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[B-171279]

Station Allowances—Military Personnel—Temporary Lodgings—Delayed Departure No Fault of Member or Dependents

The additional temporary lodging allowance provided by paragraph M4303-2e(2), Joint Travel Regulations, when the departure of a member with dependents from an overseas duty station is delayed beyond the 10-day period of entitlement through no fault of the member or his dependents, should not have been paid to a member whose departure was delayed awaiting court-martial proceedings, since the charges of misconduct against the member established *prima facie* that he was not without fault for the delay. Therefore, there was no entitlement to the allowance for the period during which charges were pending, and the member would be eligible to receive the allowance only if exonerated from blame. However, having been found guilty—and it is immaterial if charges were made in a civil action or under the Uniform Code of Military Justice—the erroneous allowance payments would be for recoupment but for the fact the administrative regulations were not clear.

To the Secretary of the Army, February 3, 1971:

By letter dated October 7, 1970, the Assistant Secretary of the Army requests a decision whether a staff sergeant, USAF, is entitled to temporary lodging allowance under the circumstances disclosed. The request has been assigned Control No. 70–51 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary refers to paragraph M4303–2e(2), Joint Travel Regulations, which provides for the payment of additional temporary lodging allowance to a member with dependents when the 10-day period of entitlement upon departure from an overseas permanent duty station authorized by subparagraph (1) begins and departure is delayed through no fault of the member or his dependents. He says that the sergeant, whose departure from his permanent duty station was delayed while he was awaiting court-martial, was in receipt of temporary lodging allowance during part of the period of delay. The action of the overseas commander in authorizing additional temporary lodging allowance has been questioned on the basis that the member caused the delay in departure from his permanent duty station by allegedly committing the offenses for which he was held for trial by court-martial and, therefore, was not entitled to additional periods of temporary lodging allowance. This does not appear, however, to be the view of all components of the Department of the Air Force.

Accordingly, the Assistant Secretary requests a decision as to whether the commission of acts leading to a member's being held for court-martial should be considered the proximate cause of delay in departure from a permanent duty station, and whether such delay was the fault of the member so as to cause loss of entitlement to tempo-

rary lodging allowance for the period of delay. Also, he asks whether a finding of not guilty in the court-martial proceedings would result in a different holding from that reached if the finding were guilty.

The file shows that the sergeant was reassigned from a station in Holland to McConnell Air Force Base, Kansas, with effective date of transfer for record purposes shown as October 10, 1969. The orders stipulated a port call date of November 29, 1969, for the member and his dependents and authorized the member a 30-day delay in the country where his overseas duty station was located. He and his family had been living on the local economy, and his lease expired on November 29, 1969, at which time he was required to vacate the premises to make room for an incoming military family.

The file shows further that the member's household goods were picked up for transoceanic shipment on November 11, 1969. However, the member's goods were later seized by Customs officers and he was detained for investigation by the Office of Special Investigations, for possible court-martial proceedings. Since it was determined that the member's wife, being of Dutch nationality, would suffer hardship if she went to the United States without her husband, the port call was canceled. The member was unable to locate furnished housing on the local economy and was therefore required to occupy hotel or hotel-like accommodations. It is shown further that the sergeant's wife was pregnant and on December 5, 1969, she was within a 60-day travel restriction applicable to dependents in that condition.

On March 12, 1970, the member's wife gave birth to a child and therefore was further restricted from permanent change-of-station travel. On March 17, 1970, the member was tried by general court-martial, found guilty of the charges preferred against him and was sentenced to 3 months' hard labor without confinement and reduction in grade. The record shows that he was paid temporary lodging allowance for the period from November 29, 1969, through January 8, 1970, and from February 21 through March 13, 1970.

Paragraph M4303-2e(1), Joint Travel Regulations, implementing section 405 of Title 37, United States Code, and in effect during the period involved, provides that the period of entitlement upon departure to temporary lodging allowances—authorized for the purpose of partially reimbursing a member for the more than normal expenses incurred in hotels or hotel-like accommodations and public restaurants—will be the last 10 days preceding the day of departure of the member from his permanent overseas duty station in compliance with permanent change-of-station orders, with certain exceptions not here pertinent. Subparagraph (2) provides in pertinent part that when the period of entitlement begins and actual departure is delayed

through no fault of the member or his dependents, additional entitlement may be authorized or approved by the commander concerned, or his designee, in increments of 10 days or less, for the entire period that temporary lodgings are required to be utilized.

The file shows an administrative disagreement as to the interpretation of the word "fault" contained in paragraph M4303–2e(2) of the regulations. By letter dated June 19, 1970, Headquarters, USAFE, expressed the opinion that the sergeant's delay was within his control and therefore if he had not tampered with U.S. mail nor attempted to include alcoholic beverages in his household goods, he would not have been detained beyond his original departure date. Consequently, it was concluded that all of the temporary lodging allowance received by the member should be recouped.

In a letter dated July 2, 1970, Headquarters, United States Air Force, Washington, D.C., contended, however, that the word "fault" is not synonymous with "blame" in the legal or moral sense, but, rather, it refers to a choice or election in regard to temporary lodging allowance. Since in this case the delay was not of the member's choice, the view was expressed that he was entitled to temporary lodging allowance both before and after the court-martial. Also, the letter made reference to USAFE Supplement 1, Air Force Manual 177–105, a copy of which was enclosed, and directed attention to item 5 of attachment 2 thereto. That attachment relates to extension of TLA upon delayed departure through no fault of the member or his dependents, and under item 5 reasons listed for extension of temporary lodging allowance beyond 10 days include change in port reporting date, and illness or involvement in civil court actions of the member or dependents. The contention is made that since there is no indication whether success or failure in civil court action would have a bearing on recoupment of temporary lodging allowance; and since no mention is made of action under the Uniform Code of Military Justice (UCMJ), members facing charges under UCMJ should receive similar treatment.

The word "fault" generally connotes an act to which blame, censure, impropriety, shortcoming, or culpability attaches. 35 C.J.S. "Fault," page 960, and authorities cited. Though that word may be susceptible to different constructions, it is our opinion that in the context of the provision under consideration, it should be given the generally accepted meaning of "blameworthy," "wrongful," or "culpable."

We are of the opinion that if a member's departure from his overseas station is delayed beyond 10 days because of charges involving misconduct, such charges would establish *prima facie* that the delay was not without his fault; and payment of additional temporary

lodging allowance is not authorized while such charges are pending and after conviction, if tried and found guilty, regardless of whether the member is charged in a civil action or under the Uniform Code of Military Justice.

If, however, the member is tried and acquitted of the charges, or the charges are dismissed without trial, or are dismissed upon review after conviction, resulting in his exoneration from blame, we are also of the opinion that temporary lodging allowance would then be payable, as otherwise authorized, for the period of delayed departure.

In the case presented, since the sergeant was found guilty in a court-martial proceeding of actions which resulted in his departure being delayed, it is evident that the member's delayed departure was not without his fault. However, as indicated above, the administrative regulations were not clear with regard to withholding payment pending the disposition of charges under the Uniform Code of Military Justice. In these circumstances, and since we do not appear to have considered the matter in prior decisions, recoupment of the amount of temporary lodging allowance paid prior to this decision in this and other cases will not be required if the payments were correct in other respects. The questions presented are answered accordingly.

[B-170584]

Contracts—Modification—Change Orders—Within Scope of Contract

A value engineering change substituting solid state tuners for electro-mechanical tuners intended as replacement components for electronic Countermeasures Sets properly was effected by the issuance of a change order to the sole producer of the sets since competitive procurement was not required as the change was within the changes clause contained in the letter contract for the tuners and does not constitute a "cardinal change" within the meaning of 10 U.S.C. 2304(g) and paragraph 3-805 of the Armed Services Procurement Regulation. The change also is in accord with the rule in *Keco Industries, Inc.* v. *United States*, 364 F. 2d 838, that in determining whether a change is within the general scope of the contract, consideration should be given to both the magnitude and quality of a change and whether the original purpose of the contract had been substantially altered.

To Loral Electronic Systems, February 9, 1971:

We refer to your letter of August 25, 1970, and the prior correspondence, protesting the issuance of a change order to replace electro-mechanical tuners with solid state tuners under Letter Contract No. N00019-70-C-0587 between the United States Navy, Naval Air Systems Command, and the Bunker-Ramo Corporation.

The subject letter contract dated June 27, 1970, requires replacement components for the ALQ-86 Electronic Countermeasures Set. We are advised by the Department of the Navy that Bunker-Ramo was the only known producer of the ALQ-86 and that the subject contract was entered into with that firm in order to assure that the replacement

components being procured will perform the same function in the equipment as the component it will replace.

The contract called for 42 electro-mechanical tuners and 40 amplifiers as components for the ALQ–86. It is reported that on July 10, 1970, Bunker-Ramo submitted a value engineering change proposal to deliver 42 solid state tuners in lieu of the 42 electro-mechanical tuners and 40 amplifiers. The Navy states that it was extremely interested in this proposed change to solid state tuners because of cost savings as well as technical advantages, including improved performance and greater reliability.

You state that on July 24, 1970, your firm, the producer of the electro-mechanical tuners for Bunker-Ramo, submitted an unsolicited proposal to the Navy for a semi-solid state tuner. In this connection, you advise that prior to the award of the letter contract to Bunker-Ramo, your firm had a series of discussions with Navy concerning the use of solid state tuners for the ALQ–86; that as a result of these discussions Loral submitted a technical proposal for solid state tuners on June 17, 1970, and a price proposal on July 24, 1970, and that this proposal was for a two-channel tuner with a provision for growth to a third channel at a later date. You report that following receipt of your July 24, 1970 proposal, the Navy advised you that it was planning to issue a request for quotations for a three-channel solid state tuner, and that while your firm was preparing technical specifications for the three-channel tuner the Navy decided to allow Bunker-Ramo to develop a two-channel solid state tuner under a change order.

The Navy reports, however, that your July 24, 1970 proposal was considered technically unacceptable because it continued to utilize electro-mechanical components in the servo-drive section. By letter dated August 13, 1970, your firm was notified of this objection. Also by letter of August 13, 1970, your firm advised the Navy that Loral would submit a proposal within a few days to replace the electro-mechanical components with solid state components. But on the same date, August 13, 1970, the change order was issued to Bunker-Ramo effecting its value engineering change proposal. Navy's determination not to conduct a competitive procurement for solid state tuners under the contract was based on the following reported reasons:

(1) The ALQ–86 is a highly specialized equipment and the Navy desired that the responsibility for overall system compatibility remain with the manufacturer of the equipment.

(2) In order to meet systems compatibility requirements, another contractor would need either an ALQ–86 or a specification for the tuner. An ALQ–86 was not available to be furnished another contractor and a specification for the tuners was not in existence.

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(3) It was necessary to issue the change order by 13 August 1970 so that Bunker-Ramo would not incur costs on electro-mechanical tuners and would be able to deliver solid state tuners in accordance with the contract delivery schedule in the place of electro-mechanical tuners. The delivery schedule is tailored to meet urgent fleet requirements.

You question Navy's right to utilize the "changes" clause of the letter contract to accomplish this procurement. It is your contention that these solid state tuners constituted a new procurement and that the Loral proposal should have received consideration in accordance with the provisions of 10 U.S.C. 2304(g), and Armed Services Procurement Regulation (ASPR) 3-805, which require that discussions be held with all responsible offerors who submit proposals within a competitive range, price and other factors considered.

We believe the propriety of the contracting officer's action depends on whether the change comes within the changes clause incorporated in the letter contract or whether it constitutes a "cardinal change" outside the scope of the clause. If the change is cardinal we agree that the provisions of 10 U.S.C. 2304(g) and ASPR 3-805 apply.

The applicable changes clause permits changes in the "drawings, designs or specifications"; however, the change must be "within the general scope of the contract." Whether a change is within the general scope of the contract is not always easy to determine. We believe there are sufficient similarities between this situation and that considered by the Court of Claims in *Keco Industries, Inc.* v. *United States*, 176 Ct. Cl. 983, 364 F. 2d 838 (1966), to warrant following the logic of that case in the present situation. In *Keco* a change from electric refrigerators to gasoline-driven refrigerators was held to be a change within the scope of the changes clause. The court there stated that consideration should be given both the magnitude and quality of the change and whether the original purpose of the contract had been substantially changed.

In light of all of the circumstances, we cannot conclude that the original purpose of the contract was so changed here as to require a conclusion that the change was beyond the scope of the contract.

Accordingly, your protest against the issuance of the change order in this case is denied.

[B-171597]

Contracts—Specifications—Qualified Products—Production Line Certification Propriety

The proposed "NASA Microelectronics Reliability Program" that would establish a Qualified Products List for microcircuits and require production line certification of manufacturers prior to procurement although restrictive of competition is considered acceptable on the basis of agency need since the testing of micro-

circuits to determine the extremely high level of quality and reliability assurance demanded by the space program is either impossible or impractical and the criticality of the product justifies the pre-qualification procedures. Therefore, the restriction on competition resulting from the program is not an unreasonable or invalid restriction in conflict with 10 U.S.C. 2304(g) and 10 U.S.C. 2305(a) and (b). However, as the line certification is a departure from normal procedures, the right is reserved to give the matter further consideration.

To the Acting Administrator, National Aeronautics and Space Administration, February 9, 1971:

We refer to a letter of December 22, 1970, from your Assistant General Counsel for Procurement Matters requesting our review and comments on a proposed "NASA Microelectronics Reliability Program."

The proposed program would establish within NASA a NASA Qualified Products List for microcircuits. In addition, the program would require production line certification of manufacturers prior to, and independent of, any particular NASA procurement of microcircuits. This line certification would be a condition to the qualification of a manufacturer's microcircuit as a class A microcircuit for the purpose of the proposed NASA Qualified Products List.

As noted by your Assistant General Counsel, the proposed certification of a manufacturer's production line appears to go one step beyond current programs instituted by the Government in its attempt to obtain highly reliable products. Since the program will undoubtedly require microcircuit manufacturers to invest their funds and time in obtaining certification of their production lines, our views are requested as to whether the program appears on its face to be valid with respect to concept and proposed execution. The legal question involved is correctly stated in the letter of December 22 as follows:

> Specifically, the principal legal issue appears to be whether, in accordance with 10 U.S.C. 2304(g) and 10 U.S.C. 2305(a) and (b), the proposed NASA microcircuit reliability program permits such free and full competition as is consistent with the nature and requirements of the product (microcircuits) to be procured. In brief, is the proposed program, which admittedly would have a restrictive effect on competition, realistically adapted to measurement of the manufacturer's responsibility and not unduly restrictive? We believe that this question should be answered affirmatively, and we ask for your advice with respect to this question, and for other comments you may have on the proposed program.
>
> The proposed NASA program, with respect to qualified products, is closely patterned after the Department of Defense's regulations (ASPR Part 11 and Chapter IV of the *Defense Standardization Manual* M200B (April 1, 1966). We have built into these regulations, as a condition to qualification of a class A microcircuit, the requirement of line certification.

Section 2304(g) of Title 10, United States Code, provides in part that in all negotiated procurements in excess of $2,500, proposals must be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. Section 2305(a) of the same Code title provides in part that in formally advertised procurements the specifications and invitations

for bids "shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned," while section 2305(b) thereof requires, among other things, that specifications in bid invitations contain the necessary language and attachments to permit full and free competition.

We have noted, with respect to the provisions of section 2305(a) (Title 10, U.S.C.), that the section and its legislative history indicate that the individual agencies are vested with a reasonable degree of discretion to determine the extent of competition which may be required consistent with the needs of the agency. 36 Comp. Gen. 809, 816 (1957). In this decision, which upheld the use of a qualified products system, we observed that legitimate restrictions on competition in Government procurement have been determined to be valid when the needs of the agency required it, citing 35 Comp. Gen. 161 (1955); 26 *id.* 676 (1947); and 20 *id.* 862, 865 (1941).

The central question here, therefore, is not whether the proposed line certification requirement would restrict competition—this admittedly it would do—but whether the requirement for line certification in appropriate instances is reasonable and consistent with the needs of your Administration. In this connection, Attachment A to the draft of the Management Instruction sets forth the purpose and justification for the line certification requirement as follows:

> The purpose of certification of manufacturing lines is, prior to and independent of any procurement action, to provide additional and necessary reliability assurance by the only practical means known—by holding within established limits the manufacturing process and material controls at critical points to assure the quality and homogeneity of units during manufacture. The intended NASA use of qualified microcircuits from certified lines is in space and aeronautical hardware requiring the highest level of quality and reliability to ensure success of missions and to protect from injury, death, and damage the personnel, craft and equipment involved in such missions. Testing of microcircuits to determine this highest level of quality and reliability assurance is either impossible because not within the state-of-the-art, or impractical because of the length of time or cost, or both, which would be needed to conduct such tests before acceptance or use. Therefore, to assure continuous availability of microcircuits to meet these needs, line certification will be required under appropriate circumstances.

Line certification under the proposed program would, in effect, constitute a determination of a prospective contractor's responsibility, i.e., ability and capacity to manufacture the particular microcircuit to be procured. While determinations concerning a contractor's responsibility must be made before contract award, we have not ordinarily sanctioned such determinations prior to bid opening since to do so might foreclose the receipt of proposals from responsible contractors of whom the procurement agency is not aware. Thus, in the usual case, such prebid opening determinations have been considered as unduly restricting competition within the meaning of the statutes governing competition. In the instant case, however, it is represented that the

testing of microcircuits to determine the extremely high level of quality and reliability assurance demanded by the space program is either impossible or impractical. We do not question the needs or the requirements of your agency with respect to the high level of quality and reliability assurance for microcircuits, nor do we see any basis for questioning the representation that testing of such microcircuits before acceptance or use is either impossible or impractical. Bidder prequalification procedures are provided for in some circumstances where justified by the criticality of the product. See Armed Services Procurement Regulation (ASPR) 18-209. We cannot conclude, therefore, that the restriction on competition resulting from the proposed program is an unreasonable or invalid restriction in conflict with the provisions of 10 U.S.C. 2304(g) and 10 U.S.C. 2305(a) and (b). Accordingly, we will interpose no objection to the adoption of the proposed "NASA Microelectronics Reliability Program" at this time. However, since line certification prior to bid opening for purposes of determining bidder responsibility is a wide departure from normal procedures, we reserve the right to give this matter further consideration should it later develop that the program either itself, or as implemented, unduly restricts competition beyond the legitimate needs of your Administration.

[B-170938]

Federal Credit Unions—Property Lost or Damaged—Disposition of Moneys Received in Settlement

Moneys received from carriers by the National Credit Union Administration (NCUA) in settlement for goods lost or damaged in transit that were shipped in connection with the operations of the Administration should be deposited for credit to the account of the Administration and not the general fund of the Treasury since the miscellaneous receipts rule (31 U.S.C. 484) is not for application, as the operating funds of the NCUA are not provided by annual appropriations but by fees and assessments upon credit unions pursuant to 12 U.S.C. 1755, which provides for the deposit of collections from the credit unions with the Treasurer of the United States for credit to the account of the Administration.

To the Administrator, National Credit Union Administration, February 10, 1971:

Reference is made to a letter of September 30, 1970, from Mr. Carroll Smith, Assistant Administrator for Administration, requesting an exception for the National Credit Union Administration from the general rule requiring the deposit of funds received in settlement for goods lost or damaged in transit into the Treasury as miscellaneous receipts.

The incident precipitating the request was a loss of office equipment caused by the wreck of a moving van during a shipment from Charlottesville, Virginia, to Harrisburg, Pennsylvania. We have been advised informally that your agency is no longer concerned about that

particular nominal loss since the funds have already been deposited into the general fund of the Treasury, but is concerned with the application of the general rule on future occasions.

The miscellaneous receipts rule is codified in 31 U.S.C. 484 (section 3617, Revised Statutes) and reads as follows:

> The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. * * *

Your Assistant Administrator's letter states that all operating funds of the National Credit Union Administration are provided from charter, examination, and supervision fees charged to Federal credit unions, and that your agency has not received public funds through appropriations since July 1, 1953. He adds that the application of 31 U.S.C. 484 and our prior decisions thereunder would have the effect of charging your member credit unions with the cost of replacing items which they had paid for in the first place. Therefore, he contends that the intent of Congress in establishing the financial arrangement for the National Credit Union Administration was to exempt it from the general rule and he refers us to the principle of our decision B–4906, dated October 11, 1951, making an exception for the Old-Age and Survivors Insurance Trust Fund.

The statutory authority for the collection of fees from Federal credit unions for the payment of the expenses of the Administration is section 5 of the Federal Credit Union Act, 12 U.S.C. 1755, as amended, which reads in part as follows:

> All such fees shall be deposited with the Treasurer of the United States for the account of the Administration and may be expended by the Administrator for such administrative, supervisory and other expenses incurred in carrying out the provisions hereof as he may determine to be proper, the purpose of such fees being to defray such expenses as far as practicable.

The latest amendment to the Federal Credit Union Act was Public Law 91–206, approved March 10, 1970, which created the National Credit Union Administration as an independent agency to replace the Bureau of Federal Credit Unions which had been located in the Social Security Administration of the Department of Health, Education, and Welfare. Both the Senate and House Reports on the new law confirm that the full expenses of operation have been and will continue to be paid by fees collected from the credit unions. House Report No. 91–331 states at page 2:

> One of the most important aspects of this legislation is that the *establishment of the Administration will not cost the taxpayers a single penny nor result in any appropriations by Congress*, since all the operating costs of the agency will be borne by fees and assessments paid by the more than 12,000 Federal credit unions in the United States. For more than 15 years, the supervision and regulation of

credit unions has been carried out without any expense to the taxpayers. In short, all costs of operating the National Credit Union Administration will be borne directly by credit union fees and assessments. [Italic supplied.]

We decided in 35 Comp. Gen. 615, 618 (1956) that the fees collected from Federal credit unions in payment for services rendered by the Bureau of Federal Credit Unions represent appropriated funds and are subject to the various restrictions and limitations on the uses of appropriated moneys. While that decision would preclude the payment of insurance premiums, it did not involve the question of the application of 31 U.S.C. 484 to moneys received from carriers for goods lost or damaged in transit, and our holding there does not necessarily mean that the miscellaneous receipts rule is applicable to such receipts.

In the decision cited to us as the basis for your request, B-4906, October 11, 1951, the question raised was the proper disposition of miscellaneous collections received by the Bureau of Old-Age and Survivors Insurance which was financed, not by appropriations, but with funds transferred from the Federal Old-Age and Survivors Insurance Trust Fund. We held that the Bureau's recoveries for lost or damaged Government property were clearly identified with trust expenditures, since all administrative expenses were paid from trust funds, and that those receipts should be credited to the trust fund which bore the costs of acquisition.

In the present case, the operating funds of the National Credit Union Administration are likewise not provided by annual appropriations but instead by assessments upon credit unions pursuant to the quoted provisions of 12 U.S.C. 1755. We agree with you that the principle established in 1951 for the Bureau of Old-Age and Survivors Insurance is applicable here. See also 22 Comp. Gen. 1133 (1943).

Accordingly, any amounts recovered by the National Credit Union Administration for property lost or damaged in connection with the operations of the Administration should be deposited for credit to the account of the Administration and not into the general fund of the Treasury.

[B-171232]

Contracts—Negotiation—Late Proposals and Quotations—Acceptance in Government's Interest

The propriety of considering two proposals under an amendment to a small business set-aside for fin assemblies that changed quantities and delivery rates—one proposal from a concern whose late offer had been rejected, the other from a concern whose proposal under the amendment was an initial offer which is being considered for partial award of a proposed low combination award—will not be questioned. The two late offerors having expended considerable time and effort in competing for the procurement, and the urgent need for the supplies not war-

ranting the reopening of the negotiations, the desirability of applying the late bid concept to the negotiating area in these circumstances appears appropriate even though, generally, untimely submitted initial proposals will not be admitted into the award competition.

To the Secretary of the Army, February 10, 1971:

Reference is made to a letter dated January 5, 1971, AMCGC-P, from the Army Materiel Command, concerning request for proposals No. DAAA09-71-R-0024, dated July 24, 1970, a total small business set-aside issued by the Army Ammunition Procurement and Supply Agency, Joliet, Illinois. It was proposed to make awards to at least two sources of supply which qualified as small business concerns and quoted on various specified alternate quantities of 60 MM, M2, fin assemblies.

The request for proposals originally specified a requirement for 4,950,000 units. On August 7, 1970, amendment No. 0001 was issued to change the requirement to a quantity of 4,050,000 units, to be delivered at a rate of 450,000 units per month over a 9-month period. On August 14, 1970, 18 firms responded with timely proposals; one firm, R. L. Pohlman Company, submitted a late proposal and was informed by the procuring activity that the proposal would not be considered for award.

On August 19, 1970, the 18 responding firms were advised that negotiations would be conducted until August 25, 1970 (R. L. Pohlman Company was not invited to participate in those negotiations). While the final offers submitted on August 25, 1970, were being considered and evaluated, the procuring office was advised by the Army Munitions Command that the previously reported requirement for 4,050,000 units was being reviewed and was subject to change. It was then determined that a total quantity of 4,164,400 units would be required. In accordance with this determination, amendment No. 0002 to the request for proposals was issued September 23, 1970, specifying 4,164,400 units, to be delivered at a rate of 400,000 units per month over an 11-month period commencing February 1971, based upon the assumption that awards would be made by October 30, 1970. The Alternate A through E quantities would permit combination awards totaling 4,164,400 units, such as awards to two concerns offering to furnish the Alternate C quantity of 2,082,200 units, or awards to two concerns, one quoting on the Alternate A quantity of 1,064,400 units, and the other quoting on the Alternate E quantity of 3,100,000 units.

Amendment No. 0002 was sent to the original 18 offerors, with instructions to submit final revised proposals by October 2, 1970, for awards by October 30, 1970. On October 2, 1970, 16 proposals were received, 15 of which were from firms that had responded to the basic request for proposals. In addition, an offer was received from Stile-

Craft Manufacturers, Incorporated, a firm that had not responded to the basic solicitation. Stile-Craft submitted a complete proposal on October 2, 1970, with a transmittal letter stating that it had received the procurement package in early August 1970, but did not have sufficient time to reply by August 14, 1970.

The October 2 proposal submitted by Stile-Craft was evaluated low, based on award of one alternate to Stile-Craft and another alternate to UNeCo Manufacturing Company. The contracting officer decided that it was proper to include Stile-Craft in the award consideration, although that company had not participated in the initial proposal submission. However, the contracting officer decided that it was also proper to reopen negotiations in order to include R. H. Pohlman Company, the initial late proposer, in the negotiations for the revised (amendment No. 0002) quantities.

Accordingly, negotiations were reopened October 5, 1970, and closed October 9, 1970. This time both Stile-Craft and Pohlman were invited to participate in the negotiations. Offered proposals were reevaluated, and it was determined that the Government's best interests would be served by making awards for the same alternates to Stile-Craft and UNeCo.

By October 22, 1970, pre-award surveys had been completed on both Stile-Craft and UNeCo in anticipation of completing award action by October 30, 1970. However, on October 22, 1970, Mr. F. G. Arkoosh, President, Wilkinson Manufacturing Company, a current supplier for the M2 Fin Assembly and a competitor on this procurement, contacted the purchasing office and indicated that he wanted to reopen negotiations, since he concluded that his firm was not low. On the same day, Mr. Arkoosh sent a teletype to the purchasing office offering to reduce Wilkinson's unit price on the alternate proposed for award to UNeCo.

Based on the offered reduction, the contracting officer determined that Wilkinson would be low on that alternate. He thereupon reopened negotiations October 27, 1970, for a period of 7 days, until November 3, 1970.

On November 5, 1970, after evaluation of the latest "best and final" offers, a teletype was sent by the purchasing office to all the apparently unsuccessful offerors, listing Wilkinson and Stile-Craft as the "apparently successful offerors" in accordance with Armed Services Procurement Regulation (ASPR) 3-508.2(b) for negotiated small business set-aside awards.

On November 13, 1970, however, Mr. Arkoosh, President of Wilkinson, alleged a mistake in computing its unit price on the alternate on which the firm was low. Mr. Arkoosh advised that the price should be increased by $0.05 per unit, which would bring its unit price to the

figure Wilkinson had quoted in its prior proposals on that alternate. Worksheets were furnished showing that a material cost figure of $0.03740 used in computing Wilkinson's price in the October 1970 round of negotiations had been computed at $0.003740 in arriving at its latest reduced price. A quote from the material supplier was also furnished to the contracting officer. Mr. Arkoosh stated that the prior quoted price represented only the basic cost of the item and that Wilkinson could not accept a contract at the lower figure. The record shows that even at the higher price, Wilkinson and Stile-Craft would still be the lowest combination.

In the meantime, we were requested to conduct an investigation of the award selection procedures followed on this procurement. In this regard, we were specifically requested to consider the question whether both Stile-Craft and Wilkinson are eligible small business concerns. Also, a question was raised whether an official of Wilkinson was a former contracting officer at the Joliet, Illinois, procurement office and, if so, whether there were grounds for suspecting that his firm received preferential treatment on this procurement. Finally, we were asked to consider whether the purpose of the procurement, to maintain at least two sources of supply, would be frustrated by the fact that the two prospective contractors are planning to subcontract to each other. We were advised that Stile-Craft has been the principal subcontractor for Wilkinson on this item in the past, and it was suggested that if, for any reason, one of these companies could not perform, neither of these companies would be able to perform on this contract.

The record shows that by letters of November 10, 1970, and December 3, 1970, respectively, the Small Business Administration Regional Officers concerned determined that both Stile-Craft and Wilkinson are eligible small business concerns for this procurement. Under 15 U.S.C. 637(B)(6) such determinations are binding on our Office.

As to whether an official of Wilkinson was a former contracting officer at the Joliet procurement installation, the file contains a letter dated November 27, 1970, from Mr. Fred G. Arkoosh, in which he states that to the best of his knowledge neither he nor any other employee of Wilkinson has ever worked for the United States Army Ammunition Procurement (APSA) and Supply Agency; that Mr. Arkoosh while serving on active duty was assigned to the St. Louis Ordnance District, but that his service was completed in 1946. The file also contains a statement from the contracting officer that: "In no way or at any time has Wilkinson Mfg. Co. received any special or preferential treatment. All offerors have been treated in the same manner."

With regard to the relationship between Stile-Craft and Wilkinson, the contracting officer reports it is true that Wilkinson does intend to purchase cartridge housings from Stile-Craft and Stile-Craft does intend to purchase fins from Wilkinson. Based on his investigation, the contracting officer has concluded that Stile-Craft is capable of manufacturing the fins in-house, and that Wilkinson can purchase the cartridge housing from an alternate source, R. L. Pohlman.

The contracting officer recommends that immediate awards be made. However, he requests a decision as to whether the alternate in question may be awarded to Wilkinson and, if so, at what price.

Your Deputy General Counsel (AMC) recommends against any award on the alternate to Wilkinson. He states that the evidence of mistake has been examined and that, in his opinion, the offeror has not clearly and convincingly established his intended price so as to permit correction, and therefore that the proposal should be disregarded. This opinion was confirmed by memorandum of February 1, 1971.

Counsel would permit award to Stile-Craft under this procurement, although he believes that the contracting officer erred in permitting Stile-Craft and Pohlman to participate in the procurement after issuance of the second amendment, since neither of these firms had submitted timely initial proposals. He states that while he is aware of GAO decisions sanctioning reopening of negotiations upon receipt of late modifications offering significant reductions in prices, he is not aware of any decision permitting consideration of a proposal not submitted initially in a timely manner. But he also points out that an argument can be made that the second amendment, which changed quantities and delivery dates, was in the nature of a new procurement, thus justifying acceptance of what were ordinarily late proposals. Counsel feels that whether this argument has merit or not, it is now too late in the procurement process to refuse to consider these two proposals, and he recommends that they be permitted to continue to compete in the procurement.

In this connection, he suggests the possibility of reopening negotiations with all competitors one final time with a short closing date. However, he recommends against this course of action on the basis that the identity of the low offerors has been disclosed and to reopen negotiations at this point would be tantamount to conducting an auction. He also feels that the award has already been long delayed and that the other offeror [Stile-Craft], who would be in line for an award but for the allegation of mistake by a competitor, could properly claim prejudice. Accordingly, counsel proposes that the contracting officer disregard Wilkinson's offer on the alternate on which it alleged mistake

and make immediate awards on the basis of the next low combination. Our decision on the matter is requested.

In view of the urgent need for this procurement, we agree that immediate awards should be made. We must recognize that the prime purpose of the procurement process is to satisfy the Government's requirements for supplies and services in a timely and effective manner. To continue to conduct additional rounds of negotiations to the point where the timeliness of the procurement is adversely affected does not appear to be in the Government's best interests. We therefore agree that a further round of negotiations should not be held at this point. We also agree that correction should not be permitted on the Wilkinson proposal on the basis that the standards for permitting correction have not been met.

Regarding the proposals submitted by Stile-Craft and Pohlman, counsel's analysis of our prior decisions is correct. While we have sanctioned opening of negotiations upon receipt of late modifications offering significant reductions in prices, we have not ruled on the question of permitting consideration of proposals not submitted initially in a timely manner. Thus in 47 Comp. Gen. 279 (1967) we criticized the refusal of a contracting officer to enter into negotiations when he had the opportunity to do so and was offered a price in a late modification considerably below the price he intended to accept. In that case, however, the offeror quoting the lower price had submitted a timely initial proposal; and our decision was based on the concept that the significantly lower, albeit late, modification cast substantial doubt that award without discussion would result in fair and reasonable prices within the proviso of 10 U.S.C. 2304(g).

As you know, the late bid concept which implies the establishment of definite cut-off points has been applied by the Department of Defense to the competitive negotiating area for a number of years. ASPR 3-506. (The instant RFP includes the standard late bid clause at ASPR 2-306.) Our Office has never disapproved of the use of a late bid clause in competitive negotiated procurements. In fact, we have recognized the desirability of translating the late bid concept to the negotiating area in appropriate circumstances. See B-161782, March 25, 1968.

Although ASPR 3-506(c) recognizes an exception to the late bid rule where it is determined that consideration of a late proposal is of extreme importance to the Government, the contracting officer is required in such cases to resolicit all responsible firms who have submitted proposals. ASPR 3-506(c). Generally, however, offerors who have failed to submit timely initial proposals will not be admitted into the award competition. We think this is a necessary rule from an adminis-

trative standpoint. Award selection could not proceed in an orderly fashion if contracting officers were constantly required to consider new initial proposals at various stages of the competition. There is also the consideration of fairness to the competing offerors who have submitted timely proposals.

Of course, as your counsel suggests, the argument can be made in this case that the second amendment, which changed quantities and delivery rates, was in the nature of a new procurement. In any event, the contracting officer permitted both Stile-Craft and Pohlman to participate in the procurement, and undoubtedly by this time they have expended much time and effort in the competition. In the circumstances, we think that these firms should be considered for award.

Accordingly, we believe that awards should be made on the next low combination as proposed by your counsel. We understand that this will result in awards to Stile-Craft and Delta Manufacturing Company. Therefore, we see no need to consider the question whether awards to both Stile-Craft and Wilkinson would frustrate the stated purpose of the procurement to maintain at least two independent sources of supply for the item.

Individual prices are not stated herein because of the restrictions placed upon the public disclosure of prices quoted by offerors during the negotiation of a procurement.

[B-159715]

Colleges, Schools, Etc.—Work Study Programs—Economic Opportunity Act—Agency Participation Apart From Grant Agreement

The limitation in the Economic Opportunity Act (42 U.S.C. 2754 (b)) requiring that work-study grant agreements with institutions of higher education provide that the "Federal share" of the compensation of students employed in the College Work-Study Program will not exceed 80 per centum of the compensation paid to the students, pertaining only to payments from grants made by the Office of Education to the institutions and not to the payments made by other Federal agencies where the students are employed, the employing agencies may bear a larger portion than 20 percent of student earnings so that grant funds may be spread over a greater number of students. Whether an agency should pay a social security tax on its contribution to a student's salary, and if so in what amount, is for determination by the Commissioner of the Internal Revenue Service.

Personal Services—Private Contract *v.* Government Personnel—Employment Recruiting

Contracts with the District of Columbia Urban Corps, a part of the D.C. Government, and similar Urban Corps and other organizations, including profit-making organizations in other localities, may not be entered into by Federal agencies for the purpose of recruiting students and dealing with educational institutions because the type of services contemplated can be performed more economically and feasibly by their own personnel. Even if a contract arrangement were permitted with the D.C. Urban Corps, the "override" payable would constitute a

reimbursement to the D.C. Government that is barred by section 601 of the Economy Act of 1932 (31 U.S.C. 686); moreover, any payment received would be for deposit into the Treasury of the United States to avoid the augmentation of the D.C. appropriation used to fund the Corps.

To the Chairman, United States Civil Service Commission, February 11, 1971:

The Executive Director of your Commission by letter of November 24, 1970, requests our advice on several questions with respect to recent developments in the College Work-Study Program. This program is authorized under title I–C of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. 2751, *et seq.*, and its general purpose is to stimulate and promote the part-time employment of students in institutions of higher learning who have need for earnings to pursue their courses of study.

The program is funded by grants made to qualifying institutions of higher education by the Office of Education, and the institutions are required to operate programs of part-time employment for their students. The students may work for the institutions themselves or work in the public interest for public or nonprofit organizations. Federal agencies may cooperate with institutions by providing job opportunities for students in the program, and it is work performed in and for Federal agencies which gives rise to the questions presented.

At the present time, institutions pay up to 80 percent of student earnings from funds granted by the Commissioner of Education, and participating Federal agencies have paid the remaining 20 percent. Recently, some Federal agencies have been asked by the institutions to bear a larger portion of student earnings, so that the funds granted by the Office of Education may be spread over a greater number of students. We are asked to advise whether under the law this is permissible.

The law found at 42 U.S.C. 2754(6) requires that agreements with institutions of higher education for work-study grants shall:

> provide that the Federal share of the compensation of students employed in the work-study program * * * *will not exceed* 80 percentum of such compensation. * * * [Italic supplied.]

It has already been determined that in this program the term "Federal share" pertains only to payments made from grants of the Office of Education and does not include payments made by other Federal agencies where the students may be employed. See 46 Comp. Gen. 115 (1966).

It is our view that the language of 42 U.S.C. 2754(6) can only be construed as an upward limitation of 80 percent on the Federal share payable from the grant funds. Accordingly, if Federal agencies—or for that matter any other "employers" in the program—are agreeable

to higher payments (for the agency's share of the student's salary payment), such payments may be made and the "Federal shares" may be correspondingly reduced.

The second question relates to social security costs of student employees. In 46 Comp. Gen. 115 (1966) we held that, in addition to salary payments, Federal agencies may pay unreimbursed administrative costs such as social security taxes, compensation insurance, and other standard contributions. You now ask whether agencies may pay the full social security tax rather than merely a proportion based on the agency share of salary payment. You point out that since the agency is receiving the benefit of the employer's contribution and the social security payments would not result in a profit to the institutions, full payment by the agency would seem to be justified. We agree with this position. Moreover, as a matter of policy, it has been decided by the Office of Education that none of the "Federal share" may be used for the payment of such costs. See section 710, page 7–7, Office of Education College Work-Study Program Manual, 1968.

We would point out, however, that it seems to us that in order for full reimbursement for these costs to be made by the Federal agencies to the institutions, the students must, in every case, be employees of the institutions. The Federal Insurance Contributions Act, as amended, 26 U.S.C. 3111, provides that the rates of tax imposed on an employer relates to wages "paid by him" with respect to employment. If in fact the student employees are considered employees of the agencies where they perform their work, the agencies under the law might be required to pay only the FICA taxes on amounts paid students from their appropriations. It is recommended that this aspect of the matter be cleared with the Commissioner of the Internal Revenue Service.

The other two questions relate to Federal agencies contracting with the D.C. Urban Corps, a part of the District of Columbia Government, and similar Urban Corps and other organizations (including profit-making organizations) in other localities for the purpose of recruiting students and dealing with institutions on behalf of the agencies. It is envisioned that these Corps will be paid an "override" on the wages of student-enrollees supplied by the Corps for the staff services utilized and administrative expenses. You ask if there is any legal objection to the proposed arrangement, and if so whether there is any other basis on which reimbursement could be made for the proposed services by any of the referred-to organizations.

With regard to the matter generally, it is a rule of long standing that services normally performed by Government personnel may be performed under contract only if it can be shown that contracting out to non-Government parties is substantially more economical or feasible

or is necessary in the circumstances. That rule is to be applied to contract procurement on a strictly job basis, under which the Government contracts for the furnishing of a product or the performance of a service with no detailed control or supervision over the method by which the result required is accomplished. See 44 Comp. Gen. 761 (1965). The services that would be rendered the agencies by these urban corps or other organizations are the type of services for which personnel units of Federal agencies ordinarily are maintained, and thus it would seem to us that they can be performed on a substantially more economical and feasible basis by such personnel units. Therefore, unless it is determined that such is not the case, our view is that it would be improper to enter into such agreements. With specific reference to the D.C. Urban Corps, there are additional reasons why such an agreement would not be authorized. The D.C. Urban Corps is a part of the District of Columbia Government; and the consequence of such an arrangement would be that, insofar as agencies would be paying an "override" to the D.C. Urban Corps, this would constitute a reimbursement by the agencies involved to the District of Columbia Government. While such reimbursements are allowable between Federal departments and agencies under section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686, that act does not apply to the District of Columbia, and reimbursement for services rendered between the District of Columbia Government and Federal agencies is not authorized. B-107612, February 8, 1952. Moreover, as the D.C. Urban Corps is part of the District of Columbia Government, any amounts received by it for the services here contemplated would be for deposit into the Treasury of the United States for the credit of the District of Columbia, since, absent a provision of law to the contrary, to permit the D.C. Urban Corps to retain and use such payment would constitute an improper augmentation of the District of Columbia appropriation used to fund the D.C. Urban Corps.

[B-153007]

Transportation—Household Effects—Military Personnel—Replacement for Effects Damaged or Destroyed

Replacement items for the household effects of members of the uniformed services assigned in Europe, which were destroyed by fire before delivery was effected, may not be shipped at Government expense, the authority in 37 U.S.C. 406(b) to ship household effects at Government expense incident to a change of station relating to effects possessed by a member on the effective date of his orders, or the effects acquired shortly thereafter in exceptional circumstances, and before they are turned over to a transportation officer or carrier for shipment, at which time the member's shipping rights are exhausted, even though the original shipment is damaged or destroyed in transit. Moreover, to authorize replacement shipments under 37 U.S.C. 406 would provide duplicate transportation benefits, since the compensation paid pursuant to 31 U.S.C. 241 for destroyed property includes the cost of transportation.

To the Secretary of the Navy, February 16, 1971:

Further reference is made to letter of May 22, 1970, from the Assistant Secretary of the Navy, in which he requests a decision whether shipment of household effects at Government expense to a duty station outside continental United States to replace those which have been destroyed by fire prior to final delivery is authorized under the provisions of paragraph M8000–2, item 9, Joint Travel Regulations. If not, he asks whether the regulations may be amended to authorize such shipment. The request has been assigned Control No. 70–13 by the Per Diem, Travel and Transportation Allowance Committee.

The file transmitted with the request contains correspondence from the Directorate of Army Transportation, Deputy Chief of Staff for Logistics, Department of the Army, dated December 6, 1969, with enclosures, concerning a situation in which all of the household goods belonging to some 15 military members assigned in Europe were destroyed in a warehouse fire in Europe before final delivery under Government bill of lading was made to the proper owners. It was stated that the members will receive full compensation for their loss, but the problem is that they are unable to buy replacement items in Europe. On that basis, the Assistant Secretary requests a decision whether paragraph M8000–2, item 9, Joint Travel Regulations, may be used by the members concerned as authority to ship to Europe at Government expense replacement items of household goods in an amount:

a. Not to exceed the weight of the original shipment of household goods which was destroyed in the fire, or;
b. Not to exceed the weight of the unused portion of the member's authorized weight allowance remaining after shipment of the household goods that were destroyed by fire.

If the answers to those questions are in the negative, the Assistant Secretary asks whether the Joint Travel Regulations may be amended to authorize shipment in future similar cases.

Paragraph M8000–2, item 9, Joint Travel Regulations, implementing section 406 of Title 37, United States Code, provides that the term "household goods" that may be transported at Government expense does not include—

9. articles of household goods acquired subsequent to the effective date of permanent change-of-station orders except when purchased in the United States for shipment to a duty station outside the United States with the approval of the appropriate authority of the Service concerned, or when they are bona fide replacements of articles which have become inadequate, worn out, broken, or unserviceable on or after the effective date of orders but prior to the date of release of the bulk of household goods to the transportation officer or carrier for shipment.

Under the provisions of 37 U.S.C. 406(b), the right of members of the uniformed services to shipment of household effects at Government expense incident to change of station accrues to such members

upon the issuance of orders and becomes definite on the effective date of such orders. Therefore, entitlement to shipment generally relates only to those effects possessed by a member at that time. 43 Comp. Gen. 514 (1964) and decisions therein cited.

In 24 Comp. Gen. 69 (1944), we held that there was no authority for a civilian employee to ship at Government expense household effects purchased after the effective date of orders to replace those destroyed by fire at the old station prior to the date such orders were issued. In 44 Comp. Gen. 290 (1964), we said that this principle was applicable to military personnel as well; and since nontemporary storage is in lieu of shipment, there was no authority for the payment of nontemporary storage charges for effects purchased to replace goods destroyed by fire at the storage facility.

In that decision, we expressed the view that after a member has placed his household effects in nontemporary storage, he has legally exhausted his shipping entitlement to the weight stored; and the law does not contemplate that nontemporary storage will be furnished at Government expense for any additional weight of household effects subsequently acquired, even though such weight is acquired to replace the weight destroyed while in nontemporary storage.

As pointed out by the Assistant Secretary, an exception to the rule against the shipment of effects acquired after the effective date of permanent change-of-station orders was recognized in 27 Comp. Gen. 171 (1947). This exception permitted the shipment under controlled circumstances of after-acquired household goods from the United States to an overseas station because of certain abnormal housing conditions then existing. A further exception was authorized in 43 Comp. Gen. 514 (1964) to permit shipment of replacement items of equipment which had been serviceable on the effective date of orders but had to be replaced because of a breakdown, wearing out, etc., after such date but before the date the goods were turned over to a transportation officer or carrier for shipment. Paragraph M8000–2, item 9, is based on these decisions.

The general rule cited above, including the exceptions mentioned, comes within the concept long held by the accounting officers that the right to ship household effects under 37 U.S.C. 406(b), and the prior statutes from which it stems, is a change-of-station allowance and relates to the effects in the possession of the member on the effective date of his orders, or effects which were acquired shortly thereafter in the exceptional circumstances specified, and before the household effects are turned over to a transportation officer or carrier for shipment.

Once a member has turned over his goods to a transportation officer or carrier and shipment has commenced, however, it would appear

that he has exercised his shipping rights; and we are of the opinion that there is no authority under the statute for an additional shipment consisting of items required to replace those effects that have been damaged or destroyed, even though the damage or destruction may have occurred while the original shipment was in transit incident to a change of station. *Cf.* 44 Comp. Gen. 290.

Accordingly, the answers to questions a and b must be in the negative. Furthermore, it is our view that there is no legal basis for a change in the applicable regulations to provide for shipment of after-acquired household effects at Government expense under the circumstances indicated.

As stated above, correspondence in the file shows that the members will be fully compensated for the destroyed property. Presumably such action will be taken under the provisions of 31 U.S.C. 241 (formerly 10 U.S.C. 2732). The regulations implementing those statutory provisions are contained in chapter 11 of Army Regulation 27–20, dated September 18, 1970, and paragraph 11–15 of the regulations, "Factors in determination of loss," authorizes compensation equal to the value of the article at the time of its destruction.

As a basis for determining such value, paragraph 11–15 provides that:

> In most cases, the value at the time of * * * destruction should be predicated upon the replacement cost, *at the time* of the incident and *at the place* of claimant's geographic location at the time of adjudication of the claim. Replacement cost should be computed on the basis of a new item which is identical or substantially similar to the item which is * * * destroyed, less the appropriate percentage of depreciation * * *.

We understand that under those provisions the compensation paid to the members here concerned for the destruction of their property will include any necessary cost of transporting like replacement property from the United States to their geographic location at the time of adjudication of their claims, presumably Europe in this case. Therefore, the promulgation of a regulation pursuant to 37 U.S.C. 406 which would authorize transportation of the replacement articles at Government expense would confer on the members concerned duplicate transportation benefits. We find no justification for such a result on either legal or equitable grounds.

[B–170241]

Contracts—Awards—Labor Surplus Areas—Certificate of Eligibility—Validity

Although the first preference labor surplus certificate of eligibility furnished by a small business concern was invalid as the bidder had no plant in the labor surplus area at the time the certificate was issued, the plant being acquired a month after the award of the set-aside portion of the procurement for detecting sets to the concern on the basis of the labor surplus preference, the award need

not be canceled as it is voidable at the Government's option rather than void *ab initio*, since it was made in good faith as the contracting officer was required to accept the certificate in the absence of a pre-award protest or evidence of error on the face of the certificate, which prospectively located the plant in the surplus labor area, and also the contracting officer properly waived the omission of the plant's address in the surplus labor area as a minor deviation.

To Universal Industries, Inc., February 16, 1971:

Reference is made to your letters dated July 9, July 24, September 4, October 27, and November 25, 1970, protesting against the award of a contract to Fourdee Incorporated under solicitation No. DAAKO1-70-B-6402, issued by the Department of the Army, Army Materiel Command (AMC), U.S. Army Mobility Equipment Command, Directorate of Procurement and Production, St. Louis, Missouri.

The solicitation was issued on May 15, 1970, for the purchase of 6,426 Detecting Sets, Mine Portable Metallic (U), in accordance with MIL-D-0023356B(ME). The solicitation provided for a 50 percent set-aside for small business concerns.

The course of the instant procurement prior to award may be summarized as follows (quoting from the Army report of August 13, 1970):

The low responsive responsible bidder on the non-set-aside portion was the VP Company who received award of contract DAAKO1-70-C-7694 for that portion in the total amount of $1,023,143.00.

Six small business (and one ineligible large business) firms submitted responsive bids on the non-set-aside portion at a unit price within 130% of the VP's highest unit price and thus were eligible to participate in negotiations for award of the 50% set-aside portion as provided in Article 3 of the Invitation entitled "Notice of Partial Small Business Set-Aside (1969 June)." Those firms were (utilizing prices bid for option 1—Military Preparation rather than option 2—Commercial Preparation):

The VP Company	$1,041,943.00
Polan Industries	1,067,890.50
Fourdee Inc.	1,087,508.00
Universal Industries Inc.	1,104,730.40
Aerotronic Controls Co.	1,127,339.00
Barnett Instrument Co.	1,209,245.00

After careful evaluation, the priority for negotiations of the set-aside portion pursuant to Article 3 was determined to be as follows:

Group 1—Fourdee Inc.
Universal Industries
Group 3—Polan Industries
Group 4—The VP Company
Aerotronics Control Company
Barnett Instruments Company

Fourdee Inc. was determined to have fallen within Group 1 by its submission of a Certificate of Eligibility for Preference in Federal Procurement under Defense Manpower Policy No. 4 with its bid. It was found to be first in the order of priority based on its having submitted the lowest bid price on the non-set-aside portion of the firms within Group 1.

Prior to award, a pre-award survey was requested and performed by the Defense Contract Administration Services District Orlando, Florida on Fourdee Inc.

The Pre-Award Survey Report noted that Fourdee had "coordinated with the U.S. Department of Labor and the Florida State Employment Service, Tampa, Florida, relative to "Eligibility for Preference in Federal Procurement" under

the Defense Manpower Policy No. 4" and planned "to perform approximately 25% of the contract effort in the Tampa area."

Based on the foregoing confirmation of Fourdee's status as a certified eligible concern, the contracting officer conducted negotiations and made award of Contract DAAK01-70-C-7973 to Fourdee for the Set-Aside Portion in the total amount of $1,021,477.24 on 25 June 1970.

Approximately 4 days after the award of the set-aside portion to Fourdee, your company questioned the eligibility and priority given to initial negotiations with Fourdee for the set-aside portion and asserted that Fourdee was only entitled to a Group 2 classification rather than Group 1 because its certificate of eligibility for preference was invalid. Subsequent to your post-award allegations concerning the validity of Fourdee's first preference certificate, the procurement activity's contract specialist "made verbal inquiry of the Department of Labor to ascertain whether the Certificate of Eligibility was valid." A memorandum dated July 2, 1970, describes that inquiry and the response thereto as follows:

Reference telecon 30 June 69 in which contractor's contention was that there was no verification that this company (Fourdee) intended to produce this work in a critical labor surplus area.

2 July 70—A telecon was made to the Department of Labor, 813-229-5121, Mr. Fred Johnson and Fourdee's certificate of eligibility under Defense Manpower Policy No. 4 dated 1 June 70 was discussed. Mr. Johnson stated Fourdee's certificate was in perfect order and is the only agreement between the Department of Labor and Fourdee and this is the only agreement required by law. Fourdee has informed the Department of Labor that within 30 days he will have a facility in the Tampa Model Cities area ready to start production. The Department of Labor will make personal contact to assure the contractor is adhering to the DMP4 "disadvantaged" program. He stated they were impressed with Fourdee's presentation.

Apparently, due to the continued allegations of your company that the certificate was invalid, including a protest to our Office, the procurement activity, by letter dated July 23, 1970, requested that the Department of Labor "furnish this office with the decision of the Department of Labor concerning the validity of the Certificate of Preference issued to Fourdee Company * * *." By letter dated August 7, 1970, the Associate Manpower Administrator for U.S. Training and Employment Service, Manpower Administration, Department of Labor, advised the activity that "the certificate was invalid."

We need not rule upon the validity of the certificate in question, since the Associate Solicitor for Manpower, Department of Labor, reviewed the matter at the request of the Associate Manpower Administrator. The Associate Solicitor's response, dated August 28, 1970, is as follows:

We have reviewed the material which you submitted to us regarding DMP-4 certification of Fourdee, Incorporated at Tampa, Florida and concur with your disposition of the legal aspects of this question as reflected in the Korfonta to Norweed telegram of July 13, 1970, and your letter of August 7 to A. T. McGrath of the U.S. Army Mobility Equipment Command.

The State Employment Security Agency, under the amendments to 29 CFR Part 8, which became effective on June 1, 1970 is without authority to issue first preference certificates unless the requesting party is an "employing establishment *in or near* . . . classified sections of concentrated unemployment or underemployment. . . ." The Regional Manpower Administrator has indicated that Fourdee did not become "operational" in Tampa, which is such an area, until July 24, 1970, and there is no clear indication that Fourdee had an employing establishment in Tampa before that date. Therefore, under these circumstances no authority existed for the issuance of a first preference certification to Fourdee from June 1 until July 24.

Similarly, under the provisions of the regulations which were in effect prior to July 1, 1970, the State Employment Security Agency was without authority to issue first preference group certificates unless the requesting parties were "firms *in or near* . . . classified sections." This "in or near" requirement for first preference was applicable under the old regulations to any type of certificate which the State Employment Security Agency was authorized to issue. [Italic supplied.]

Since we adopt the position taken by the Department of Labor that no authority existed for the issuance of the first preference certification to Fourdee until almost 1 month after contract award, it is clear that Fourdee was not entitled to first priority negotiation for award of the set-aside portion of the solicitation. Therefore, at issue is what effect, if any, the subsequently ascertained invalidity of the certificate had on the award of the contract to Fourdee. In addition, consistent with your protest, we must also consider the effect of the failure of Fourdee to indicate in its bid, as required by paragraphs 24 and 27 of the solicitation, the location of the plant where the work under the set-aside portion of the contract was to be performed; *i.e.*, Tampa, Florida.

With respect to the first issue, our Office has had occasion to consider situations closely analogous to the one here involved. In these cases, in response to a solicitation restricting eligibility for award to small business concerns, a bidder will self-certify that it is a small business concern and receive an award based upon that certification. Subsequent to award, it is discovered that, through no fault of the bidder, the self-certification was in error. We have held that the awarded contract, based upon the bidder's good faith self-certification, and the Government's good faith acceptance of the certification, is voidable, rather than void *ab initio*, solely at the option of the Government. See 49 Comp. Gen. 369, 375–376 (1969).

Since the Department of Labor has ruled that the certificate of eligibility furnished with Fourdee's bid was invalid due to the fact Fourdee had no plant in or near the Tampa labor surplus area at the time the certificate was issued, we believe that the above rationale should be applied with respect to this procurement.

The certificate involved was furnished with Fourdee's bid in accordance with Article 3(e) of the solicitation which states:

(e) Eligibility Based on Certification. Where eligibility for preference is based upon the status of the bidder as a "certified-eligible concern," the bidder shall

furnish with his bid evidence of its certification or its first tier subcontractors' certification by the Secretary of Labor.

The certificate reads with respect to the location of Fourdee's plant:

It is hereby certified that:
Fourdee, Incorporated * * *
* * * Name of Firm * * *
has an approved plan to employ disadvantaged workers residing in Model Cities Area of Tampa, Florida in its facilities located at or to be located at
Classified Section City and State
* * * Tampa, Florida
City State

The firm named above is therefore certified for preference in procurement of Federal Government contracts under Defense Manpower Policy No. 4. * * * [Italic supplied.]

The certificate, approved June 1, 1970, is signed by the Manager of the Florida State Employment Service, Tampa, Florida. The caption to the certificate states as follows:

U.S. DEPARTMENT OF LABOR
Manpower Administration

Bureau of Employment Security
Washington, D.C. 20210

Certificate of Eligibility
for Preference in Federal Procurement
Under Defense Manpower Policy No. 4

The preaward survey on Fourdee clearly indicated to the contracting officer that Fourdee had no plant in Tampa prior to award. In addition, under the language of the certificate, Fourdee was permitted to prospectively locate in the Tampa area. Under these circumstances, the contracting officer cannot reasonably be charged with notice of an error in the certificate so as to have required him to question the certificate's validity.

Defense Manpower Policy 4-Placement of Procurement and Facilities in Sections and Areas of High Unemployment, 32A CFR, chapter 1, makes it clear that the Secretary of Labor is responsible for certifying establishments which agree to perform contracts in or near sections of concentrated employment or underemployment. Armed Services and Procurement Regulation (ASPR) 1–800 was promulgated to implement these policies within the Department of Defense. ASPR 1–803(a)(iv) provides that the Department of Labor certifications shall be considered conclusive with respect to a particular procurement. See Article 3(b)(3)(i) of the solicitation as follows:

(i) "Certified eligible concern" means a concern (A) located in or near a section of concentrated unemployment or underemployment which has been certified by the Secretary of Labor in accordance with 29 CFR 8.7(b) with respect to the employment of disadvantaged persons residing within such sections, and (B) which will agree to perform, or cause to be performed by a certified concern, a substantial proportion of a contract in or near such sections: it includes a concern which, though not so certified, agrees to have a substantial proportion of a contract performed by certified concerns in or near such sections.

A concern shall be deemed to perform a substantial proportion of a contract in or near sections of concentrated unemployment or underemployment if the costs that the concern will incur on account of manufacturing or production in or near such sections (by itself if a certified concern, or by certified concerns acting as first-tier subcontractors amount to more than 25 percent of the contract price.

Considering the above regulations and solicitation provisions, it would be unreasonable to impute to the contracting officer any improper action or bad faith in accepting the certificate submitted with Fourdee's bid as other than a valid, subsisting certificate. We believe that under the applicable regulations, the contracting officer is required to accept the certificate at face value in the absence of a preaward protest from other bidders or errors obvious on the face of the certificate. See B–161991, September 15, 1967, and 46 Comp. Gen. 123, 132 (1966). An examination of the record fails to disclose evidence of bad faith on the part of Fourdee either in applying for the certificate or in submitting the certificate with its bid. Throughout the preaward period, Fourdee indicated its intention to prospectively establish its plant in Tampa. In conclusion, we quote, as dispositive of this issue from our decision at 41 Comp. Gen. 252 (1961), where the small business status of an awardee was determined to be erroneous approximately 1 month after award:

* * * Furthermore, there is no evidence to indicate that Dawson, Johnson & Kibler was imprudent or lacking in good faith when it certified itself as a small business concern since prior to that self-certification the Small Business Administration had in its two most recent determinations on the size status of the firm declared that the firm was a small business concern. * * *

There, as here, both the bidder and the Government relied on an apparently valid eligibility determination made by the Government agency required to make such determinations in consummating the award of the contract. We therefore conclude that the submission of the certificate of eligibility with the bid entitled the contracting officer to rely upon such certificate.

With respect to your contention as to Fourdee's failure to insert in paragraph 24, as required, the labor surplus area address (location) at which it was to perform at least 25 percent of the contract price, attention is invited to the introductory provision of that paragraph specifically advising bidders that:

This procurement is not set aside for labor surplus area concerns. However, the offeror's status as such a concern may affect entitlement to award in case of *tie offers, or of offer evaluation in accordance with the Buy American clause* of this solicitation. In order to have his entitlement to a preference determined *if those circumstances should apply*, the offer must: * * * [Italic supplied.]

We believe that a reasonable reading of paragraph 24 results in the conclusion that it applies to a bidder's entitlement to award on the non-set-aside portion of the solicitation only in the specific limited instances mentioned therein. Consequently, Fourdee's failure with

regard to the provisions of that paragraph did not affect its eligibility for award on the small-business set-aside portion of the solicitation.

With respect to paragraph 27, Fourdee designated its home plant at Casselberry, Florida, as the plant where the work was to be performed rather than the proposed site at Tampa, Florida. Although it is apparent that Fourdee failed to furnish complete information in the appropriate spaces as to the location of its labor surplus area plant, we view such failure as a minor deviation from the requirements of the solicitation which could have been waived by the contracting officer. We believe that the furnishing of the certificate of eligibility with the bid clearly evidenced the fact that Fourdee would perform the required portion of any resultant contract at a facility in Tampa, Florida. See ASPR 2-405.

Since, under Article 3(d) of Fourdee's contract, it agrees to perform a substantial portion of the contract in or near sections of concentrated unemployment or underemployment, and since it would not now be in the Government's best interests to cancel the contract, which was entered into in good faith, your protest is denied.

[B-170398]

Contracts—Research and Development—Conflicts of Interest Prohibitions

The Federal Highway Administration, Department of Transportation, in awarding a cost-plus-a-fixed-fee contract for an Urban Traffic Control System (UTCS) to the offeror that had prepared the specifications for the system under a research and development study, did not violate any mandatory regulations, since the Federal Procurement Regulations do not contain an organizational conflicts of interest provision and the Department has not issued specific rules governing conflicts of interests, and even if the Administration was subject to the Department of Defense Directives 5500.10, "Rules for the Avoidance of Organizational Conflicts of Interest," which it is not, the Directive is not self-executing and would not apply in the absence of notice to prospective contractors and inclusion of a restrictive clause in the contract. Moreover, whether the UTCS program represents a judicious, as distinguished from legal, expenditure of public funds would not affect the legality of the contract.

Contracts—Negotiation—Competition—Failure to Solicit Proposals From All Sources

The fact that several sources experienced in traffic control systems were not solicited to submit offers by the Federal Highway Administration, Department of Transportation, under a request for proposals, does not establish that adequate competition and a reasonable price were not obtained, since in resolving questions concerning the adequacy of the solicitation of supply sources the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained and not upon whether every possible supply source was offered an opportunity to bid or submit a proposal.

Contracts—Negotiation—Requests for Proposals—Submission Date

The determination of the date to be specified for receipt of proposals is a matter of judgment properly vested in the contracting agency; and where the record

evidences that a 40-day period for the submission of proposals on an Urban Traffic Control System to the Federal Highway Administration, Department of Transportation, was adequate for any offeror who had an interest in the project, as well as experience, knowledge, systems expertise, and capability sufficient to meet the requirements contained in the request for proposals, it is concluded the date specified for the submission of offers was not arbitrarily or capriciously selected, nor was the date unduly restrictive of competition for the procurement.

Contracts—Negotiation—Evaluation Factors—Criteria

Where a solicitation is deficient in not providing reasonably definite information as to the relative importance of the evaluation criteria or factors set out in the request for proposals, and the sufficiency of the information is not questioned prior to the submission of proposals, and the record does not establish that any offeror was placed at a competitive advantage or disadvantage by the inadequacy of the information, the deficiency is not sufficiently material to disturb a contract award.

Contracts—Negotiation—Requests for Proposals—Ambiguous

Although it is incumbent upon a Government agency to state the material requirements of a procurement in a clear and unambiguous manner, should any aspect of a solicitation require clarification, good faith and an observance of the spirit of competitive solicitation, as well as sound business practice on the part of competitors for Government contracts, dictate that the appropriate time for a detailed examination of any provision considered to be ambiguous or confusing should be prior to the time specified for submission of proposals or bids, and any unresolved ambiguities should be the subject of a timely protest.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Nonresponsive Proposals

When a proposal is determined upon initial evaluation to be outside the competitive range, there is no requirement in accordance with section 1-3.805-1(a) of the Federal Procurement Regulations to conduct further discussions concerning the deficiencies of the proposal, the section requiring that after receipt of initial proposals, written or oral discussions should be conducted only with responsible offerors "who submitted proposals within a competitive range."

Contracts—Cost-Plus—Basis for Award

The cost-plus-a-fixed-fee contracts authorized by 41 U.S.C. 254(b) may be used when the head of an agency determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without use of a cost or cost-plus-a-fixed-fee or an incentive type contract; and since the administrative determination is afforded finality by 41 U.S.C. 257(a), there is no legal basis to require cancellation of a contract simply because it is a cost reimbursement type of contract.

To the LFE Corporation, February 17, 1971:

Further reference is made to your telegram of July 15, 1970, and to subsequent correspondence from you and your attorneys, protesting the award of a contract to Sperry Rand Corporation under request for proposals (RFP) No. 241, issued by the Federal Highway Administration (FHWA), Department of Transportation, Washington, D.C.

Request for proposals No. 241 was issued on April 22, 1970, to 20

firms, including LFE. The statement of work was set out in the RFP as follows:

> The contractor shall furnish the necessary facilities, materials, personnel, and such other services as may be required, and in consultation with the Government, conduct a research and development study entitled, "Advanced Control Technology in Urban Traffic Control Systems—Installation," with the objectives to procure, install, and to render to operational status (including software) the Urban Traffic Control System and the Bus Priority System.
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> The contract shall cover the final system analysis, engineering procurement and installation of the equipment for the first phase of the Urban Traffic Control System computer-controlled signal system, and the Bus Priority System. A necessary requirement is the programming of all the software and the development of the initial complement of signal control timing patterns. A more detailed method of procedure will be inserted here based upon the selected contractor's method of approach.

On June 1, 1970, the closing date for receipt of proposals, the following cost-plus-a-fixed-fee proposals were received and recorded:

Sperry Rand	$3,778,581
LFE	4,026,930
TRW, Inc.	4,556,549

You also stated in your transmittal letter that you were willing to negotiate a firm fixed-price contract for the project. Although the proposed cost of your proposal was less than the cost shown in TRW's proposal, price was not of primary importance because a cost reimbursement type of contract was involved, and the RFP provided that award might be made to other than the lowest offeror if another proposal was clearly superior.

The three proposals received from Sperry Rand, TRW, and your company were examined and assigned numerical scores of 83.6, 77.8 and 61.4, respectively, by a technical evaluation team. With no dissenting votes, the technical evaluation team recommended that your proposal be eliminated from further consideration. In these circumstances, the contracting officer determined that your proposal was outside the competitive range. Written questions concerning their proposals were then provided Sperry Rand and TRW, and oral discussions were conducted with those firms on June 15, 1970. Following the discussions, final cost proposals (including revisions as a result of the discussions) were submitted and the technical and business evaluations of the proposals were completed. Sperry Rand's final cost proposal totaled $3,975,849, and TRW proposed a final price of $4,083,650. The evaluation panel recommended to the contracting officer that a contract be negotiated with Sperry Rand. Final negotiations were undertaken with Sperry Rand and the contract was awarded to that firm on June 30, 1970, in the amount of $3,775,691. On the day preceding the award, you withdrew your proposal.

You say that you are not seeking the contract for your company and that your position is that the contract should not have been awarded to Sperry Rand for a number of reasons, including your belief that the entire Urban Traffic Control Systems (UTCS) Program is of questionable value and could well be discontinued, thus saving the Government a considerable amount of money. The details of your protest are summarized in your attorney's letter of August 3, 1970, as follows:

> LFE Corporation is protesting the Department of Transportation award to Sperry Rand on the ground that this negotiated procurement has been so flawed by action contrary to regulations and in excess of administrative authority that the procurement itself should be canceled. First, LFE contends that this procurement has been conducted in such a way as to minimize competition, rather than maximize it. Indeed, there has been such a combination of anticompetitive factors here that virtually no competition has existed. That combination of factors includes the following:
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> (1) an organizational conflict of interest on the part of Sperry, which performed the preceding, federally funded contract for the preparation of the RFP;
> (2) an inadequate solicitation of potential sources;
> (3) an inadequate time for offerors (other than Sperry) to prepare offers, including highly important technical proposals;
> (4) both a failure of procurement officials to communicate the relative weights to be given to the various evaluation factors and the inclusion of an improper, completely subjective evaluation factor;
> (5) ambiguities within the RFP, which was prepared by and probably understood only by Sperry;
> (6) apparent communications with Sperry, which advised Sperry of the technical approach employed by LFE and permitted it to make a major change in its technical approach; and
> (7) a failure on the part of the agency, despite its communications with Sperry, to engage in discussions with LFE.
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> In addition, the Department of Transportation officials have awarded a cost reimbursement contract where there is no need for such a contract form and where LFE has in fact indicated its willingness to negotiate a fixed price contract; no discussions were held with LFE with respect to this possibility. Furthermore, we believe this cost reimbursement contract is for a total amount in excess of appropriated funds; either the contract amount is in excess of appropriated funds or the agency does not need funds it is presently requesting from Congress.
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> Under these circumstances, and where the need for this program is questionable to begin with, the procurement action should be abandoned. LFE Corporation requests that the Comptroller General instruct the agency that, in view of the illegalities and infirmities of this procurement, the contract be canceled.

At the outset, it should be understood that the action which you request of this Office—to require the cancellation of Sperry Rand's contract—may be taken only upon the conclusion that the actions of the agency in awarding the contract were so incompatible with the requirements of the pertinent laws, and regulations issued pursuant thereto, as to render the contract clearly illegal. Whether the UTCS Program, or the system involved in the subject contract, represents a judicious (as distinguished from legal) expenditure of public funds would not affect the legality of the contract.

Your contentions, as summarized above, will be considered in the order presented.

In support of your first contention, you point out that section 1-3.101(d) of the Federal Procurement Regulations (FPR) requires that negotiated procurements be on a competitive basis to the maximum practical extent. You say that the requirement for maximization of competition contains an implicit ban on procurements which unnecessarily favor one contractor over others, and that Sperry Rand was in a favored position by reason of its having prepared the specifications for the procurement under a study contract with the Federal Highway Administration. You maintain that Sperry Rand experienced an organizational conflict of interest in the performance of the study contract that led it to draft specifications favoring the use of UNIVAC computers, which are manufactured by Sperry Rand.

It is your further position that although the specifications accompanying RFP No. 241 ostensibly permitted a choice among several manufacturers' computers, all but the UNIVAC group were uncompetitive from a price or performance point of view. You note that the FPR does not contain regulations on organizational conflicts of interest and that the Department of Transportation (DOT) has not issued specific rules governing such conflicts of interest. You say, however, that conflicts of interest impede competition in contravention of the provisions of the FPR, and that the Department of Defense rules on organizational conflicts of interest may be used to measure the anticompetitive effect and impropriety of the conflicts of interest which, you contend, were involved in this procurement.

Rules 2 and 3 of Department of Defense Directive 5500.10, June 1, 1963 (Armed Services Procurement Regulation Appendix G), "Rules for the Avoidance of Organizational Conflicts of Interest," pertain to the imposition of restrictions, in the procurement of nondevelopmental items or systems, on contractors who were involved in the preparation of specifications, etc., for those items or systems. While we agree that in the absence of DOT and FPR instructions on organizational conflicts of interest it would not have been objectionable for the FHWA to have consulted Directive 5500.10 as a guide in drafting the solicitation for proposals on preparation of the system's specifications and for the subsequent procurement of the system, it is evident that the FHWA is not subject to the Department of Defense directive and that it did not violate any mandatory regulations by failing to include an organizational conflict of interest provision in the contract. In this connection, FHWA reports that as individual contracts are written, an informal determination is made as to whether such exclusion clauses are relevant and applicable to a given procurement.

Additionally, since Sperry Rand's contract for the preparation of the specifications did not contain a clause restricting the company

in a follow-on procurement, we do not believe under such circumstances that the directive supports your position that a competitive advantage was afforded Sperry Rand as the drafter of the specifications, which should have made that firm ineligible to compete for the system. In upholding the award in 49 Comp. Gen. 463 (1970) we stated:

> An examination of DOD Directive 5500.10 indicates that it is not self-executing, but specifically provides that prospective contractors will be advised of the applicability of the organizational conflict of interest rules by a notice in the solicitation and by a clause in the resulting contract. See B-165794, April 25, 1969, 48 Comp. Gen. 702. ASPR 1-113.2(a), dealing with organizational conflicts of interest, provides that "the Directive cannot of itself impose any obligations on the contractor; such obligations must be imposed by a contract clause designed to carry out the intent of the Directive." It is further provided that prospective contractors must be advised of the applicability of such rules and be given an opportunity to negotiate the terms of the clause and its application. The contract awarded to A.V.L. in 1965 contained no clause restricting A.V.L.'s activities on later procurements or the development of the small, lightweight compression engine in question. * * * Hercules, likewise, is under no "hardware exclusion" clause or any other restriction on follow-on procurements which may have prevented it from accepting the award of the instant contract.
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> ASPR 1-113.2(c) provides that:
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> > "The contracting officer shall not impose restrictions under the Directive in follow-on procurements on any prospective contractor in the absence of a specific contractual agreement with the contractor."
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> The contract clause is the controlling factor. This conclusion is supported by the House Report concerning, "Avoiding Conflicts of Interests in Defense Contracting and Employment" (House Committee on Government Operations, H.R. Rep. 917, 88th Cong., 1st Sess. (1963)), at page 72:
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> It would seem to follow * * * that the contract clause is the controlling factor. If the prohibitions cited and illustrated in the directive do not apply in any given case, they will not be embodied in the terms of the contract. In such cases, the contractor need not be concerned about the present or future restrictions or prohibitions. Thus, as each individual contract is written, a determination is made whether exclusion clauses are relevant and hence applicable.
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> It is therefore clear that the Directive cannot be applied in the absence of an appropriate contract clause and neither A.V.L. nor Hercules was subject to a contractual restriction on future procurements. Under these circumstances, the award to Hercules did not violate the provisions of DOD Directive 5500.10.

Regarding your statement that Sperry Rand drafted specifications under its study contract favoring the use of UNIVAC computers, we note that the specifications listed other acceptable computer systems, and their typical configuration prices, which are competitive with the UNIVAC equipment. Also, the specifications did not indicate that the list was all-inclusive or that other computers were not available and acceptable. Accordingly, we are unable to accept your view that the specifications were restrictive of competition in this area even though the Xerox Data Systems Sigma 3 which you proposed to use in combination with the Sigma 5, was not listed.

In your second contention you complain that maximum competition was not secured because several companies experienced in traffic control systems were not solicitied; the RFP provided that offerors be able to show that they had successfully performed Government development contracts of $3,000,000 within the last 5 years; the pub-

lished notice of the procurement stated that the notice was for information only and that the RFP was not available; and LFE, a most experienced firm in traffic control systems, was not furnished a copy of the RFP until it made a request for a copy. In response to these assertions the agency reported:

> On April 9, 1970, a representative of LFE visited with the UTCS project staff where for the first time LFE displayed a real corporate interest in the UTCS project. This official was given all available information in addition to being directed to the Clearinghouse for Federal Scientific and Technical Information where information regarding system specifications had been available since February 1970. It is apparent to us that LFE had knowledge of, but displayed no tangible interest in, the development of the UTCS project since the inception of the project planning phase, in June 1968, and their decision to become an active offeror was made at a rather late date.
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> It is true that LFE was not on a preliminary list prepared in December 1969, by the technical office. This list naming 15 potential contractors was compiled from available information as to competence, capability, systems expertise, interest and general ability to perform a major system development. However, between January and the official mailing on April 22, *five* organizations were added, including LFE. The reason why conventional suppliers of traffic control equipment were not on the solicitation list lies in the fact that the project is primarily developmental research and involves many other aspects besides conventional traffic control equipment. As a point of fact, several traffic control equipment manufacturers visited the project staff of the Traffic Systems Division and upon learning of the scope of RFP-241 indicated they would not be interested offerors. When LFE indicated their interest before the RFP was released, they were added to the solicitation list (TAB 4).

In resolving questions concerning the adequacy of the solicitation of supply sources, we have held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained, not upon whether every possible bidder was afforded an opportunity to bid. B-167379, August 15, 1969; B-164047, June 10, 1968. Further, it is clear that your firm was not denied an opportunity to compete for the contract, inasmuch as you were furnished a copy of the RFP and did, in fact, submit a technical proposal in response thereto. In any event, since the record does not establish that adequate competition and a reasonable price were not obtained, no basis is provided for canceling the contract on those grounds.

You also contend, however, that the 40-day period allowed offerors to submit proposals was inadequate (except for Sperry Rand) in view of the considerable technical effort, study, and judgment required. You cite, as support, the requirement in the Department of Transportation Procurement Regulations (12-2.202-1) that the time permitted should reflect the considered judgment of the contracting officer taking into account all of the facts surrounding the procurement which, you contend, is not the situation here. As indicated in the cited regulation, the amount of time allowed for responding to a solicitation is a matter committed to the best judgment of the contracting officer. In this connection, the record shows that the recommended 6-week period

(after mailing of the RFP's) for submission of proposals was reviewed and approved by the appropriate officials concerned. It is also reported that it was the considered opinion of the responsible technical office that the period authorized for the preparation of the proposal was adequate for any bidder who had an interest in the project as well as experience, knowledge, systems expertise, and capability sufficient to meet the requirements contained in the RFP. In addition, it is noted that although prospective offerors were advised at the preproposal conference on May 1, 1970, that the agency did not anticipate extending the proposal opening date of June 1, 1970, no objection was raised to the time allowed for submission of proposals, nor did you or any of the other prospective offerors protest that such time was insufficient for the preparation of adequate proposals.

As indicated above, the determination of the date to be specified for receipt of proposals is a matter of judgment properly vested in the contracting agency, and we cannot conclude from the record that the date specified was arbitrarily or capriciously selected, or that such date unduly restricted competition for the procurement.

You next contend that the complete list of evaluation factors, and the weights assigned to those factors, were not communicated in the RFP. You further allege that the evaluation points given to certain criteria were unrealistic and that the agency did not use those evaluation factors which were identified in the RFP but instead used a rating form having no apparent correspondence to the criteria specified in the RFP. You also say that the second criterion listed in the RFP, which showed as an evaluation factor "The subjective judgment of an evaluation panel as to the ability of the offeror to bring adequate staff and facilities to bear upon the problems * * *," reduced competition by promoting ambiguity as to the basis for competition.

The RFP provided that the proposals would be evaluated and the prospective contractor selected principally on the following criteria:

1. General Quality and Responsiveness of Proposal
   a. Recognition of overall objectives.
   b. Comprehensiveness, objectivity and compliance with criteria of the requirements as set forth in the Prospectus.
   c. The offeror's exercise of judgment, thorough knowledge, and competence in related fields.
   d. Responsiveness to requirements, terms, conditions.
   e. Facilities available.
2. The subjective judgment of an evaluation panel as to the ability of the offeror to bring adequate staff and facilities to bear upon the problems to insure a high probability of successful accomplishment of the objectives. An evaluation will be made of past performance data on similar government development contracts over 3 million dollars which were completed or in process within the last five years. Data on at least the following items should be included in the proposal.
   a. Name of contract, contract number, contract objectives.
   b. Name of sponsoring agency, government contracting officer and technical manager.

c. Original contract price and final contract price with reasons for overruns, if any.
d. Original completion date and final completion date with reasons for time extensions, if any.
e. Dollar amount of major subcontracts and name of subcontractor.
3. The qualifications of staff to be assigned to the project.
4. Costs: Costs will be a factor, however award may be made to other than the lowest offeror in an instance whereby a proposal is clearly superior in the categories reflected above.

As you allege, the evaluation panel did not actually evaluate the proposals in the manner as the criteria were set out in the RFP, but used a prepared form entitled "Criteria for Individual Evaluation of Proposals." The form listed 32 evaluation factors and the weight applicable to each factor. The basis for using the form, which was designed for this procurement, and its correlation to the criteria shown in the RFP, are explained by the agency as follows:

The "Criteria for Individual Evaluation" reflects all the basic elements outlined in RFP No. 241. The difference is in the detailed breakdown of the major subgroups which was considered necessary for the proper evaluation of the individual proposals and the assignment of weights to individual criterion in accordance with established practices for a large system development-type contract. The other difference is that a past performance criterion was not directly stated in the individual evaluation sheet. It was felt that this aspect was adequately covered in the Summary of Individual Evaluations of Proposals (TAB 6) under the following criteria:

A. General—Adequacy of the offeror's facilities, resources and management support for this project.
B. Project Managament—All criteria stated therein.

For further correlation the following breakdown is offered:

RFP No. 241	Criteria for Individual Evaluation of Proposals
1a. Recognition of objectives.	General—Recognition of objectives.
1b. Comprehensiveness. objectivity and compliance with criteria of the requirements as set forth in the prospectus.	Understanding of Scope Technical Approach.
1c. The Offeror's exercise of judgment, thorough competence and knowledge in related fields.	Technical Approach—Quality and strength of the programming effort. Project Management—Availability of an interdisciplinary and balanced team.
1d. Responsiveness to requirements, terms, conditions.	General—Compliance with requirements. Technical Approach—Software: Compliance with specified structure. Installation: Provisions for meeting directed subcontracts and special arrangements. Compliance with general construction and operation requirements.
1e. Facilities available.	General—Adequacy of Offeror's facilities, etc. Technical — Approach — Software: Availability of preinstallation computer facility for program and development testing.
2. Adequate staff, facilities and past performance.	See A and B above.
3. The qualifications of staff to be assigned to the project.	See B above.

Although it is evident that the criteria listed in the RFP are not broken down to specify each factor used in the evaluation process, we believe there is sufficient correlation between the detailed evaluation factors actually used and the generalized criteria shown in the RFP to satisfy the requirement that prospective offerors be advised of the evaluation criteria which will be applied to their proposals. Regarding the weights assigned to the evaluation factors, such matters require the exercise of informed judgment by the technical experts of the agency. Unless it is clearly and convincingly established that the administrative determinations are arbitrary, capricious, or not reasonably supportable by the facts, we will not attempt to substitute our judgment in such matters for that of the technical personnel of the agency. On these standards, we cannot conclude that the evaluation factors and their relative weights, as used in the evaluation of the proposals, were unrealistic in relationship to the objectives of the solicitation. In addition, we note that all offerors received the same evaluation information, and that the same preselected factors and weights were used in evaluating each of the three proposals received. Since these factors and weights were established by agency personnel without advice or participation by Sperry Rand, we cannot accept your view that Sperry Rand received an unfair competitive advantage through their use.

We also reject your position that the use of "subjective judgment" in the second criterion shown in the RFP created such an ambiguity as to reduce competition for the procurement. The logical import of that provision is that an evaluation would be made of each offeror's staff, facilities, and past performance, and that the subjective judgment of the evaluation panel would be exercised in determining the ability of the offeror to accomplish the procurement's objectives. While the criterion could have been stated in a clearer manner, the evaluation in such areas obviously requires a broad exercise of judgment; and we do not believe that the reference to the subjective judgment of the evaluation panel created an ambiguity as to the factors which were to be evaluated. In such connection, we note that an explanation of the statement was not requested by any of the prospective offerors, and it is elementary that if an offeror had any serious question as to the meaning of the provision he should have presented it prior to the submission of his proposal.

Regarding your contention that the weights assigned to the evaluation criteria or factors were not communicated in the RFP, neither our Office nor the applicable procurement regulations require disclosure of the precise numerical weights to be used in the evaluation process. Also, see the ruling of the court dated December 23, 1970, in the case of *Page Communications Engineers, Inc.* v. *Stanley R. Resor, et al.*,

Civil Action No. 3173-70, United States District Court for the District of Columbia, in which it is stated "Furthermore, neither bidder was entitled to be advised of the precise numerical weights to be used."

In determining whether the evaluation weights should have been disclosed to prospective offerors, we stated in B-170449(1), November 17, 1970:

> While this is an acceptable method of conveying to offerors the relative importance of evaluation criteria (see B-170142, October 22, 1970), it is not a required method. Rather, it has been our position that offerors should be informed of "the broad scheme of scoring to be employed" and "reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other." 49 Comp. Gen. 229, 230-231 (1969).

It is our view that the solicitation was deficient in not providing reasonably definite information as to the relative importance of the evaluation criteria or factors set out in the RFP. However, our position in such situations is that where the sufficiency of the information concerning the relative importance of the evaluation criteria is not questioned prior to the submission of proposals, and the record does not establish that any offeror was placed at a competitive advantage or disadvantage by the inadequacy of such information, we do not consider the deficiency as sufficiently material to disturb an award. See B-169754, December 23, 1970, and 50 Comp. Gen. 59 (1970), cited therein. Since the contracting officer was not asked prior to the submission of proposals for a more definite statement of the relative importance of the evaluation factors, and since we do not find that the offerors' competitive positions were affected by the deficiency, we will not interfere with the award on such basis.

In contending that the equipment and performance specifications contain ambiguities, you point out several seeming inconsistencies in the specifications which you say hindered your proposal efforts and caused your rating to be reduced. You assert that since Sperry Rand prepared the specifications, it was in a favored position to resolve the ambiguities. You also state that when your representative made specific inquiry of the agency as to bus detectors, he was advised to check other sources, whereas TRW received helpful interpretations concerning bus transmitters from the agency during its proposal preparation effort. It should be noted that the communications between the agency and TRW, which you cite in support of your last statement, were made after the submission and evaluation of TRW's proposal, during the subsequent discussions or negotiations conducted with that firm, and not in connection with the preparation of its initial proposal as you indicate. We therefore reject your suggestion that favoritism was shown TRW in such respect.

Complaints concerning ambiguities in specifications have been made to this Office on many occasions. Here, in observance of its responsi-

bility to see that the requirements were clearly stated, the agency conducted multiple reviews of the specifications to reduce the occurrence of errors or ambiguities in the material released with the RFP. While it appears that all of the ambiguities may not have been discovered, the views of this Office regarding errors in specifications were stated in B-156025, May 4, 1965, as follows:

> While it is incumbent upon a Government agency to state the material requirements of a procurement in a clear and unambiguous manner, we recognize that 100 percent clarity as to all aspects of every solicitation is unlikely. It is not unreasonable to expect that in any extensive retrospective examination by an unsuccessful competitor of a voluminous solicitation such as the RFP here concerned, which in turn incorporates additional lengthy documents and material, minor inconsistencies can be found on which to submit a protest. We feel that good faith and observance of the spirit of competitive solicitation, as well as sound business practice on the part of competitors for Government contracts, dictate that the appropriate time for a detailed examination of the solicitation and clarification of any provision thereof considered to be ambiguous or confusing is prior to the time specified for submission of proposals or bids. * * * The submission of a protest after such time, on matters which the competitor considered material to his quotation or bid and on which he could reasonably be expected to have had clarified during the period in which he was computing his price, necessarily raises a question as to the sincerity of the protest, frequently operates as a hinderance to the procuring activity in obtaining urgently needed items in a timely manner, increases the administrative costs of the procurement, and seriously detracts from the benefits derived by the Government from the competition.

In addition to having failed to make a timely protest to this Office concerning any unresolved ambiguities, you have not demonstrated that ambiguities worked to the particular disadvantage of your firm, or that they resulted in the assignment of a lower rating in any specific area, although you were furnished a copy of the rating sheet on your proposal showing the points assigned to each of the factors evaluated. Further, since the RFP specifically provided that the agency should be contacted for technical information, and any decisions concerning conflicting specifications would necessarily be made by the agency, we do not find that Sperry Rand was in a better position, as you contend, than your firm in obtaining a resolution of any inconsistencies in the specifications.

Concerning your contentions that Sperry Rand was advised by agency personnel of the technical approach employed by your firm and afforded an improper opportunity to amend its proposal to offer Xerox Data Systems computers instead of the UNIVAC computer originally offered, the agency submitted the following report in response to our questions on these contentions:

> 3. Disclosure of Another Offeror's Computer Configuration:
>
> No employee of the Department of Transportation disclosed to any offeror the computer configuration proposed by any other offeror following submission of proposals under RFP No. 241. In arriving at this conclusion, we contacted all technical evaluators who were directly involved in the evaluation of proposals on RFP No. 241. In addition, this question was discussed with every technical

division staff member involved in this procurement and in each instance their response was negative.

Specifically, question No. 3 was discussed with personnel in the following offices within the Department of Transportation:

Urban Mass Transportation Administration

Office of Program Demonstrations

Federal Highway Administration

Office of Traffic Operations, Traffic Control Division
Office of Administration, Computer Services Division
Office of Administration, Contracts and Procurement Division
Office of Research and Development, Science Advisor
Office of the Chief Counsel, General Law Division

Although your question did not specifically request comment outside the Department of Transportation, we also checked with the D.C. Department of Highways and Traffic (who participated on the evaluation team) and their response was negative.

You will note that as regards the benchmark tests held in early June, offerors with similar computer configurations were present since only one test for idential configurations was required.

4. Request for Alternate Computer from Sperry Rand:

No employee of the Department of Transportation, following the submission of proposals under RFP No. 241, made any suggestion to Sperry Rand that it should alternatively propose the use of Xerox Data Systems Computers. The same personnel in the respective offices mentioned in the responses to question 3 were contacted and in each instance their reply to question 4 was negative. As regards Sperry's offer of an alternate Xerox Data Systems Computer, the administrative record reflects the following events:

Sperry Rand had initially offered a single UNIVAC 418 III processor which was found to meet the specifications. However, certain doubts were expressed by computer experts on the evaluation team in regard to the availability of UNIVAC 418 III user experience and expansion capability. Subsequently, Sperry whose offer was considered to be within a competitive range, was asked to prepare written answers and engage in oral discussion on a number of questions which primarily dealt with the computer. Sperry's reply, during the course of technical discussion, was to the effect that they had studied a number of possible candidate systems including the XDS system, and they had found the XDS Sigma 5 combination to be the most desirable but did not offer it initially since the 418 III met the specifications at the lowest cost to the Government. At the close of the technical discussion with Sperry, they were asked if there was any additional information they wished to submit to clarify their proposal based on the questions asked during the technical discussion. Sperry replied by proposing two additional alternate computer configurations for the Government's evalution:

a. A combination UNIVAC 418 III and 418 II, and
b. A dual XDS Sigma 5 system.

Since you were furnished a copy of the above report and have not submitted any evidence to refute the agency's statements, the record does not support a conclusion that the computer configuration proposed by you was revealed to Sperry Rand, or that improper actions by agency officials were involved in the subsequent opportunity afforded Sperry Rand to offer alternate computers. While Sperry Rand originally proposed the use of the UNIVAC computer, that computer was determined to be acceptable and the points assigned to Sperry Rand's proposal in the initial evaluation were on the basis of the UNIVAC computer proposed therein. It was in the initial evaluation that your proposal was determined to be outside the competitive range; therefore, the offering of alternate computers by Sperry Rand in the

subsequent discussions or negotiations with that firm could not have operated to your competitive disadvantage inasmuch as you had been eliminated from the competition in the initial evaluation.

With reference to your complaint that the agency engaged in discussions with Sperry Rand concerning its proposal but did not do so with your firm, FPR 1-3.805-1(a) requires that, after receipt of initial proposals, written or oral discussions be conducted with all responsible offerors "who submitted proposals within a competitive range." Since, as stated above, your proposal was determined upon initial evaluation to be outside the competitive range, there was no requirement that further discussions be had with your firm concerning your proposal's deficiencies.

You also question the action of the agency in using a cost-reimbursement type contract for the procurement, on the basis that you had indicated to the agency a willingness to negotiate a fixed-price contract. Cost-plus-a-fixed-fee contracts are authorized by 41 U.S.C. 254(b) when the head of an agency determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee or an incentive type contract. A determination in accord with this authority was made in the case at hand. Inasmuch as such determinations are afforded finality by 41 U.S.C. 257(a), we perceive no legal basis on which this Office can require the cancellation of the contract simply because it is a cost reimbursement type of contract. *Cf.* B-164165, August 13, 1968.

Finally, you express the belief that the contract amount is either in excess of appropriated funds or the agency did not need certain funds which it requested from the Congress. The agency's reply to this contention is as follows:

> The FHWA has continued to provide Congressional Appropriations Committees with detailed budget statements and program objectives of all active research and development projects. Within the testimony before the Subcommittee of the Committee on Appropriations, House of Representatives, on the FHWA Fiscal Year 1970 budget, the estimated cost through Fiscal Year 1969 is given at $1,400,000 with remaining costs estimated at $4,900,000. The requested appropriation for Fiscal Year 1970 is shown as $1,100,000. The testimony on the FHWA Fiscal Year 1971 budget before the same Subcommittee also requests appropriation of $1,100,000 for continuation of this project. The contract awarded to Sperry Rand as a result of RFP-241 was funded in accordance with the standard policies of the FHWA. Research and Development funds in the amount of $1,276,804, Traffic Operations demonstration funds amount to $600,000 and Urban Mass Transportation Administration funds totaling $1,470,887, were also applied. A balance of $428,000 of the total contract price of $3,775,691 is subject to availability subsequent to July 1, 1970 (TAB 16).

In view of the agency's explanation of the contract's funding, there appears to be no basis for further questioning the availability of funds to satisfy the Government's obligations incurred by the contract.

In your various communications to this Office, you have contested at considerable length the agency's position that the contract requires major research and development effort. You say such issue is important in determining whether there was an organizational conflict of interest and whether the use of a cost reimbursement contract was contrary to mandatory regulations. Since we have determined above, on other grounds, that we may not cancel the contract on the basis of an organizational conflict of interest or because of the type of contract selected, the issue as to the amount of research and development work involved in the fulfillment of the contract's objectives is now considered to be academic insofar as it may be relevant to these points of your protest.

In view of the foregoing, we find no basis in your protest on which this Office may legally require the cancellation of Sperry Rand's contract, and your request for such action is therefore denied.

[B–171651]

Transportation — Dependents — Military Personnel — Dislocation Allowance—Hospital Transfers

A Navy officer detached from duty overseas and assigned to a hospital "for study and treatment if indicated and appearance before a Medical Board and preretirement physical examination," who before moving his dependents home maintained them for a short period in the vicinity of the hospital until he was placed on the temporary disability retired list, is entitled to a dislocation allowance, since paragraph M9003–3a, Joint Travel Regulations, providing the allowance incident to a hospital transfer applies to the officer and not paragraph M9004–1, item 2, which prohibits payment of the allowance in connection with separation, release from active duty, placement on the disability retired list, or retirement, since at the time the officer's orders were issued there was only a possibility of retirement or transfer to the temporary disability retired list.

To R. Shinn, Department of the Navy, February 17, 1971:

There has been received by second endorsement from the Director, Navy Military Pay System, dated November 20, 1970, your letter of October 22, 1970, in which you request a decision as to the entitlement of Commander John L. Meisenheimer, USN, to a dislocation allowance in the circumstances presented. The request has been assigned PDTATAC Control No. 70–58, by the Per Diem, Travel and Transportation Allowance Committee.

Headquarters, United States European Command, APO New York 09128, orders of June 17, 1970, quoting Bureau of Naval Personnel Message of June 16, 1970, provide that when directed, Commander Meisenheimer was to be detached from duty with the Joint Staff and was to proceed to the Naval Hospital, National Navy Medical Center, Bethesda, Maryland, "* * * for study and treatment if indicated and appearance before a Medical Board and pre-retirement physical ex-

amination." Ten days' delay was later authorized. Subsequent endorsement dated August 1, 1970, directed the officer to report with his dependents to Stuttgart, Germany, for transportation to the United States via Prestwick, Scotland.

Endorsement to the orders, dated August 8, 1970, states that the officer reported that day at the Naval Hospital, National Navy Medical Center, for temporary duty undergoing hospitalization and that Government messing and berthing facilities were available and were to be utilized by the officer. The officer's claim shows that upon arrival at his duty station, he maintained a residence for his dependents in Bethesda, Maryland.

The record shows that the officer was placed on the Temporary Disability Retired List on September 30, 1970. The Chief of Naval Personnel has reported that the primary purpose of ordering the officer to the National Naval Medical Center was for study, treatment, and for appearance before a Medical Board. He says the preretirement physical examination was incidental.

You say that the officer advised you it was necessary for him to obtain housing for his dependents in the area for a period of about 1 month before being able to transport them to his home. However, you indicate that in the circumstances disclosed, there is doubt as to the officer's entitlement to dislocation allowance, saying that the provisions of paragraphs M9004–2 and M9003–3, Joint Travel Regulations, which are applicable in his case are in direct conflict with each other.

Section 407(a)(1), Title 37, United States Code, provides in pertinent part that, under regulations prescribed by the Secretary concerned, a member whose dependents make an authorized move in connection with his change of permanent station, is entitled to a dislocation allowance in an amount equal to his basic allowance for quarters for 1 month.

Paragraph M9003-3a, Joint Travel Regulations, promulgated pursuant to the statutory provision cited, provides that a dislocation allowance is payable to a member with dependents who is transferred from outside the United States to a hospital in the United States for observation and treatment and who relocates his household incident to such transfer. Paragraph M9004–1, item 2, of the regulations, provides in pertinent part that the allowance will not be payable in connection with permanent change-of-station travel performed from last duty station to home or to the place from which ordered to active duty upon separation from the Service, release from active duty, placement on the temporary disability retired list, or retirement.

In 4 Comp. Gen. 653, we held that when an officer at a foreign station is detached with directions to proceed to a hospital in the United States for treatment, his family or dependents are entitled to be brought back to the United States. For that reason, insofar as the member's household is concerned, a permanent detachment from a foreign station with orders to a hospital in the United States for treatment is regarded as a permanent change of station.

In decision dated December 17, 1957, B–134227, involving a situation somewhat similar to the one under consideration, an officer was ordered from an overseas station to the Walter Reed Army Medical Center, Washington, D.C., for observation and treatment, appearance before a Medical Board and, if warranted, before a Physical Evaluation Board. Apparently at that time, the officer's dependents were relocated from overseas to Takoma Park, Maryland. Subsequently, the Physical Evaluation Board found the officer eligible for retirement. Thereafter, the dependents continued to reside in the area. We held that the officer had made a permanent change of station in his transfer to a hospital in the United States. B–130953, July 11, 1957.

We held further that while the reference in the orders indicated a possibility that the officer's physical condition might be found to be such as to warrant his retirement, it appeared that his retirement and travel to his home was not contemplated at the time the orders were issued. Consequently, in such circumstances, it was concluded that the officer's transfer to the United States on a permanent change of station did not involve travel from his last station to his home. The payment of a dislocation allowance was therefore authorized.

While the orders of June 17, 1970, directed a study and treatment, appearance before a Medical Board, and preretirement physical examination, it would appear that at the time the orders were issued only a possibility existed that the officer would be found eligible for retirement or transfer to the temporary disability retired list on account of physical disability. Accordingly, it would appear that the transfer to the Naval Hospital, National Navy Medical Center, Bethesda, Maryland, on a permanent change of station did not involve travel to home incident to retirement. Therefore, it is concluded that the officer is entitled to a dislocation allowance and the submitted voucher is returned herewith for payment, if otherwise correct.

[B–165571]

Appointments—Discrimination—Race or Sex

Upon determination that an employee who received an excepted Schedule B appointment at grade GS–9 was discriminated against because of race or sex, which is expressly prohibited by 5 U.S.C. 7154(b) and 5 CFR 713.202, as she

qualified for a GS–11 position and was assigned and performed work warranting a GS–11 classification, correction of the personnel action and adjustment in pay is legally justified on the basis the original classification and appointment as a GS–9 was illegal, and the corrective action is not viewed as a retroactive promotion such as ordinarily is prohibited by law.

To the Director, Office of Economic Opportunity, February 19, 1971:

This is in reference to letter dated July 30, 1970, and enclosures, and supplementary letter dated November 6, 1970, from the Deputy Director, Office of Economic Opportunity (OEO), requesting advice as to whether the Back Pay Act of 1966, now codified in 5 U.S.C. 5596, or other legal authority is available to compensate an employee, Mrs. Henrietta Canty, who has been found pursuant to the Office of Economic Opportunity's equal employment opportunity procedure to have been discriminated against in initially classifying her as a GS–9 rather than a GS–11 upon appointment.

It is stated in the letter of July 30 that your office has considered our decision reported in 48 Comp. Gen. 502 (1969) involving discrimination in connection with promotion. Our advice in the matter is requested on the basis of arguments set forth in a memorandum forwarded with the Deputy Director's letter to the effect that the Back Pay Act may be construed as applicable to discrimination cases.

In 48 Comp. Gen. 502 we held that an employee could not be awarded back pay under 5 U.S.C. 5596 on the basis of a determination by an equal employment opportunity officer, under administrative equal employment opportunity procedures, that the employee had failed to receive a promotion on a timely basis because of racial discrimination, and the officer's recommendation that remedial action in the form of a retroactive promotion be effected. The Department of Housing and Urban Development, by letter dated June 24, 1969, requested that the matter be reconsidered. By decision dated July 18, 1969, B–165571, the conclusion reached in 48 Comp. Gen. 502 was affirmed. See also decision of same date to the Chairman, Civil Service Commission, B–165571. You will note that the points argued in the memorandum forwarded with the Deputy Director's letter here under consideration were discussed and answered in our decisions of July 18, 1969. These points include the discussion covering the liberalizations included in the Back Pay Act and the legislative history with respect thereto; the distinction between our decisions B–158925, July 16, 1968, and 48 Comp. Gen. 502; and the legal significance of the statement of policy as set forth in 5 U.S.C. 7151, the equal employment opportunity provisions, as a basis for the allowance of back pay under authority of 5 U.S.C. 5596.

While we adhere to the view of the inapplicability of the aforementioned back pay provisions, where there is a failure to promote an employee because of discrimination, it is our opinion that retroactive

correction of the personnel action and adjustment in pay in Mrs. Canty's case is legally justified.

The records show that an equal employment opportunity panel concluded that when Mrs. Canty received an excepted Schedule B appointment on May 9, 1966, at grade GS-9, she was discriminated against because of race or sex; that she was qualified for a GS-11 position; and that she was assigned to work warranting a GS-11 classification. Since the determination as to qualifications of Mrs. Canty is a matter properly for consideration by the Civil Service Commission, we requested the Commission's views and were advised by letter dated January 18, 1971, as follows:

With respect to the matter of qualifications, section 6.2 of the Civil Service Rules (5 CFR 6.2) provides that appointments to positions listed in Schedule B are subject to such noncompetitive examination as may be prescribed by the Commission. At the time of Mrs. Canty's appointment the request from the agency was for appointment to a GS-9 position. Appropriate staff in the Commission have now reviewed the application originally submitted and say that if the agency had requested approval of Mrs. Canty for a GS-11 position the request would have been approved.

The Commission further points out that on the basis of the OEO finding of discrimination because of race or sex (which is expressly prohibited by law and regulations—5 U.S.C. 7154(b) and 5 CFR 713.202) the position to which Mrs. Canty was appointed was intentionally misclassified at a lower grade in order to pay her a lower rate than was proper for the duties and responsibilities assigned to her.

Section 7154 of Title 5, United States Code, provides in part:

(b) In the administration of chapter 51, subchapter III of chapter 53, and sections 305 and 3324 of this title, discrimination because of race, color, creed, sex, or marital status is prohibited with respect to an individual or a position held by an individual.

The record established that discrimination such as prohibited by the foregoing provision of law did in fact occur. It is therefore concluded that the original classification and appointment as a GS-9 was illegal and as such requires correction. A corrective action in these circumstances is not viewed as a retroactive promotion such as ordinarily is prohibited by law but as a correction of an intentional illegal appointment or misclassification—a violation of both statute and regulation.

In view of the foregoing, and since it is stated in the Deputy Director's letter of November 6 that Mrs. Canty was assigned and did in fact perform duties of a supervisory nature well above the entry level of a GS-9, we offer no objection to a retroactive adjustment of compensation.

[B-171813]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, Etc.—Evaluation Formula Erroneous

An invitation for bids issued pursuant to 41 U.S.C. 252(c) that requested lump-

sum bids for the construction of campus facilities (base bid), plus bids on each of four additive items, and indicated an award for the base bid, plus additives, if any, would be made to the low bidder on the base bid without regard to his overall bid price, did not conform with the requirements in 41 U.S.C. 253(b) that award should be made to the responsible bidder whose bid "will be most advantageous to the Government, price and other factors considered." Therefore, an award for the facilities and additives to the lowest overall bidder who was not low on the base bid would be proper and in accord with section 253(b), as the lowest bidder must be measured by the total work to be awarded in order to obtain the benefits of full competition, which is the purpose of the public procurement statutes.

To the Secretary of Agriculture, February 19, 1971:

By letter of January 26, 1971, copy enclosed, Mr. Charles J. Petersen, contracting officer, Pacific Northwest Forest and Range Experiment Station, Portland, Oregon, requested our decision permitting him to award a contract to Batterman Construction Company for the five bid items under invitation for bids No. PNW-71-1, issued December 10, 1970, for the construction of certain facilities at the Oregon State University campus, Corvallis, Oregon.

The invitation requested lump-sum bids for the major construction requirements set forth in Item A (Base Bid) plus bids on each of four additive items under Item B. The following award provisions were set forth in the invitation's Bid Schedule:

A. *Base Bid*

* * * * * * *

NOTE.—Award of this contract will be made on the lowest responsive bid for Base Bid Item A.

Bids must be submitted for both the Base Bid and Additive Bid Items in order for a bid to be considered responsive.

Additive Bid Items Instructions

Bidders are requested to submit a lump-sum offer for each of the items listed below. If appropriated funds are available for this project, the Government reserves the right to add to *Item A. BASE BID* offer any single additive item or any group of additive items. Separate awards will not be made.

On January 19, 1971, the eight bids received were opened and recorded as follows:

	Base Bid	Base Bid Plus Additives
Batterman Construction Company	293, 300	428, 200
Mathis Construction Company	301, 880	437, 821
Wilson Construction Company	299, 960	465, 985
Strandberg Construction Company	249, 500	507, 500
Contractors, Inc.	312, 200	461, 000
Lantz Construction Company	318, 650	473, 343
Tee & Jay Construction Company	291, 657	441, 496
Vik Construction Company	307, 805	455, 064

It will be observed that the Batterman Construction Company (Batterman) submitted the lowest overall bid for the base work (Item A) plus the four additives, while Strandberg Construction Company (Strandberg) and Tee and Jay Construction Company (Tee & Jay) submitted lower bids than Batterman for the base work only.

The contracting officer states that a strict interpretation of the Bid Schedule's award provisions would indicate that an award should be made to Strandberg as the apparent low bidder on the base work. However, it is further stated that at the time the invitation was issued the Forest Service contemplated that an award would obtain the complete construction package (base work plus additives), consistent with the total appropriated funds ($460,000) available. Since the low overall bid is well within the funds limitation, it is stated that an award to other than Batterman would not be in consonance with the original intent in releasing the invitation, nor would it permit the Government to obtain the "total and most economical product from an overall competitive basis."

The solicitation was issued pursuant to the authority of 41 U.S.C. 252(c) which states in pertinent part:

> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title . . .

Contracts awarded pursuant to that authority must conform to the requirements of 41 U.S.C. 253(b) which provides in pertinent part:

> * * * Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . .

The substance of this provision is set out in paragraph 10(a) of Standard Form 22 (October 1969 Edition), which is included in the invitation documents.

In this connection, our Office has held that the quoted provision requires that award in an advertised procurement, if any, be made to the lowest responsive and responsible bidder. 37 Comp. Gen. 330 (1957); 28 Comp. Gen. 662 (1949). The lowest bidder must be measured by the total work to be awarded. Any measure which incorporates more or less than the work to be contracted for in selecting the lowest bidder does not obtain the benefits of full competition which is one of the chief purposes of the public procurement statutes. See *United States* v. *Brookridge Farm*, 111 F. 2d 461 (1940). If award is to be made on five items, award for all items to the bidder who is low on one of the items without regard to his relative standing as to the other items cannot be considered an award to the "lowest bidder" under any reasonable interpretation of that term.

In view of the foregoing, it is at least doubtful that the award provisions in the Bid Schedule of the subject invitation are in conformity

with the requirements set forth in 41 U.S.C. 253(b), and paragraph 10(a) of Standard Form 22, since the Bid Schedule provisions indicate that an award for Item A plus additives, if any, will be made to the low bidder on that item without regard to his overall bid price.

In view thereof, and since the record does not show that competition for the total work was adversely affected by the award provisions of the Bid Schedule, we believe that an award should properly be made to the lowest overall bidder, otherwise eligible for the award, as proposed by the contracting officer.

Remedial action should be taken to prevent a repetition of this circumstance in future procurements.

The file received with the letter of January 26 is forwarded for return to the contracting officer.

[B-164281]

Pay—Retired—Grade, Rank, Etc., at Retirement—Service in Higher Rank Than at Retirement

The rule in 49 Comp. Gen. 618 to the effect that members of the armed services would be entitled to retired pay based on the pay of a higher grade, whether temporary or permanent, in which a member served satisfactorily, even though the higher grade was in other than the service from which he retired, is equally applicable to Army members, notwithstanding 10 U.S.C. 3963(a), under which the members are retired, seems to require that the qualifying service be in the Army, since that section, as well as 10 U.S.C. 8963(a), involved in the ruling, have a common legislative source. Under 10 U.S.C. 3963(a), the Secretary is authorized to determine qualification for the higher pay; and, therefore, there is no objection to the administrative settlement of retroactive retired pay due that is not barred by 31 U.S.C. 71a, and the 10-year limitation period begins to run after a final administrative determination of satisfactory service.

To the Secretary of the Army, February 22, 1971:

Further reference is made to letter dated December 9, 1970, from the Assistant Secretary of the Army (FM), requesting an advance decision regarding the application of decision of March 23, 1970, 49 Comp. Gen. 618, to Army members who have served in a higher grade in another branch of the armed services and who have their retired grade established under 10 U.S.C. 3963(a). This request has been assigned submission No. SS-A 1097 by the Department of Defense Military Pay and Allowance Committee.

Our decision of March 23, 1970, was to the effect that, in view of certain decisions rendered by the Court of Claims and information received from the Department of Justice, we had concluded that where a statute authorizes computation of the retired pay of a member or former member of an armed service on the basis of the pay of the grade in which he had served satisfactorily and which is higher than the pay of the grade on which he otherwise would be entitled to compute his retired pay, we will authorize payment of retired pay based

on the pay of the higher grade in which the individual had served satisfactorily, without regard to whether that grade was a temporary or permanent grade, even though the armed service in which he held that higher grade is not the service in which he retired. We indicated, however, that such authorization is subject to (1) the application of the statute of limitations (31 U.S.C. 71a), to the payment of retroactive retired pay, and (2) any applicable statutory requirement for Secretarial determination of satisfactory service in the higher grade.

The Assistant Secretary directs our attention to the fact that while the language of section 3963(a), Title 10, U.S. Code—relating to the payment of retired pay to Army officers based on the highest grade in which they served satisfactorily—seems to require that the qualifying service be in the Army, the equivalent sections of Title 10, U.S. Code, applicable to commissioned officers of the U.S. Navy and U.S. Air Force (sections 6151 and 8963, respectively), do not include a similar limitation. It is pointed out that the language of section 3963 (a) is not mentioned in our decision of March 23, 1970, as limiting in any way the authorization conveyed therein and, as a consequence, doubt is expressed as to whether that decision is applicable to Army officers whose retired grade entitlement must be established under section 3963(a) but whose higher grade was held in another branch of the armed services. Hence, a decision is requested on the following questions.

a. May a member of the Army who has served on active duty in another armed service of the United States in a grade higher than his highest Army active duty grade be placed on the appropriate Army retired list in such higher grade (under 10 United States Code 3963(a)) and receive the pay of that grade, subject to Secretarial determination as to satisfactory service where such determination is required by statute?

b. If the answer to question a is affirmative, may a retired member of the Army who, prior to his retirement, had served on active duty in another armed service of the United States in a grade higher than his highest Army active duty grade be advanced on the Army retired list to such higher grade (under 10 United States Code 3963(a)) and receive the retired pay of that grade, subject to Secretarial determination as to satisfactory service where such determination is required by statute and subject to the statute of limitations on retroactive pay (act of 9 October 1940, 31 United States Code 71a)?

c. May the Secretary of the Army make administrative settlement of claims for retroactive pay, based on advancement retroactively on appropriate Army retired list to higher grades in which such members previously served on active duty in another armed service of the United States, without referral to the General Accounting Office, except for doubtful claims or claims barred by the act of 9 October 1940, 31 United States Code 71a?

Both section 3963(a) of Title 10, U.S. Code, which contains the language "in the Army" which gives rise to the present questions, and section 8963(a) of Title 10, U.S. Code, which does not contain similar language for Air Force commissioned officers, were derived from section 203(a) of the act of June 29, 1948, Ch. 709, 62 Stat. 1085, 10 U.S.C. 1002 (1952 ed.), which provided in pertinent part:

Each commissioned officer of the Regular Army or of any reserve component of the Army of the United States, and each commissioned officer of the Regular Air Force or of any reserve component of the Air Force of the United States, heretofore or hereafter retired or granted retirement pay under any provision of law shall be advanced on the applicable officers' retired list to the highest * * * grade in which he served satisfactorily for not less than six months while serving on active duty, as determined by the cognizant Secretary * * * and shall receive retired pay at the rate prescribed by law, computed on the basis of the base and longevity pay which he would receive if serving on active duty in such higher grade * * *.

The above-quoted section was repealed by section 53*b* of the act of August 10, 1956, Ch. 1041, 70A Stat. 644, 678, and was reenacted by that act as 10 U.S.C. 3963(a) and 8963(a). At that time the words "in the Army" were inserted in both sections. While both of those sections were amended in 1958 by Public Law 85–861, those words were omitted only from section 8963(a). However, nothing has been found in the legislative history of either the 1956 act or the 1958 amendments to that act which evidences an intent to grant Air Force commissioned officers broader rights under section 8963(a) upon retirement than would accrue to their Army counterparts under section 3963(a). While the words "in the Army" contained in section 3963(a) may have furnished some basis for doubt as to the applicability of our decision of March 23, 1970, to Army officers, it was not our intention to exclude such officers (retired under section 3963(a)) from the broad rule stated in that decision.

Accordingly, the first two questions are answered in the affirmative. *Cf. Satterwhite* v. *United States*, 123 Ct. Cl. 342 (1952).

As to the third question, authority to make determinations under section 3963(a) and other similar sections of Title 10, U.S. Code, of the highest grade satisfactorily served on active duty, is vested by law in the Secretary of the service concerned. A retroactive advancement on the retired list based on such Secretarial determination would seem to constitute action in the nature of a correction of such retired member's pay records. If such determination is made, this Office will interpose no objection to the administrative settlement of retroactive retired pay in those cases which are not barred by the act of October 9, 1940, Ch. 788, 54 Stat. 1061, 31 U.S.C. 71a, and which are not of otherwise doubtful validity.

With respect to the application of the 1940 barring act to the payment of retroactive retired pay in individual cases, it is our view that a retired member does not become entitled to retired pay based on the highest grade until a determination has been made by the appropriate Secretary that service in that grade was satisfactorily performed. Thus the 10-year limitation period prescribed in the 1940 act begins to run against a retired member only after a final administrative determination regarding such satisfactory service has been made. See *O'Keefe* v. *United States*, 174 Ct. Cl. 537, footnote 8, on page 550 (1966).

[B-171457]

Courts—Criminal Justice Act of 1964—Attorney Fees—Appropriation Chargeable

The accounting procedure employed by the Administrative Office of the United States Courts with respect to paying court-appointed attorneys under the provisions of the Criminal Justice Act of 1964 from the appropriation current at the time of the appointment regardless of the date the voucher, subject to court review, is submitted, may not be revised to make payment from the appropriation current at the time the voucher is approved in order to eliminate holding the obligated appropriation account open beyond the close of a normal fiscal year. The contractual obligation for payment of an attorney occurs at the time he is appointed, even though the exact amount of the obligation remains to be determined; and pursuant to sections 3732 and 3679, Revised Statutes, and 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, the fee payable is chargeable to the appropriation for the fiscal year in which the obligation was incurred.

To the Director, Administrative Office of the United States Courts, February 25, 1971:

Reference is made to your letter of December 2, 1970, requesting our concurrence with a revised accounting procedure proposed by your office with respect to payments to court-appointed attorneys under the provisions of the Criminal Justice Act, 18 U.S.C. 3006A, as amended.

It is stated that at present payments to an attorney entitled to compensation under the act are made from the appropriation current at the time the attorney is appointed by the court, regardless of the date on which a voucher is submitted. According to your letter, the cases often involve protracted litigation, and it is frequently necessary to hold an appropriation account open for substantial periods of time beyond the close of a normal fiscal year due to resultant delays in the submission of vouchers. Your proposal involves paying the attorneys from the appropriation current as of the date on which the court, pursuant to its statutory duty to review the propriety of the voucher, approves payment.

Under current procedures, upon the appointment of an attorney by the court, a copy of the order of appointment is sent to your office for the purpose of estimating the obligation to be charged against the current appropriation. This estimate made by your office is based on past average costs per case and the fact that the act sets dollar limits on the amount of compensation a court-appointed attorney may receive.

It is your position that it is not necessary to consider the order of appointment as constituting a contractual obligation of the Government which must be charged to the current fiscal year appropriation. You state:

* * * While the appointment of such an attorney may be considered as constituting a contract to pay for such services, payment is not automatic. The judge must review the voucher for propriety and may approve or deny it as given or may approve it in a lesser amount. * * *

Under the proposed accounting procedure, the date of the court's approval of the voucher for payment would constitute the moment of contractual liability, and the appropriation then current would be charged with such liability. You cite 46 Comp. Gen. 895 (1967), as a case in which we approved institution of a similar revised procedure.

Consideration of the property of the proposed revised procedure in question necessarily involves the provisions of sections 3732 and 3679, Revised Statutes, as amended, and section 1 of the act of July 6, 1949, 63 Stat. 407, derived from section 3690, Revised Statutes, codified as 41 U.S.C. 11, 31 *id.* 665(a), *id.* 712a, respectively, in pertinent part as follows:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *.
>
> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize as obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.
>
> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

These statutes evidence a plain intent on the part of the Congress to prohibit Federal officers or employees, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made. 42 Comp. Gen. 272 (1962.)

The following provision is contained in the various order of appointment forms used by the courts under the Criminal Justice Act (CJA Forms 1, 2, 3, and 11):

> The said attorney or bar association or legal aid agency which made the attorney available is authorized, pursuant to the provisions of the Criminal Justice Act of 1964, to present to the court a claim for compensation and reimbursement for expenses of representation reasonably incurred.

Under this provision, it is clear that from the time of the attorney's

appointment a contractual obligation exists on the part of the Government to pay the reasonable costs of the representation, and that the subsequent court review of the voucher is only for the purpose of determining that the actual costs claimed to have been incurred were necessarily incurred and are in fact reasonable. See *United States* v. *Pope*, 251 F. Supp. 234, 238 (1966). Under the provisions of the act, 18 U.S.C. 3006A(d) (incorporated by reference into the appointment order), maximum amounts and hourly rates are established, with a standard of reasonable costs for similar services in the court's district designated as the measure for exact calculation of the compensation earned. Such "open price" or "open compensation" agreements constitute valid and enforceable contracts, as made. When an agreement describes the mode of determining the price or compensation, and such is determined according to that mode, the contract becomes perfect and complete in that respect as if it had been originally fixed in the writing. See 17 Am. Jur. 2d §§ Contracts 82, 422; C.J.S. Contracts 36 (2) c., and cases cited therein.

Thus, in the instant cases, the moment of contractual obligation occurs at the time of the court's appointment of the attorney, though the exact amount of such obligation remains to be determined. We have long held, consistent with the above-quoted statutes, that a claim against an annual appropriation when otherwise proper is chargeable to the appropriation for the fiscal year in which the obligation was incurred. The rule is applicable in all cases in which there is a definite determination as to the time the public funds became obligated for the payment of a given liability whether the amount is, or is not, certain at the time. 18 Comp. Gen. 363 (1938); 23 *id.* 370 (1943).

In 46 Comp. Gen. 895 (1967), we approved a proposed revised procedure for providing fee-basis out-patient treatment and other medical services to veterans with service connected disabilities, which procedure resulted in charging the fiscal year Veterans Administration appropriation current at the time a physician's claims for reimbursement were approved by the agency. Under the circumstances of that case, however, there was no contractual obligation or liability on the part of the Government until the vouchers were approved: under that procedure participating physician's bills underwent an agency quasi-adjudicative review process to determine whether liability should be accepted by the Government for the cost of the service rendered, including fundamental determinations as to whether the veteran was eligible for the treatment rendered and whether such treatment was necessary and proper in light of the disability record. Agency approval, in that case, constituted the initial acceptance of the liability and contractual obligation, whereas in the instant case, contractual obliga-

tion is imposed on the Government by the order of appointment, with subsequent court review of the voucher intended only to insure the reasonableness of the expenses incurred. *United States* v. *Pope*, *supra*.

In light of the foregoing, it is our view that the proposed revised procedure, if instituted, would contravene the statutes quoted above relative to obligating fiscal year appropriations by contracts. You are, accordingly, advised that under the existing law we cannot concur with your proposed accounting procedure revision.

[B-171391]

Contracts—Labor Stipulations—"Successor Employer" Doctrine

The selection of a contractor for negotiation of a cost-plus-award-fee type contract for support services at Kennedy Space Center that are being performed under an expiring contract without binding the selected contractor to the "successor employer" doctrine that would impose the terms of the current collective bargaining agreements with the incumbent union employees was a valid exercise of the discretion granted to the contracting agency to award a contract that will be most advantageous to the Government, since there is neither a statutory nor judicial requirement that a contractor who succeeds a prior contractor in the performance of service for the Government at a Government installation assume the predecessor contractor's bargaining agreement with its union employees; and, moreover, the selected contractor proposes to recognize the bargaining representatives of the incumbent employees.

To Trans World Airlines, Inc., February 26, 1971:

We refer to your protest by telegram dated November 25, 1970, as supplemented by letters dated December 11, 1970, and January 21, 1971, against the selection by the National Aeronautics and Space Administration (NASA) of The Boeing Company (Boeing) for negotiation of a cost-plus-award-fee type contract for the performance at Kennedy Space Center (KSC) of installation support services, including base support work which you are currently providing under a contract which expires on March 31, 1971. You also protest consideration of a proposal submitted by Pan American World Airways, Incorporated (Pan Am), under the same procurement solicitation, request for proposals (RFP) 2-370-0, dated June 30, 1970.

As discussed in more detail below, it is your position that, as a matter of law in the field of labor relations and as is implied by preproposal advice given by NASA to prospective offerors, the selected contractor will be bound by the "successor employer" doctrine as set forth in various decisions of the courts and in related orders issued by the National Labor Relations Board (NLRB), to abide by the material terms of the current collective bargaining agreements with your incumbent union employees. To be responsive to the RFP, therefore, you contend that each offeror must consent to comply with the "successor employer" doctrine.

In line with the foregoing, you assert that Boeing and Pan Am were not responsive to the RFP since each of them proposed union arrangements in conflict with the "successor employer" doctrine. You therefore request that NASA be directed to reject the proposals submitted by Boeing and Pan Am and to make award to a responsive offeror like yourself, who is willing to continue to abide by your existing union bargaining agreements covering the incumbent employees.

In the alternative, you assert that if it is NASA's belief the issue whether the "successor employer" doctrine applies to the procurement is a question of law, resolicitation of the procurement is in order on the basis that the solicitation is fatally defective because NASA did not so advise prospective offerors before the submission of proposals. You further state that NASA now seems to rely on a legal opinion which it did not obtain until December 14, 1970, or after you had filed your protest, and after a majority of the offerors had already committed themselves to application of the "successor employer" doctrine, and that the effect of such procedures has been not only to deprive the Government of its right to secure bids capable of just comparison, but to deprive you of an opportunity to renegotiate your existing bargaining agreements with your employees [with an apparent view to securing lower wage rates] and thereby be competitive with the other offerors.

Performance of the specified services was required for an initial period of 1 year commencing February 1, 1971, with four extensions of 1 year each to be available at the Government's option under contract, the first of which was required to be firm priced. Basic proposals were required to be based upon fixed staffing specified in the RFP, but alternate proposals were solicited based upon organization and staffing other than as indicated in the RFP.

Article VI of Appendix III of the proposed contract stated a requirement for continuity of services necessitating phase-in training of the successor contractor during the last 60 days of the contract term and cooperation of both contractors respecting release of employees to the new contractor, among other factors. Article XXXII, which governed the phase-in of the functions to be assumed under the proposed contract from three incumbent contractors, required that allowance for phase-in be made in the cost and fee negotiated under the proposed contract subject to adjustment in the event the functions in question are not fully operational and completely staffed as agreed during negotiations by the dates scheduled in Article XXXII.

Article XXIV, entitled "Service Contract Act of 1965," informed offerors of the issuance of a wage determination by the Department of Labor establishing a minimum hourly wage of $2.45 per hour, including fringe benefits, for janitors, porters, and cleaners.

Paragraph 2.c., section 1, part B, Appendix II, of the RFP, as amended, relating to management structure, reads as follows:

Explain your understanding of the impact, if any, that the collective bargaining agreements covering incumbent employees will have on your assuming the contract responsibilities. Discuss which of your employees, if any, will be covered by collective bargaining agreements and indicate which, if any, supervisory personnel are included.

Prospective offerors are advised that most employees of the incumbent contractors are represented by IAM and that the labor agreements in force are as follows:

Area	Union	District No.	Local No.	Current Contract Expiration Date
Majority	IAM	142	773	12/31/71
Janitorial	IAM	166	1306	12/31/71
Guard	UPGWA		128	1/31/72
Fire Service	TWU		525	7/ 9/71
Training	IAM	166	690	3/ 1/71

IAM stands for the International Association of Machinists; UPGWA for the United Plant Guard Workers of America; and TWU for the Transport Workers Union of America. IBT, which is discussed in connection with Pan Am's proposal, stands for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Paragraph 11 of Appendix I, part B, relating to evaluation of proposals, informed prospective offerors that failure of a proposal to be accepted for award would not necessarily reflect any deficiencies, but would mean only that another proposal was considered to be more advantageous to the Government. The major factors to be considered in the proposal evaluation and their relative order of importance were (a) Technical Work Plans; (b) Reasonableness of Cost and Fee; (c) Experience and Past Performance; (d) Key Personnel; and (e) Management Structure. Offerors were advised that factor (a) would have slightly more weight than factor (b); that factors (c), (d), and (e) would be considered to have approximately the same importance; and that the aggregate of factors (c), (d), and (e) would be approximately the weight of factor (b). August 19, 1970, was specified as the closing date for submission of proposals.

On July 21 and 22, 1970, prospective offerors were provided a tour of the KSC facilities which would be involved in the performance of the required services, and a preproposal conference was held, during which various questions relating to the contract were raised by participants in the conference and were answered by NASA. Subsequently, NASA distributed to interested parties a list of the questions and answers with a letter dated July 31. Question 56 and NASA's answer, with which your protest is concerned to a great extent, read as follows:

QUESTION 56:
1. Is it NASA's opinion that successful bidders will be required to assume employee representation by incumbent unions?
2. (a) If the answer to Question 1 is "yes," is the basis for this opinion "no significant change in work scope?"
   (b) If the answer to Question 1 is "no," is the basis for this opinion "a significant change in work scope?"
3. If the answer to Question 1 is "yes," does NASA KSC plan to provide contents of the current union agreement as well as specific employee rates and benefits costs to enable bidders to submit competitive bids?

ANSWER:
1. The NLRB has held that when an employer assumes the operations of another employer without change in employees, jobs or methods, the successor-employer is obligated to bargain with the Union before changing wages and other conditions of employment. Under a recent series of cases, the NLRB has held that the successor-employer must assume the predecessor's collective bargaining agreement. It is NASA's position that the offerors make themselves familiar with the NLRB cases covering this issue namely, The William J. Burns International Detective Agency, Inc., 74 LRRM 1098; Chemrock Corp., 58 LRRM 1582; John Wiley & Sons vs. Livingston, U.S. Sup. Ct. 55 LRRM 2769.
2. The offeror will have to apply the NLRB's reasoning in the previously mentioned cases to the scope of the RFP in relation to method in which the work has been performed and to its own intended mode of operation.
3. It is not our policy to supply any offerors with any copies of labor agreements covering units of employees coming within the scope of the RFP.

By August 19, NASA had received basic proposals from seven companies, including your company, Boeing, and Pan Am. Boeing also submitted an alternate proposal covering a lesser number of employees than specified by NASA as required staffing. Only the basic Boeing proposal is involved in your protest.

Boeing proposed to recognize the bargaining representatives of the incumbent employees but not to assume your existing labor agreements. Instead, Boeing stated its intent to bring the incumbent IAM employees of your firm under Boeing's company-wide labor agreement with Lodge 2061 of IAM, with which Boeing has had a very good relationship. This agreement covers employees at Boeing's main aircraft and aerospace manufacturing operation, as well as in the KSC area under Boeing's Apollo V stage contract, and the wage rates are considerably lower than the rates paid by your company to incumbent employees performing similar work.

The record indicates that Boeing will accept the "successor employer" doctrine with respect to the security employees currently represented by the UPGWA and the fire protection employees represented by the TWU, but proposes to subcontract the janitorial function. NASA's Industrial Relations Officer expressed the opinion that no major labor problems would seem to be associated with Boeing's basic proposal, but the alternate proposal, which proposed fewer employees, might give rise to a problem of convincing the IAM that a smaller number of employees was needed.

Pan Am proposed to operate under the Railway Labor Act (RLA), 44 Stat. 577, 45 U.S.C. 151, as amended, pursuant to which Pan Am has operated as a contractor for the Department of the Air Force at the nearby Air Force Eastern Test Range, Patrick Air Force Base, Florida. Pan Am considers itself not subject to NLRB and court decisions espousing the "successor employer" doctrine since Pan Am is an airline operation coming under the RLA and also views the incumbent employees as an accretion to existing bargaining units covering employees in Pan Am's overall company operations. These Pan Am bargaining units are represented by the TWU, the IBT, and the UPGWA, and all have been approved by the National Mediation Board (NMB) established under the RLA. (Under the "accretion" doctrine, the accreted incumbent employees would have no choice over whether they want to be included in Pan Am's existing bargaining units.) Pan Am, therefore, would endeavor to persuade the incumbent employee members of IAM to transfer to the TWU and the IBT and to accept reduced wage rates applicable under Pan Am's bargaining agreements with such units.

NASA's Industrial Relations Officer expressed doubt about the proposed Pan Am agreements with the TWU and IBT since they will involve a major turnover of collective bargaining representation of incumbent employees, which, upon challenge by IAM, may not stand up.

In this connection, NASA refers to the "Jackass Flats" case, *Pan American World Airways, Inc.* v. *United Brotherhood of Carpenters and Joiners of America*, 324 F. 2d 217 (1963), involving the performance of preventive maintenance work by Pan Am at a nuclear research development station in the State of Nevada, which the court held had nothing to do with transportation by air or rail and was not within the application of the Railway Labor Act, and therefore the airline was not entitled to an injunction restraining the union from striking, picketing or otherwise interfering with the operation. NASA also mentions friction which has been experienced between TWA/Bendix and Pan Am employees because of the rivalry between IAM and TWU/IBT employees, the labor disputes ranging from petty harassment to threat of work stoppage.

After initial consideration of all proposals, your proposal was ranked highest, with Pan Am's proposal a close second, and Boeing's basic proposal third. The two proposals which were ranked lowest were eliminated from the competitive range at this stage, and the respective offerors were so notified by letters dated September 18, 1970. The five remaining offerors were then invited to participate in oral discussions of their proposals with attention to be focused on 25 general questions and various specific questions relating to particular

proposals. General question No. 18 asked each offeror to what extent labor agreements would be applicable to employees performing on the contract and to explain the types of units and unions involved in the proposal.

Discussions were conducted with the offerors from September 28 to October 1, inclusive, and each offeror was afforded an additional week to further revise or clarify its proposal(s) in light of the discussions. The cutoff date for all offerors was October 19, 1970, as stated in telegraphic amendment No. 3 to the RFP, and no further revisions were received after that date. Further, no changes were made by any offeror in its proposed union structure in response to the questions which had been raised by the Government.

Subsequently, as in the initial assessment, your proposal and Pan Am's proposal were ranked essentially equivalent technically, with Boeing's proposal being third. On the business aspects of the evaluation process, however, you rated very high with Boeing nearly as high. Pan Am was rated third on the basis that its proposed wage rates were not realistic, such rates being lower than Pan Am now pays at the nearby Air Force Eastern Test Range and also dependent upon the success of Pan Am's efforts to induce IAM employees to transfer to the TWU and IBT units with which Pan Am has its bargaining agreements, a factor which NASA believes, as stated above, is likely to involve serious labor problems.

After careful reconsideration of all proposals, NASA concluded that the technical superiority of your proposal did not justify its acceptance if the low cost arrangement could be achieved with Boeing, whose technical proposal was entirely acceptable to NASA. NASA accordingly concluded that selection of Boeing's basic proposal would give the Government the best promise of good technical performance and reasonable cost, and the Acting Administrator of NASA directed that negotiations be conducted with Boeing on the basis of the labor plan reflected in Boeing's proposal, with the condition that Boeing show firm agreements with the appropriate unions providing coverage for the work to be performed under the procurement before approval of the contract.

As to Pan Am, whose proposal price was close to Boeing's basic proposal price, NASA decided not to risk the labor unrest which was likely to attend its acceptance. In view of this rejection of Pan Am's proposal, and our decision of today denying Pan Am's protest against such rejection, it would appear that your protest against consideration of Pan Am's proposal for award has become moot. The remainder of this decision will therefore be confined to your protest against consideration of Boeing's proposal.

Boeing, upon notice from NASA of your protest, submitted a legal memorandum to NASA stating, among other things, that your agreements with the IAM specifically state that they are "in accordance with the provisions of the Railway Labor Act"; therefore, Boeing, not being a carrier subject to the RLA, could not be bound by your agreements. Further, Boeing raises the question of the legality of your agreements on the basis that the services in question do not relate to transportation, and under the decision in the Jackass Flats case, *supra*, the National Labor Relations Act is the controlling statute.

Enlarging on its argument that it cannot succeed to your union bargaining agreements, Boeing stated that such agreements are with a nationwide unit which includes individuals employed as guards. While the Railway Labor Act, according to Boeing, permits inclusion of guards in the bargaining units, section 9(b) of the National Labor Relations Act (29 U.S.C. 159(b)) specifically prohibits certification by the NLRB of any bargaining unit which includes guards.

Boeing also pointed out that your agreements do not provide for arbitration as contemplated by the National Labor Relations Act but rely, rather, upon the provisions of the Railway Labor Act. In this connection, Boeing stated that District Lodge 142 of the IAM, with which you executed an agreement, bargains solely for employees subject to the Railway Labor Act.

Boeing also urged that since it has over 22,000 employees represented by the IAM in a nationwide bargaining unit, the additional 1,000 employees which Boeing might hire from your firm should properly be considered as an "accretion" to Boeing's IAM bargaining agreement in which event the "successor employer" doctrine would have no application.

In 42 Comp. Gen. 1 (1962), we had occasion to consider whether the Department of Defense and NASA could properly include in missile construction contracts at Cape Canaveral and Patrick Air Force Base the terms of a labor management project agreement which would require payment of specified wages and fringe benefits to laborers and mechanics, which had been approved by the Secretary of Labor but which were not prescribed pursuant to statute. At page 2 of our decision, we made the following pertinent statements:

> Our Office has considered many proposals to incorporate in Government contracts conditions or requirements concerning wages and other employment conditions and practices, and has in a long series of decisions adhered to the principle that contract stipulations tending to restrict competition and to increase the cost of performance are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation involved, or unless such stipulations are expressly authorized by statute; and that when the Congress has legislated on the subject it is not open to administrative discretion to stipulate conditions beyond or at variance with those specifically directed by the statute.

In line with the above statements, which were followed by citations to pertinent decisions of our Office, such as 10 Comp. Gen. 294 (1931) relating to the need for specific statutory authority to prescribe in a Government contract minimum wage rates to be paid by a contractor, and for the other reasons stated in our decision, we held that a clause in the construction contracts in question which would require adherence to the project agreement would not be in conformity with the general statutes governing Government contracting. We did, however, point out that if a determination were made pursuant to the act of August 28, 1958, Public Law 85–804, 50 U.S.C. 1431–35, and Executive Order No. 10789, November 14, 1958, that the national defense would be facilitated by the inclusion of such a provision in the contracts in question, the contracts could be executed or modified accordingly.

We are not aware of any statute which imposes a requirement that a contractor who succeeds a prior contractor in the performance of services for the Government at a Government installation is required to assume the predecessor contractor's bargaining agreements with its union employees. Nor are we aware of any court decision to such effect. Neither the *Wiley* nor the *Burns* cases cited by NASA in its answer to question 56 at the preproposal conference, nor any of the other cases which you have cited for the proposition that the "successor employer" doctrine applies to the proposed contract, involved services at a Government installation. Nor did consideration of the statutes governing Government contracting enter into the making of any such decisions.

Further, we believe that in the case of *Potter* v. *Emerald Maintenance*, Civil Action 70–L–36, Southern District of Texas, October 29, 1970, relating to contracts for the performance of service and maintenance work for the Air Force, the United States District Court raised some objections to application of the successor contractor theory, as espoused in *Burns*, to Government procurements.

Turning now to the effect of the language which NASA used in the RFP and in its response to question 56 respecting your bargaining agreements with incumbent employees, we are unable to concur with your position that such statements constituted a requirement that offerors consent to be bound by such agreements. The language in the RFP simply called for a statement of the offeror's understanding of the impact, if any, of such agreements upon the offeror's assumption of the contract responsibilities, and the reply to question 56 merely placed offerors on notice of the "successor employer" doctrine as applied by NLRB in the *Burns* and *Wiley* cases but left to the offerors the interpretation of such decisions. That such interpretations could vary, depending upon the nature of each offeror's proposal, is apparent from NASA's answer numbered 2. While it is evident that your commitment to wage rates which were higher than those apparently available to

Boeing and Pan Am placed you in a poor competitive position if you proposed only on the basis of paying such rates, that fact alone presents no adequate basis for requiring all other bidders to adopt your wage rates.

In line with the foregoing, it is our view that NASA was not obliged to include in the RFP a requirement that offerors agree to accept the "successor employer" doctrine as to incumbent employees covered by union bargaining agreements, and it is our further view that the language which NASA used in the RFP and in its response to question 56 at the preproposal conference did not state such a requirement but properly left the decision to the offerors. In the circumstances, we are unable to accept your position that the Government was deprived of meaningful competition under the solicitation so as to justify resolicitation of the procurement, as you have suggested as an alternative to elimination of Boeing and Pam Am from consideration for award.

Nor can we accept your argument that Boeing, which has proposed to abide by its own bargaining agreement with the IAM, has offered a price that is less than reasonably anticipated costs contrary to the provisions of NASA Procurement Regulation (NASA PR) 1–311 relating to "buying in" at low cost with expectation of recovering additional amounts after award. Not only has there been no authoritative determination that your employer bargaining agreements are applicable to any successor contractor, which will be performing services in addition to those currently performed by you, but the Acting Administrator of NASA has conditioned the award to Boeing on a showing by Boeing of firm agreements with the appropriate unions providing coverage for the work to be performed under the proposed contract. It is our opinion that Boeing's proposal, when supported by such agreements, may properly be considered reasonable as to anticipated costs.

We have noted that the award of cost reimbursement contracts requires exercise by procurement personnel of informed judgments whether submitted proposals are realistic as to proposed costs as well as to technical approach. B–152039, January 20, 1964. Further, we believe that such judgment properly should be left to the discretion of the contracting agencies concerned since they are in the best position to assess "realism" of costs and technical approaches and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. 50 Comp. Gen. 390, December 16, 1970.

On the record before us, we are unable to conclude that NASA's selection of Boeing for negotiation of a contract for this procurement, under the conditions stipulated by the Acting Administrator of NASA as set out above, was other than a valid exercise of the discretion granted to NASA, as the contracting agency, to make the award which will be most advantageous to the Government as contemplated by the provisions of NASA PR 3–805.2. Your protest is therefore denied

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