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[B-209098]

Bids-Invitation for Bids—Amendments—Failure to Acknowledge—Wage Determination Changes—Union Agreement Effect

When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening.

Matter of: Brutoco Engineering & Construction, Inc., January 4, 1983:

Brutoco Engineering & Construction, Inc. protests award to anyone but itself under Invitation for Bids (IFB) N62474-82-B-0244 issued by the Naval Air Station, Alameda, California. The solicitation requested bids to repair concrete aprons at the Naval Air Station. The Navy rejected Brutoco's bid as nonresponsive because it failed to acknowledge amendment 1 containing a revised wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976) (the Act).

Brutoco recognizes that its bid was defective in failing to acknowledge the amendment, but Brutoco maintains that the defect should be waived. Brutoco points out that it bid $1,399,600, compared with $1,494,843 bid by the next low offeror. Brutoco asserts that it did not receive a copy of the amendment.

According to Brutoco, the only class of labor affected by the amendment is cement masons; the difference in the minimum wage rate for this labor classification in the original determination and in the amendment is $1.15 per hour; and the total difference in cost for the entire contract is less than $800.00.[1] Brutoco asserts that it is obligated to pay a wage rate in excess of the minimum shown on the wage rate amendment because of its union agreement.

The issue as we view it is twofold—(1) whether Brutoco obtained any actual or theoretical competitive advantage as a result of its failure to acknowlege the amendment, thus adversely affecting the competitive bid system; and (2) whether there would be an adverse effect on the interests protected by the Act. We are of the opinion that under the circumstances of this case, neither the competitive bid system nor the Act will be subverted by an award to Brutoco.

We have, in limited circumstances, permitted a bidder to cure a defect in an otherwise responsive bid. For example, where an invitation requires a price on every item in a solicitation, a bid that does not contain a price for an item is generally considered to be nonresponsive and must be rejected. This is so because the bidder is not legally obligated to perform the work represented by the

[1] About .8 percent of the $95,213 difference between Brutoco's bid and that of the second low bidder. There is no evidence on the record to rebut these assertions.

missing price. We have, nonetheless, permitted correction of such a bid where the bid not only indicates the *possibility* of the error, but also its exact nature and the price involved. This exception to the general rule is premised on the theory that where the consistency of the pricing pattern on the bid establishes the error and the price, to hold the bid nonresponsive would convert an obvious clerical error of omission to a matter of responsiveness. E.g., *Selland Construction, Inc.,* B-201701.2, May 19, 1981, 81-1 CPD 383.

The procurement regulations also recognize, and we have permitted, the waiver of a bid's technical nonresponsiveness where it was shown that the deviation did not have any relative impact on bid prices because its effect was *de minimus.* See *Roarda, Inc.,* B-192443, November 22, 1978, 78-2 CPD 359. In *Roarda,* we considered the possible impact of price to the Government of .1 percent of the low bidder's total price and 4 percent of the difference between the low and the second lowest bid to be so insignificant as to permit the waiver of the deviation as a minor informality.

When we view the facts of this case in relation to the factors discussed above, we conclude that, at least insofar as the effect on the competitive bid system is concerned, Brutoco's failure to acknowledge the amendment cannot reasonably be construed to affect the competition such that the competitive bid system will be adversely affected if the firm is permitted now to cure the defect by acknowledging the amendment.

However, we also recognize that the Act's principal purpose is to protect a contractor's employees from substandard earnings by fixing a floor under wages on Government projects. *United States* v. *Binghamton Construction Co., Inc.,* 347 U.S. 171 (1953). For that reason, we have always held that the failure to acknowledge a wage rate determination is a material deviation that cannot be waived because the absence of such an acknowledgement would not legally obligate the bidder to pay the specified wages to its employees. *Air Services Company,* B-204532, September 22, 1981, 81-2 CPD 240.

Yet, there are circumstances as a practical matter where the rights of these employees are protected—not by any act of the Government—but through the contractual relationsip of the employees' union and the employer/bidder. Thus, where it can be shown that the employees in question are in fact covered by a contract that legally binds the employer/bidder to pay wages not less than the Secretary of Labor's minimum wage rate determination, we think that the employees have been protected from the evils the Act was designed to foreclose. Because of its legal obligation under a union contract, we do not see how a bidder could refuse to acknowledge a wage rate determination after bid opening by claiming it did not intend to pay the wages set forth in it. Thus, the employer/bidder's ability to disavow its bid on the basis of the wage rate determination alone is so remote that it can be disregarded.

We also recognize that there are other administrative factors involved in the protection of the employees' right to adequate payment, such as the right of the Government to withhold payments to the contractor to the extent necessary to pay the employees the difference between the wages actually paid and those required by the determination. 40 U.S.C. § 276a.

For that reason, we believe the wage rate determination must be acknowleged prior to award, to afford the full panoply of protection contemplated by the Act.

We think, then, that under the circumstances of this case, the failure to acknowledge the amendment is immaterial and that Brutoco should be permitted to cure the technical deficiency in its bid by acknowledging the amendment.

The protest is sustained.

[B-207777]

Foreign Governments—Contracts With United States—Canadian Commercial Corporation—Endorsement of Canadian Bid/Offer

Canadian Commerical Corporation, a corporation of the Government of Canada, is required to submit an unequivocal endorsement of Canadian producer's bid. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases are modified in part.

Contracts—Payments—Progress—Request—What Constitutes—Canadian Bids

Requests for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire.

Matter of: Canadian Commercial Corporation, January 7, 1983:

The Canadian Commercial Corporation (CCC) protests the rejection of a bid submitted by Canada Cordage, Inc., a Canadian producer, to the Defense Industrial Supply Center (DISC), Defense Logistics Agency (DLA), in response to invitation for bids (IFB) No. DLA500-82-2315.

CCC's endorsement of Canada Cordage's bid contained a request for progress payments which DLA construed as imposing a condition that rendered Canada Cordage's bid nonresponsive. CCC contends it did not condition the bid on the receipt of progress payments but merely requested that they be provided if they were available. CCC furthermore contends that its requests cannot be construed as a condition because of CCC's status as an endorser of bids submitted by Canadian producers under Defense Acquisition Regulation (DAR) § 6-501 *et seq.* (Defense Acquisition Circular No. 76-25, October 31, 1980), which sets forth an agreement between the United States and Canada.

The protest is sustained.

CCC is wholly owned by the Government of Canada. It was established in 1946 in order to, among other things, assist in the development of trade between Canada and other nations. CCC provides a variety of services to the Department of Defense (DOD) and acts as the prime contractor on any bid endorsed by CCC or submitted through it to DOD and subcontracts 100 percent of the contract to the Canadian firm submitting the bid. See *Baganoff Associates, Inc.*, 54 Comp. Gen. 44 (1974), 74-2 CPD 56.

Canada Cordage's bid the CCC's endorsement were submitted in accordance with DAR § 6-504.1(b)(2) which provides:

> When a Canadian bid or proposal cannot be processed through the Canadian Commerical Corporation in time to meet the bid opening requirement, the Corporation is authorized to permit Canadian firms to submit bids or proposals directly, *provided* the Canadian bid or proposal and the Canadian Commerical Corporation endorsement are both received by the purchasing office prior to bid opening. [Italic in original.]

See generally, *Ronald Campbell Company,* B-190773, April 17, 1978, 78-1 CPD 296; *Canadian Commerical Corporation,* B-185816, June 21, 1976, 76-1 CPD 396. CCC's endorsement was contained in the following telex to DLA:

> Bid by: Canada Cordage Inc., Kitchener, Ontario, Canada is hereby endorsed (DAR 6-504.1(b)(2)). Duty not to be included for evaluation (DAR 6-1403.1(c)(4)). Double asterisk prime contract with CDN Commercial Corporation, Ottawa, Ontario K1A 0S6. (DAR 6-1406.1(a)). For information F St Germain A/C 819 944-3314 CCC File No. 70K3-82-2315(FS) refers. Double asterisk progress payments, in accordance with governing US procurement regulations, are requested.

The bid was rejected on the basis of DISC Master Solicitation, Clause L-19, "Progress Payments" (DISC 1970 FEB), which was incorporated by reference into the IFB. Clause L-19 implements DAR Appendix E § 504.5. The clause provides:

> *PROGRESS PAYMENTS* (DISC 1970 FEB)
>
> (a) Advertised Procurement: Unless specifically provided for in the Schedule of this Solicitation, progress payments will not be made in connection with this procurement and progress payment clauses will not be included in the contract at the time of award. *Offers conditioned upon provision for progress payments, when such payments are not authorized in the schedule of the Solicitation, will be rejected as nonresponsive.* [Italic supplied.]

DLA construed CCC's request for progress payments as a condition of Canada Cordage's bid which rendered it nonresponsive.

Our Office has held that a bid conditioned on the receipt of progress payments where they are not allowed by the solicitation is nonresponsive in a material respect because it modifies the legal obligations of the parties concerning payments contrary to the express terms of the solicitation. 46 Comp. Gen. 368 (1966).

DLA relies on 46 Comp. Gen. 368 (1966), and 45 *id.* 809 (1966), for the rejection of the Canada Cordage bid. In 46 Comp. Gen. 368, the bidder included the following statement:

In the event Lockheed Electronics Company is awarded a contract resulting from the subject IFB, it is requested that a suitable clause for progress payments to be included therein.

In the 45 Comp. Gen. 809 case, the bidder included in the bid section entitled "Supplies or Services & Prices" the words "Progress Payments Are Requested." In both cases we held that the statements imposed conditions that rendered the bids nonresponsive. Both cases relied on B-154755, September 23, 1964, in which we stated:

While we would agree that in the ordinary sense the word "request" is precatory in nature, *its precise meaning must depend upon the existing circumstances.* * * * Since the invitation provided for a method of payment we think it not unreasonable to view your request as something more than a mere wish or desire. Had your bid been accepted it could have been argued that the Government accepted your request for progress payments and was bound to make payment in accordance therewith. If, as suggested, your request was in the nature of mere hope or wish and you intended to accept a contract subject to the "Payments" article, it was incumbent upon you to clearly express such intention. * * * It is a rule of long standing that where two possible meanings can be reached from the terms of a bid a bidder may not be permitted to explain what he intended since he would then be in a position to affect the responsiveness of his bid. * * * [Italic supplied.]

CCC argues that the present case is more analogous to *Potomac Iron Works, Inc.,* B-200075, January 8, 1981, 81-1 CPD 15, in which a bidder included the following advance payment request in its bid:

Due to nature and supply of specified alloy, advance payment request in the amount of $1,800 each *to secure supply.* Advance payment liquidated in 1 month or less. All *in accordance with* App. E of DAR. * * *" [Italic supplied.]

The procuring agency determined that the request conditioned the bid because it demonstrated that the protester could not secure supply without advance payment. We disagreed:

In our view, Potomac's statement requesting advance payments "to secure supply" in accordance with Appendix E of DAR can reasonably be interpreted only to mean that Potomac was "requesting" advance payments and was not in any way conditioning or qualifying its bid. DAR E-407 permits bidders to request advance payments and there is nothing in Potomac's bid which indicates that it could not obtain the necessary materials in the absence of advance payments. Therefore the rejection of Potomac's bid as nonresponsive was improper and its protest is sustained. * * *

CCC argues that the language contained in its request is virtually identical to the "in accordance with App. E of DAR" language approved in *Potomac,* and is actually clearer because it does not contain the accompanying "to secure supply" language.

Our Office has held that the failure of CCC to submit, prior to bid opening, an endorsement of a bid submitted by a Canadian producer renders the bid nonresponsive. *Ronald Campbell Company, supra; Canadian Commerical Corporation, supra.* In our view, the endorsement must also be unequivocal. If the endorsement contains a condition that the endorsement is valid only if progress payments are to be paid, the bid is nonresponsive.

The word "request" is in the ordinary sense precatory in nature. B-154755, *supra.* CCC's request for progress payments therefore does not render Canada Cordage's bid nonresponsive unless the ex-

isting circumstances indicate that the "request" may have been something more than a mere wish or desire. *Id.* In our view, CCC's request "in accordance with governing U.S. regulations" can reasonably be interpreted only to mean that CCC was "requesting" progress payments and was not in any way conditioning its endorsement. Moreover, we agree with CCC that its request is even clearer than the request involved in *Potomac* because CCC's request did not contain the "to secure supply" language involved in *Potomac.* We conclude that CCC's endorsement did not render Canada Cordage's bid nonresponsive.

We recognize that the facts of this case are similar to 47 Comp. Gen. 496 (1968), 46 *id*, 368, *supra,* and 45 *id*, 809, *supra,* in which we reached a contrary conclusion. However, the rule applied in those cases, that is, whether the "request" is a condition or mere wish or desire, is identical to the rule applied in this case and *Potomac.* To the extent that our application of the rule in those cases may be inconsistent with our descision in this case, those cases should not be followed.

Because we have sustained the protest, we need not consider other issues raised by CCC.

The protest is sustained.

[B-197765]

Agriculture Department—Farmers Home Administration—Loans—Natural Disaster Emergency Loans—Eligibility—Consolidated Farm and Rural Development Act

It is concluded that Farmers Home Administration (FmHA) practice of determining eligibility for natural disaster emergency loans, authorized under 7 U.S.C. 1961 *et seq.*, on county-wide rather than individual crop losses, is unlawful. Legislative history of amendment to 7 U.S.C. 1961, in which area designation requirement was abolished, Pub. L. 95-334, sec. 118, 92 Stat. 426 (Aug. 4, 1978), clearly indicates that Congress intended that programs be made available to farmers on a case-by-case basis. Furthermore, the Secretary of Agriculture has an affirmative duty to make the programs available to potential farm borrowers, and since under current guidelines, farm borrowers, in counties in which more than 25 farmers are affected by disaster, cannot apply for loans unless county-wide crop losses exceed 30 percent, FmHA's conduct of program is contrary to law.

To The Honorable Thomas F. Eagleton, Committee on Appropriations, United States Senate, January 10 1983:

This responds to your letter dated May 25, 1982, requesting our opinion on whether the Farmers Home Administration (Administration) has been unlawfully limiting the availability of natural disaster emergency loans authorized under the Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1013a, 1921 *et seq.* (1976) (Act)). In your view, the Administration's practice of basing loan eligibility on county-wide, rather than individual, crop losses the Act. You asked us to review the loan program's authorizing legislation and advise you as to the legality of the Administration's prac-

tice. As explained below, we agree that the Administration is conducting the program in a manner which is inconsistent with Congressional intent and in violation of the Act.

You are concerned that the Administration may be administering the loan program contrary to the letter and intent of the provisions of its authorizing legislation, 7 U.S.C. §§ 1961 *et seq.* (1976). Generally, under the program, the Secretary of Agriculture makes and insures loans to establish farmers, ranchers, or persons engaged in aquaculture (or United States businesses engaged primarily in farming, ranching or aquaculture) who have suffered production losses as a result of having been affected by a natural disaster or by a major disaster or emergency designated by the President. 7 U.S.C. § 1961(a).

7 U.S.C. § 1970, provides that:

> [t]he Secretary shall make financial assistance under this subchapter available to any applicant seeking assistance based on production losses if the applicant shows that a single enterprise which constitutes a basic part of the applicants' farming, ranching, or aquaculture operation has sustained at least a 30 per centum loss of normal per acre or per animal production or such lesser per centum of loss as the Secretary may determine as amended by Pub. L. 97-35 § 163, approved August 13, 1981, 95 Stat 378, as a result of a disaster * * *.

Your understanding is that the Administration denies individual farmers emergency loans unless county-wide losses exceed 30 percent of normal production in cases where more than 25 farmers have been affected by a disaster. (If fewer than 25 farmers sustain losses, applications for assistance are considered by Agriculture on an individual basis.)

In your view, 7 U.S.C. § 1970 directs the Secretary to consider each farmer's crop reduction individually when determining if the 30 percent production loss eligibility requirement has been met in cases where more than 25 farmers are affected. Any applicant meeting the 30 percent test should be considered for a loan regardless of the percentage of crop loss of others in his county, under your reading of section 1970. The Administration's practice, however, prevents individual farmers from applying for loans where more than 25 farmers in a county are affected even though they have suffered a 30 percent crop reduction if county-wide losses do not average 30 percent.

Upon receiving your inquiry, we asked the Secretary of Agriculture for his comments on the issues you raise. His response indicates that your understanding of the administration's practice is essentially correct, although the Department describes it in a slightly different way. The Administration's procedure when a natural disaster occurs is to determine whether a county has suffered a 30 percent loss, and if so the Secretary designates it as a disaster relief area. Upon such designation, the farmers within the county may apply for loans individually. However, farmers not in a designated county may not receive assistance, unless there are fewer than 25 farms in the county which have suffered a 30 percent loss.

The area designation procedure is prescribed by regulation. 7 CFR § 1945.20 (1982). A guideline established by the Secretary sets forth the requirements that a designation be made on the basis of county-wide losses.

The Secretary's position is that determination of loan eligibility on a county-wide basis is not contrary to the Consolidated Farm and Rural Development Act. In his view, the Act gives the Secretary sufficient discretion in administering the emergency loan program to allow the Department to use the county designation procedure. 7 U.S.C. § 1961, which provides the Secretary the general authority to conduct the program, states in pertinent part:

> The Secretary shall make and insure loans under this subchapter * * * to (1) establish farmers, ranchers, or persons engaged in aquaculture * * * where the Secretary finds that the applicants' farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the United States * * *.

We recognize that under the statute the Secretary is accorded a degree of latitude in administering the emergency loan program. However, the Secretary does not have the discretion to establish a procedure, such as making an area designation based on county-wide losses, which systematically excludes those farmers which the Congress intended the program to benefit.

The legislative history of section 1961 indicates that Congress does not intend that the Administration follow an area designation procedure in conducting the natural disaster emergency loan program. Before amendment in 1978, section 1961 specified that the Secretary was required to designate emergency areas and make loans in such areas if he found that a natural disaster had occurred in that area which had substantially affected farming. However, in 1978, Congress amended section 1961 by deleting the area designation requirement. (Public Law No. 95-334, § 118, 92 Stat. 426 approved August 4, 1978). Congress altered section 1961's language to its current form, quoted above. The provision deleting the requirement was a Senate floor amendment to the Senate's version of the bill which was later enacted as the Agriculture Credit Assistance Act of 1978. Senator Allen, Chairman of the Subcommittee on Agriculture Credit and Rural Electrification, offered the amendment, apparently on the recommendation of the Farmers Home Administration. 124 Cong. Rec. S 12139 (Daily ed. May 2, 1978) (remarks of Sen. Allen). He explained the amendment's purpose as follows:

> The purpose of this amendment, which contains all the present provisions in section 114, is to give the Secretary of Agriculture greater discretion in making available emergency loans. It will permit the Secretary to adopt revised procedures that would make emergency loans more readily available to farmers, ranchers, and aquaculture operators after the occurrence of a natural disaster, therefore making assistance available to disaster victims on a more timely basis. *id.* at S 12139

The explanation of the Conference Committee Chairman, Senator Talmadge, during the Senate's consideration of the conference report also indicates that Congress intended that the Administra-

tion determine disaster loan eligibility on an individual basis. Senator Talmadge said:

> In the past, the emergency loan program could not be put into effect without going through the process of having an entire county declared a disaster, under this bill, the emergency program administered by the Farmers Home Administration can be made available to individual farmers on a case-by-case basis. This is a significant improvement over the existing law. 124 Cong. Rec. S 21996 (daily ed. July 20, 1978) (remarks of Senator Talmadge).

Further, Representative Jones, chairman of the House of Representatives Agriculture Committee's Subcommittee on Conservation and Credit, during the House of Representative's consideration of the conference report stated:

> Another change which should go a long way to reducing frustrations of farmers and their Congressmen is natural disaster situations. One of the first actions I took as chairman of the Subcommittee on Conservation and Credit was to hold hearings on our emergency programs especially as they were operating under the drought conditions. This bill makes some changes in the FmHA disaster loan program which will make it operate much more effectively.
>
> The secretarial emergency designation would no longer be required in order to make disaster loans to farmers. Instead emergency loans would be made when the applicant's farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the United States or by a major disaster. I feel this simplified procedures will end a lot of the problems with this program. 124 Cong. Rec. H21752 (daily ed. July 20, 1978) (remarks of Rep. Jones).

For other portions of the legislative history of section 1961 which indicate that Congress intended that the Secretary administer the program on an individual basis, see 124 Cong. Rec. H 21749 (daily ed. July 19, 1978) (remarks of Rep. Foley); 124 Cong. Rec. S 21998 (daily ed. July 20, 1978) (staff summary of conference substitute); and the Joint Explanatory Statement of the Committee of Conference, reprinted in the U.S. Code Cong. and Admin. News at 1185, 1186 (1978).

The cited legislative history shows that Congress believed that the disaster loan program would operate more effectively if the area designation requirement was abolished. Accordingly, in light of the legislative history discussed above, it is clear that Congress intended that the Administration stop following the area designation procedure and begin determining disaster loan eligibility on a case-by-case basis after the 1978 amendment to 7 U.S.C. § 1961.

The Secretary contends that notwithstanding this legislative history, the Act gives him sufficient discretion to continue to use the county designation procedure. He reads 7 U.S.C. § 1961 as setting forth the basic eligibility criteria for emergency loans. He contends that 7 U.S.C. § 1989, which authorizes him to make regulations and to prescribe conditions for making loans, permits him to "issue regulations necessary to define a natural disaster along with establishing guidelines as to the manner of determining whether or not an area is substantially affected by such a natural disaster." The Secretary also acknowledges that under his interpretation of 7 U.S.C. § 1989 he has the discretion to make loans available to individual farmers. He informs us, however, that the Department has con-

cluded that the continued use of the county designation process is necessary for "administrative convenience."

The provisions of 7 U.S.C. § 1961 are mandatory, not permissive; the Secretary may not ignore the section's directives. In *Berends* v. *Butz*, 357 F. Supp. 143, 150 (1973), the Secretary of Agriculture made a similar argument to justify terminating an emergency loan program under the previous version of this Act. The United States District Court for the District of Minnesota stated:

> "Shall" is mandatory language * * * The language in the statutes and regulations relied on by plaintiffs is not of a permissive nature, but affirmatively directs defendants to perform. Whereas the Secretary may have a great deal of discretion in the administration of emergency loans, he has no license to act in violation of mandatory language of statutory laws or agency regulations. *id.* at 150.

See also *Dubrow* v. *Small Business Administration*, 345 F. Supp. 4 (D. Cal. 1972) where the right to apply for Small Business Administration disaster loans was at issue. The Government contended that under the Disaster Relief Act of 1972, the agency had absolute discretion to determine whether or not to make a loan. The Court stated:

> Whatever the limits on this Court's authority to review denial of an application, they do not preclude judicial review when the SBA has refused to follow its statutory duty to determine whether the loan to a given applicant is necessary or appropriate. *id.* at 8, 9.

Accordingly, as subsection (a) states, if the Secretary finds that an applicant's farming operations, as opposed to designated areas, have been substantially affected by a natural disaster, he must make or insure a loan in accordance with the program's authorizing provisions (assuming available funds and that the Secretary determines that the applicant is otherwise eligible.) He may not conduct the program under a policy which systematically excludes individual farmers made eligible for loans by the statute.

In our view, the Secretary's County designation policy could operate to frustrate the Act's clear mandate that all qualified farmers who have suffered the requisite minimum loss of 30 per cent be eligible for a disaster loan. However, the Secretary's policy would arbitrarily exclude from consideration, regardless of the extent of his loss, a farmer who happens to live in a county where at least 25 of his fellow farmers are affected by a natural disaster but where the average loss, county-wide, fell a little short of 30 per cent.

The guideline the Secretary uses to determine what constitutes a substantial loss is set forth in the 1982 Emergency Operations Handbook for USDA State and County Emergency Boards. Under the guideline, a substantial loss is defined as, "at least 30 percent dollar loss to all cash crops grown in the County during the disaster year." Conceivably, there may be counties where a natural disaster has affected more than 25 farmers, but the county-wide production loss is under 30 percent. Farmers who have suffered individual losses greater than the 30 percent prescribed by 7 U.S.C. § 1970 would thus be automatically precluded from applying for

loans. A farmer residing in a designated county who has suffered a 30 percent loss could get a loan, while his neighbor residing in a non-designated county, who has suffered a much greater loss could not apply for assistance because the losses in his county, suffered by more than 25 farmers, did not meet the Secretary's guideline.

Accordingly, in our opinion, the Secretary's guideline which provides in effect that he make his determination to accept applications on whether more than 25 farmers have suffered substantial losses based upon county-wide losses is inconsistent with the legal requirement that he make the program available to all who may qualify. The deficiency could be cured, among other ways, if his policy was to make designations in counties where he found that more than 25 farmers had suffered at least a 30 percent loss instead of requiring a county-wide loss of 30 percent. In that way the program would be available to all farmers—by county designation in counties where more than 25 farmers have been affected by a natural disaster, and by FmHA State Director authorization in counties where 25 or fewer farmers have been affected.

[B-206339]

Checks—Payees—Deceased—Heirs' Claim—Fact of Possession—Insufficient to Support Payment

Claimants assert entitlement to proceeds of 13 Treasury checks issued in 1936 and 1937. Original payee died in 1954. Payee had indorsed one check incident to unsuccessful attempt to negotiate it in 1939, but other 12 were unindorsed. Checks were found among personal effects of payee's nephew, who was not a legatee under payee's will and who died in 1979. Claimants are heirs of nephew. Mere fact of possession does not establish *inter vivos* gift or other basis of entitlement, and record contains no evidence of delivery of checks by payee to nephew. Therefore, General Accounting Office finds no basis to allow claim, under either Uniform Commercial Code or relevant state law.

Matter of: Estate of William A. Sixbury—Claim for Proceeds of Unpaid Treasury Checks, January 17, 1983:

This is a claim for the proceeds of 13 Treasury checks issued in 1936 and 1937. The claimants allege that the checks were a gift from the payee to his nephew and that the nephew subsequently died and left the checks to them. The matter has been referred to our Office by the Department of the Treasury pursuant to 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)), which provides that where a doubtful question of law or fact exists regarding the presentation of a United States Treasury check for payment, "the Secretary [of the Treasury] shall defer payment until the Comptroller General settles the question." The doubtful question in this matter is whether the named payee transferred or delivered the checks to his nephew with intent to make a gift, or whether the facts of this case are otherwise legally adequate to permit payment. We conclude that there is insufficient evidence to allow payment of the proceeds to these claimants.

Between June 1936 and August 1937, the Treasury Department issued 13 Treasury checks totalling $18,828.97 to George T. Howeth, a gold dealer in Syracuse, New York. Each check bore the notation that it was issued for "bullion." Except for one unsuccessful attempt by Mr. Howeth to cash one of the checks in 1939, no claim was made on any of the checks until February 1980, when the Treasury Department was informed that the checks (12 of which were not indorsed by Mr. Howeth) had been found among the personal effects of a Mr. William A. Sixbury, of Syracuse, New York, who was the nephew of Mr. Howeth, but not a legatee under Mr. Howeth's will. Mr. Sixbury died in 1979. The claimants in the case, Harry J. Snyder and Mary Snyder, are the residuary legatees of Mr. Sixbury's estate.

Few facts are known beyond those stated above. Mr. Howeth did not mention the checks in his will. His entire estate was left to his wife, Lucy Howeth, who died in 1956. She in turn left her estate to her brother, Harry J. McCarthy, Sr., who died in 1963. Mr. McCarthy's estate, with the exception of one specific bequest to his son, Harry, Jr., was left to his wife Agnes F. McCarthy.

The will of Mr. Sixbury similarly does not mention the checks or how he gained possession of them.

The claimants have argued that the checks must have been a gift from Mr. Howeth to Mr. Sixbury. However, they have presented no evidence of this. Both Mr. Sixbury and Mr. Howeth are dead, and the residual heirs of Mr. Howeth, Agnes McCarthy and Harry McCarthy, Jr., have not been located. Thus, there is no way for us to ascertain how Mr. Sixbury gained possession of the Treasury checks which were payable to Mr. Howeth.

Analysis

Federal law rather than state law governs the rights and duties of the United States on commercial paper that it issues. To hold otherwise would cause an undue diversity in results "by making identical transactions subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1942). More specifically, our Office has held that the Government should follow the Uniform Commercial Code (UCC) "to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972).

Under the UCC, the rights of a person in possession of an instrument depend largely on whether that person qualifies as a "holder." If the person is a "holder," he may negotiate the instrument and enforce payment in his own name. UCC § 3-301. Mere production of the instrument is sufficient, and a party asserting a defense has the burden of proving it. UCC § 3-307 and Comment 1 thereto.

With respect to an "order" instrument (all of the checks in question are order instruments), status as a holder requires both delivery and indorsement. UCC § 3-202. Without indorsement, a transferee of an order instrument is not a holder. See UCC § 3-201, Comment 8. Mere possession of the instrument does not suffice. With respect to the 12 unindorsed checks, therefore, Mr. Sixbury could not be viewed as a "holder," nor can his heirs. Without the status and rights of a holder, the "person in possession of an instrument must prove his right to it and account for the absence of any necessary indorsement." UCC § 3-307, Comment 2. See also UCC § 3-201, Comment 8. Since there is no indorsement and no evidence of delivery by Mr. Howeth to Mr. Sixbury, the UCC would appear to preclude recovery.

With respect to the one check that was indorsed by Mr. Howeth, claimants argue that Mr. Sixbury became a holder and that the executors of his estate acquired this status. However, the record shows that the indorsement was incident to an attempt by Mr. Howeth to negotiate the check, and not to any transfer of the check to Mr. Sixbury. The check in question was dated September 14, 1936. Mr. Howeth indorsed it pursuant to an attempt to negotiate it in January 1939. Under the law in effect at that time, Government checks generally had to be negotiated by the end of the fiscal year following the fiscal year in which they were issued. 31 U.S.C. § 725t (1934 ed.). After that time, negotiation required settlement by the General Accounting Office and the issuance of a substitute check.[1] The check in question was returned to Mr. Howeth unpaid because he had exceeded the time limit, and he apparently made no further attempts (nor did Mr. Sixbury) to negotiate it or any of the other 12 checks. Thus, the record contradicts any inference that the indorsement on the September 14 check bore any relationship to a transfer to Mr. Sixbury. As with the other 12 checks, there is no evidence of delivery and therefore no basis for recovery.

Claimants in this case can recover only if the mere fact of possession is sufficient to establish an entitlement or perhaps to create the presumption of a gift. As seen above, the UCC does not provide the basis for recovery.

To determine whether the checks in Mr. Sixbury's possession were a gift, we also turned to New York law for guidance. Under New York law, the essential elements of an *inter vivos* gift are (1) delivery of the property by the donor to the donee, (2) intent to pass title, and (3) acceptance by the donee. See *First National Bank of Lockhaven* v. *Fitzpatrick,* 289 N.Y.S. 2d 314, 320 (1968). The law never presumes a gift. *Rabinof* v. *United States,* 329 F. Supp. 830, 839 (S.D. N.Y. 1971). All three facts, but especially the first two,

[1] Now, with certain exceptions, Treasury checks may be negotiated without time limit. 31 U.S.C. § 3328 (formerly 31 U.S.C. § 132).

should be proven. The burden of proving a gift is upon those claiming it, and the evidence or proof must be clear and convincing.

Based on the record in this case, we have no evidence as to any of the essential elements. The claimants know only that the checks were found with Mr. Sixbury's personal effects after his death. From this information, we cannot assume that delivery took place, that Mr. Howeth had donative intent, or that Mr. Sixbury accepted the gift sometime between 1937 and 1954, the year of Mr. Howeth's death. Possession by one claiming property as a gift is insufficient to prove a valid gift. *Duboff* v. *Duboff,* 186 N.Y.S. 2d 760 (1959); accord, *In Re Hackenbroch's Estate,* 182 N.E. 2d 375, 377 (D. Ill., 1962).

In conclusion, we fail to find evidence of either the proper requirments for the transfer of the negotiable instruments or of the essential elements of a gift. Therefore, on the facts presented, we determine that there is no basis for the Treasury Department to make payment to Mr. and Mrs. Snyder.

[B-207177]

Contracts—Negotiation—Requests for Proposals—Specifications—Specificity—Sufficiency

Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Agency Determination to Use Less Restrictive Specifications

Protest urging that performance type specifications be revised to require certain elements of protester's equipment configuration is in effect an allegation that a more restrictive specification should be used. Agency determination that performance type specification is adequate and that conforming equipment will meet Government's needs will not be questioned.

Contracts—Negotiation—Offers or Proposals—Evaluation—Life-Cycle Costing—Indefinite, Future Needs

Where agency specifies additional features of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimates of the usage of those features and they need not be included in the overall price evaluation.

Matter of: Cincinnati Bell Telephone Company, January 17, 1983:

Cincinnati Bell Telephone Company protests that request for proposals No. 5FCC-TC-81-137, issued by the General Services Administration to obtain a telephone system for the Cincinnati, Ohio

area, should be revised to clarify the Government's requirement and to provide a common basis for evaluation. We deny the protest.

The solicitation calls for an indefinite quantity, indefinite delivery, fixed price contract, with minimum ordering requirements, covering 10 years, including option periods. The selected contractor will engineer, install and maintain a complete system with 4,500 to 6,000 telephones, including necessary lines, switching gear and related equipment needed to serve some 150 Federal agencies located throughout the Cincinnati area. Offerors are to propose the types of equipment that they believe will satisfy the Government's specified technical requirements and service levels, together with unit prices for that equipment, on the basis of lease, purchase, or combinations thereof. Award is to be made on the basis of the technically conforming proposal that offers the lowest evaluated life cycle cost.

GSA originally issued the solicitation on April 20, 1981, but due to numerous questions raised by offerors, GSA canceled, then revised and reissued the solicitation on November 11, 1981. Since that time Bell has raised additional objections to the terms of the solicitation in a series of letters to GSA, many of which GSA resolved to Bell's satisfaction. The remaining issues were timely protested to this Office by Bell's letter of April 19, 1982, the day before proposals were due. A number of these issues have also been resolved; only those discussed below remain open. GSA advises that it is continuing to negotiate with the offerors pending our decision on the protest.

Bell first contends that the solicitation is defective because it fails to adequately describe how the six-button telephones specified in clause T-550 will be used. Bell argues that these six-button telephones are only one portion of a key telephone system and that additional information, particularly the number of key units and key line units, the number of telephones associated with each key line unit, and the number of lines connected to each telephone must be provided to enable offerors to estimate costs. In the absence of such information, Bell argues, the specification is indefinite and ambiguous, so that offerors are not competing on a common basis. In support of its position, Bell has submitted examples of typical key telephone systems showing widely varying cost differences. Bell urges that GSA should revise the solicitation to define typical key telephone system configuration in order to assure equality in the bidding process.

Bell further contends that clause T-550 of the solicitation fails to properly define expansion requirements for the key telephone systems. According to Bell, although the clause shows anticipated growth in the number of six-button telephones, it does not show anticipated growth in the number of key telephone units. Moreover, Bell argues, GSA's projections for the number of six-button telephones needed in the 96th month of the contract is not consistent with the number of key telephone units specified in Attachment 2,

clause T-554. Bell therefore concludes that the future requirements are also ambiguous.

GSA contends that offerors have all the information needed to prepare adequate proposals. GSA points out that its requirements are stated in terms of number of telephones, numbers of lines, types of services provided, levels of service, and building locations, but no equipment configuration is specified; offerors are to propose that combination of equipment they believe best serves the Government's needs. Since each offeror is required to propose the same quantity of telephones, the same equipment capacity, and the same service levels and since as many other costs to the Government as are identifiable, quantifiable and reasonably certain to be incurred are taken into account in the price evaluation, GSA argues that the relative standing of the offerors' price proposals is reflective of their ultimate probable cost to the Government.

GSA asserts that Bell's key station equipment which operates the six-button telephones is not configured the same as its competitors. Under the Bell system, it is necessary to install a key telephone unit on a common control unit to control each six-button telephone. Each common control unit may control one or more key systems and is separate from the system's main switching gear. Other vendors, however, offer main switching gear which control key systems directly, without the need for an intervening common control unit.

GSA also argues that Bell's examples of different, but typical, key system arrangements reflecting widely varying costs are misleading since the arrangements differ primarily in the number of six-button telephones installed, which presumably will be priced separately by Bell. As to any alleged inconsistency between the stated future requirements and Attachment 2, Clause T-554, GSA points out that the latter is simply a listing of equipment now installed, provided for reference purposes only, and that the projected contract requirements will vary over time as indicated in the tables at clause T-550.

The determination of the Government's minimum needs and the method of accommodating them are properly the responsibility of the contracting agency. *Maremont Corporation*, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. However, the solicitation requirements must be free from ambiguity and describe the minimum needs of the procuring activity. *Klein-Sieb Advertising and Public Relations, Inc.*, B-200399, September 28, 1981, 81-2 CPD 251. This does not mean that all elements of the requirement must be so precisely specified that the contract is free from risk; rather, some risk is inherent in most contracts and offerors are expected to allow for risks in their offers. See *Klein-Sieb Advertising and Public Relations, Inc., supra.*

We believe that the Government's minimum needs have been specified with the requisite degree of specificity here, given the

nature of the procurement, contemplating a changing level of performance over a 10-year period.

Knowledgeable offerors can adequately protect themselves in these circumstances, through their proposed pricing structure. Bell is free to estimate the cost of the equipment needed to support a key telephone system and include those costs in its price for individual six-button telephones, or it may choose to avoid the risk of estimating costs on that basis and separately price each component of its key telephone system. In any event, given GSA's uncontradicted assertion that Bell's competitors offer alternative configurations for supporting key telephone systems that also satisfy the Government's minimum needs, GSA has no basis for restricting competition to Bell's type of equipment, which specifying key units and key line units would necessarily do. See *Ultraviolet Purification Systems, Inc.*, B-192783, August 20, 1979, 79-2 CPD 132. Consequently, we cannot agree with the assertion that the components of Bell's key line system should be specified.

Originally Bell argued that clause T-413, which requires that replacement parts be available for the system life, was ambiguous because it could refer to either the 10-year contract life or the 18½-year system life assumed in clause T-419 for cost evaluation purposes. In response, GSA stated the contractor will not be required to make replacement parts available beyond the life of the contract since 40 U.S.C. 481(a)(3) (1976) establishes a maximum period of 10 years for telecommunications contracts. Bell now contends that there is a material contradiction between clauses T-413 and T-419 because they contemplate differing periods of time. However, Bell has not explained why the two differing periods create a contradiction and therefore we deny Bell's protest in this respect.

Bell also contends that GSA should provide offerors with additional information for estimating the cost of providing radio paging, dial dictation and centralized attendant services. Clause T-540 identifies these as additional features which the offered equipment must be capable of providing should the Government, in its discretion, decide to procure them. Offerors are required to price these features, although that price will not be included in the Government's cost evaluation.

Bell argues that it cannot prepare prices for these features without an estimate of their usage during the life of the contract and an indication where GSA intends to locate its attendant services. Further, Bell emphasizes that centralized attendant services are required to operate the system in any event, pointing out that GSA now employs five attendants in Cincinnati.

GSA replies that these additional features have been identified as future potential requirements of the Government that must be included in the solicitation to assure their availability should they be needed at a later date. However, since there is no present or defined future requirement for these features, their anticipated

usage has been described with the greatest degree of specificity possible, *i.e.,* none, and they are therefore not included in the cost evaluation. As to the necessity for centralized attendant services, GSA recognizes that it presently employs people in Cincinnati for this purpose, but consistent with its policy of reducing the number of attended locations nationwide, GSA does not intend to provide this service with the new telephone system. As a consequence, GSA concludes that it has no definite requirement for any of the questioned additional features.

Where appropriate, an agency's minimum needs may properly include consideration of system capabilities that will permit the Government to satisfy potential requirements that may arise in the future. See *California Computer Products, Inc.,* B-193329, July 3, 1979, 79-2 CPD 1. However, the agency's cost evaluation need not include prices for items where the agency lacks the data on which it believes a reasonably accurate estimate can be based. See *Tex-La Cable T.V., Inc.,* B-201558, April 5, 1982, 82-1 CPD 300. We believe that GSA has reasonably demonstrated that although it has a potential requirement for these additional services, it does not have sufficient information on which to base a reasonably accurate estimate.

Bell also argues that GSA has failed to adequately define its requirements for maintenance and associated services specified in clause T-507 and for engineering and consulting services specified in clause T-505. Bell argues that offerors need additional information on the anticipated amount of these services to prepare their proposals and asks that GSA provide estimates in the same manner that it did under clause T-419 concerning the anticipated number of telephone installations, removals, and rearrangements that will occur during contract performance.

GSA replies that offerors normally include the cost of maintenance service in their price for the equipment proposed, but that offerors are free to propose separate maintenance prices based upon their knowledge of their own equipment. GSA further states that it has not included engineering and consulting services in its price evaluation because it anticipates only a negligible amount will be required. GSA explains that most of these services are provided incident to system design and included in the price of the equipment; that GSA maintains its own professional staff for any additional work; but that it is desirable to obtain a price for these services in case of unforeseen events, such as disasters. As a consequence, GSA contends that it has provided offerors with all the information required to calculate costs and prepare proposals and that all costs reasonably certain to be incurred will be taken into account in the Government's price evaluation.

We believe that GSA's explanation is persuasive. Given the circumstance that maintenance service is customarily included in the price of equipment and the fact that maintenance will vary with

the type of equipment proposed, GSA's treatment of maintenance prices is unobjectionable. Further, because the requirement for maintenance service is dependent upon the type of equipment proposed, this requirement is distinguishable from such follow-on services as telephone relocations, which are dependent upon Government action. Further, GSA's assertion that, although the amount of engineering and consulting services to be ordered cannot be predicted with a reasonable degree of accuracy, only a negligible amount is anticipated, is uncontradicted by the record. Consequently, the price of such services does not appear to be necessary for price evaluation. See *Tex-La Cable T.V., Inc., supra.*

The protest is denied.

[B-206196]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Appeal of Agency's Analysis

Protest of Army's consideration of appeal of comparative cost analysis and agency's subsequent decision to sustain that appeal and to order new management study under Office of Management and Budget (OMB) Circular A-76 analysis is subject to General Accounting Office review where solicitation establishes ground rules for the appeal process.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Cancellation of Solitication—Specification Changes—Minimum Needs Overstated

Cancellation of invitation after bid opening is proper where Government determines, albeit after allegedly inappropriate consideration of OMB Circular A-76 appeal, that solicitation's statement of work overstates actual minimum needs and that Government is no longer able to furnish a significant amount of the Government Furnished Equipment identified in the solicitation.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Cancellation of Solicitation—Specification Changes—Anticipated Prior to Award

Agency may not avoid canceling solicitation where it is aware before award of need for specification changes by use of Changes and Government-Furnished Property clauses which provide for an equitable adjustment for property not delivered by the Government.

Bids—Preparation—Costs—Noncompensable—Invitation Properly Canceled

Claim for bid preparation costs is denied where the claimant has not shown that agency has abused its discretion in canceling the solicitation.

Matter of: D-K Associates, Inc., January 18, 1983:

D-K Associates, Inc. protests the Army's cancellation of invitation for bids DAKF27-80-B-0206 for the operation of the Training and Audiovisual Support Center at Ft. Meade, Maryland. The solicitation, which was issued as a part of a cost comparison under

Office of Management and Budget (OMB) Circular A-76, was canceled primarily because an agency management study resulting from an appeal of the cost comparison analysis revealed inaccuracies in the solicitation's list of Government Furnished Equipment (GFE). Essentially, D-K contends that the appeal of the cost comparison should not have been considered, that the management study should not have been conducted and that in any event, the Army did not have compelling reasons to cancel the solicitation. D-K claims that it is entitled to either contract award or bid preparation costs. We deny the protest.

In 1981, the Army developed a statement of work, conducted a management study and prepared an in-house cost estimate in anticipation of issuing the subject solicitation. The estimate was based on the assumption that 43 civilian employees and seven buildings would be required for the Army's operation of the Center. The Army also concluded that $1.2 million in GFE would be provided the contractor if the function were contracted out.

The Army issued the solicitation on May 7, 1981. The solicitation advised bidders that it was part of a cost comparison to determine whether accomplishing the work in-house using Government employees or by contract would be more economical. The solicitation also provided that, prior to a final determination regarding contracting out, interested parties would be given time to review the cost comparison data and could appeal the results of that comparison. Bids were opened on June 22 and D-K's bid was the lowest of the five bids received from commercial firms. The agency determined as a result of its cost comparison that it would be most economical to contract out the function to D-K.

On July 17, a civilian employee of the Center appealed the agency's proposed decision to contract out this activity. The employee contended that the cost comparison was not based on the optimum organizational structure for the operation of the Center and argued that the organization and staffing could be improved at savings to the Government. On September 3, the U.S. Army Forces Command Appeals Board sustained the appeal in part and directed Ft. Meade to conduct a new management study and develop a revised estimate for performance in-house. By letter of October 8, D-K protested to the Army that its consideration of the appeal was improper. The Army denied the protest by letter of November 10.

Meanwhile the new management study was completed on November 6. It produced recommendations to close some buildings and renovate others, which would result in the use of only four buildings for the Center instead of the seven stated in the solicitation's statement of work and in the reduction of the personnel needed from 43 to 32. In conjunction with the new study, Ft. Meade reviewed the solicitation's provisions on workload and GFE. A complete inventory of the Center revealed the unavailability of approximately $368,000 worth of equipment identified as GFE in the

original statement of work, as well as approximately $86,000 worth of equipment acquired subsequent to the development of the statement of work and not listed in the solicitation. Based on these findings and the fact that the prolonged evaluation period would require that the proposed start date be delayed at least 6 months, the agency concluded that the solicitation should be canceled. It informed D-K of its decision by letter of January 11, 1982.

The agency canceled the solicitation notwithstanding a memorandum dated November 25 from the Deputy Assistant Secretary of Defense (Facilities, Environment and Economic Adjustment) concurring with an Office of Federal Procurement Policy (OFPP) letter dated November 19 which concluded that the appeal should not have been considered. The OFPP letter stated that it was improper for contracting activities to consider appeals involving OMB Circular A-76 determinations after bid opening where the issue raised concerns whether the agency has chosen the most efficient approach for performing the function in developing its in-house cost estimate. The Army, however, states that it decided to complete its reevaluation since by the time it received the November 25 memorandum the new management study was completed and in the final stages of review and the preliminary inventory showed a substantial variance from the list of GFE included in the solicitation.

D-K objects to the rejection of its low bid and the cancellation of the solicitation on two main grounds. First, the protester contends that the appeal filed by the Center employee should not have been considered and the second management study resulting from that appeal should not have been conducted because neither the solicitation nor agency regulations contemplated appeals based on the management approach chosen by the Government. Second, the protester argues that even if the appeal and the resulting management study were proper, the conditions cited by the agency as justifying the cancellation are insignificant.

D-K's position concerning the propriety of the appeal and the second management study is fourfold. First, D-K asserts that the appeal challenged the original management study and not the cost comparison analysis as provided for in the solicitation, Department of the Army (DA) Circular No. 235-1, para. 3-6d and OMB Circular A-76. Second, the protester states that no evidence has been introduced to indicate that the conclusions of the original study were unfounded or that the list of GFE was inaccurate at the time the cost comparison analysis was conducted. Third, D-K claims that the appeal was lodged after exposure of its bid and that elements of that bid subsequently formed the basis of the employee's appeal as well as the basis of the reorganization plan in the second study. Lastly, D-K asserts that the new study was contrary to the OFPP letter as adopted by the Department of the Defense (DOD).

The Army states that we should not consider this matter because the cost comparison analysis involves OMB Circular A-7, and im-

plementing Department of the Army regulations, which reflect only executive policy and which we regard as outside the scope of our Bid Protest Procedures, 4 C.F.R. Part 21 (1982).

Generally, we do not review an agency decision to perform work in-house rather than to contract for the services because we regard the decision as a matter of policy within the province of the Executive branch. *Midland Maintenance, Inc.*, B-202977.2, February 22, 1982, 82-1 CPD 150. Where, however, an agency uses the procurement system to aid in its decision making, spelling out in the solicitation the circumstances under which the Government will award or not award a contract, we will review whether the agency followed announced procedures in comparing in-house and contracts costs. We do so because we believe it would be detrimental to the system if, after the agency induces the submission of bids, it deviates from the ground rules or procedures announced in the solicitation and which were relied on by those induced to bid. See, e.g., *Mar, Inc.*, B-205635, September 27, 1982, 82-2 CPD 278; D-K Associates, Inc., B-201503, B-201625, September 10, 1981, 81-2 CPD 208.

Our prior cases have involved a challenge to the actual cost comparison that was made, with the protester asserting that the comparison rules announced in the solicitation—usually those found in OMB's Cost Comparison Handbook or in other agency regulations—were not followed. See, e.g., *Mar, Inc., supra; Crown Laundry & Dry Cleaners, Inc.*, 61 Comp. Gen. 233 (1982), 82-1 CPD 97, *affirmed* B-204178.2, August 9, 1982, 82-2 CPD 115; *Serv Air, Inc., A VCO,* 60 Comp. Gen 44 (1980), 80-2 CPD 317. This case is somewhat different because the protester does not challenge the cost comparison; rather, it challenges the Army's decision to consider the employee's appeal and to conduct a second management study, and ultimately to cancel the solicitation and resolicit. This difference is not material to the question of whether we should consider the protest, however, because the invitation contained a provision dealing with appeals and, in our view, established the ground rules for the cost comparison appeal process. Moreover, the challenge to the cancellation of the invitation is appropriate for our review since we believe the general rules applicable to cancellation after bid opening, *see* Defense Acquisition Regulation (DAR) § 2-404.1 (1976 ed.), are applicable to solicitations issued for Circular A-76 cost comparison purposes since the competitive bid system is involved.

Under the circumstances, however, we need not consider the propriety of the Army's consideration of the appeal because we believe that regardless of whether the appeal should have been considered the cancellation[1] of the invitation was appropriate.

[1] The Army contends that the protest of the cancellation is untimely. It argues that D-K was told by the contracting officer in a telephone conversation on December 22 that the solicitation was to be canceled, but D-K did not file its protest until January 26, more than 10 working days after it had knowledge of the basis for the protest. *See* 4 C.F.R. § 21.2(b)(2) (1982). However, on December 22, D-K was merely advised of the agency's intent to cancel—no final decision had been made at that time. The Army did not actually cancel the solicitation until it issued its Janauary 11 letter notifying D-K of the cancellation. As D-K filed its protest on January 26, within 10 working days of its receipt of that notification, the protest is timely.

The general rule regarding cancellation after bid opening and the exposure of bids is that such cancellation is not proper unless it is warranted by a cogent and compelling reason. *McGregor Printing Corporation*, B-207084, B-207377, September 20, 1982, 82-2 CPD 240. One recognized basis for cancellation is that the solicitation did not reflect the Government's actual minimum needs. See *Praxis Assurance Venture*, B-190200, March 15, 1978, 78-1 CPD 203. As we pointed out in that case:

> * * * when * * * an invitation for bids contains specifications which overstate or misstate the minimum needs of the procuring agency, or the agency decides after bid opening that the needs of the Government can be satisfied by a less expensive design differing from that on which bids werre invited, the best interest of the Government requires cancellation of the invitation. * * *

Here, even if we assume that the Army's consideration of the appeal was inappropriate, it learned as a result of the appeal and subsequent management study that its original statement of work overstated its actual needs and that there was a less expensive approach to satisfying those needs. While the Army should have determined the most advantageous approach prior to soliciting bids, nothing requires it to be locked into a less advantageous approach, either through in-house performance or contracting out, which exceeds its minimum performance needs. That an agency will discover after bid opening that its needs have been overstated in a solicitation is simply one of the risks faced by those who bid on Government contracts.

Moreover, the disparity discovered with respect to the GFE also provides a basis for the cancellation. The variance discovered in the $1.2 million worth of GFE listed in the solicitation was substantial, amounting to $368,000. The agency also found that equipment worth $86,000 had been acquired since the list in the IFB had been computed. Although it is true, as D-K argues, that these changes in the GFE list did not alter the description of the services needed in the solicitation, the change in the GFE list significantly alters the resources available for use by both commercial bidders and the Government in performing these services and thus changes the basis upon which bidders and the Government computed their prices. In such circumstances, we have recognized that cancellation is appropriate. See *Monarch Enterprises, Inc*, B-201688, June 15, 1981, 81-1 CPD 483; *Aul Industries, Inc.*, B-195887, February 6, 1980, 80-1 CPD 98.

Further, we do not agree with D-K's assertion that this matter could be accommodated by the Government-Furnished Property (GFP) [2] and the Changes clauses included in the solicitation. Both provisions (the GFP clause provides for an equitable adjustment under the Changes clause for property not delivered by the Government) are concerned with changes which occur after the award of

[2] There is no diferences between GFE and GFP here. The list in the solicitation was designated GFE while the clause uses the term GFP.

the contract and are not to be used to make changes which like these are known prior to contract award. See *Central Mechanical, Inc.*, B-206030, February 4, 1982, 82-1 CPD 91; DAR §7-104.24(f). The integrity of the competitive bidding system requires that the agency not award a contract competed for under one set of provisions with the intention of changing to a different set after award. See *W. M. Grace, Inc.*, B-202842, August 11, 1981, 81-2 CPD 121.

In conclusion, we find that the Army's cancellation of the solicitation was proper. Accordingly, we cannot find that D-K has been subjected to arbitrary and capricious treatment, a showing of which is a prerequisite to entitlement of bid preparation costs, and therefore the protester is not entitled to recover such costs. See *Man Barrier Corporation*, B-197208, August 5, 1980, 80-2 CPD 88.

The protest and claim are denied.

[B-206972]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Referral to SBA for COC Mandatory Without Exception

Contracting officer's determination of nonresponsibility, based on finding that small business concern otherwise in line for award does not have acceptable quality assurance system to perform required work, must be referred to Small Business Administration (SBA), albeit on an expedited basis, for consideration under certificate of competency (COC) program, since applicable law and regulations no longer allow exception to this requirement based on urgency. However, General Accounting Office recommends that Executive branch consider developing expedited COC procedure to permit prompt consideration of COC referrals by SBA when critically urgent procurements are involved.

Matter of: Metal Service Center, January 18, 1983:

Metal Service Center, a small business, protests the determination that it was nonresponsible and therefore not eligible for the award of a contract under invitation for bids (IFB) No. N00612-82-0009 issued by the Naval Supply Center, Charleston, South Carolina. Because there was an urgent need for the items being procured, the agency made award to another bidder without referring the question of Metal Service Center's responsibility to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) program. Metal Service Center maintains that the nonresponsibility determination was based on erroneous and outdated information and that the award of the contract is illegal because, as a small business, it had the right to apply for COC from the SBA, but was never given the opportunity. For the reasons discussed below, the protest is sustained.

The IFB, issued Janaury 18, 1982, solicited bids for two lengths of copper-nickel alloy tubing which was required by the Navy as piping material for the overhaul of nuclear submarines. The IFB identified the requirement as "Level I" which indicated that the material was to be used in high pressure piping systems operating under

critical conditions. As a result, the IFB contained numerous stringent quality assurance requirements, including a requirement for the contractor to maintain an inspection system in accordance with Military Specification MIL-I-45208 in effect on the date of the contract (Defense Acquisition Regulation (DAR) § 7-104.33 (DAC 76-28, July 15, 1981)).

The IFB was mailed to 21 prospective bidders with bid opening scheduled for February 17, 1982. Three bids were received and Metal Service Center submitted the low bid. By letter of February 22, Metal Service Center advised the contracting officer that the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania, had recently conducted a technical survey to establish the firm's ability to comply with Level I and MIL-I-45208A requirements. The survey report, dated November 20, 1981, was forwarded to the contracting officer by quality assurance personnel on February 25, 1982, 8 days after bid opening. The report cited numerous deficiencies in the contractor's quality control manual and system, and recommended changes to implement the quality assurance requirements of the military specifications. On that same day, Navy quality assurance personnel reported to the contracting officer that representatives of the Defense Contract Administration Services Management Area Atlanta (DCASMA) orally indicated that Metal Service Center, as of that date, had failed to correct the deficiencies noted in the survey report. The Navy's quality assurance personnel then prepared a "Vendor Performance Summary Report," dated February 25, recommending that no award be made to Metal Service Center because of the urgency of the requirements, noting that a second technical survey of the firm, then scheduled for mid-March 1982, was necessary to determine its compliance with contract quality requirements.

On February 26, the Director, Regional Contracting Department, determined Metal Service Center to be nonresponsible and concluded that award should be made without delay and without referral of Metal Service Center's nonresponsibility determination to the SBA for processing under the COC procedures. He based his decision on the following finding:

> The fifteen day delay required for the SBA to make a decision on whether to issue a Certificate of Competency will result in failure to meet the final critical overhaul milestone objective of [a nuclear submarine which would also result in] a failure to return this nuclear submarine to the operating fleet on schedule.

He further determined that a "concomitant result of the delay" would be the "nonavailability" of the drydock for overhaul of another nuclear submarine.

Award was made to Metal Mart, Inc., the second low bidder, on March 1, 1982. The contract was modified on March 29 to accelerate delivery by shipping the material air express. Delivery occurred on April 12, 1982.

Metal Service Center argues that the contracting officer's determination of nonresponsibility was improper since a formal preaward survey would have shown that the company had, in fact, corrected all the deficiencies disclosed by the November technical survey, when, on January 19, 1982, it furnished to DCASMA all the necessary revisions to its quality assurance system. Metal Service Center also questions the urgency of the procurement, noting that the contracting officer took from February 17 to February 25 to orally contact DCASMA about the status of Metal Service Center's quality assurance system and also noting that the procurement was effected by formal advertising rather than by expedited negotiations. The protester also points to the fact that 5 calendar days elapsed between the receipt by the contracting officer of the unfavorable survey report and award of the contract to the second low bidder, which the protester considers to be an unreasonable delay in view of the stated urgency of the procurement. Finally, the protester objects to the contracting officer's failure to refer the question of its responsibility to the SBA as required by the Small Business Act.

The Navy admits that the contracting officer had no legal basis for not referring the question of Metal Service Center's responsibility to SBA and that he violated the Small Business Act in failing to do so. However, the Navy excuses this failure on the grounds that the contracting officer nevertheless acted "reasonably" under the "critical" factual circumstances of this procurement.

The Navy explains that during the overhaul of nuclear submarines a "critical path" must be maintained which requires completion in sequence of each stage of the overhaul process. After issuance of the IFB, the critical path for the submarine undergoing overhaul was accelerated, requiring delivery of the tubing at the earliest possible date and not later than April 15. (The high pressure piping system was to be used in the emergency blow-out system for the ballast tanks on the nuclear submarine.) After DCASMA reported to the contracting officer on February 25 that Metal Service Center had not corrected the deficiencies noted in the technical survey, the Navy's technical experts advised the contracting officer that Metal Service Center could not correct the deficiencies and deliver the required material by April 15. Further, the contracting officer was advised that any slippage in delivery of the material would delay the undocking of the submarine and the drydocking of another submarine, with an estimated cost to the Government because of submarine scheduling delays of $36 million.

According to the Navy, the contracting officer did not request a formal preaward survey of Metal Service Center because completion of the survey would have required 10 to 30 days. Similarly, the contracting officer did not refer the question of the company's responsibility to the SBA because processing of the COC application would have required approximately 15 days. Therefore, because of

his concern that the required material be timely delivered, the contracting officer awarded the contract to the second low bidder.

Finally, the Navy argues that, in any event, once the requirement for an acceleration of the delivery schedule materialized after bid opening, it could have canceled the IFB since the delivery schedule of June 17, 1982, set forth in the solicitation no longer represented its needs. The Navy asserts that after such cancellation the contracting officer would have had the authority to negotiate the requirements from only those vendors whose quality assurance systems were approved at the time and thus able to comply with the new accelerated required delivery date. The Navy thus argues that the protester was not prejudiced by the Navy's failure to refer the question of its responsibility to SBA since viable alternate procurement actions existed which also would have resulted in the exclusion of that firm.

We believe that by beginning its procurement process earlier the Navy could have avoided the scheduling dilemma in which it found itself. In addition, we question the magnitude of the damages which the Navy estimated would result from the delay in receiving the piping—$36 million—which figure was without any substantiation. Nevertheless, we would agree that the record supports the conclusion that following the opening of bids the Navy found itself in urgent need of materials, delay in the receipt of which could cost the Government far more than the $8,000 difference between the low bid of the protester and that of the awardee. These circumstances, however, do not excuse the contracting officer's failure to refer the question of Metal Service Center's responsibility to the SBA as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV 1980).

Under the Act, a small business may not be precluded from award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under the COC procedures and the SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. *See Com-Data, Inc.*, B-191289, June 23, 1978, 78-1 CPD 459. The language and legislative history of the Act and SBA's implementing regulations provide no exception to this referral procedure. *See* H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong. 1st Sess. 21 (1977); reprinted in [1977] U.S. Code Cong. & Ad. News 838, 851; 13 CFR § 125.5 (1982). In a prior decision concerning a procurement by the Veterans Administration, we noted specifically that the statute "makes no exception for urgency as a ground for not referring the question of a small business's responsibility to SBA" and that the Federal Procurement Regulations had been amended to eliminate the urgency exception previously allowed. *Hatcher Waste Disposal,* 58 Comp. Gen. 316 (1979), 79-1 CPD 157. In this regard, the urgency exception previously pro-

vided by DAR § 1-705.4(c)(iv) also has been deleted by Defense Acquisition Circular (DAC) 76-18, March 12, 1979, at 26.

The Navy argues that the contracting officer acted reasonably under the unusual circumstances of this case. However well-meaning the contracting officer may have been, his actions were in direct contravention of a statute which requires, without exception, that the question of a small business concern's lack of responsibility must be referred to the SBA for consideration under the COC procedures. We do not think that a knowing violation of Federal law is reasonable. In addition, while DAR § 1-705.4(c) (DAC 76-24, August 28, 1980) does provide for withholding of award until SBA action concerning issuance of a COC is taken or until 15 days after the SBA is notified, in view of the urgency of this procurement, we believe the contracting officer and the SBA should have attempted to arrange for an expedited review by the SBA of Metal Service Center's responsibility.

With respect to the Navy's argument that the protester was not prejudiced because the solicitation could have been canceled and the requirements negotiated only with qualified offerors, the fact remains that the Navy made award under the advertised solicitation and did not comply with the law in so doing. Moreover, on this record we cannot say that the protester properly could have been viewed as unqualified for participation in a follow-on negotiated procurement.

For the foregoing reasons, we sustain the protest. However, since the contract has been performed, no corrective action is possible in this case. Nevertheless, we believe this case suggests the need for an expedited COC procedure so that contracting officials can meet the Government's most urgent procurement needs while complying with the Small Business Act. To that end, we are recommending to the Office of Federal Procurement Policy that the Executive branch consider the development of such a procedure.

[B-206152]

Contracts—Annual Contributions Contract-Funded Procurements—Complaints—Timeliness—"Reasonable Time" Standard

Complaint against action of grantee filed with General Accounting Office 16 working days after an adverse agency decision will be considered since complaint was filed within a "reasonable" time.

Contracts—Annual Contributions Contract-Funded Procurements—Indian Low-Income Housing—Preference to Indian Firms—Bid Nonresponsive—Nonresponsibility Basis

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise.

Matter of: Bradley Construction, Inc., January 24, 1983:

Bradley Construction, Inc. (Bradley) has filed a complaint concerning the refusal of the Zuni Housing Authority (ZHA) to consider its bid submitted in response to an invitation for bids for a construction contract for three Demonstration Housing Units in the Zuni Pueblo Indian Reservation for project No. NM19-11. Bids were limited to 100-percent Indian-owned organizations and Indian-owned economic enterprises and bid opening was scheduled for December 11, 1981. Bradley contends that the ZHA arbitrarily and capriciously refused to consider its bid which was returned unopened. Bradley also objects to the subsequent issuance of another solicitation which was not limited to Indian-owned firms and the award to Hunt Building Corporation (Hunt).

Based upon our review of the record, we deny the complaint.

Background

On January 16, 1976, the United States of America and the ZHA entered into Annual Contributions Contract No. SF-651, pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* (1976), and the Department of Housing and Urban Development Act, 42 U.S.C. § 3531 (1976). Under the Annual Contributions Contract (ACC) the ZHA agrees to develop and operate low-rent housing projects and the Government agrees to provide financial assistance for such projects in the form of annual contributions. On July 13, 1981, the United States Department of Housing and Urban Development (HUD) and the ZHA entered into an Amendatory Agreement to the Annual Contributions Contract, concerning project No. NM99-11 for the development of three units of housing at a maximum development cost of $750,000.

The IFB provided that any firm seeking to qualify as an Indian contractor submit evidence 15 days prior to bid opening sufficient to establish to the satisfaction of the ZHA its qualifications as an Indian organization or an Indian-owned economic enterprise. Pursuant to 24 C.F.R. § 805.204(a)(3), this prequalification package also was to contain sufficient evidence to demonstrate that the prospective contractor had the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the proposed contract.

On December 9, 1981, the Board of Commissioners reviewed Bradley's November 25, 1981 submittal for qualification as an Indian organization or an Indian-owned economic enterprise. Based on the evidence submitted, the ZHA determined that Bradley did not have the technical, administrative and financial capacity to perform contract work of the size and type involved within the time provided under the proposed contract. Bradley was informed of this determination by mailgram on December 9, 1981.

At the December 11, 1981 bid opening, the only bid received was the one submitted by Bradley which was rejected by the ZHA and returned unopened. On December 23, 1981, HUD authorized the ZHA to readvertise for bids without limiting the advertisement to Indian-owned organizations or Indian-owned economic enterprises and on the same date ZHA denied Bradley's protest to it regarding the rejection of its bid.

HUD regulation, at 24 C.F.R. § 805.204(a)(2), provides that if an Indian Housing Authority (IHA), after attempting to afford Indian preference in the award of the contract, fails to receive an acceptable bid from one or more qualified Indian enterprises, it:

> * * * may advertise for bids or proposals without limiting the advertisement to Indian Organizations and Indian-owned Economic Enterprises and as in all cases shall accept the lowest responsible bid or the best proposal.

Four bids were received on January 20, 1982, and the low bid was submitted by Hunt in the amount of $521,000. Bradley submitted the second low bid of $578,000. Award was made on February 25, 1982, to Hunt as the low responsive bidder.

Bradley protested to our Office by mailgram dated January 18, 1982, received here on January 20, 1982, the rejection of its unopened bid and the subsequent readvertisement. In addition Bradley sent another mailgram dated January 20, 1982, which was received here on January 27, 1982, protesting the new bid opening of January 20, 1982, because it felt its bid of December 11, 1981, met the ZHA requirements. In effect, the later mailgram was a restatement of the earlier one.

While this procurement is not a direct Federal procurement and, therefore, not reviewable under our Bid Protest Procedures, 4 C.F.R. part 21 (1982), we have recognized that contracts pursuant to ACC's are reviewable under our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants." 40 Fed. Reg. 42406 (1975). See *Curtiss Development Co. and Shipco, Inc.*, 61 Comp. Gen. 85 (1981), 81-2 CPD 414.

Timeliness

HUD contends that Bradley's complaint is untimely under 4 C.F.R. § 21.2(a) (1982) of our Bid Protest Procedures since it was not filed within 10 days of the ZHA's decision to reject it. We point out that since this is not a direct Federal procurement, the time limits of our Bid Protest Procedures are not literally applicable to our review of grant complaints but we require that complaints be filed within a reasonable time. *Urban Transportation Development Corporation, Ltd.*, B-201939, August 7, 1981, 81-2 CPD 107.

Bradley protested the ZHA's rejection of its bid on December 11, 1981, and, as noted earlier, the ZHA denied the protest on December 23, 1981, which Bradley should have received within 1 calendar week. On January 8 and 12, 1982, Bradley sent letters to HUD ap-

pealing the ZHA decision and providing further documentation concerning its Indian status. On January 13, 1982, HUD responded to Bradley's January 8, 1981 letter concerning the December 11, 1981 bid opening. HUD found that the ZHA had complied with the rules and regulations governing the development of Indian housing and with the IFB on project NM19-11.

We find Bradley's complaint dated January 18, 1982, and received on January 20, 1982, for consideration on the merits since we believe its complaint, filed 16 working days after the ZHA denied its protest, was filed within a "reasonable" time after the basis was known. Contrary to HUD's assertion, we find the first mailgram adequately stated Bradley's grounds for complaint and the second mailgram added nothing which would require our Office to use January 27, 1982, as the filing date.

Essentially, the basis of Bradley's protest is that the ZHA improperly returned its bid unopened after determining that the Bradley prequalification package failed to demonstrate that Bradley has the "prerequisite technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract." Bradley also protests the resolicitation on the ground that it was not required since an award could have been made to Bradley under the original solicitation.

Pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450e (1976), HUD regulations permit an IHA to include in solicitations special HUD-approved Indian preference requirements. HUD regulations at 24 C.F.R. § 805.204 provide that an IHA shall to the "greatest extent feasible" give preference in the award of contracts in connection with a project to Indian organizations and Indian-owned economic enterprises. Here the ZHA issued an IFB limited to 100-percent Indian-owned organizations and Indian-owned economic enterprises. The IFB required a prospective contractor seeking to qualify for the preference to submit, 15 days prior to bid, opening evidence sufficient to establish its qualifications as an Indian organization or Indian-owned enterprise.

24 C.F.R. § 805.204 sets forth the HUD regulations regarding Indian preference. Section 805.204(a)(3) provides:

> A prospective contractor seeking to qualify as an Indian Organization or Indian-owned Enterprise shall *submit with or prior to* submission of his bid or proposal:
>
> (i) Evidence showing fully the extent of Indian ownership and interest.
>
> (ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; material or equipment supply arrangements; and management, salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest.
>
> (iii) Evidence sufficient to demonstrate to the satisfaction of the IHA and HUD that the prospective contractor has the technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract * * *. [Italic supplied.]

HUD reports that the Board of Commissioners of the ZHA, after reviewing Bradley's prequalification package, determined from the documents submitted that Bradley did not have the technical, administrative and financial capacity to perform the work of the size and type involved and within the time provided under the proposed contract. HUD contends that the record shows that the ZHA's evaluation of Bradley's prequalification package was in accordance with established criteria and was based on the reasoned judgment of the ZHA Board of Commissioners.

HUD contends that the review of the prequalification statement is analogous to a responsibility determination. Bradley, following up on this argument, contends that since its qualifications were a question of responsibility it should have been determined after bid opening in accordance with Federal Procurement Regulations (FPR) § 1-1.1205-2 (1964 ed.) (Second Amendment, August 1971). Bradley further argues that the ZHA's decision to disqualify its firm based on issues of responsibility was unreasonable.

Initially, we point out that since an IHA procurement is involved rather than a direct Federal procurement, the FPR's are not applicable. Further, although we agree that the review of the prequalification package was analogous to a nonresponsibility determination, the review was made not for the purpose of determining a prospective contractor's capability to perform a contract but for the purpose of determining whether Bradley was eligible for Indian preference pursuant to HUD regulations. Under that regulation IHA is permitted to require such information prior to the submission of bids as was, therefore, properly done here.

With regard to the reasonableness of that determination, we believe the following principles are applicable. In direct Federal procurements we have held that a procuring agency has broad discretion in making responsibility determinations. Deciding a prospective contractor's probable ability to perform a contract involves a forecast which must of necessity be a matter of judgment. Such judgment should be based on fact and reached in good faith. However, it is only proper that it be left largely to the sound administrative discretion of the contracting agency involved. The agency logically is in the best position to assess responsibility, must bear the major brunt of any difficulties experienced in obtaining required performance, and must maintain day-to-day relations with the contractor. 43 Comp. Gen. 228 (1963). Thus, we will not disturb an agency determination of nonresponsibility unless it lacks a reasonable basis. See *The Mark Twain Hotel,* B-205034, October 28, 1981, 81-2 CPD 361.

In our view, the ZHA had a reasonable basis for its determination that Bradley was not qualified to perform the work called for in the IFB based upon the information furnished by Bradley on November 25, 1981, which failed to show that the firm had performed work of the size involved here. In 7 years, Bradley had received

only one contract of this magnitude, which it was currently completing. Further, additional information submitted by Bradley during the course of its appeals to the ZHA and HUD in support of its qualifications is not germane. It was the obligation of Bradley to submit with its prequalification package all information available to support its qualifications. At the time of the determination by the ZHA, the only evidence submitted by Bradley bearing on its qualifications was considered and reasonably determined inadequate.

In view of our conclusion that Bradley's bid was properly rejected under the first solicitation and it was not the low bidder under the second solicitation, we find it unnecessary to consider Bradley's allegations concerning what it characterizes as "Inferences of Fraud, Gross Mismanagement of Abuse," such as the failure of HUD to cancel the resolicitation and an alleged change in the cost limitation applicable to the procurement.

We deny Bradley's complaint.

[B-174839]

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Anti-Deficiency Act Compliance

The Antideficiency Act, 31 U.S.C. 1431, would not prevent the Navy from entering into the TAKX long-term ship leasing program, to be financed through the Navy Industrial Fund, so long as the unobligated balance of the Fund is sufficient to cover the Government's obligation until commencement of the lease period. Navy may not, through acceptance of vessel delivery, agree to commencement of the lease arrangement if the obligational availability of the Fund is at that time insufficient to cover any consequential increase in the Government's obligation.

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Termination Expenses

Under the Navy's TAKX ship leasing program, ship charters will cover a base period of 5 years, renewable up to 20 years at 5-year intervals, and with substantial termination costs for failure to renew. Such contracts, once in effect, should be recorded as firm obligations of the Navy Industrial Fund at an amount sufficient to cover lease costs for the 5-year base period, plus any termination expenses for failure to renew.

Matter of: Navy Industrial Fund: Obligations in connection with long-term vessel charters, January 28, 1983:

By letter dated December 2, 1982, the Comptroller of the Navy requested our opinion as to the proper manner in which to record certain obligations of the Navy Industrial Fund, in connection with two Military Sealift Command programs to build/convert and charter TAKX Maritime Prepositioning Ships and build and charter T-5 Tankers.

The question as originally presented related to the manner of recording termination expenses under the charter contracts. While we shall address that question below, it has become clear from our discussions with Navy officials that their principal concern is with

the total amount that should be presently recorded as a firm obligation of the Government under the TAKX program. As is explained in detail below, it is our view that the Navy must record the TAKX program as a firm obligation only to the extent of the Government's maximum potential liability prior to commencement of the initial lease period. Once the Navy, through acceptance of vessel delivery, agrees to commencement of the lease, it must record the TAKX charter agreements as firm obligations in an amount sufficient to cover lease costs for the base period, plus termination expenses.[1]

BACKGROUND

Under the TAKX program, vessels are constructed or converted to meet military requirements and are subsequently time-chartered to the Military Sealift Command. The program consists of 13 vessels, provided by three different contractors. The Navy enters into two different agreements with each contractor: an Agreement to Charter and a Charter Party. The Agreement to Charter binds the Government until it accepts delivery of the TAKX vessles (in about 2 years, we are told). The Charter Party is the actual charter agreement, setting out the rights and responsibilities of the various parties throughout the lease period. Although both contracts are signed at the same time, the Charter Party does not become effective until the "Commencement Date," the date of the Government's acceptance of delivery of the vessels.

Once effective, each Charter Party provides for an initial hire term of 5 years following the construction period, with options to renew for four consecutive 5-year periods. Failure to exercise such options subjects the Government to substantial termination expenses. The capital hire rate during the entire 25-year term of the initial and optional charter periods is computed to repay to the equity bondholders and the owners the full value of their investments, plus interest. The Government may terminate the charter at the end of any 6-month period after the initial 5-year base period, but is thereby subject to termination expenses. Termination expenses are calculated to pay the outstanding principal and interest on the bonds, and to return to the owners their investments plus a rate of return to the date of termination (the "termination value"), less the proceeds of any sale of the vessel (or insurance proceeds in the case of a loss).

The Navy's concerns about recording obligations under the TAKX program arise from the fact that current available resources

[1] We do not here address the more fundamental question of whether the Navy Industrial Fund is a proper source for funding such long-term lease arrangements. As we approved the use of the Fund to finance similar contracts in our decision 51 Comp. Gen. 598 (1972), we would not object to the TAKX program on that basis. Nonetheless, this issue will be reexamined by this Office in an upcoming in-depth review of the practice of obligating the Federal Government for multi-billion dollar programs such as the TAKX Prepositioning Ship Program through the use of Industrial funds. See H.R. Rep. No. 943, 97th Cong., 2nd Sess. 48-49 (1982). Similarly, we do not here address the wisdom of long-term leasing, as opposed to purchase, of TAKX vessels.

of the Navy Industrial Fund are sufficient to cover only about $2.2 billion of new obligations. Thus, if the Navy must record firm obligations for the 13-ship TAKX program in excess of that amount, it would be necessary to scale-back the program to avoid a violation of the Antideficiency Act. The Antideficiency Act provides that:

> An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either Government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1), recodified from 31 U.S.C. § 665(a) (1976).

DISCUSSION

I. Current TAKX Program Obligations

As indicated above, two contracts govern the Navy's obligation under the TAKX program. The first, the Agreement to Charter, is effective upon its signing: it obligates the Navy to accept delivery of vessels conforming to the specifications of the contract. Although the Navy may terminate for convenience at any time prior to accepting delivery, it would be required to pay any amount of basic capitalized costs incurred by the Shipowner up to the date of termination. The second contract, by comparison, is entirely contingent upon completion of the first. The Navy's obligation under the Charter Party agreement does not commence until it has accepted delivery of the TAKX vessels. Termination of the Agreement to Charter would simultaneously terminate the Charter Party, with no additional liability on the part of the Government.

Because the Navy's obligation under the Charter Party will not commence until it has accepted delivery of the TAKX vessels, it is our view that the Navy is not required to record a firm obligation under that contract until the contract becomes effective. Nevertheless, until the vessels are delivered there is, through the Agreement to Charter, a contingent liability, based on the possibility that the Government will in fact be bound by the Charter Party. That potential liability, however, is limited by the Navy's own power to terminate the Agreement to Charter at any time prior to delivery. In our opinion, therefore, the Navy should record an obligation in an amount sufficient to cover its maximum potential liability prior to acceptance of the TAKX vessels. As we have been informed by the Navy that the current unobligated balance of the Navy Industrial Fund is sufficient to cover this obligation for all 13 TAKX vessels, we do not consider the Antideficiency Act to be a bar to the Navy's present program. We would caution, however, that once the delivery of vessels is accepted by the Navy, any new obligation, based on the terms of the Charter Party, may not exceed the unobligated balance of the Fund at that time.

II. Recording of Charter Party Obligations

As mentioned above, the question initially raised by the Navy related to the manner in which Charter Party termination expenses should be considered for purposes of recording obligations of the Navy Industrial Fund. While Charter Party obligations need not be recorded until the Navy accepts delivery of the TAKX vessels, there is some concern on the part of Navy officials that the unobligated balance of the Navy Industrial Fund may at that time be insufficient to cover all obligations, particularly if the Navy is required to include charter termination expenses. To avoid overobligating the Fund, the Navy has proposed to record as firm obligations under TAKX Charter Parties only the lease amounts due during the 5-year base period. Any additional expenses (*i.e.* termination costs after the base period) would not be recorded as firm obligations, but would be treated as contingent liabilities, shown as footnotes to the financial records of the Fund.

The Navy has argued that its proposed treatment of TAKX Charter Party termination expenses is consistent with title 2, section 13 of our *Policy and Procedures Manual for Guidance of Federal Agencies,* which describes the types of liabilities to be recorded as obligations. Subsection 13.2 of the Manual provides that contingent liabilities need be recorded as expenses only to the extent it is probable that a liability will be incurred and its amount reasonably estimated. Otherwise, as is indicated in our decision 37 Comp. Gen. 691, 692 (1958), contingent liabilities may be shown as footnotes to the appropriate financial statements.

Having examined the contracts in question and the proposed treatment of termination expenses, we cannot agree that those expenses may be shown as footnote items. We recognize that these specific expenses are technically "contingent" in that they will arise only upon the happening of one of several events (for example, failure to renew, termination for convenience of the Government, or loss after delivery). If none of the contingent events arises, however, the Government will have a substantial alternative obligation. A principal example would be the continuation of the charter through the Navy's exercise of the renewal option. Renewal by the Navy would at that time create a new obligation to pay lease costs for the second 5-year period, plus termination expenses (unless, of course, the second renewal option was in turn taken). This process of replacing one obligation with another would continue throughout the full 25-year period, with the unliquidated obligation at each renewal period (*i.e.* the termination cost) being replaced by that created by continuation of the contract.

It is probable from the nature of these contracts that the Navy will choose to renew at each 5-year period. Nonetheless, any new obligation created by continuation of the contract will in fact exceed termination expenses after the 5-year base period. Whether the

contract is continued only for one additional 5-year period (including termination costs) or up to the full 25 year lease term of the charter (at a cost over that period of about $13 billion, we are told), the total expense to the Government of continuing the lease past the initial base period will be more costly than termination. It is our view, therefore, that each Charter Party, once in effect, should be recorded as a firm obligation to pay lease costs for a 5-year base period, plus termination costs after that time. This would represent the least amount for which the Government will be liable under the contract. *See* 48 Comp. Gen. 497, 502 (1969), in which we stated in the context of revolving funds that we would have no objection to contracting for a basic period with renewal options, provided that funds were obligated to cover the cost of the basic period, plus any charges payable for failure to exercise the options.[2]

Based on the above, it appears that the Navy may be precluded from accepting delivery of (and thereby chartering) all 13 ships under the TAKX program, unless the obligational availability of the Navy Industrial Fund is increased in some manner. There are several ways that this might be accomplished. One would be by the direct infusion of funds through appropriations, or by transfers from other Defense Department accounts. Another way would be through enactment of specific "contract authority" for this program (specific authority to contract in excess or advance of appropriations). *See, e.g.,* 56 Comp. Gen. 437, 444 (1977). Finally, the Navy might ask the Congress for specific statutory authority, at least for this particular program, to include anticipated reimbursements from future orders as budgetary resources of the Navy Industrial Fund. The Department of Defense has previously stated that it already has such authority with respect to its Industrial funds. We do not share this view. See our report "The Air Force has Incurred Numerous Overobligations in its Industrial Fund," AFMD-81-53, App. III, August 14, 1981.

CONCLUSION

Based on the foregoing, we have no legal objection to the Navy's TAKX program, so long as current obligational availability of the Navy Industrial Fund is sufficient to cover the Government's present obligation, that is, until the Navy, through acceptance of vessel delivery, agrees to the commencement of TAKX leases. Once TAKX charter agreements become effective, the Navy must record

[2] In 51 Comp. Gen. 598, 604 (1972), we sanctioned an arrangement very similar to the present one, and in so doing, distinguished 48 Comp. Gen. 497 (1960). Our 1972 decision, however, did not reflect a different view of the types of commitments that must be recorded at the time that a contract becomes effective. Instead, we distinguished 48 Comp. Gen. 497 (1960) on the basis that the Navy had no need to rely solely on cash reserves of the Navy Industrial Fund in order to cover its obligations under the lease program. In 1972 we were persuaded that sufficient budgetary resources were available to cover all obligations under the program through exercise of the Navy's authority to transfer funds from other sub-accounts of the Navy Industrial Fund, or from other working capital funds. In the present case, however, the Navy is unable to assure us that it would be able to cover all TAKX Charter Party obligations in this manner.

such agreements as firm obligations of the Fund to the extent of lease costs for the 5-year base period, plus any termination expenses for failure to renew. The obligational availability of the Fund must at that time be sufficient to cover any increase in the Government's obligation by reason of commencement of the lease period.

[B-208701]

Bids—Late—Hand Carried Delay—Commercial Carrier—Failure to Deliver to Designated Office

Government did not frustrate carrier's ability to deliver bid package where commerical carrier that contracted with protester to deliver bid to office designated in the solicitation instead asked an agency employee—who was not affiliated with the contracting activity—to deliver an unmarked package containing protester's bid. 57 Comp. Gen. 119 and B-202141, June 9, 1981, are distinguished.

Bids—Late—Mishandling Determination—Improper Government Action—Not Primary Cause of Late Receipt—Hand Carried Delay

Where carrier for its own convenience gives an unmarked package containing protester's bid to an agency employee rather than delivering it to the proper office, subsequent misrouting of bid by another agency employee was not the paramount reason for the late arrival of the bid at the contracting office and bid was properly rejected.

Matter of: Visar Company, Inc., January 31, 1983:

Visar Company, Inc. protests the refusal of the Department of the Army, Corps of Engineers, to consider its bid under invitation for bids (IFB) No. DACW57-82-B-0094. Visar contends that its bid was received after the time set for bid opening because a Corps employee frustrated its carrier's ability to deliver the bid. Alternatively, Visar contends that the Corps mishandled the bid after its timely receipt at the Government installation. For the reasons that follow, we deny the protest.

The solicitation, for miscellaneous earthwork construction, was issued on June 18, 1982, and called for bid opening at 2 p.m., July 22. It contained the standard clauses regarding the conditions under which a late bid would be considered. It also stated that hand-carried bids should be left in the depository in Room G-12 of the Multnomah Building, 319 S.W. Pine Street, Portland, Oregon.

When bids were opened as scheduled on July 22, E. W. Eldridge, Inc. was the apparent low bidder at $244,300. Visar's bid of $226,556.50 would have been low but for the fact it was not received in the contracting office until 8:50 on the morning of July 23. The contracting officer determined that under the circumstances the solicitation provisions that permit consideration of late bids would not apply to Visar's bid. Therefore, by letter of July 26, the Corps informed Visar that its bid would not be considered. Visar protested this determination to the Corps but prior to the

agency's resolution of the matter, Visar filed a protest with this Office.

Visar sent its bid via Greyhound Bus Lines. It paid Greyhound a special fee to deliver the bid to the Corps' offices. The bid arrived at the Greyhound terminal in Portland early in the morning on July 22. Sometime between the hours of 9 and 10 a.m., a cartographic aide in the Corps' photogrammetry section was sent to the Greyhound terminal to pick up several packages that had arrived at the terminal destined for that section. At the same time, under circumstances more fully discussed below, she picked up Visar's bid and returned it along with the other packages to her supervisor in the photogrammetry section.

Visar contends that the Corps' employee volunteered to deliver its bid to the Corps' offices and that in doing so she assumed Greyhound's duty to deliver the bid in time for bid opening. It argues that she failed to do so, and this failure frustrated Greyhound's attempt to deliver the bid. Visar further contends that this failure amounts to improper Government action that justifies consideration of its bid.

The employee states in an affidavit that the Greyhound clerk asked her if she would deliver a package, without informing her that the plain, unmarked Greyhound envelope (which was later destroyed and is not available) she was given contained Visar's bid. The agency argues that Greyhound acted unreasonably in giving the bid to the employee rather than delivering the bid itself. Since the protester has offered no evidence refuting the Corps' version and, in fact, has elected not to comment at all on the Corps' report submitted to our Office in connection with this protest, we will accept the agency's account. See *Nielson, Maxwell & Wangsgard*, 61 Comp. Gen. 370 (1982), 82-1 CPD 381.

The Corps concedes that Visar's bid was delivered to the photogrammetry section in the Corps' office 4 hours before bid opening and was recognized by the supervisor of that section and misrouted by him within the internal mail system. The agency notes that neither the employee who delivered the bid nor her supervisor had any expertise in procurement matters or much contact with the Corps' contracting branch. The Corps states that the misrouting of the bid was not the paramount reason for its late receipt, but rather the paramount reason was Greyhound's failure to deliver the bid.

We disagree with Visar's contention that the Corps frustrated Greyhound's ability to deliver the bid and we agree with the agency the paramount reason for the delay in receipt of Visar's bid was Greyhound's failure to deliver the bid.

Late bids delivered by commercial carriers are not to be considered under the late bid provision contained in Defense Acquisition Regulation § 7-2002.2 and the "Late Bid" clause in the solicitation, both of which allow consideration of a late bid sent by mail if late-

ness is due to Government mishandling after it has been received. See *Scot, Incorporated,* 57 Comp. Gen. 119 (1977), 77-2 CPD 425. A late hand-carried bid, or as in this case, a late bid delivered by a commercial carrier, may, however, be considered where lateness is due to improper action of the Government and where consideration of the late bid would not compromise the competitive procurement system. On the other hand, such a late bid should not be accepted if the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility of delivering the bid to the proper place by the proper time, even though lateness may be in part caused by erroneous Government action or advice. *Empire Mechanical Contractors, Inc.,* B-202141, June 9, 1981, 81-1 CPD 471. For a late hand-carried bid to be considered, it must be shown that wrongful Government action was the sole or paramount cause of late receipt.

In cases where we have permitted late hand-carried bids to be considered, there was some affirmative action on the Government's part, such as improper or conflicting delivery instructions, that made it impossible for the hand-carried bid to be timely delivered to the bid opening location. See, for example, *Scot, Incorporated, supra; Empire Mechanical Contractors, Inc., supra.*

Here, the carrier for its own convenience solicited the Corps' employee's services to deliver an unmarked package, even though it should have been aware that the package contained Visar's bid, and despite the fact that it had received a special fee to deliver the package to the contracting office. The employee's agreement to deliver the bid did not amount to affirmative action on the Government's part that frustrated Greyhound's ability to deliver the bid. This is especially so since the employee was not a representative of the contracting officer and she did all that could reasonably have been expected of her when she turned the unmarked package over to her supervisor.

Regarding the misrouting of Visar's bid in the Corps' internal mailing system—the supervisor concededly misaddressed the bid—we do not believe that this was the paramount cause for the late receipt of Visar's bid. Where a bidder (or as in this case its agent) significantly contributes to the late receipt of a bid by acting unreasonably in fulfilling its responsibilities, any subsequent mishandling by the Government is clearly not the paramount reason for the bid's late receipt. See *Ferrotherm Company,* B-203288, September 1, 1981, 81-2 CPD 194. In this connection, we note that there is some doubt that the bid would have been delivered to the contracting office in the normal course of events by the Corps' internal mailing system in time for bid opening even if it had been properly addressed by the Corps' employee after it arrived in the photogrammetry section.

In our view, Greyhound acted unreasonably in giving the unmarked package to a Corps' employee who had no official relation-

ship with the contracting officer. This act initiated a series of events that culminated in the bid arriving late at the contracting office. Under the circumstances, the late arrival was not caused by improper Government action and the bid therefore was properly rejected.

The protest is denied.

[B-209414]

Compensation—Periodic Step-Increases—Waiting Period Commencement—Repromotion—During Period of Grade Retention—Civil Service Reform Act of 1978

Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable.

Matter of: Eric E. Bahl—General Schedule Within-Grade Increase—Grade Retention—Repromotion to Prior Position After Demotion, January 31, 1983:

This decision is in response to a letter dated October 1, 1982, from Mr. Gary W. Divine, President, Local 29, National Federation of Federal Employees, requesting a decision pursuant to the provisions of 4 C.F.R. § 22 (1982), on behalf of Mr. Eric E. Bahl, a civilian employee of the United States Army Corps of Engineers, Kansas City, Missouri. The Corps of Engineers was served, as required by 4 C.F.R. § 22.4 (1982), on October 4, 1982, but has not responded to the claimant's request for a decision.

Mr. Bahl, a General Schedule employee, requests that this Office retroactively award him a within-grade increase under the provisions of 5 U.S.C. § 5335 (Supp. IV 1980), based on credit toward a within-grade increase for the time period during which he was demoted to a lower grade while receiving a grade retention. Thus, the issue we are asked to consider is whether an employee's repromotion to his former position, occurring during the 2-year grade retention period of 5 U.S.C. § 5632 (Supp. IV 1980), is an "equivalent increase" under 5 U.S.C. § 5335(a) (Supp. IV 1980), is an "equivalent in crease" under 5 U.S.C. § 5335(a) (Supp. IV 1980), and 5 C.F.R. § 531.403 (1982), so as to require a new waiting period for his periodic step increases beginning as of the date of repromotion.

Pursuant to the provisions of Title VIII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, 1218-1220, 5 U.S.C. §§ 5361-5366 (Supp. IV 1980), and the regulations at 5 C.F.R. Part 531 (1982), we hold that the repromotion of a General Schedule employee under the circumstances described does not constitute

an equivalent increase. Therefore, Mr. Bahl is entitled to be retroactively awarded a within-grade increase based on his original schedule. The date of his restoration to his former position is irrelevant for purposes of computing within-grade increases in his case.

The facts are as follows. Mr. Bahl was promoted to step 1 of grade GS-11 when he was transferred to the Army Real Estate Agency in Europe in June 1975. Due to subsequent pay adjustments and within-grade increases, Mr. Bahl had attained step 4 of grade GS-11 in June 1978. Had Mr. Bahl remained in that position and grade, his next two within-grade increases would have occurred in June 1980 and June 1982. However, on July 1, 1980, Mr. Bahl was demoted to grade GS-9 when he was transferred back to Kansas City. Concurrently, he received a within-grade increase to step 5 of his former grade. Because Mr. Bahl qualified under the provisions of 5 U.S.C. § 5362 (Supp. IV 1980), he was afforded grade retention at that time, and, hence, for pay administration purposes, his grade remained the same (grade GS-11, step 5). In November 1980, Mr. Bahl was repromoted to his former position at grade GS-11, step 5.

In light of Mr. Bahl's repromotion in November 1980, the Acting Personnel Officer of the Department of the Army Corps of Engineers, Kansas City District, denied Mr. Bahl's request for a retroactive within-grade increase effective on or about July 1, 1982, stating that it was not due until November 1982, and citing 42 Comp. Gen. 702 (1963). Mr. Bahl maintains that the Department wrongfully withheld his within-grade increase; that the Comptroller General decision cited by the Department is no longer valid under recent statutes and regulations; and that he should be retroactively awarded all monies and interest due to him as a result of the within-grade denial.

Grade retention following a change of positions is governed by section 5362 of Title 5, United States Code (Supp. IV 1980). That section provides that "[a]ny employee * * * whose position has been reduced in grade is entitled * * * to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade." 5 U.S.C. § 5362(b)(1) (Supp. IV 1980). It further provides that, for the 2-year period, the retained grade "shall be treated as the grade of the employee's position for all purposes (including pay and pay administration * * *)." 5 U.S.C. § 5362(c). *Grade* retention under section 5362 is to be distinguished from *pay* retention under section 5363 of Title 5, U.S. Code another new provision added by the Civil Service Reform Act of 1978.

Section 5335(a) of Title 5, U.S. Code (Supp. IV 1980), provides that an employee is eligible for periodic step increases in pay upon completion of 104 calendar weeks of service in pay rates 4, 5, and 6, as long as the employee did not receive an "equivalent increase" in pay from any cause during that period.

In two cases arising before the Civil Service Reform Act of 1978, *Richard C. Dunn,* B-193394, March 23, 1979, and *Duane E. Tucker,* B-193336, March 23, 1979, we held that, after a demotion with retained pay and a later repromotion to the employee's former grade and step, the employee must begin a new waiting period upon repromotion without counting service at the grade and step before the demotion as part of the new waiting period. The *Dunn* and *Tucker* cases followed the rule formulated under the statutory provisions in effect before the Civil Service Reform Act of 1978. See 43 Comp. Gen. 701 (1964); 43 *id.* 507 (1964); 42 *id.* 702 (1963). However, that rule is inapplicable to a repromotion during a period of *grade* retention as defined by Title VIII of the Civil Service Reform Act.

Congress provided that the retained grade of an employee is to be treated as the grade of the employee's position for *all* purposes during the 2-year period. Those purposes include pay and pay administration, retirement, life insurance, eligibility for training, promotion and reassignment, and other employee benefits. 5 U.S.C. § 5362(c) (Supp. IV 1980). Although Congress articulated several exceptions to the rule, the facts of this case do not conform to any of the situations in which an employee's assigned grade, rather than his retained grade, is to be used. See 5 U.S.C. § 5362(c)(1)-(4) (Supp. IV 1980); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 63-64 (1978).

This interpretation of the Civil Service Reform Act is consistent with the Office of Personnel Management regulations governing within-grade increases. See 5 C.F.R. Part 531 (1982). We agree with Mr. Bahl that the definition of "equivalent increase," as set forth in 5 C.F.R. § 531.403 (1982), does not include repromotion while in the same retained grade status under 5 U.S.C. § 5362. Since an employee's retained grade is to be used for purposes of pay and pay administration during the 2-year period, under 5 U.S.C. § 5362(c), the employee remains entitled to within-grade increases otherwise due during that period without regard to the demotion. Hence, a repromotion to the former position during that period does not represent an equivalent increase under 5 C.F.R. § 531.403 (1982); therefore, a new waiting period does not commence.

On the basis of the relevant statutory and regulatory provisions, the repromotion of Mr. Bahl to his former position during the period of grade retention did not constitute an equivalent increase, and did not require the commencement of a new waiting period for within-grade increases. The schedule established by his last within-grade increase, on or about July 1, 1980, applies, and Mr. Bahl is entitled to be retroactively awarded the within-grade increase due him on or about July 1, 1982.

[B-209612]

Buy American Act—Domestic or Foreign Product—Country of Manufacture—Alternative Statement—Slash (/) Virgule Usage

Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award.

Matter of: Airpro Equipment Inc., January 31, 1983:

Airpro Equipment Inc. protests the evaluation of its bid in response to line item 3 of Invitation for Bids (IFB) R6-82-272S, issued by the Forest Service for an industrial loader backhoe tractor. Airpro argues that its bid was improperly evaluated as foreign for purposes of applying the six percent Buy American preference. Airpro states that similar equipment has been purchased in the past by the Government, including the Forest Service, and should be considered domestic. The parties agree that Airpro would have been in line for award had the six percent differential not been added. We deny the protest.

The IFB Bid Schedule required that bidders identify the country of manufacture of the equipment offered. It also included the standard Buy American Certificate (Standard Form (SF) 33, p. 2) and clause (SF 32 para. 14) implementing the Buy American Act (41 U.S.C. §§ 10a-d (1976)). Airpro left its Buy American Certificate blank which action, without more, would have bound Airpro to furnish a domestic product and would have required its bid to be evaluated as offering a domestic product. See *Lanier Business Products, Inc.*, B-196736, March 10, 1981, 81-1 CPD 186. However, Airpro identified the country of manufacture on its schedule as "USA/England." The Forest Service determined that Airpro's use of the virgule (/) implied that the country of manufacture could be the United States *or* England, and relying on our decision in *Trail Equipment Company*, B-205026, January 27, 1982, 82-1 CPD 63, concluded that the product offered had to be evaluated as foreign.

Although Airpro challenges the Forest Service's interpretation of its bid, contending that it honestly filled out the bid documents as it did because a portion of the manufacture of the equipment is done in England, we believe Airpro's choice of language must be construed as permitting it to furnish either a domestic or a foreign product in event of award. We have examined a number of authorities in attempting to define the meaning of the virgule, which is alternatively referred to as a "diagonal" (*Webster's New Collegiate Dictionary* 314 (G. & C. Merriam Co. 1975)), solidus or slash (*The American Heritage Dictionary* 1303, 1431 (Houghton Mifflin Co. 1969)). These authorities recognize that at least one common use of the virgule is as a conjunction to join two alternative words or phrases. See also *Webster's New International Dictionary* 2848 (G. & C. Merriam Co. 1952). In this sense, therefore, Airpro's use of the

phrase "USA/England" as the country of manufacture implies that the equipment might be manufactured in the United States *or* in England.

In the circumstances, we view our decision in *Trail Equipment Company, supra,* as controlling. There, we considered a bid which identified a product as manufactured in the "USA or France." There, as here, the Buy American Certificate was left blank. In light of the alternative statement of country of manufacture, we concluded that the bid, although responsive, was to be treated as foreign for purposes of applying the six percent differential.

With respect to Airpro's assertion that similar equipment has been purchased in the past, we point out that the Buy American Act does not prevent the purchase of a foreign product if, applying the differential, that product remains the least costly product offered. Moreover, application of the differential depends upon whether Airpro in its bid obligated itself to furnish a domestic product. As a bidder, Airpro bore the responsibility of assuring that its bid was free of ambiguity. Any uncertainty in its bid must be construed against it since it cannot be permitted to explain or thereby alter its bid after bids have been opened. See *Trail Equipment Company, supra.* Accordingly, the differential was properly applied in evaluating Airpro's bid.

The protest is denied.