposal preparation costs requires showing only that claimant had substantial chance of award rather than, as previously held by General Accounting Office, that it would have received award but for agency's failure to properly consider its proposal, did not eliminate requirement for showing of arbitrary or capricious agency action before recovery can be permitted.

Matter of: Decision Sciences Corporation—Claim for Proposal Preparation Costs, October 20, 1980:

In *Decision Sciences Corporation*, B–196100, May 23, 1980, 80–1 CPD 357, we sustained a protest of the award of a contract to Messer Associates, Inc. by the Internal Revenue Service (IRS) under request for proposals No. IRS–79–66. We held that the IRS erred in failing to conduct meaningful discussions with Decision Sciences Corporation (DSC) whose lower price proposal was within the competitive range. We further held that, despite DSC's assertions, the record did not establish that the deficiency was the result of fraudulent, arbitrary or capricious action by the agency but, rather, that the agency was mistaken in its belief that in this case it could request best and final offers without first conducting discussions concerning technical deficiencies in proposals.

DSC has since submitted a claim for recovery of its proposal preparation expenses which it estimates to be at least $25,000. For reasons discussed below, this claim is denied.

This Office first permitted reimbursement of bid/proposal preparation costs in *T & H Company*, 54 Comp. Gen. 1021 (1975), 75–1 CPD 345, where we adopted the standard announced in *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974). In applying this standard, we have held that recovery of such costs requires a showing that the agency's actions were so arbitrary or capricious as to have deprived the claimant of an award to which it was otherwise entitled. *Morgan Business Associates*, B–188387, May 16, 1977, 77–1 CPD 344; *System Development Corporation*, B–191195, August 31, 1978, 78–2 CPD 159. In a recent case, although the United States Court of Claims denied proposal preparation costs where an agency lost and did not consider a proposal, the court stated an offeror need show only that there was a substantial chance it would have received the award. *Morgan Business Associates, Inc.* v. *United States*, Ct. Cl. No. 274–78, April 2, 1980. In a footnote, the court specifically denied that its opinion in *McCarty Corporation* v. *United States*, 499 F. 2d 633 (Ct. Cl. 1974), provided any basis for our decisions in *Ampex Corporation; RCA Corporation*, B–183739, November 14, 1975, 75–2 CPD 304 and *Morgan Business Associates*, *supra*, which held that proposal preparation cost recovery required a showing that the claimant would have received the award but for the agency's failure to properly consider its proposal.

The court did not, however, eliminate the need for a showing of arbitrary or capricious agency action and it rejected the proposition that any breach of an agency's duty to give consideration to a proposal creates an immediate entitlement to proposal preparation costs. Thus, in the absence of a finding of arbitrary or capricious action, proposal preparation costs cannot be recovered even if the claimant would have received the award except for the agency's mistake, inadvertence, simple negligence or lack of due diligence. *Case Information Systems, Inc.*, B–186932, October 25, 1978, 78–2 CPD 299; *Forteo Constructors*, B–188770, August 7, 1979, 79–2 CPD 89. In *Keco Industries, Inc.* v. *United States*, *supra*, the court, while amplifying its position that the ultimate standard is whether the agency was arbitrary or capricious, stated that a proven violation of pertinent statutes or regulations "can, *but need not necessarily*, be ground for recovery." [Italic supplied.]

In its protest, DSC disagreed with the agency's down-grading of its proposal for being unclear and not specific as to how much time each professional would devote to each task. We found the agency's actions in this regard to have been reasonable. DSC also alleged that the agency was motivated by bad faith and was biased toward its competitor, allegations which we found unsupported by the record. The only respect in which we sustained DSC's protest was that the agency made an honest error in judgment in concluding that it need not conduct competitive range discussions in this case, even though it requested best and final offers. In all other respects, we found the procurement was properly conducted and the technical and cost evaluations complied with the criteria and cost evaluation formula specified in the solicitation.

Under certain circumstances, a simple request for best and final offers may constitute adequate discussions. *See, e.g., Dyneteria, Inc.*, B-181707, February 7, 1975, 75-1 CPD 86. Here, in light of the deficiencies in DSC's proposal, we believe that in order for the discussions to have been "meaningful", as required by our decisions, the agency should have preceded its request for best and final offers with competitive range discussions of the deficiencies it perceived. However, we remain of the belief that in this case the procurement deficiency does not reflect such arbitrary action so as to be ground for recovery of proposal preparation costs.

The claim is denied.

[B-197220]

Travel Expenses — Overseas Employees — Renewal Agreement Travel—Unauthorized Mode—Rented Car—Constructive Cost Basis of Reimbursement

Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government.

Matter of: Ronald D. Beeman—Unauthorized mode of travel, rental car, October 20, 1980:

This action is in response to a request for a decision submitted by the National Security Agency regarding the use of a rental car in connection with renewal agreement travel. The decision request, forwarded by the Per Diem, Travel and Transportation Allowance Committee, has been assigned PDTATAC Control No. 79–42.

The questions presented concern an employee's entitlement to reimbursement for rental car expenses where use of a commercial rented car was not authorized as advantageous to the Government. Specifically, three questions have been asked:

1. Where modes of transportation authorized in renewal agreement travel orders were Government and commercial air, rail, bus, and privately owned conveyance not advantageous to the Government, may the employee be reimbursed the actual round-trip rental automobile costs of $211.50 when comparative cost of rail travel and air travel between the overseas duty station and the port of embarkation are higher?

2. If the answer to question one is in the affirmative, should the orders authorize the use of a rental car for such travel and if the orders do not authorize rental automobile, would administrative approval on the travel voucher suffice for payment of the claim?

3. Would the answers to questions one and two apply, regardless of whether the travel was in connection with permanent change of station; renewal agreement travel; and, regardless of whether the expenses were incurred overseas or within the continental United States when the cost of the rental car was less costly than travel by rail or air between the same points of travel?

The facts of this case which are pertinent to the questions presented concern that portion of the renewal agreement travel of a Federal civilian employee from his post of duty outside the continental United States to a port of embarkation and his travel upon return from the port of debarkation to the post of duty outside the United States. The employee and his family performed travel from his overseas duty station to the aerial port of embarkation by rent-a-car at a cost of $95.50; and, upon return, from the aerial port of debarkation to his duty station by rent-a-car at a cost of $116. The total rent-a-car cost was $211.50.

For the 434 miles traveled by rent-a-car, the employee has been paid a mileage allowance of $73.78 based on the $.17 per mile rate authorized for travel by privately owned vehicle where that mode of travel has been determined to be advantageous to the Government. In limiting the employee's reimbursement, the agency relies on the fact that paragraph C2151–3 of the Joint Travel Regulations (JTR), Volume 2, states that renewal agreement travel by privately owned vehicle will be considered advantageous to the Government and will be reimbursed at the $.17 per mile rate when it is determined that the cost of such travel is less than the cost of travel by common carrier. The employee seeks reimbursement for the $137.72 amount he incurred for rental car expenses in excess of the mileage allowance paid.

In answer to the first question, the employee may be reimbursed for the rent-a-car expenses claimed inasmuch as they do not exceed the cost of commercial carrier transportation authorized. The authorization of a particular mode or modes of travel on an employee's travel order does not defeat the employee's right to reimbursement for travel expenses on a constructive cost basis when the employee travels by a mode of transportation other than authorized. See generally, *Lawrence B. Newell*, B-181151, January 3, 1975.

Provisions of the Federal Travel Regulations and of Volume 2 of the Joint Travel Regulations, as applicable to Department of Defense civilians, requiring approval of the use of rental vehicles, are not for application when reimbursement is to be on a constructive cost basis. As in all constructive cost cases the actual cost to the employee, regardless of mode, is compared to the cost by an allowable mode.

In *A. L. Strasfogel*, B-186975, March 16, 1977, we held that an employee whose travel by commercially rented vehicle was not authorized as advantageous to the Government was nonetheless entitled to reimbursement for rental car expenses limited to the constructive cost of travel by common carrier. As in the instant case, the travel was performed under circumstances in which travel by privately owned vehicle was advantageous to the Government. Nonetheless, the employee's reimbursement was not limited to the mileage to which he would have been entitled if he had traveled in his own automobile. As indicated in *Anthony P. DeVito*, B-196950, March 24, 1980, authorization of travel by privately owned vehicle as advantageous to the Government does not limit reimbursement for travel by unauthorized rental car to less than the cost by common carrier or other authorized mode. Such authorization may result in additional entitlement where the constructive mileage payment for travel by privately owned vehicle exceeds the cost of commercial transportation, but it does not serve to reduce that entitlement unless the employee actually travels by privately owned vehicle. Compare *Ernest D. Ellsworth*, B-196196, August 19, 1980, and cases cited therein.

Because the employee was authorized travel by common carrier and since his claim as well as his entitlement to reimbursement for rental car expenses is limited to the constructive cost by that mode of travel, payment may be made based on approval of his travel voucher. We would point out for the sake of clarification that although the travel order in the *Strasfogel* case was amended to authorize use of rental car limited to cost of common carrier that claim could have been paid on a constructive cost basis without regard to the amendment. Question number 2 is answered accordingly.

With respect to question number 3, we note that the *Strasfogel*, *DeVito*, and *Waldman* cases all involved travel for relocation purposes. Just as there is no reason to differentiate between change of station and renewal agreement travel, the principles of constructive cost reimbursement stated above apply to travel within the United States as well as to travel overseas.

[B-198022]

Contracts—Protests—Authority to Consider—North Atlantic Treaty Organization (NATO)—Procurements

Protest over award of contract by Army for North Atlantic Treaty Organization is subject to General Accounting Office (GAO) bid protest jurisdiction since use of appropriated funds are initially involved and procurement is therefore "by" an agency of the Federal Government whose accounts are subject to settlement by GAO.

Contracts — Negotiation — Requests for Proposals — Failure to Solicit

Protest alleging deliberate exclusion of potential bidder is denied where protester fails to affirmatively prove that agency made deliberate or conscious attempt to preclude potential bidder from competing.

Matter of: Security Assistance Forces & Equipment International Inc., October 22, 1980:

Security Assistance Forces & Equipment International Inc. (SAFE) protests the award of a contract to Gebr. Weimer Gmbh by the U.S. Army Contracting Agency, Europe (USACAE) under Request for Proposals (RFP) DAJA37-80-R-0113. SAFE alleges that USACAE committed a civil rights violation by failing to send SAFE a copy of the solicitation until after the submittal date had passed. SAFE also contends that its offer would have been lower than the awardee's had it been provided an opportunity to submit a timely offer.

The contract is for the purchase of steel bar window grills and doors for the Central Army Group (CENTAG) of the North Atlantic Treaty Organization (NATO). USACAE has advised us that the purchase is being funded initially from a Department of the Army appropriation which will be reimbursed by CENTAG.

As a preliminary issue, the Army raises the question of whether we have jurisdiction to consider protests concerning NATO procurements. Our Bid Protest Procedures provide for our consideration of protests by interested parties of the proposed or actual award of a contract, or the award of a contract "*by or for an agency of the Federal Government* whose accounts are subject to settlement by the General Accounting Office." 4 C.F.R. § 20.1(a) (1980) [Italic supplied.]. Recently we took jurisdiction over protests concerning procurements conducted pursuant to the Arms Export Control Act (formerly the Foreign Military Sales Act), 22 U.S.C. § 2751 *et seq.* (1976), where the Department of Defense (DOD), acting for a foreign government, directly enters into an agreement with a contractor and initially uses its own funds to accomplish the transaction. *Procurements Involving Foreign Military Sales*, 58 Comp. Gen. 81 (1978), 78–2 CPD 349. The involvement of the USACAE in this procurement is essentially identical to the involvement of DOD in Foreign Military Sales Act transactions to the extent that appropriated funds are used at least initially. Consequently, we believe the involvement of USACAE in this procurement is sufficient to constitute a procurement "*by* * * * an agency of the Federal Government * * *." 4 C.F.R. § 20.1(a) [Italic supplied].

Pursuant to a request from NATO for the procuring of steel bar window grills and doors, the Army mailed RFP DAJA37–80–R–0113 on December 12, 1979 to six firms on its bidders list. SAFE was not one of the six firms to receive the solicitation. Closing date for receipt of proposals was set for January 9, 1980.

In a postscript to a letter directly addressed to the Commander, USACAE, dated December 14, 1979, SAFE requested a copy of the solicitation. SAFE did not request the solicitation from the contracting officer, nor did its representative attempt to obtain a copy from the procurement office, although he resided nearby and could have done so. The Commander, replying to SAFE in a letter dated January 8, 1980, stated that SAFE was not listed on its records as a firm providing the types of items required by this solicitation. Nevertheless, SAFE received a copy of the requested solicitation on January 14, five days after the closing date for receipt of proposals.

On January 15, SAFE protested to the Army concerning the failure of the Army to send SAFE a copy of the solicitation until after the closing date for receipt of proposals. SAFE alleged that this act was just one of several similar deliberate actions on the part of the Army to exclude SAFE from participating in this and other procurements. To remedy this particular wrong, SAFE requested that the submittal time for the contract be extended, thus affording it the opportunity to submit an offer.

The Commander, USACAE, in a reply to SAFE dated February 22, acknowledged that SAFE should have been sent a copy of the solicitation immediately following his receipt of SAFE's request dated December 14. He stated further that:

> * * * I have found no evidence that any of the SAFE companies have requested to be placed on the Bidder's List for construction items or is a current producer of steel bar grills for doors or windows. * * *

* * * [M]y reply to SAFE International, Inc.'s letter of 14 December 1979 was not a conscious or deliberate attempt to preclude [SAFE] from making an offer to subject RFP. Instead of having the Contracting Officer provide the RFP directly to you in response to your Post Script, I requested that it be forwarded to me for incorporation into my response * * *. Regrettably my reply to you was delayed due to staffing coordination and Christmas and New Year Holidays during which the Agency was closed and/or personnel were on * * * leave.

* * * However, in order to reduce the number of occasions in which you assert that your firms are not placed on original source lists for those supplies and services for which they are interested in making offers, I reiterate my request that your companies maintain their Bidder's Mailing List applications in a current status. * * *

I further recommend that should an occasion arise wherein one of your firms is not solicited * * * you make your request for the particular RFP to the responsible Contracting Officer [who] is best situated to promptly dispatch * * * the requested RFP * * * if a copy is available. * * * It is USACAE's routine practice * * * to send * * * an RFP, if available, to any firm * * * upon request. * * *

Not satisfied with this response from the Army, SAFE protested to our Office.

Inadvertent actions of an activity which preclude a potential bidder from competing on a procurement do not constitute a compelling reason to question an award if there is no evidence of a deliberate or conscious attempt to preclude the potential bidder from competing and competition resulted in an award at a reasonable price. *Intermountain Sanitation Service*, B-193239, January 19, 1979, 79-1 CPD 33; *Valley Construction Company*, B-185684, April 19, 1976, 76-1 CPD 266. In the instant case, SAFE does not contend that competition was inadequate or that the contract was awarded for other than a reasonable price. SAFE only asserts, after the fact, that if it was able to participate in the procurement, it would have made a lower offer than that of the awardee. Moreover, since SAFE's assertion that the Army deliberately attempted to exclude it from participating in the procurement was only substantiated by references to alleged similar actions by the Army, which were never proven, and since the Army not only emphatically denied these contentions but offered a plausible explanation for its actions, SAFE has not met its burden of affirmatively proving its assertion. *Crestwood Furniture Company—Reconsideration*, B—195109.3, January 21, 1980, 80-1 CPD 59; *Introl Corporation*, B-194570, January 15, 1980, 80-1 CPD 41. We believe that the record here amply demonstrates that most of SAFE's difficulties in this procurement resulted from its own actions—the manner in which the request was made, its incomplete bidders list application, its failure to attempt to personally obtain a copy of the RFP—rather than as a result of anything that the procuring activity did.

Finally, we do not believe the allegations raised here concerning a corporate firm's exclusion from a procurement properly may be viewed as involving civil rights violations.

The protest is denied.

[B-195183]

Contracts—In-House Performance v. Contracting Out—Cost Comparison—Failure to Follow Agency Policy and Regulations

Protest against agency's determination to retain function in-house based on cost comparison with offers received in response to solicitation is sustained to extent that agency failed to follow prescribed guidelines in conducting comparison.

Contracts—In-House Performance v. Contracting Out—Cost Comparison—Faulty—Cost Escalation Factor

Where decision to retain function in-house is based on comparison of estimated in-house costs with offers received in competitive procurement, integrity of process dictates that comparison be supported by complete and comprehensive data, and that elements of comparison are clearly identifiable and verifiable.

Matter of: Serv-Air, Inc.; AVCO, October 24, 1980:

Serv-Air, Inc. (Serv-Air) and AVCO Corporation (AVCO) protest the determination by the Department of the Air Force that the Military Aircraft Storage and Disposal Center (MASDC) at Davis-Monthan Air Force Base in Arizona would be operated at a lower cost to the Government through continued use of Government personnel rather than by awarding a contract based on proposals submitted by either of the two firms. The protesters contend that when comparing in-house costs and the costs of contracting, the Air Force failed to properly implement its own regulations, policies and procedures. AVCO also raises certain additional matters with respect to the solicitation of offers itself.

The protests are sustained to the extent that we find that the Air Force's determination is not supported by the agency's cost comparison as presented to our Office.

Initially we point out that a dispute over an agency decision to perform work in-house rather than to contract for the services involves a matter of Executive branch policy which we do not generally review as part of our bid protest function. *General Telephone Company of California*, B-189430, July 6, 1978, 78-2 CPD 9. Nevertheless, when an agency utilizes the procurement system to aid in its decision-making by spelling out in a solicitation the circumstances under which a contract will or will not be awarded, we believe it would be detrimental to the system if, after the agency induces the submission of proposals, there is a faulty or misleading cost comparison which materially affects the decision in that respect. Therefore, we do consider protests which allege such a faulty or misleading cost comparison. *Jets, Inc.*, 59 Comp. Gen. 263 (1980), 80-1 CPD 152; *Crown Laundry and Dry Cleaners, Inc.*, B-194505, July 18, 1979, 79-2 CPD 38. However, we also point out that the burden is on the protester to show the inaccuracy of the cost comparison. *Amex Systems, Inc.*, B-195684, November 29, 1979, 79-2 CPD 379.

Facts

Request for Proposals (RFP) No. F04606-79-R-0150 to operate MASDC contemplated a fixed-price incentive fee contract with a ceiling price of 125 percent of the contractor's target cost. The contract term was one year, with options by offerors priced for two more years. Offerors were advised that once the offer most favorable to the Government was determined, the "phase-in price, plus total ceiling price, plus over and above contract line item prices" would be compared with the Government's three-year cost estimate of retaining the operation in-house. A contract would be awarded only if the in-house cost estimate were higher.

A pre-proposal conference for 15 firms was conducted, after which three firms submitted proposals. All were found technically acceptable. Discussions were held, and best and final offers were submitted. Serv-Air's proposal was the most favorable of the three.

The Government's in-house cost estimate of approximately $39,600,000 for three years was then disclosed to the offerors, and AVCO and Serv-Air submitted numerous questions with respect to certain of its elements. The protests were filed in our Office based on the Air Force's responses to a number of the questions. The comparison of the in-house estimate with Serv-Air's cost proposal (as evaluated at approximately $39,900,000 for three years) showed that it would be more economical for the Air Force to keep the MASDC function in-house.

Serv-Air Protest

Serv-Air requests that we focus on four areas of the Air Force's cost comparison:

(1) whether the Air Force should have escalated its estimate for civilian personnel costs for the second and third years if the MASDC function were retained in-house;

(2) the Air Force's computation of the personnel termination costs if the function were contracted out;

(3) the Air Force's estimated cost for a Project Management Office to, in part, oversee the contractor's performance; and

(4) whether the correct Federal tax rate was used in estimating the amount of taxes the Government would collect on the contract price if it awarded a contract to Serv-Air.

(1) Cost Escalation

Line item 10 of the Cost Analysis Worksheet used by the Air Force in its cost comparison is for the "Civilian Personnel Costs" payable if the in-house operation is retained. The Air Force's estimated first, second, and third year costs were $11,304,767, $12,064,213 and $12,-569,405, respectively; the second and third year cost estimates were not escalated for possible civilian personnel cost increases, *e.g.*, wage and General Schedule salary rate increases. Serv-Air protests that cost escalation was mandated by Air Force regulations.

Section 814(b) of the Department of Defense (DOD) Appropriation Authorization Act, 1979, Pub. L. No. 95–485, 92 Stat. 1611, 1625 (1978), prohibited DOD from contracting out commercial or industrial functions unless performance by a private contractor began before the date of its enactment (October 20, 1978), or would have been allowed by the policy and regulations in effect before June 30, 1976. That prohibition was in effect until October 1, 1979. and is applicable to the instant procurement. *See Tri-States Service Company*, B–195642, January 8, 1980, 80–1 CPD 22. Therefore, the dispute on this issue concerns whether Air Force policy and regulations which were in existence prior to June 30, 1976, required salary escalation in the Government in-house cost estimate. The Air Force asserts that they did not.

First, the Air Force states that Air Force Regulation 26–12, "Use of Commercial or Industrial Activities" (published on January 29, 1974), made no provision for escalation of either personnel or material costs. On March 5, 1976, Air Force Regulation 26–12 was replaced by an advance draft copy of Chapter 1 of Air Force Manual (AFM) 26–1, "Manpower Utilization," which was to be implemented upon receipt. AFM 26–1 prescribed in paragraph 1–16(e):

> * * * All recurring costs such as contract cost (line 8) and civilian personnel cost (line 10) will be straight lined for the three year period *unless there are known changes for the second and third year* (i.e., line 12; maintenance of facility). * * * No adjustments will be made in the in-house cost estimate for the second and third year recurring cost items for such things as inflation, price escalation and/or projected wage increases, except where the contractor has estimated such costs in the second and third year of a multi-year contract or in priced options for the second and third year. [Italic supplied.].

The Air Force points out that possible civilian personnel wage increases for the second and third years were not "known" at the time the analysis was done, *i.e.*, prior to the receipt of offers, nor was it known at that time whether or to what extent an offeror for a fixed-price incentive fee contract would consider possible increases in computing a price proposal.

Second, the Air Force asserts that "Monthly Messages" of March and April 1976 issued to supplement AFM 26–1 provided examples of second and third year personnel cost estimate computations which do not appear to escalate those costs from the first year.

Third, the Air Force asserts that it never has escalated second and third year civil servant costs in a cost estimate, where, as here, the contractor would be eligible for annual contract adjustments under a "Fair Labor Standards Act and Service Contract Act" contract clause. The clause provides for a contract price adjustment when the contractor implements a change issued by the Department of Labor in either the minimum prevailing wage determination or the Federal minimum wage from that initially applicable to the contract. The Air Force evidently assumes that since minimum wage increases would be payable as contract price adjustments in any event, offerors do not escalate proposed personnel costs for option years.

Fourth, the Air Force cites post-1976 communications from the Air Force Directorate of Manpower and Organization, which has primary responsibility in the Air Force for cost comparison policy and regulation, clarifying the pre-June 1976 policies and which the Air Force contends do not authorize cost escalation.

Serv-Air argues that the Air Force practice of straightlining the second and third year estimated costs in a cost comparison, where an offeror in fact escalated its costs, simply perpetuates a misinterpretation of the agency's pre-June 1976 policies. Serv-Air focuses on the language in paragraph 1–16(e) of AFM 26–1 requiring adjustment in the in-house estimate "where the contractor has estimated such costs in the second and third years." In this connection, Serv-Air asserts that as a matter of economics an offeror certainly escalates his estimated costs in this area for those years.

Serv-Air also points to paragraph 1–18(a), which requires the Air Force to project in its estimate additional pay increases for Government employees for the second and third years of a multi-year contract or a contract with pre-priced options where there are no economic adjustment clauses in the contract. Serv-Air asserts that there are no economic adjustment clauses in the proposed contract as contemplated by that provision for personnel, material, maintenance, overhead and similar costs.

Serv-Air also asserts that the "Monthly Messages" referenced by the Air Force at best are not clear on the issue, and that any post-1976 clarifications of the pre-June 1976 policies in any event are "nothing more than one Air Force organization's interpretation."

We consider that the Air Force's practice here was contrary to the requirement in paragraph 1–18(a), and also failed to properly give effect to all of the language in paragraph 1–16(e).

We point out here that in our view the RFP, by clearly advising offerors that the cost comparison and the contract award would be made "in accordance with AFM 26–1," effectively established the pre-June 1976 manual as the groundrule mandated by section 814(b) of the 1979 DOD Appropriation Authorization Act, *supra*. Since in preparing their proposals offerors therefore were entitled to rely on the explicit provisions of AFM 26–1, we would view a cost comparison based on a selective reading of the document, *i.e.*, one incorporating only certain of its instructions and substituting post-June 1976 practice for others, as precisely the type of misleading comparison contemplated in our decisions in *Jets, Inc., supra*, and *Crown Laundry and Dry Cleaners, Inc., supra*.

Also, we do not find support for the Air Force's view in either the 1976 "Monthly Messages" or the post-1976 Air Force policy "clarifications," since neither addresses the situation where an offeror escalated second year civilian personnel costs, and then further escalated such third year costs.

We find that paragraph 1–18(a) of AFM 26–1 is dispositive of the matter. The paragraph specifically provides for second and third year Government employee pay escalation in the Government estimate when making decisions of the type here in issue if prices are requested for more than one year and there are no economic adjustment clauses. The economic price adjustment clause regarding labor rates for inclusion in contracts is at Defense Acquisition Regulation (DAR) § 7–107 (1976 ed.). It allows for contract price adjustments whenever the contractor's labor costs increase during performance, if otherwise appropriate. This clause did not appear in the RFP.

The results of the Air Force's approach, which essentially ignores paragraph 1–18(a), are that (1) the Air Force estimate simply does not reflect the actual cost of performing the function in-house, since that cost certainly increases in the second and third years, and (2) the Air Force is comparing two figures that were prepared on two different bases, *i.e.*, the offeror's escalation of second and third year personnel costs, and the agency's straight-lining of them for in-house estimating purposes.

To the extent that the Air Force views the contract's "Fair Labor Standards Act and Service Contract Act" clause as the type of economic adjustment clause contemplated by paragraph 1–18(a), that clause only provides for contract price adjustments if the contractor is *compelled* to increase employees' wages to comply with a change mandated by the Department of Labor. Thus, if a contractor is already paying its employees more than the minimum wage when an increase in the minimum wage becomes operative, there will be no contract price adjustment unless the new wage exceeds the one being paid. Further, offerors certainly may plan to increase proposed personnel costs in years two and three based on business judgment independent of the minimum wage. We do not view the existence of that clause here as invoking the exception to the cost escalation mandate in paragraph 1–18(a).

Regarding paragraph 1–16(e), we recognize that, as a practical matter, at the time an estimate is prepared there are no "known" changes in Federal civilian personnel costs for the years after the initial performance year, since historically Federal employee pay increases are not definitized until shortly before the beginning of the fiscal year in which they are to take effect.

However, we believe that the only reasonable reading of paragraph 1–16(e) in light of the direction in paragraph 1–18(a) as to how to compare costs in these *specific* circumstances, is that where offers for three years are solicited on a fixed price basis without an economic adjustment clause, the Government must adjust the in-house estimate by escalating second and third year costs.

Accordingly, we believe that the Air Force's in-house civilian personnel cost estimate should have been adjusted on a reasonable basis for the second and third years.

As indicated above, the Air Force's three year estimate to continue the MASDC function in-house was $39,600,000, which included $35,938,385 in civilian personnel costs. Serv-Air's offer was evaluated at approximately $39,900,000 for three years. Since even a minimal escalation in the second and third year civilian personnel costs would have resulted in a three-year in-house estimate exceeding Serv-Air's offer, under the published award criteria a contract should have been awarded to Serv-Air.

Therefore, it is unnecessary to consider the other issues raised by Serv-Air.

The protest is sustained.

AVCO Protest

In addition to joining Serv-Air in protesting the matters noted above, AVCO has raised a number of additional isues. Certain of them involve the accuracy of the Air Force's in-house estimate, and thus are academic in view of our conclusion above.

However, AVCO also raises matters relevant to the preparation of its own proposal: that it was improper to invite proposals on a fixed-price plus incentive-fee basis rather than a fixed-price one; that the RFP improperly required the offeror to include in its proposal costs to secure and provide facilities and equipment that already were on the installation and thus were not included in the Government in-house estimate; and that the labor rates prescribed by the Secretary of Labor for use in the RFP were excessive.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), requires that protests based upon alleged improprieties apparent from an RFP as issued be filed prior to the closing date for the receipt of initial proposals. The protest on these issues involves alleged improprieties within the meaning of that provision, but was filed in our Office over two months after initial proposals were due. Accordingly, the issues will not be considered on the merits.

In any event, we point out with respect to the prescribed labor rates that the courts have held that the correctness of a prevailing wage determination made by the Secretary of Labor is not subject to judicial review. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954); *Nello L. Teer Co.* v. *United States*, 348 F. 2d. 533 (Ct. Cl. 1965). We have construed the former decision as precluding this Office from reviewing the correctness of a wage determination in situations such as we have in the present case. *See International Union of Operating Engineers*, B-182408, February 12, 1975, 75-1 CPD 90. The appropriate manner in which to challenge wage determinations is through the administrative process within the Department of Labor as established by 29 C.F.R. part 7 (1979). *Associated General Contractors of America, Inc., Arkansas Chapter*, B-190775, January 17, 1978, 78-1 CPD 40.

Finally, AVCO disagrees with certain of the procedures prescribed in AFM 26-1 for use in calculating various costs. This matter also is untimely under section 20.2(b)(1) of our Bid Protest Procedures, since as stated above the RFP clearly advised offerors that AFM 26-1 would be the groundrule for the cost comparison. Nonetheless, consistent with our limited review role in this area as stated at the outset, we will question only whether mandated procedures were followed, not the efficacy of the procedure themselves.

Recommendation

The protests are sustained to the extent discussed above.

The Air Force originally determined to compete the MASDC operation and to contract it if the low evaluated offer were less than the

Government estimate. We presume that another competition thus would not be inappropriate.

Accordingly, by separate letter we are recommending to the Secretary of the Air Force that since the first performance year has ended he consider having a new solicitation issued as soon as possible with a new Government cost comparison made on the basis of any offers that are received in response. That comparison in turn should form the basis for a new Executive branch decision with respect to the performance of the MASDC operation.

We point out that the comparison would follow the guidelines set out in Office of Management and Budget Circular A-76, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," which applies to DOD solicitations issued after October 1, 1979 (when the prohibition in section 814(b) of the DOD Appropriation Authorization Act, 1979, expired).

We are also recommending that as a general matter the Secretary insure that cost comparisons with respect to contracting-out decisions are supported by complete and comprehensive data, and that the elements of the comparisons are clearly identifiable and verifiable.

[B-196397]

Pay—Withholding—Member's Consent Requirement—Anticipated Indebtedness—Early Discharge—Advance Leave, Unearned Bonuses, etc.

A service may withhold from pay due a member, with the member's consent, amounts expected to become due to the United States because of paid bonuses and advance leave which are expected to become unearned bonuses and excess leave due to the member receiving an early separation from the service. However, such amounts may not be withheld from current pay without the member's consent since no actual debt exists until the member is discharged.

Leaves of Absence—Military Personnel—Advance Leave—Separation Prior to Leave Accrual—Recoupment—Pay Rate Applicable

Collection for advance leave which becomes excess leave on discharge must be computed based on pay received by the member at the time the leave was taken and not on pay rates in effect at time of the member's discharge.

Matter of: Debts of Service Members Discharged Early, October 28, 1980:

The following questions are presented for an advance decision by the Principal Deputy Assistant Secretary of the Air Force (Financial Management):

a. May a Service, with the member's consent, withhold from pay due the member prior to an early separation, a reasonable portion of the amount expected to become due to the United States because of paid but unearned bonuses and advance leave?

b. Is it legally permissible to compute advance leave that becomes excess leave because of an early separation, at the rates in effect at separation rather than at the rates in effect at the time of the advance leave?

The matter was submitted through the Department of Defense Military Pay and Allowance Committee and assigned submission number SS-AF-1331. For the following reasons, question a is answered yes and question b is answered no.

Concerning question a, the submission indicates that military members who are given early separations often have used advance leave which was granted based on the leave they were expected to earn during their normal term of service. Also, they often have been paid reenlistment-type bonuses, continuation pay, and variable incentive pay based on their normal expected period of service. When they are discharged early the advance leave becomes excess leave, payment for which must be recouped. Similarly, the unearned portions of the bonuses must be recouped.

The Air Force indicates that it is difficult to collect these amounts from members after separation and involuntary collection of these projected debts prior to separation appears impermissible. However, the Air Force indicates that since the member is requesting a voluntary early release, if such a release is going to create a debt to the United States, it appears reasonable for the member to agree to the withholding from subsequent monthly entitlements of a reasonable amount of the anticipated debt, not to exceed two-thirds of his pay.

As the Air Force is aware, members who have received the bonuses in question become liable to refund a pro rata amount of the bonuses if they do not complete the term of service for which they were paid. See 37 U.S.C. §§ 308(d), 308(b), 311(b), 313(b) and (c). Also, collection is required of pay and allowances received for advance leave which becomes excess leave on discharge. 37 U.S.C. § 502(b) and Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), paragraph 10305a. Thus, although it is possible to estimate in advance based on a projected early discharge date the amounts which a member will owe upon discharge, the member is not actually in debt for unearned bonuses or advance leave until the date of discharge. Therefore, there is no authority we are aware of to begin collection of those amounts from the members' current pay without their consent prior to discharge.

As to withholding current pay with the member's consent to cover an anticipated debt, while there is no specific statutory authority for such a procedure, there is authority for members to make voluntary allotments or assignments of their pay. 37 U.S.C. §§ 701(d), 702, 703, 705. Also, we have recognized that, although a member may not waive his statutory entitlement to retired pay (which is similar to the entitlement to active duty pay) he may decline to receive such pay. 28 Comp. Gen. 675 (1949); B-159343, August 24, 1966; and B-196839, April 24, 1980. Therefore, we would not object to the procedure proposed in question a.

In response to question b, a member of the Armed Forces is entitled, under 10 U.S.C. § 701(a), to accrue leave at the rate of 2½ calendar days for each month of active service. Section 704 provides that such leave may be taken on a calendar-day basis as vacation or as an absence from duty with pay annually as accruing or otherwise, in accordance with regulations issued by the Secretary concerned. Under the provisions of 37 U.S.C. § 502(b) a member who is authorized by the Secretary concerned to be absent for a period that is longer than the leave authorized by section 701, is not entitled to pay or allowances during that part of his absence that is more than the number of days leave authorized. See 43 Comp. Gen. 539 (1964) and B-175160, April 27, 1972. The DODPM implements the mandate of 37 U.S.C. § 502(b) at paragraph 10305b in requiring that collection will be computed based on the pay and allowances actually received by the member during the period of leave involved. Therefore, it is not permissible to compute the amount of excess leave at the pay rates in effect at separation. The statute makes it clear that the applicable rate to compute excess leave is that which the member received at the time the advance leave was taken.

[B-198460]

Subsistence—Per Diem—Death of Employee on Temporary Duty—Rule for Payment

Employee of General Services Administration died while on temporary duty for which he was authorized per diem allowance. Payment of per diem in these circumstances is subject to same rule which governs payment of compensation to deceased employee; namely, payment may be made to one legally entitled to payment of per diem allowance due deceased employee of United States up to and including entire date of death, regardless of time during day that death occurs, but such payment may not be made for any date later than that. 59 Comp. Gen. 609, modified (extended).

Subsistence—Per Diem—Death of Employee on Temporary Duty—Prepaid Expenses—Reimbursement Basis

Where application of rule stated in this decision in regard to termination of deceased employee's per diem entitlement precludes reimbursement for author-

ized expenses actually incurred by employee and definitely intended for coverage by the per diem entitlement, agency may find that employee's death comes within the scope of our decision *Snodgrass and VanRonk*, 59 Comp. Gen. 609. Accordingly, prepaid expenses incurred by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed.

Matter of: James H. Bailey—Termination of Per Diem Entitlement when Employee Dies on Temporary Duty, October 28, 1980:

The General Services Administration (GSA) has asked this Office to determine when the per diem entitlement terminates in circumstances where an employee on temporary duty dies. For the reasons which follow we conclude that an employee's entitlement to per diem continues through the entire day of the employee's death but may not be further extended to a later date to approximate the planned culmination of the temporary duty and return travel.

Mr. Fred T. Latkowski, Acting Assistant Regional Administrator, Transportation and Public Utilities Service, General Services Administration—Region 5, reports that on December 17, 1979, Mr. James H. Bailey, a motor pool employee with the General Services Administration, Transportation and Public Utilities Service, Motor Equipment Division, was sent on temporary duty travel. Mr. Bailey, whose official station was Red Lake, Minnesota, was detailed to perform temporary duty at the Duluth, Minnesota, GSA Interagency Motor Pool from December 17, 1979, through December 21, 1979. On December 19, 1979, Mr. Bailey suffered an apparent heart attack and was pronounced dead at St. Lukes Hospital, Duluth, Minnesota, at 11:55 a.m.

Mr. Bailey left his home at approximately 8 a.m. on December 17, 1979. Commercial lodgings were obtained in Duluth, Minnesota, at a daily rate of $19.66 with the motel charging for 3 days lodgings, December 17 through 19, 1979. In connection with this temporary duty Mr. Bailey was authorized per diem computed on the "lodgings plus" method not to exceed $35 per day. Following his death Mr. Bailey's remains arrived back at the official station at about 10:30 p.m. on December 20, 1979.

Authorizing officials at the Red Lake, Minnesota, facility requested assistance from the GSA Finance Division, Kansas City, Missouri, on preparation of the travel voucher. The responsive instruction were to claim the actual expenses for preparation of the remains for transportation to the official station, limited to $250, as well as those transportation expenses not to exceed cost by common carrier, and per diem expenses until the time the remains arrived at the official station. Mr. Latkowski questions the continuation of per diem beyond the day of Mr. Bailey's death since compensation may not be paid beyond the day of death of an employee.

Section 5702 of title 5 United States Code (1976), provides that under regulations prescribed by the Administrator of General Services, employees as defined by 5 U.S.C. § 5701 while traveling on official business inside the continental United States are entitled to a per diem allowance at a rate not to exceed $35. Implementing regulations appear in the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973). The pertinent paragraph 1-7.3c(1) of the FTR, as amended effective May 1, 1977, provides that when lodgings are required, per diem shall be established on the basis of the average amount the traveler pays for lodging, plus an allowance of $16 for meals and miscellaneous expenses, not to exceed the maximum amount. This is known as the "lodgings-plus" system of computing allowable per diem. *Hutchinson*, B-191559, November 8, 1978.

Paragraph 1-7.3c(1)(a) of the FTR provides that to determine the average cost of lodging, the *total amount paid* for lodgings during the period covered by the voucher is divided by the number of nights for which lodgings were or would have been required while away from the official station. Moreover, FTR paragraph 1-7.3c(2) requires that the traveler actually incur expenses for lodging before lodging costs may be used in computing per diem. Thus it seems clear that the only lodging expenses which may be reimbursed to a traveler are those that he actually paid in connection with his official travel. There appears to be no basis under the law or regulations to credit or pay an employee for lodging costs on a hypothetical basis. See *Hutchinson*, *supra*, citing *Bornhoft* v. *United States*, 137 Ct. Cl. 134 (1956).

We are unaware of any legal authority which would permit the continued payment of a per diem allowance beyond the date of death of an employee on temporary duty. Therefore, we conclude that the payment of per diem in these circumstances is subject to the same rule which governs the payment of compensation to a deceased employee; namely, payment may be made to the one legally entitled thereto of the unpaid compensation due a deceased employee of the United States up to and including the date of death, but such payment may not be made to include any date later than that. See generally 9 Comp. Gen. 111 (1929); 16 *id.* 384 (1936); 43 *id.* 128 (1963); and 43 *id.* 503 (1964). In addition, the unpaid compensation is payable for the entire day of death—regardless of the time during—the day that death occurs—where the employee was in a pay status immediately prior to his death. See generally 25 Comp. Gen. 366 (1945); and 52 Comp. Gen. 493 (1973).

Accordingly, the per diem allowance authorized for Mr. Bailey is payable to the person entitled thereto under 5 U.S.C. § 5582 (1976) for the period of his temporary duty from December 17 thru the date of his death, December 19, 1979. The voucher submitted should be adjusted to delete the per diem for December 20, 1979, before it is certified for payment.

Mr. Latkowski has also asked whether, "[I]f the per diem entitlement is much less than the actual and necessary subsistence expenses of the traveler, may the agency place the employee on actual expense reimbursement due to unusual circumstances and establish a reasonable allowance for meals?"

We recognize that strict application of the rule in regard to the termination of a deceased employee's entitlement to per diem may work an unintended hardship in certain cases. For example, where specific expenses associated with the temporary duty have been firmly established and incurred in advance, the death of an employee may preclude further reimbursement notwithstanding that such costs were definitely intended to be covered by the per diem allowance. In such circumstances, we believe there is for application the rule we recently adopted for cases where temporary duty is cancelled or curtailed by an agency. In our recent decision *Snodgrass and VanRonk*, 59 Comp. Gen. 609 (1980), we held that when an employee has acted reasonably in incurring allowable lodging expenses pursuant to temporary duty travel orders before they have been cancelled for the benefit of the Government and is unable to obtain a refund, reimbursement of the expenses should be allowed to him as a travel expense to the same extent that they would have been if the orders had not been cancelled.

We believe that the special circumstances which attend the death of an employee while on authorized temporary duty are within the scope of *Snodgrass and VanRonk*, *supra*. Accordingly, prepaid expenses incurred by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed.

In the present case, however, the use of the *Snodgrass and VanRonk* principle would not appear to be necessary. As stated above, per diem is payable for the period through the entire day of Mr. Bailey's death, i.e. for the 3 full days of temporary duty on December 17, 18, and 19. Since he paid in advance for 3 nights lodging, the per diem allowance would appear to cover the expenses incurred.

The voucher prepared in connection with Mr. Bailey's temporary duty may be certified for payment in accordance with this decision.