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[B-177540]

Courts—Administrative Matters—Experts and Consultants Hire—Civil *v.* Criminal Proceedings

The fee and expenses of a psychiatrist for services in a criminal case that arose under 24 D.C. Code 301(e), which provides for the conditional release from a mental hospital of persons committed when acquitted of criminal charges on the basis of an insanity defense, may be paid notwithstanding the conditional release proceedings are civil in nature whereas the judge's order appointing the doctor was issued under Rule 28, Federal Rules of Criminal Procedure in view of the court's inherent authority to procure expert services and, therefore, the services are not for payment under the Criminal Justice Act of 1964. The doctor's invoice is payable by the Administrative Office from funds appropriated under the Judiciary Appropriation Act of 1971 "for necessary travel and miscellaneous expenses, not otherwise provided for, incurred by the judiciary."

To the Attorney General, April 3, 1973:

By letter dated November 27, 1972, the Assistant Attorney General for Administration requested our advice concerning the proper source of payment of an invoice by Dr. Albert E. Marland, a psychiatrist, representing his fee and expenses for services rendered in the case of *United States* v. *Harry Hantman*, Criminal No. 1446–68, a conditional release proceeding held in the United States District Court for the District of Columbia.

This proceeding arose under Title 24, section 24–301(e) of the District of Columbia Code (1967 ed., Supp. V). Subsection (d) of section 24–301 provides for commitment in a mental hospital of persons acquitted of criminal charges on the basis of a defense of insanity. Subsection (e) of section 24–301 provides, *inter alia*, for the initiation of release proceedings when the hospital superintendent files with the court, in which the criminal prosecution was held and serves upon the office which conducted the prosecution, a certificate that a person committed pursuant to subsection (d) is in a condition to be conditionally released under supervision. After the expiration of 15 days following filing and service, the superintendent's certificate is sufficient to authorize the court to order conditional release without a hearing. However, subsection (e) also provides that the court may on its own motion—or must upon objection to the certificate by the prosecutive office—hold a hearing "at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital." Subsection (e) provides further that:

> * * * if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

In the instant proceeding Judge Edward M. Curran, who presided at the hearing, found the psychiatric testimony presented (appar-

ently by the hospital staff) conflicting, and felt the need of impartial advice in order to make a just ruling. Accordingly, Judge Curran issued an order under Rule 28, Federal Rules of Criminal Procedure, appointing Dr. Marland to examine Mr. Hantman to determine his mental condition and whether conditional release would be advisable. Dr. Marland's invoice, in the amount of $306, indicates in addition to expenses the following services: an examination of Mr. Hantman, an examination of the hospital's clinical file concerning Mr. Hantman, a conference with Mr. Hantman's attorney, a conference with the United States Attorney, a report to the judge, and testimony at the hearing.

Dr. Marland's invoice was presented initially to Judge Curran, and was referred by him to the Administrative Office of the United States Courts (Administrative Office) for payment under the Criminal Justice Act of 1964, as amended, 18 U.S. Code 3006A. By letter dated December 6, 1971, the Deputy Director of the Administrative Office returned the invoice to Judge Curran, advising that conditional release proceedings are entirely civil in nature, that Rule 28 was not for application, and that the services of an independent psychiatrist were not related to provision of an adequate defense so as to authorize payment therefor under 18 U.S.C. 3006A. Judge Curran then submitted the invoice to the Department of Justice, which again sought to have payment made by the Administrative Office. Several letters passed between the Department of Justice and the Administrative Office. In this correspondence, the Department of Justice took the position that Dr. Marland's fee is payable from the miscellaneous expense appropriation of the Administrative Office, noting that:

> * * * The Comptroller General has ruled in his unpublished decision B-121306 of November 4, 1954, that independent experts called by the court for assistance "* * * in order to determine the proper action to be taken" by the court should properly be paid from the appropriations of the judiciary.

The Administrative Office responded that the Comptroller General decision cited involved a straight habeas corpus proceeding, and that: "Traditionally, these expenses are borne by the parties. We do not have an appropriation to be used for this purpose."

The Assistant Attorney General's letter referring this matter to us states in part:

> * * * The Comptroller General determined in his decision 39:133 that habeas corpus proceedings, although civil actions, are integrally related to the original criminal proceeding. Although the conditional release proceeding is not a habeas corpus proceeding (under the provisions of 24 D.C. Code 301(e) the release is requested by the hospital), they are both civil actions incident to the original criminal proceedings, and involve the protection of basic constitutional rights of the defendant; therefore, the same situation appears to prevail.
>
> This department does not feel that this type of psychiatric examination and testimony comes within the provisions of 18 USC 4244 to determine competency

to stand trial nor is it an expense incident to the prosecution of the case, and therefore can find no appropriation of this department to which it could properly be charged.

The services of Dr. Marland in this matter were provided at the instance of, and clearly for the primary benefit of, the court. There is no indication in the materials submitted to us that Mr. Hantman requested the appointment of an independent psychiatric expert; and we assume that he considered his interests to be adequately protected by the testimony of the hospital's psychiatrist. In view of the foregoing, we do not believe that Dr. Marland's services may be regarded as "representation for" Mr. Hantman for purposes of the Criminal Justice Act.

While the judge may have been incorrect in basing his order for Dr. Marland's services upon Rule 28 of the Federal Rules of Criminal Procedure, there appears to be no question concerning the authority of a court to procure at its own motion expert services which are deemed necessary to determine the matter before it. The exercise of such discretion has traditionally been regarded as an inherent power of the court. *See*, e.g., 9 Wigmore on Evidence (Third ed.) § 2484; 98 C.J.S., Witnesses, § 350. Several decisions of this Office have also recognized this power; and have concluded that expenses so incurred are properly payable from appropriations available to the judicial branch "for necessary * * * miscellaneous expenses, not otherwise provided for * * *." Our decision of November 4, 1954, B–121306, cited by the Assistant Attorney General, seems particularly similar to the instant matter. In that case, a Federal district judge had on his own motion appointed a psychiatrist to examine a prisoner who exhibited a possible mental condition during the course of a hearing on the prisoner's application for a writ of habeas corpus seeking his transfer to a hospital for an operation. We held:

> In the instant case, the court apparently felt that the views of psychiatrists were needed in order to determine the proper course to be taken with respect to the writ, and in such situations the court appears to have inherent power to call witnesses on its own motion without specific authority for action in some law or rule. See the notes following Rule 28 [Federal Rules of Criminal Procedure] set forth in title 18, United States Code. Accordingly, it is concluded that the appropriation specified in the court order—which appropriation is available for miscellaneous expenses not otherwise provided for the judiciary—is available for payment of the expenses involved * * *.

See also 39 Comp. Gen. 133, 137 (1959); B–132461, August 27, 1957; *cf.*, 48 Comp. Gen. 681 (1969).

We believe that the approach taken in our prior decision, discussed above, is applicable to the instant matter. Accordingly, it is our opinion that the invoice submitted by Dr. Marland is payable by the Administrative Office from funds appropriated "for necessary travel and miscellaneous expenses, not otherwise provided for, incurred by the

judiciary * * *" under the Judiciary Appropriation Act, 1971, approved October 21, 1970, Public Law 91–472, title IV, 84 Stat. 1055, 1057.

We are sending a copy of this letter to the Director of the Administrative Office.

[B–177707]

Bids—All or None—Omission of Item Effect

Under an invitation for bids for the preparation of personal property of military personnel for shipment or storage that divided delivery requirements into schedules I, II, and III, each schedule further divided into three geographical areas, a bidder who when awarded a contract for schedules II and III as low bidder alleged intent to bid on an "all-or-none" basis, except for the indicated exclusion of area I, schedule III, may not have its bid corrected as for a minor error, nor may the bid be disregarded, since the error in designating the all-or-none portion of the bid is not ascertainable from the bid documents and corrections would displace the low bidder on schedule I (ASPR 2–406.3(a)(3)). Although an award for the three schedules on an all-or-none basis would be pecuniarily advantageous to the Government, the preservation of the competitive system requires the rights of other bidders to be considered.

To Denning & Wohlstetter, April 3, 1973:

Reference is made to your letter of March 21, 1973, and prior correspondence, protesting against award to any firm other than the De Witt Transfer and Storage Company under invitation for bids No. N00244–73–B–0300, issued by the Naval Supply Center, San Diego, California.

Bidders were requested to submit bids on a requirement for preparation of personal property of military personnel for shipment or storage and for intra-city/intra-area movement for a 1-year period ending December 31, 1973. The requirement was divided into schedules I, II and III, each schedule being further divided into three geographical areas. The invitation provided for the evaluation of bids on the basis of the total aggregate price of all items within an area of performance under a given schedule.

At bid opening, De Witt was found to be low bidder on schedules II and III only. Upon learning that the contracting officer intended to make an award on that basis, De Witt queried why it would not receive an award on schedule I also. The contracting officer noted that the cover letter with the De Witt bid stated as follows:

> Please be advised, enclosed Solicitation Number N00244–73–B–0300, presented as follows:
>
> | | | |
> |---|---|---|
> | Schedule I | Area 1, 2 & 3 | All or None |
> | Schedule II | Area 1, 2, & 3 | All or None |
> | Schedule III | Area 2 and 3 | All or None |
>
> No Secondary or Tritary [sic], Schedule III, Area 1.

De Witt alleged that this language resulted from a secretarial error in transferring the limitations from dictated notes to the cover letter. De Witt contended that it intended to bid on an all-or-none basis for the combined schedules I, II and III, excluding area I of schedule III.

The contracting officer determined the alleged error not to be minor under Armed Services Procurement Regulation (ASPR) 2–405 and accordingly denied De Witt's request for correction of the bid. De Witt protested the decision. Upon receipt of the protest by the Deputy Commander, Procurement Management, Naval Supply Systems Command, it was recognized that the regulation applicable to an alleged mistake was ASPR 2–406 and the authority to decide whether correction could be made lay with the Deputy Commander. The protestant was advised of this and requested to submit a statement as to the nature of the mistake, how it occurred and the intended bid price, and a written request indicating the firm's desire to withdraw or modify the bid. In response to this advice, the attorney for De Witt by letter of January 22, 1973, alleged that the bidder intended at all times to bid "all or none" as regarded all items bid upon, and it was requested that the bid be changed accordingly or be disregarded. An affidavit from the secretary who allegedly made the error explaining how it had occurred was also furnished.

After considering the evidence, the Deputy Commander noted that the governing regulation in the matter, ASPR 2–406.3(a)(3), states as follows:

> (3) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; *provided* that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. * * *.

Although the extrinsic evidence furnished by the bidder outside the invitation and the bid was considered convincing as to the fact that a mistake in bid had been made, correction of the alleged mistake was not allowed in view of ASPR 2–406.3(a)(3) because it would result in displacing the low aggregate bidder on schedule I. The existence of the mistake and the bid actually intended were not considered to be ascertainable substantially from the invitation and the bid. Further, the evidence was considered to conflict as to whether an all-or-none bid was intended on all three schedules *in toto* or on all three schedules less area I of schedule III.

The original request of the attorney for De Witt by letter of January 8, 1973, was "that either an award of contract covering all work required under schedules I, II, and III be made to De Witt or if such an award is not to be made to DeWitt then it is urged that DeWitt be

permitted to withdraw its bid." The attorney further contended that because the intended bid prices are those in the bid originally submitted by De Witt and because the cover letter, which is also a part of the bid, notes the all-or-none qualifications with which the allegation of mistake is concerned, the existence of an error and of the intended bid prices is clearly established from the bid and therefore correction may be allowed even if the displacement of another low bid should occur thereby. It was also stated that the fact that the De Witt bids on areas II and III of schedule III were out of line with the prices submitted by the other bidders should have placed the contracting officer on notice as to the all-or-none error.

We are unable to concur with your contentions. Even if the contracting officer should have been placed on notice as to the possibility of error in the De Witt bid by the lowness of the De Witt prices for areas II and III of schedule III, this fact could equally point to a mistake having been made by the bidder in the computation of its bid prices on those items. That the error occurred in designating the all-or-none portion of the bid is, in our opinion, not ascertainable from the bid documents. Rather, the nature of the error is proven only by resorting to extrinsic evidence. Consequently, since correction would displace the low bidder on schedule I, under ASPR 2-406.3(a)(3), we believe that correction was properly disallowed. Further, inasmuch as the extrinsic evidence showed that all-or-none bids were not intended as to each schedule individually, it is proper that the De Witt bid be withdrawn. Although an award to De Witt for the three schedules on an all-or-none basis would be pecuniarily advantageous to the Government, our Office has held that, where the correction would result in displacement of one or more bidders, the interest of the Government in preserving and maintaining the competitive bidding system requires that the rights of other bidders be considered as calling for denial of the correction, except where it can be ascertained substantially from the invitation and bid itself. 37 Comp. Gen. 210 (1957); B-166523, August 5, 1969; and B-169986, June 18, 1970.

Accordingly, the protest is denied.

[B-171637]

Courts — Jurors — Fees — Government Employees in Federal Courts—Sequestered Jurors

The fact that jury duty involves only 8 hours of absence from a Federal position does not entitle a Federal employee sequestered for 49 days as an alternate juror in a United States District Court to additional jury fees for 16 hours a day on the basis of the "two-thirds rule" for the days that were within the employee's regular tour of duty and for which jury fees were not paid in accordance with 5 U.S.C. 5537, which prohibits payment to an employee of the United States for

jury duty in United States courts while in a pay status in a civilian position, as it is immaterial whether the employee's pay status involved only a part of the period of jury service since there is no authority to pay jury fees on a pro rata basis.

To the National Vice President, American Federation of Government Employees, April 4, 1973:

Reference is made to your letter dated October 5, 1972, with enclosures, reference L–1156, requesting a decision on the claim of Mrs. Rosemary A. McGinn, a Federal employee, for additional fees covering jury service in the United States District Court for the Middle District of Pennsylvania.

The information furnished indicates that during the period February 7–April 5, 1972, Mrs. McGinn, while serving as an alternate juror in the United States District Court for the Middle District of Pennsylvania, was sequestered along with other jurors for a period of 49 days (February 17–April 5, 1972). Pursuant to the cognizant statute (5 U.S. Code 5537), Mrs. McGinn was only paid jury fees for those days of service (14) which were not within her regular tour of duty as a Federal employee (7 weekends).

What Mrs. McGinn seeks now is compensation for the balance of the time she served as a juror on the basis of the "two-thirds rule." The rationale employed is that of the 24 hours on any day which Mrs. McGinn served as a sequestered juror, only 8 hours involved absence from her Federal job. In such light she claims ⅔ of the daily compensation payable to a juror asserting that 16 hours of every day served in such a capacity were during her normal off-duty hours.

5 U.S.C. 5537 provides as follows:

(a) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia may not receive fees for service—

(1) as a juror in a court of the United States or the District of Columbia; or

(2) as a witness on behalf of the United States or the District of Columbia.

(b) An official of a court of the United States or the District of Columbia may not receive witness fees for attendance before a court, commissioner, or magistrate where he is officiating.

(c) For the purpose of this section, "court of the United States" has the meaning given it by section 451 of title 28 and includes the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands.

28 U.S.C. 1871 states in pertinent part that:

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $25 for each day in excess of thirty days he is required to hear such case.

We have held that when an employee performs jury service after his duty hours, or on a nonworkday, or on a holiday (no court leave being involved), he is entitled to payment of or retention of jury fees. 36 Comp. Gen. 378, 379 (1956) and 45 *id.* 251 (1965).

As to jury duty in a Federal court where such duty extends beyond the hours covered by an employee's court leave, we note that a similar situation was the subject of question 3 and the answer thereto as contained in 36 Comp. Gen. 378 at page 379 (1956). The question was as follows:

> (3) If there is a partial conflict between the usual hours of employment of such an employee and the hours of jury service, may the employee collect or retain the jury fee on a *pro rata basis* to the extent of such conflict? [Italic supplied.]

In response thereto, this Office stated that:

> Referring to question (3), we see no proper legal basis under section 2 of the above-quoted statute for prorating any jury fee in the case of jury service by "any employee specified in section 1" where the jury service is "in any court of the United States"—a situation to which your third question is addressed. Unlike section 3 of the statute—providing for some measure of "reimbursement" to the United States for jury service rendered in State courts where the compensation and annual leave account of the Federal employee continues without diminution during the period of all or a part of his scheduled tour of duty—section 2 is explicit in its mandate that such employee "shall not receive any compensation for such service." That section of the statute has consistently been construed by our Office as prohibiting payment to an employee of the United States for jury duty for those days on which he may perform jury service in the United States courts while in a pay status in his civilian position (29 Comp. Gen. 391), and whether such pay status involves only a part of the period of jury service is immaterial. To provide for prorating under section 2 of the statute would be reading into the statute a provision which is not there. We must conclude, therefore, that question 3 is for answering in the negative.

We see no reason why the above conclusion would not be applicable here regardless of the fact that Mrs. McGinn was sequestered for 49 days (24 hours a day). In that connection we point out that the jury fee in a Federal court may cover only a short period of the day or the full 24 hours. Furthermore, our review of the legislative histories of the provisions of 5 U.S.C. 5537, including the predecessor act of June 29, 1940, and the provision of 28 U.S.C. 1871, does not reveal any legislative intent to authorize partial juror fees in the event of an overlap of the time a Federal employee serves as a juror and the time of his normally scheduled tour of duty.

Accordingly, we perceive no basis upon which Mrs. McGinn could properly be paid jury fees on a pro rata basis during the period in question. We assume she has filed or will file a claim with the Clerk of the Court for the jury fee covering the holiday, February 21, 1972, in accordance with our decision in 45 Comp. Gen. 251.

[B-173815]

Foreign Service—Promotions—Delayed—Annuity Computation

Notwithstanding a 4-year delay in promoting a Foreign Service Officer from FSO–4 to FSO–3 due to age discrimination, the officer who will reach mandatory retirement age within 8 months of his promotion may not be permitted for the purpose of increasing his annuity payments to pay into the Foreign Service and Disability Fund the additional amounts that would have been deducted from his salary and deposited into the fund but for the delay. Compulsory contributions to the retirement fund are based on actual salary received and since the employee may not be retroactively promoted upon removal of the age discrimination, his annuity payments are not for computation on the salary of grade FSO–3 prior to the date he was promoted to that grade.

To Kiyonao Okami, American Consul, Embassy of the United States of America, April 4, 1973:

Reference is made to your letter of March 5, 1973, requesting that you be permitted to pay into the Foreign Service and Disability Fund the additional amounts that would have been deducted from your salary and deposited into the fund if your promotion from FSO–4 to FSO–3 had been made in 1968 instead of being delayed to 1972 because of discrimination on account of your age. You state that you will reach the mandatory age for retirement on June 30, 1973, and wish to make such additional contributions to the fund so that your annuity will be computed on the higher salary that you would have received but for the discrimination.

You state that after being passed over for promotion for several years on account of age, you filed a grievance in 1971. On June 5, 1972, the Foreign Service Grievance Board found that you had been discriminated against. Accordingly, the Board recommended to the Secretary of State that you be promoted to the fourth step of FSO–3, which would have been the approximate point in grade which you would have held had your career not been impeded by discrimination. The Secretary concurred with the Board and you were subsequently promoted to the fourth step of FSO–3, effective October 9, 1972. You note that you will have been paid at the higher salary for only 8 months at the time of your retirement and the increased salary payments for this short period will have little effect on the basic salary for the highest 3 consecutive years of service, on which your annuity is to be based. While you do not claim any back pay, you believe that under the circumstances you should be permitted to make additional deposits into the retirement fund and thereby increase your annuity back to the date in 1968 when you should have received the promotion to FSO–3.

Section 821 of the Foreign Service Act of 1946, as amended, 22 U.S. Code 1076, reads in part as follows:

(a) The annuity of a participant shall be equal to 2 per centum of his average basic salary for the highest three consecutive years of service, for which full

contributions have been made to the Fund, multiplied by the number of years, not exceeding thirty-five, of service credit obtained in accordance with the provisions of sections 1091 to 1093 of this title. * * *.

Section 811 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1071 reads in part as follows:

(a) Seven per centum of the basic salary received by each participant shall be contributed to the Fund for the payment of annuities, cash benefits, refunds, and allowances. An equal sum shall also be contributed from the respective appropriation or fund which is used for payment of the salary. * * *.

* * * * * * *

(b) Each participant shall be deemed to consent and agree to such deductions from basic salary, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services during the period covered by such payment, except the right to the benefits to which he shall be entitled under this chapter, notwithstanding any law, rule, or regulation affecting the individual's salary.

Regarding the amount of the deduction, subsection 102(a) of Public Law 91-201, 22 U.S.C. 1064, approved February 28, 1970, 84 Stat. 17, substituted "Seven" for "Six and one-half."

The above statutory provisions provide that the annuity of a Foreign Service Officer is to be computed on his average basic salary for which full contributions have been made to the fund and require deductions from the salary of an officer in the amount stated. Such deductions are a full and complete discharge of the Government's obligation to the officer except for the retirement benefits, etc., contained in the remainder of the code chapter. There is no provision for computing the high 3-year basic salary on a constructive salary basis or on the basis of additional contributions to the fund. Section 881 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1116, provides that a participant may make voluntary contributions to the fund. However, such contributions are to be used to purchase an additional life annuity actuarially equivalent to such contributions, etc., and do not affect the participant's basic salary for the purpose of computing his annuity under 22 U.S.C. 1076.

Since the statutes pertaining to compulsory contributions to the retirement fund require such contributions to be based on the actual salary received, it appears that the only basis for increasing your average basic salary for the purpose of computing your annuity would be that you are entitled to a retroactive promotion and back pay. Regarding the remedy for a discriminatory personnel action it was held in 48 Comp. Gen. 502 (1969) that a retroactive promotion because of failure to timely promote an employee because of racial discrimination was unauthorized. It would appear that this rule would also apply in cases involving discrimination on account of age. We have also examined laws and regulations that became effective subsequent to the date of the decision cited above. However, we have found none that

would authorize the retroactive promotion of an employee with back pay because of failure to timely promote him due to discrimination on account of age.

In view of the above, our view is that no basis exists whereby your average basic salary for annuity computation purposes could be computed on the salary of grade FSO–3 prior to the date you actually were promoted to that grade.

[B–173976]

Compensation—Promotions—Delayed—Freeze on Promotions

Where the Federal Aviation Administration elected, in the exercise of its executive function to appoint persons to the civilian Government service, not to promote development Air Traffic Controllers who had satisfied the criteria for promotion until clarification of the Presidential order of December 11, 1972, placing a freeze on promotions, the employees did not become entitled to higher salaries prior to the date of the agency's promotional action, notwithstanding the controllers performed the duties and otherwise qualified for the promotions, or that an employment agreement may have been executed, since under Executive Order 11491, the right of promotion is retained by the management officials of an agency. Furthermore, the failure to promote is not the "unjustified or unwarranted personnel action" contemplated by 5 U.S.C. 5596 to entitle the employees to back pay.

To the Regional Vice President, Professional Air Traffic Controllers Organization, April 4, 1973:

This refers to your letter of February 6, 1973, requesting a decision concerning whether Air Traffic Controller developmental promotions delayed by the Federal Aviation Administration as a result of the President's December 11, 1972 freeze on hirings and promotions in the executive branch, should be made retroactively effective to dates when the controllers satisfied promotion criteria during the freeze period.

Your contention as we understand it is that an employment agreement between the agency and its controller employees required the agency to promote such employees whenever they satisfied certain established criteria relative to performance, training, time in grade, etc. Upon imposition of the freeze, the agency was uncertain whether such promotions were permissible under terms of the President's order and sought advice from the Civil Service Commission. You state the Civil Service Commission ruled on January 2, 1973, that an implicit commitment existed on the part of both the agency and the employees that when the employees satisfied the criteria they could not be denied promotions. You complain that the agency has not made delayed promotions retroactively effective to dates on which the employees satisfied the criteria and seek a decision on this matter.

The Federal Aviation Administration has informally advised this Office that your organization does not have an agreement covering

promotion of developmental controllers. Moreover, we note that section 12 of Executive Order 11491, Labor-Management Relations in the Federal Service, requires all agreements between an agency and a labor organization to include a basic provision retaining the right of promotion in management officials of the agency, in accordance with applicable laws and regulations. 50 Comp. Gen. 850 (1971). Apparently, you are relying on agency policy to advance developmental controllers when certain specified development criteria has been satisfied.

However, it is an established principle of law that the power of appointment to the civilian Government service is an executive function and lies within the discretion of the head of the employing agency. *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964); *Nordstrom* v. *United States*, 177 Ct. Cl. 818 (1966). Federal Government employees are entitled to the salaries of the positions to which they are appointed regardless of the duties they actually perform. Thus where employees of an agency believed themselves entitled to promotion to a higher grade or to have the positions they occupied reclassified to a higher grade, and were ultimately successful in so persuading the Civil Service Commission, their entitlement to the pay of the higher grade did not commence until they were actually promoted to that grade in accordance with the mandate of the Civil Service Commission, not having occupied the higher grade position until that time. Furthermore, the general rule is that when a position is reclassified to a higher grade as a result of an appeal to the Civil Service Commission, there is no authority to make the higher salary rate retroactively effective. *Dianish et al.* v. *United States*, 183 Ct. Cl. 702 (1968).

In the instant case, the Federal Aviation Administration elected not to exercise its discretion to promote certain developmental controllers until it obtained clarification of the Presidential order placing a freeze on promotions. Since the appointments (promotions) were not made until a later date, the employees did not become entitled to the higher salaries for any period prior thereto, notwithstanding the fact they may have performed the duties of, and have been otherwise qualified for, these positions in the interim. It has long been the rule of our Office that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. 40 Comp. Gen. 207 (1960); 39 *id.* 583 (1960).

In response to your request, we have also examined the possible application of 5 U.S. Code 5596, covering back pay due to unjustified personnel action, which reads in pertinent part as follows:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that

has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. * * *

Regulations implementing this statute have been promulgated by the Civil Service Commission in 5 CFR 550.803 and provide in part as follows:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

Our Office has had occasion to construe the language of the above-quoted statute and regulations and has consistently held that a failure to promote as a result of discrimination or other unjustified cause is not such an "unjustified or unwarranted personnel action" as to entitle the employees adversely affected thereby to back pay. *See* B–173388, July 26, 1971; B–173255, July 14, 1971, and B–165571(1), July 18, 1969, copies enclosed.

Accordingly, on the basis of the present record we are of the opinion that the Federal Aviation Administration acted properly in not making delayed promotions of developmental controllers retroactively effective.

[B–175222]

Bonds—Performance—Surety—Liability, Obligation, Etc.

A surety who requested the Government to withhold the funds due a defaulting contractor under a janitorial service contract and who met its obligations under the performance bond for the excess costs to the contracting agency to complete the contract is not liable in an amount that exceeds its obligation under the payment bond for the withheld funds that were turned over by the agency to the Labor Department to cover wage deficiencies under the defaulted contract as well as another contract. The surety did not complete the contract itself and having only guaranteed contract performance at a specified price, it is not liable for the wage underpayments that it did not guarantee. To hold the surety liable

for obligations not contemplated by the performance bond would violate the general rule of the Law of Suretyship that no one incurs a liability for another unless expressly agreeing to be bound.

To the Secretary of the Air Force, April 4, 1973:

Reference is made to your transmittal letter dated March 16, 1972, with enclosures, from the Chief, Contract Support Branch, Contract Management Division, Dir/Procurement Policy (LGPMB), concerning the claim of United States Fidelity and Guaranty Company (USF&G), surety for Western Janitorial Service, Incorporated (Western), to certain funds disbursed under contract No. F04666-69-C-0260, with the United States Air Force.

The contract was awarded to Western on June 27, 1969, and provided for custodial services at Beale Air Force Base, California, USF&G furnished payment and performance bonds on the contract. Western abandoned the contract effective February 27, 1970, and on March 2, 1970, the contracting officer notified the surety that Western had defaulted on its contract and demanded that USF&G satisfy its performance bond obligation. USF&G immediately (March 2, 1970) sent a telefax to the contracting officer directing the contracting officer to retain any and all funds due on the contract, and by letter dated March 16, 1970, it tendered the services of Murcole, Incorporated, to complete the defaulted contract and agreed to reimburse the Air Force for excess costs resulting from the default. Formal Notice of Default Termination was dated April 1, 1970, at which time Western was notified that it would be held liable for any excess costs incurred by the Government in the reprocurement of the terminated services. At the time of default by Western the Government had in its possession the sum of $1,326.29, withheld from Western for work performed prior to its abandonment of work under this contract.

Reprocurement of the terminated services was accomplished as follows:

a. Cost incurred for Government labor to perform services, Feb. 27 through March 5, 1970.	$ 438.42
b. Reprocurement:	
(1) Interim services March 6–19, 1970, from Murcole, Incorporated.	$ 1,600.00
(2) Interim services, March 20–27, 1970, from Murcole, Incorporated.	$ 800.00
(3) Contract with Murcole, Incorporated, for period March 28 through June 30, 1970.	$ 9,306.62
Total cost of completion of defaulted contract	$12,145.04

Had Western completed the contract it would have earned for 4 months and 2 days (February 27 through June 30, 1970), at $2,062.36 per month, the sum of $8,386.94 less $20.97 discount or a net amount of $8,365.97. Therefore, the net excess costs were $3,779.07.

On June 17, 1970, the surety was notified by the contracting officer that the withheld sum ($1,326.29) was being contested pending a hearing by the Department of Labor regarding claims for unpaid wages by employees of Western. The hearing examiner determined that $40,526.14 was due Western employees for work performed on a number of contracts with the United States. However, of the total amount owed, only $668.51 was attributable to the Beale Air Force Base work.

On August 12, 1970, the Air Force sent to the surety a "Notice of Assessment of Excess Cost (Damages)" on the Beale contract. The surety was notified that the total excess costs and damages incurred in completing performance were $3,779.07 and that, after subtracting the $1,326.29 of withheld funds, the surety owed $2,452.78 on the performance bond. On August 20, 1970, the surety sent its drafts for $2,452.78 (the excess costs of completing the contract after application of the withheld balance) under its performance bond and for $668.51 (the amount of the wage claims attributable to the contract) under its payment bond to the Air Force and to the Department of Labor, respectively.

On September 4, 1970, the Air Force notified the surety that it had transmitted $1,326.29, the undisbursed contract balance, to the Department of Labor at its request to satisfy wage claims against Western and demanded payment of that amount as it had been erroneously credited to the excess costs of completing the Beale contract. On September 16, 1970, the surety objected to this action in a letter to the Air Force. On the same date it called the Department of Labor's attention to its draft in the amount of $668.51 and advised of its intention to meet all its obligations on Western payment bonds. In its reply the Department of Labor returned the USF&G draft of August 20, 1970, stating that the funds withheld by the Air Force were sufficient to satisfy the amount due to Western's employees under the Beale contract.

In response to our request, the Department of Labor also advised us that of the $1,326.29, transmitted by the Air Force, $668.51 was paid to Western's underpaid employees under the Beale Air Force Base contract, and that the balance of $657.78 was used to help pay back wages found due employees on another Western contract on which there was no surety. It is Labor's position that the foregoing distribution was in accordance with the following pertinent provisions of section 3(a) of the Service Contract Act of 1965 (41 U.S.

Code 352(a)), and the implementation thereof in Armed Services Procurement Regulation 12–1004, respectively.

41 U.S.C. 352(a)

So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

ASPR 12–1004

This contract, to the extent that it is of the character to which the Service Contract Act of 1965 * * * applies, is subject to the following provisions and to all other applicable provisions of the Act and the regulations of the Secretary of Labor thereunder. * * *

* * * * * * *

(g) Withholding of payments and termination of contract. The contracting Officer shall withhold or cause to be withheld from the Government Prime Contractor under this or any other Government contract with the Prime Contractor such sums as he, or an appropriate officer of the Labor Department, decides may be necessary to pay underpaid employees. Additionally, any failure to comply with the requirements of this clause relating to the Service Contract Act of 1965 may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of work, charging the Contractor in default with any additional cost.

The surety contends that under well-established legal principles the money retained by the Government at the time of Western's default was properly for application toward completion of the contract and, therefore, USF&G's payment of the difference between that amount and the total excess completion costs absolved it of liability under its performance bond. Its rationale is to the effect that the Government holds the undisbursed funds in trust for completion of the contract and the completing surety is subrogated to the Government's right to apply the retained funds to the excess completion costs in preference to any other claims. It is the surety's position that while the Service Contract Act of 1965 authorizes the withholding of funds due the contractor to satisfy wage claims under that or other contracts, it is not applicable to the situation where, as here, the contractor defaults and the retained funds are held in trust for completion of performance.

The right of a surety to a withheld fund when the surety completes performance of a contract upon default by the contractor has long been recognized. In *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896), the court held that a retained fund under a Government contract was for the protection of the United States and that a completing surety was subrogated to the rights of the Government in the fund and therefore had an equitable interest in it. This "firmly established rule" was reaffirmed by the Supreme Court in *Pearlman* v. *Reliance Insur-*

ance Co., 371 U.S. 132 (1962) and has been applied in *Trinity Universal Insurance Co.* v. *United States*, 382 F. 2d 317 (5th Cir. 1967), *cert. den.* 390 U.S. 906 (1968), and *Security Insurance Co.* v. *United States*, 192 Ct. Cl. 754, 428 F. 2d 838 (1970). In the latter case, the Court quoted approvingly the following language from *Trinity*, *supra:*

> A different situation occurs when the surety completes the performance of a contract. The surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. If the contractor fails to complete the job, the government can apply the retained funds and any remaining progress money to costs of completing the job. The surety is liable under the performance bond for any damage incurred by the government in completing the job. On the other hand, the surety may undertake to complete the job itself. In so doing, it performs a benefit for the government, and has a right to the retained funds and remaining progress money to defray its costs. The surety who undertakes to complete the project is entitled to the funds in the hands of the government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the government. (382 F. 2d at 320.)

Essentially, the conclusion reached in these cases is that a completing surety is no worse off than one that elects to pay excess cost damages. Since in the instant case the surety did not complete the contract, the excess cost damages for which the surety is liable must be determined.

The legislative history of the Service Contract Act of 1965 indicates that the Act's purpose was to give the same protection and benefits to service employees that was afforded construction workers under the Davis-Bacon Act, 40 U.S.C. 276a. For example, page 11 of the Hearings Before the Subcommittee on Labor and Public Welfare, 89th Congress, 1st Session, on H.R. 10238, which was subsequently enacted as Public Law 89–286 (Service Contract Act of 1965), contains the following testimony of the Solicitor of Labor:

> At the threshold I have been told that there is some curiosity as to why we did not simply take the Davis-Bacon Act and extend it so that it would cover service contracts as well as construction contracts.
>
> * * * * * * *
>
> Another answer to that question is, that in principle, without mentioning it, we have followed the Davis-Bacon Act.

The Davis-Bacon Act authorizes the withholding of funds due under a contract to reimburse workers who were paid less than the required minimum wages while working on that contract. Thus, the two acts are substantially similar except for the provision in the Service Contract Act of 1965 which authorizes the use of retained funds to reimburse workers owed money under other contracts as well as the contract under which the money is retained. No explanation of this difference appears in the legislative history. We note, however, that the provisions of the Walsh-Healey Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C. 36, providing similar protection for employees under supply contracts, have also been held to apply to all contracts subject to that act, *Ready-*

Mix Concrete Company v. *United States*. 131 Ct. Cl. 204 (1955); *Cf.* 19 Comp. Gen. 785 (1940), and that the language of the Service Contract Act explicitly provides for similar application of its provisions.

We have previously had occasion to consider a claim to retained funds on behalf of unpaid workers due under a contract subject to the Davis-Bacon Act. 46 Comp. Gen. 178 (1966). In that case we rejected the trust fund concept expressed in certain prior cases (33 Comp. Gen. 496 (1954) and 35 *id.* 144 (1955)) as applied to withheld payments under a contract. We held that a trust arose in favor of the workmen, if at all, only when "determinations are made as to the employees entitled, the individual amounts due, and the withheld amounts transferred to and accepted by the General Accounting Office as impressed monies." 46 Comp. Gen. 178, 182. We noted that the statute provided that the contracting officer *may* withhold in favor of underpaid employees but that the Davis-Bacon Act procedures appeared to be supplemental to other rights and remedies available to the workers, and we concluded that the Government has priority for setoff of its claims against amounts withheld from a contractor, leaving the workers to other remedies if the retainage was insufficient to satisfy their claims also. We have held that under the Walsh-Healey Act, funds withheld for the benefit of employees must be used only for payment to employees because of the mandatory language of the act. 19 Comp. Gen. 565 (1939); 46 *id.* 178, 182, *supra*. In both cases, however, it is clear that unpaid employees can have a paramount interest in the withheld funds only if the funds were withheld specifically for the benefit of such employees. *See* B–166264, June 1, 1970.

In view of these decisions and the legislative history of the Service Contract Act, we cannot conclude that employees covered by that act have any greater protection with respect to a surety's claim to retained funds than those covered by the Davis-Bacon and Walsh-Healey Acts. Furthermore, while it is clear that under the act a contractor who fails to pay the minimum required wages to his employees may be defaulted for nonperformance, thereby subjecting the performance bond surety to liability for excess costs, it is equally clear that such excess costs do not encompass the amount by which the employees were underpaid. As stated in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 244 (1947):

> * * * When laborers and materialmen * * * are unpaid and the work is complete, the government suffers no damage. The work has been done at the contract price. The government cannot suffer damage because it is under no legal obligation to pay the laborers and materialmen. In the case of the laborers' bond, the surety has promised that they will be paid, not, as in the case of performance bond, that work will be done at a certain price. * * *.

Here, the surety, by executing a performance bond, guaranteed performance at a specified price, but it does not appear that it undertook to guarantee payment of contractor employees on the specific contract involved or on any other contract. Thus, to hold the performance bond surety for underpayment of laborers would make the surety liable for obligations not contemplated when the bond was issued. This would violate the "general rule of the Law of Suretyship that no one incurs a liability to pay a debt or perform a duty for another unless he expressly agrees to be so bound, for the law does not create relationships of this character by *mere implication.*" 44 Comp. Gen. 495, 497 (1965).

We do not believe that our holding in B–161460, May 25, 1967, is in conflict with our holding in the instant case. The prior case involved the proper distribution of funds representing amounts earned by the contractor, but unpaid, under certain defaulted contracts. There were three claimants to the funds: the contracting agency for its excess reprocurement costs, unpaid employees under the Service Contract Act of 1965, and the Internal Revenue Service for taxes owed by the defaulted contractor. In that situation the Solicitor of Labor asked the contracting officer to give priority to the unpaid employees' claims. We concluded that our Office "would not be required to object to priority being given to payment of the amounts due the unpaid employees in accordance with the request of the Solicitor of Labor." Although we held that the Government may give priority to the unpaid employees, we did not have the question presented in that case of a surety's liability for excess costs. Under the terms of the performance bond the surety is liable to the Government for the excess costs resulting from the contractor's default. In measuring the extent of the costs, we believe the Government must deduct funds it withheld from a defaulted contractor at the surety's request. While the Government may choose to apply the withheld funds to the benefit of unpaid employees rather than to its own claims, the Government may not look to the surety to reimburse it for the funds paid to the employees. See *Home Indemnity Company* v. *United States*, 180 Ct. Cl. 173, 376 F. 2d 890 (1967).

Accordingly, we believe that the surety herein may not be held liable for the $1,326.29 paid by the Air Force to the Department of Labor, except to the extent to which that amount was used to satisfy the surety's obligation under its payment bond.

[B-175254(1)]

Bids—Competitive System—Specifications—Development to Enable Competition

The low bidder under a canceled ambiguous invitation for bids on 2,000 KW gas turbine engine driven power plants and related data packages who did not submit a bid under the reissued invitation because it included a revised, more broadened experience clause, a requirement for a 100 percent performance bond, and two liquidated damage clauses at different per diem rates, provisions the bidder contended were designed to eliminate competition, was not prejudiced by use of the clauses as they were developed to protect the Government's interest in view of the responses to the initial solicitation from relatively inexperienced firms and, furthermore, the use of such clauses is not improper or unduly restrictive of competition because one or more bidders or potential bidders cannot comply with their requirements.

Bids—Competitive System—Restrictions on Competition—Protect Interests of Government

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect the interests of the Government is not restrictive of competition where the experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where the performance bond is a necessary and proper means to secure the contractor's obligation under the contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of the units to operate each day for the first year was warranted on the basis of administrative needs and prior experiences, and furthermore, the determination of whether a penalty is involved depends on facts as they arise.

Advertising—Advertising *v.* Negotiation—Specifications Availability

The use of formal advertising procedures by the Naval Facilities Engineering Command to procure 2,000 KW gas turbine engine driven power plants and related data packages was proper since adequate specifications were available and the use of the two-step formal advertising procedure is authorized pursuant to paragraph 2-501 of the Armed Services Procurement Regulation (ASPR) only when there are no adequate specifications to permit formal advertising. Moreover, the record does not indicate that negotiation of the procurement should have been authorized under the circumstances spelled out in ASPR 3-200 *et seq.* and ASPR 3-102(b)(1).

Contracts—Awards—Abeyance—Pending General Accounting Office Decision

The award of a contract during the pendency of a protest alleging restrictive specifications was proper where the determinations and findings of the contracting offier to justify the award met the criteria in paragraph 2-407.8(b)(3) of the Armed Services Procurement Regulation to the effect that the procurement was urgently needed, or that delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will otherwise be advantageous to the Government.

To the Abbott Power Corporation, April 4, 1973:

Reference is made to your telefax of October 25, 1972, and subsequent correspondence, protesting against allegedly restrictive provisions of invitations for bids N62742-73-B-6001 and N62742-73-B-

6006, issued by the Naval Facilities Engineering Command (NAV FAC), San Bruno, California.

The solicitations were for 2,000 KW gas turbine engine driven power plants and related data packages, and were issued subsequent to our decision of August 16, 1972, 52 Comp. Gen. 87, in which we recommended cancellation of a previous IFB for 12 such gas turbine units. Your company submitted the lowest bid in response to that earlier solicitation and had a Certificate of Competency (COC) from the Small Business Administration. We recommended cancellation of the IFB, however, because another bidder established that it had been prejudiced by an ambiguous specification provision dealing with the gear box to be used with the power plant.

IFB-6001, issued on September 18, 1972, and calling for bids on 12 generator units, contained several provisions that were not present in the original IFB. These provisions included a revised experience clause, a requirement for a performance bond, and two liquidated damages clauses. You did not submit a bid in response to this solicitation. Instead, on October 2, 1972, you filed a protest with the Navy, claiming that these new provisions were illegal because they were designed to eliminate you from competition, and then filed a similar protest with this Office on October 25, 1972, the day set for bid opening. On October 30, 1972, the Navy advised us that it would make award notwithstanding your protest, and the next day awarded a contract to Custom Applied Power Corporation (CAPCO), the third low bidder.

On November 13, 1972, IFB-6006, for the procurement of 12 (subsequently amended to 9) skid mounted power plants, was issued. By letter of December 12, 1972, you protested this new solicitation, claiming that it contained similar restrictive provisions. On December 26, 1972, the Navy advised us that award would be made prior to resolution of the protest, and a contract was awarded to Williams and Lane, Incorporated, the low bidder, on or about January 4, 1973.

Solicitation-6001 as issued contained the following specification provisions:

1A.6 *Performance Bond.* Within 10 days after award or notice to proceed, the Contractor shall furnish a Performance Bond (U.S. Standard Form 25). The Performance Bond, shall be in the penal sum equal to 100 percent of the contract price. * * *.

1A.7 *Damages for Delay.* Fixed, agreed and liquidated damages for each calendar day * * * shall be at the rate of $125.00 per calendar day for each unit.

1A.11 *Experience Clause*

A. * * * The power plant offered must be designed, fabricated, and assembled by a firm which has been regularly engaged for at least one year in the design fabrication and assembly of power plants rated at least 500 Kilowatts continuous duty and have operated successfully at least 1,000 hours within a period of no more than two years on liquid petroleum fuel.

Section 1A.18, captioned "Loss of Generating Capability," also provided that the "sum of $63,000 per power plant will be retained until the unit has operated without defect in design and material to produce 5,250,000 KW of electricity from the date of delivery but not longer than one year." It further provided that 1.2 cents per kilowatt hour for all hours less than 5,250,000 kilowatt hours produced in the first year would be deducted from the contract price for any unit that failed before producing that much power.

Subsequent to receipt of your October 2, 1972, letter, NAVFAC amended the specifications, deleting the words "on liquid petroleum fuel" from section 1A.11 and revising section 1A.18 to read as follows:

> In the event any unit fails from defect in design and/or material within the first year from date of delivery of the unit, the sum of $150.00 per day for each calendar day the particular unit is not able to operate will be deducted from the contract price. This warranty is in addition to all other warranty provisions of the contract.

Solicitation-6006 contained the same performance bond, damages for delay, and revised loss of generating capability clauses. The experience clause, however, was broadened to include the manufacture of pumping plants of at least 675 horsepower as an alternative to having manufactured 500 KW power plants.

You object to the experience clause provisions because you claim that NAVFAC knew you would not be able to comply with their conditions and therefore would be found nonresponsive. You contend that NAVFAC developed the clause to avoid the thrust of our August 16, 1972, decision, wherein we said that your COC foreclosed any question as to your ability to comply with the experience clause used in the earlier IFB. With respect to the performance bond requirement, you state:

> * * * the Government knows full well that we have the capacity and credit to perform the contract. However, due to the disclosure of our size and financial structure, which was revealed in the documentation required to obtain the C.O.C., they also know that we could not obtain a performance bond in the total amount of this contract without straining our bonding capacity to a point where we would be unable to obtain bonds on the other smaller contracts which are a regular part of our business and thus we could not afford to bid on this solicitation.

You further assert that the provision for loss of generating capability was "completely illegal and will result in an enormous unwarranted cost to the Government." You also point to comments made by NAVFAC's assistant counsel at a meeting at our Office on January 23, 1973, to the effect that NAVFAC did not want to make an award to your firm and that the experience clause was rewritten to preclude award to companies like Abbott. You also point to the omission of these "protective" clauses from the original solicitation as evidence that they were used to eliminate you from competition and not to protect the Government's interest.

The Navy claims that each of the clauses was a necessary requirement to properly protect its interests. It points out, in support of its use of the experience clause, that generator unit manufacturers "are free to put together their own combinations of engines, gear boxes, alternators, and controls" and that the Government "must rely upon the knowledge and successful experience of the manufacturers themselves." It states that the performance bond was required because the contractor could receive substantial progress payments "and fail to deliver or could deliver units that failed in performance," and that it has no knowledge regarding your ability to obtain bonds. It further states that the liquidated damages provision for delay in delivery was required because its damages in the event of delay would likely be "unforeseeable and legally unprovable." Finally, the Navy reports that in response to your protest it eliminated the withholding provision from the loss of generating capability clause and established $150 per day damages "based on 50% utilization and 60% load factor at 1.2¢ KWH rounded down." It further states that the requirements for bonds and for liquidated damages covering delays and breakdowns are based on NAVFAC's "previous experiences."

Solicitation clauses containing experience requirements going to both product reliability and the capability of a manufacturer have been recognized as appropriate for certain types of procurements, including procurements of diesel generator units. 48 Comp. Gen. 291 (1968). NAVFAC's original solicitation for these gas turbine generators contained an experience requirement. 52 Comp. Gen. 87, *supra.* You claim, however, that in these subsequent solicitations the Navy added a provision going to the performance history of a product so as to eliminate your firm from the competition. We do not agree that the inclusion of the provision automatically eliminated you from competition. These experience clauses require only that bidders offering to supply 2,000 KW generators have previous experience in manufacturing some smaller, albeit related, generator units that have operated successfully, and therefore compliance with such requirements is a matter of bidder responsibility and not bid responsiveness. *See*, in this regard, our letter of today to counsel for Stewart and Stevenson Services, Inc., copy enclosed. We think the record adequately establishes that NAVFAC had a legitimate purpose in seeking to limit award to bidders with successful experience in supplying operational generating units.

With regard to the performance bond requirement, Armed Services Procurement Regulation (ASPR) 10-104.2 states that performance bonds may be required in individual procurements when "the contracting officer determines the need therefor," and we have recognized that

a determination regarding such a requirement is within the contracting officer's discretion. B–170069, April 23, 1971. We have also recognized that while "the requirement for a performance bond may in some circumstances result in a restriction of competition, it is nevertheless a necessary and proper means of securing to the Government fulfillment of a contractor's obligations under his contract." B–175458(2), June 28, 1972. In that case we rejected the argument that a 100 percent performance bond requirement was unreasonable because it was difficult for small business to comply with it or that the requirement must have been included in a solicitation to favor a particular firm because prior solicitations did not contain such a requirement. Accordingly, in view of the Navy's explanation regarding the requirement for a performance bond, we cannot conclude that the performance bond requirement in these solicitations was unreasonable.

The damages for delay and loss of generating capability sections of the solicitations are both liquidated damages provisions. ASPR 1–310 (a) provides that such provisions may be used when the time of delivery or performance is such an important factor that the Government may expect to suffer damages if the delivery or performance is delinquent and the extent of such damages would be difficult to ascertain. The damages for delay provision (§ 1A.7 of both invitations) specifies per diem liquidated damages for delay in delivery; the other provision (§ 1A.18, as amended, of IFB–6001 and § 1A.17 of IFB–6006) specifies a per diem amount to be deducted from the contract price for each day a generator unit fails to perform during the first year. We have recognized the use of liquidated damages provisions going both to delay in shipment and to failure of performance. 47 Comp. Gen. 263 (1967). Although you claim that the delay in delivery provision would be sufficient to protect the Government's interests and that the use of the other provision is illegal and would add unwarranted costs to the procurements, the Navy, based on its needs and prior experience, appears to have reasonable grounds for believing the use of both these clauses is necessary. The record provides no basis for our questioning its judgment in this respect. Furthermore, your analysis of the loss of generating capability clause, to show that under certain circumstances the clause would require a penalty, provides no basis for our objecting to the clause, since the question whether a penalty was really intended will depend upon the facts of the case as they arise and "not upon a conjectural situation that might" arise under the contract. 47 Comp. Gen. 263, 270, *supra*.

In this connection, we do not believe, as you assert, that the clause assesses a penalty on its face because it provides for $150 per day damages for failure of performance while the Damages for Delay

clause establishes per diem damages of $125 in the event of late delivery. The $125 figure is based on the provisions of a NAVFAC Contract Administration Manual concerning a $300,000 contract (the approximate price of each unit) while the $150 amount is based on the estimated daily loss to the Navy, computed as indicated above ("50% utilization and 60% load factor at 1.2¢ KWH rounded down").

Thus, we cannot conclude that the use of any of the clauses to which you object was improper or unduly restrictive of competition. As we noted above, solicitation provisions cannot be regarded as unduly restrictive merely because one or more bidders or potential bidders cannot comply with the requirements. B–175221, September 20, 1972. While you apparently believed that you could not comply and therefore did not bid, we note that ten bids were received in response to IFB–6001 and three bids were received on IFB–6006. Despite your assertion that the use of these clauses limited effective competition to Detroit Diesel Allison (a major gas turbine manufacturer) distributors, awards in both instances were made to companies not affiliated with Allison.

However, although you do not seriously dispute that there was competition on these procurements, you claim that the solicitations were nevertheless defective because NAVFAC "deliberately" wrote them to exclude Abbott and other similar firms, thereby "introducing their personal preference into the bidding process and effectively barring Abbott." We think it is clear from the record that NAVFAC personnel believed that Abbott could not satisfy its needs and therefore preferred that award not be made to your company. However, the record does not establish that the solicitations were prepared as a result of a specific bad faith effort to keep you from bidding. Rather, it appears from the record that NAVFAC procurement officials, aware from the response to the initial solicitation that relatively inexperienced firms were interested in bidding on these procurements along with the larger companies with which they were familiar, developed solicitation clauses to require some minimum prior experience in producing generators and to afford the Government adequate protection in the event of delay or performance failure of the equipment. This it was entitled to do. We think any oral comments of NAVFAC personnel must be taken in this light, rather than as an admission of any improper, prejudicial action against your firm. Furthermore, as pointed out above, the rewritten experience clause is still a matter of responsibility rather than responsiveness, and had you submitted a bid, a COC could have been conclusive as to your compliance with that clause. B–175254, *supra*. The other clauses, the use of which in these procurements you describe as "over-kill," neither prevented other small companies from bidding nor from receiving awards. The fact that your financial re-

sources and bonding capacity might have kept you from bidding does not establish bad faith or impropriety on the part of NAVFAC.

You also suggest that competitive negotiation or two-step advertising would have been a more appropriate procurement method than formal advertising. However, two-step formal advertising may be used when there is no adequate specification to permit formal advertising, ASPR 2–501, and it is clear that NAVFAC had a very detailed specification for the desired 2,000 KW power plants. Competitive negotiation may be used in lieu of formal advertising only if the "contemplated procurement comes within one of the circumstances permitting negotiation" as spelled out in ASPR 3–200 *et seq.* ASPR 3–102(b)(1). The record does not indicate that negotiation of these procurements should have been authorized under any of the circumstances set forth in those sections. While you cite our decision B–154487, August 3, 1964, for the proposition that negotiation rather than formal advertising is the proper procurement method when the invitation restricts award to previous suppliers, these procurements were open to any responsible firm that could meet the requirements of the invitations.

Finally, you question the "urgency" claimed by NAVFAC as a basis for making awards during the pendency of the protest. You point out that a low priority had been assigned originally to the procurements, and suggest that the urgency "only exists as an expedient means to finalize the effective debarment of Abbott and then to hide behind the difficulty and reluctance of [GAO] to upset the fact accomplished." You further point to the verbal comments of NAVFAC's assistant counsel regarding the potential loss of funding authority for the procurements if awards had not been made, and request our ruling as to whether loss of funding is a proper basis for an urgency determination.

ASPR 2–407.8(b)(3) provides that an award will not be made during the pendency of a protest unless the contracting officer determines that the items to be procured are urgently required, or that delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will otherwise be advantageous to the Government. The Determination and Findings included with the procurement file on IFB–6001 states that the units covered by the IFB were urgently required because:

a. All slack-time in the Navy's procurement scheduling for these units has been exhausted in the eight month hold-up on the original solicitation, and Navy operating Commanders are demanding early unit availability.

b. The Navy's need for mobile generating units will be much increased by the "cold-iron" needs of the fleet as operating units put in less time at sea with the cessation of Far Eastern hostilities. Tie-up of fleet units on "cold-iron", i.e., with power needs satisfied by external units, is essential to reduce costs and maintenance and maintain morale by reducing power plant operations by watch seamen while in port.

c. Navy reserves of mobile power plants have been fully deployed to satisfy unplanned power requirements.

d. All of the twelve units to be obtained under this contract have already been committed to known future needs, e.g., five in late '73 and early '74 for support of the Nuclear Carrier Nimitz at Norfolk.

The Determination and Findings authorizing award under IFB–6006 contains justification similar to that stated in subparagraphs b, c, and d above, along with the additional comment that reducing the need for watch seamen "gives more opportunity to grant liberty to seamen and thereby enhances attainment of the all-volunteer Armed Forces Concept." These determinations were approved in accordance with ASPR 2–407.8(b)(2). Thus, while there may have been concern over the possible loss of funds, the record indicates that the decisions to make awards notwithstanding the protest were based on the above considerations and the lengthy lead time required for these generator units (365 days for delivery of the first unit). The record indicates that the Navy sent you written notice of its decisions to proceed with the awards.

For the foregoing reasons, your protests are denied.

As indicated above, we are enclosing a copy of our letter of today to counsel for Stewart and Stevenson Services, Incorporated, which also filed protests against the two awards.

[B–175254(2)]

Bidders—Qualifications—Experience—Responsibility *v.* Responsiveness

In the procurement of 2,000 KW gas turbine engine driven power plants and related data packages, and skid mounted power plants, the experience clause in the solicitations which is directed to the performance history of smaller related generators rather than to the specific performance experience of the KW generator solicited is a matter of bidder responsibility and not bid responsiveness since the clause relates to bidder experience and not to the history of product performance. Also matters of responsibility are the experience level specified for the supplier of the gas turbine engine, and the capability of the bidder to meet the qualification requirements for engineering services personnel and facilities. Furthermore, even if warned to the contrary, documentary evidence to show compliance with the experience clause requirements may be submitted after bid opening since such information relates to the bidder's qualifications to perform.

Bidders—Qualifications—Administrative Determinations—Discretionary Authority

Although the record of the contract awarded under an invitation for bids on skid mounted power plants is not clear as to the successful bidder's prior experience, and the procedures and facilities to be used in connection with engineering services to be furnished, the validity of the affirmative administrative determination of bidder responsibility will not be questioned absent a showing of bad faith or lack of any reasonable basis for the discretionary judgment made since failure to meet the literal requirements of experience clause provisions does not require bid rejection if a bidder otherwise qualifies to perform the contract awarded.

Bonds—Performance—More Than Principal's Name on Bond

A performance bond equal to 100 percent of the contract price which was made out to the contractor as "principal" and another firm as "subcontractor" is not an invalid bond, for unlike a bid bond which is considered deficient when the principal differs from the bidder in view of the rule of suretyship law that one does not incur a liability to pay the debts or perform the duties of another unless specifically agreeing to do so, the performance bond, notwithstanding the inclusion of the names of the contractor and subcontractor, will protect the Government against the failure of performance by the prime contractor, but, in any event, the furnishing of the performance bond was a condition of the contract and was not a condition precedent to the award.

To Glade F. Flake, April 4, 1973:

Reference is made to the November 2, 1972, telegram from Stewart and Stevenson Services, Incorporated, and to your subsequent correspondence on its behalf, protesting awards made under invitations for bids N62742-73-B-6001 and N62742-73-B-6006, issued by the Naval Facilities Engineering Command (NAVFAC), San Bruno, California.

The solicitations were for 2,000 KW gas turbine engine driven power plants and related data packages, and were issued subsequent to our decision of August 16, 1972, 52 Comp. Gen. 87, in which we recommended cancellation of a previous IFB for 12 such gas turbine units because of an ambiguous provision concerning the gear box to be used with the power plant. IFB-6001 was issued on September 18, 1972, and called for bids on 12 power plants. Bids were opened October 25, 1972, and after evaluating the 10 bids received, NAVFAC determined that the two lowest bids were unacceptable, and made award to Custom Applied Power Corporation (CAPCO), the third low bidder, on October 31, 1972. Stewart and Stevenson, the fifth low bidder, then protested, claiming that it submitted the lowest responsive bid.

IFB-6006, for the procurement of 12 (subsequently amended to nine) skid mounted power plants, was issued on November 13, 1972. Stewart and Stevenson submitted the highest of the three bids received on December 21, 1972, in response to this solicitation, but on December 26, 1972, it protested award to any other bidder, claiming it was the lowest responsive and responsible bidder. NAVFAC, upon evaluation of the bids, determined that the apparent low bid submitted by Bruce GM Diesel, Incorporated, and CAPCO, a joint venture, contained an arithmetical error that when corrected made the bid second low. Award was made to Williams and Lane, Incorporated, as low bidder, on or about January 4, 1973, after notification to us pursuant to Armed Services Procurement Regulation 2-407.8(b) that award would be made notwithstanding the protest from you and Abbott Power Corporation.

IFB-6001, as amended, contained the following specification provision:

1A.11 *Experience Clause*

A. For the purpose of this IFB, "Power Plant" is defined as consisting of gas turbine engine, speed reduction gearing, electric generator, fuel and lubrication systems, and auxiliary control and operating systems. The power plant offered, must be designed, fabricated, and assembled by a firm which has been regularly engaged for at least 1 year in the design fabrication and assembly of power plants rated at least 500 Kilowatts continuous duty and have operated successfully at least 1,000 hours within a period of no more than 2 years.

B. The gas turbine engine offered has been designed, manufactured, and assembled by a firm which is regularly engaged in the design, manufacture and assembly of similar gas turbine engine models, rated not less than 2500 horsepower continuous, which have operated successfully for 20,000 hours for the past 2 years.

C. In event bidder is not the original manufacturer of the gas turbine engine model being offered, bidder must furnish with the bid a written statement of the qualifications of the personnel, procedures and facilities to be used to provide engineering services necessary to monitor preliminary and final design, and fabrication, and to test the power plants to insure that all details of engine application are in complete conformance with loading criteria to which the engine is designed and manufactured. Bids from firms whose statements show that these personnel, procedures, and facilities have not previously been used to monitor and test engines and power plants proved satisfactory in use will be rejected.

D. The bidder shall submit with the bids documentary evidence demonstrating the bidder's satisfaction of these requirements.

IFB–6006 contained a similar clause, with additional language in subparagraph A to permit previous experience in the manufacture of pumping plants of at least 675 horsepower as an alternative to having manufactured 500 KW power plants. You assert that compliance with these clauses is a matter of bid responsiveness, that neither CAPCO nor Williams and Lane met the clause requirements, and that therefore both bids were nonresponsive. You state that "the experience clause presents a question of responsiveness because: (1) it related to performance history of the item, and (2) required documentary evidence, to be submitted with the bid, demonstrating the bidder's satisfaction of these requirements." We do not agree. Rather, we think that these experience clause provisions are matters of bidder responsibility and not bid responsiveness.

There is a distinction between requirements related to bidder experience and those concerned with a history of product performance. *See* 48 Comp. Gen. 291 (1968); B–175493, April 20, 1972. In our earlier decision in this matter, we said that "experience requirements directed primarily to the performance history of the item being procured concern bid responsiveness, while the experience of a bidder is properly a matter of responsibility." 52 Comp. Gen. 87. However, we have always considered experience requirements as matters of responsiveness when they are directed to performance history of the *item being procured*, and not merely to the performance history of some other item. 49 Comp. Gen. 9, 11 (1969); 52 Comp. Gen. 87. In the instant procurements, the specified requirements do not concern the performance experience of 2,000 KW generators, but rather the performance of 500 KW generators or 675 horsepower pumping plants. Thus, these

clauses do not obligate a contractor to furnish a product with a specific performance history, but rather require that bidders offering to supply 2,000 KW generators have previous experience in manufacturing some smaller, albeit related, generator units that have operated successfully. Compliance with such experience requirements has always been a matter of responsibility.

You claim that paragraph B of the experience clause required a commitment from the bidder as to the specific gas turbine engine to be offered. In our opinion, however, this provision does nothing more than specify the required experience level of the subcontractor supplier of the gas turbine engine, which is a major component of the power plant. This type of subcontractor requirement is clearly a matter of responsibility. 48 Comp. Gen. 158 (1968). Paragraph C, concerning qualifications of personnel and facilities involved with providing engineering services, goes to the capability of the bidder to provide the desired services and thus is also a responsibility matter. Finally, we do not agree with your assertion that compliance with the experience clause provisions is a matter of responsiveness because of the paragraph D requirement for submission of documentation with the bid. It is well established that bidders may be required to submit information bearing on their qualifications to perform the contract, and that even where invitations warn bidders that failure to provide such information will result in bid rejection, bids unaccompanied by the required information may not be rejected as nonresponsive and the supplemental material may be furnished after bid opening. *See* 39 Comp. Gen. 655 (1960); 48 *id.* 158, *supra*; 51 *id.* 329 (1971).

Since compliance with the experience clauses of the two solicitations is a matter of responsibility and not bid responsiveness, your assertions that CAPCO did not meet any of the requirements of the experience clause and that Williams and Lane did not comply with the requirements of paragraph A of the clause are in effect protests against NAVFAC's determinations that the two successful bidders were responsible. In addition, you claim that CAPCO did not furnish a proper performance bond.

CAPCO's bid included a statement that it had "produced two turbine driven generator power plants with 800 Kilowatts under Contract No. Nby 70678," and that the power plants have been operated for more than 1,000 hours. CAPCO also submitted to NAVFAC the following letter:

> In answer to the requirements of paragraph 1.A.11, Custom Applied Power Corporation, if awarded a contract under subject Solicitation, proposes to employ personnel from Solar, Division of International Harvester Corporation, to provide engineering tests to monitor preliminary and final design, fabrication, and the test of the power plants to be produced. Resumes on personnel to be

furnished to Custom Applied Power Corporation by Solar are attached (Enclosure No. 1).

Capco also expects to employ the services of Verbeke and Associates, P.O. 22226, San Diego, California 92122, to assist in the above functions. Resumes of their personnel are enclosed (Enclosure No. 2). We intend to use throughout the program two engineers on a continuous basis from one of the two organizations.

In the event that Capco would decide for several reasons to use a turbine provided by Allison Division of General Motors Corporation, Allison has agreed to furnish personnel familiar with the engine and its uses in power plants on an "as available" basis (See Enclosure No. 3). They have declined to furnish us names and backgrounds of such personnel. In such a case, we would also use Verbeke and Associates to assure that we do have personnel skilled in the use of power plants when required.

The testing of the power plant will be performed by General Testing Laboratories Inc., 6840 Industrial Road, Springfield, Virginia 22151. Their proposal, background and facilities are enclosed (Enclosure No. 4).

You state that contract No. Nby 70678 was awarded to the Solar Division of International Harvester Corporation (Solar), and that CAP CO was only a subcontractor to Solar. You claim that while Solar subcontracted the fabrication and testing of the two units to CAPCO, CAPCO could not have designed the units as required by the experience clause. You further claim that CAPCO, although indicating it might supply a gas turbine engine manufactured by either Solar or Detroit Diesel Allison Division of General Motors, established the qualifications only of the Solar product. You also assert that CAP CO's submission of resumes of qualified engineering personnel did not establish that these personnel would be used to perform the necessary engineering services and that CAPCO did not establish what procedures and facilities it would use in providing such services.

The Navy does not dispute that CAPCO was a subcontractor to Solar under contract No. Nby 70678, but advises that CAPCO was considered to have satisfied the experience requirement by virtue of its subcontracting work. It states:

* * * the design of the power plant (a combination of engines, gears, alternators, and controls) was on CAPCO shop drawings, the assembly and fabrication was by CAPCO in its Virginia plant, the testing was by CAPCO and an outside laboratory in its Virginia plant, and delivery was by CAPCO. This Command has documents which demonstrated these facts and showed them to Mr. Carsey Manning of Stewart & Stevenson. CAPCO's use of the word "produce" (meaning "to bring into existence" or "to create" or "bring crops, goods, etc., etc., to the point at which they will command a price", Random House Dictionary, p. 1148) comprehended its role with regard to these two generator sets and satisfies the requirement for units "designed, fabricated, and assembled" by an experienced firm.

The Navy also agrees that CAPCO, while identifying a qualified Solar gas turbine, did not specify which Allison engine it might use as an alternative source. It states, however, that "the Navy is well aware * * * that Allison is a thoroughly qualified and experienced manufacturer" of gas turbines that satisfy the experience clause requirements and that since the IFB provision "was to assure an engine from a manufacturer whose engines had stood the test of use * * *

the reference to Allison, a well-known, thoroughly qualified manufacturer, was sufficient * * *." With respect to CAPCO's identification of engineering personnel to be used, the Navy points out that CAPCO indicated it would use personnel from Verbeke and Associates and from either Solar or Allison who had the necessary experience. It further states:

> CAPCO's bid did state the qualfications of the personnel to furnish the engineering services in design, fabrication and test. * * * The IFB did not require that these persons be employees of CAPCO, and they might be employees or consultants or subcontractors. Bidders were not asked or obliged to furnish any particular type of commitment or evidence of that commitment. This Command considered Verbeke and Associates qualified and had previously verified that Allison could and would furnish qualified personnel.

Although you dispute NAVFAC's statement that CAPCO had assembled the power plants under contract No. Nby 70678 (you state that "It has now been determined by S&S that CAPCO did not even assemble and install the critical components"), the record does not establish that the Navy was unreasonable in determining CAPCO to be a responsible bidder. A determination of whether or not a bidder is capable of performance and therefore is responsible is necessarily a matter of judgment. In 43 Comp. Gen. 228, 230 (1963), we said:

> Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the Government's behalf.

We have always held that we will not question the validity of that discretionary judgment absent a showing of bad faith or lack of any reasonable basis for the determination. 36 Comp. Gen. 42 (1956); 49 *id.* 553 (1970). While the record does not make clear the exact nature of CAPCO's prior experience and does not specifically indicate what procedures and facilities would be used by CAPCO in connection with engineering services, it is well established that bidders "may not be rejected merely for failure to meet the literal requirements" of experience clause provisions if they are otherwise qualified to perform the contract. 45 Comp. Gen. 4, 7 (1965); B–176961, January 2, 1973. Accordingly, since there appears to be an adequate factual basis for regarding CAPCO as responsible, we cannot agree that award to CAPCO was improper.

Similarly, the Navy's determination that Williams and Lane was a responsible bidder does not appear to be arbitrary. The Williams and Lane bid indicated that the company had produced and installed seven gas turbine generator sets, three of which were 2,500 KW units currently in service. Although, as you point out, this does not establish that the generators have operated for at least 1,000 hours within 2

years as required by the experience clause, the record affords no basis for our taking exception to the Navy's determining that Williams and Lane was "a responsible bidder capable of performance" since, as stated above, literal compliance with that clause is not required.

Paragraph 1A.6 of the IFB–6001 required CAPCO to furnish a performance bond equal to 100 percent of the contract price within 10 days after award. The bond furnished by CAPCO was made out to CAPCO as "principal" and Bruce GM Diesel, Incorporated, as "Subcontractor." You claim that such a bond is not valid because the name on the bond is not the same as the name on the contract, with the result that the Government has a bond it cannot enforce. We do not agree. We have held that a bid bond which names a principal different from the bidder is deficient, 44 Comp. Gen. 495 (1965), and that a bid bond which names only one party to a joint venture submitting a bid may not be accepted. 52 Comp. Gen. 223 (1972). The basis for such holdings is the rule of suretyship law that one does not incur a liability to pay the debts or perform the duties of another unless he expressly agrees to do so. Thus, the Government would not be completely protected by a bond made out only to one party when a bid is submitted by a different party or by a joint venture. Here, however, we see no reason why a performance bond made out to the prime contractor as principal and naming another party as a subcontractor does not provide full and complete protection to the Government against failure of performance by the prime contractor. In any event, the furnishing of a performance bond was a condition of the contract and was not a condition precedent to the award. 51 Comp. Gen. 733 (1972).

Since we have determined that Williams and Lane was the low responsive, responsible bidder on IFB–6006, there is no need to consider your additional contention that the Stewart and Stevenson bid was also responsive.

For the foregoing reasons, your protests are denied.

A copy of our letter of today to Abbott Power Corporation is enclosed for your information.

[B–176564]

Contracts—Negotiation—Evaluation Factors—Life of Equipment

In the evaluation of the labor surplus set-aside offers under a request for proposals (RFP) that contemplated a multi-year, requirements type, life cycle cost (LCC) contract for oscilloscopes on the Qualified Products List, the contracting officer, in accordance with the terms of the RFP, properly adjusted the highest unit price awarded on the non-set-aside portion of the procurement to reflect total anticipated life cost—the LCC procurement method resting upon the premise that it is logical to consider the total anticipated life cycle of an item rather than merely its purchase price—and reduced transportation and other

cost factors that were considered in evaluating the non-set-aside portion of the procurement in order to comply with the statutory prohibition against the payment of a price differential for the purpose of relieving economic dislocation in labor surplus areas.

Contracts—Protests—Timeliness—Untimely Protest Consideration Basis

Although the protest relative to an award of a labor surplus set-aside at a unit price below that made on the non-set-aside portion of a procurement for oscilloscopes under a request for proposals contemplating a multi-year, requirements type, life cycle cost (LCC) contract was untimely filed, since the protest raises a significant question relative to the proper method for determining the unit purchase prices under the labor set-aside portion of an LCC procurement, the protest will be considered. However, as alleged improprieties other than those contained in the solicitation must be filed, pursuant to 4 CFR 20.2(a), "not later than 5 days after the basis for the protest is known or should have been known," the issue that the auction technique prohibited by paragraph 3-805.1(b) of the Armed Services Procurement Regulation was employed by the contracting agency may not be considered.

Contracts—Awards—Labor Surplus Areas—Set-Asides—Price Comparison With Non-Set-Asides

The allegations that the low unit price and life cycle costs (LCC) offered on the non-set-aside portion of a multi-year, requirements type, contract for oscilloscopes on the Qualified Products List (QPL) were so unreasonably low they should not have been used as the basis for computing the set-aside offers, and that the low unit price resulted from an "auction," constituted a "buy-in," and was a "token" offer, and that the projected life cycle costs were understated, are not supported by the record. The use of a multi-year procurement, as well as the fact the item is on the QPL, eliminates the probability of a "buy-in," and the failure of the low offeror on the non-set-aside portion to advance its priority for negotiation of the set-aside portion, does not make the non-set-aside offer a "token" offer. Furthermore, the LCC, consisting of initial logistic costs and recurring costs, must be accepted as realistic in the absence of evidence the evaluation of the LCC information was arbitrary.

Contracts—Price Adjustment—Life Cycle Costs—Target *v.* Measured Life Cycle

Although the award of the non-set-aside portion of a multi-year, requirements type, life cycle cost contract for oscilloscopes was made on the basis of the lowest evaluated target life cycle cost, the final amount to be paid the contractor under the price adjustment provision of the solicitation will be based upon measured life cycle, and the total target price will be paid only if the measured life cycle cost is equal to or less than the target (bid) life cycle cost, and if the measured life cycle cost exceeds the target life cycle cost, the amount to be paid will be reduced pursuant to the formula in the request for proposals on the basis the contractor provided hardware with demonstrated values less than the predicted values used as the basis for award.

Contracts — Specifications — Qualified Products — Changes — Approval

The production changes made by the manufacturer of oscilloscopes on the Qualified Products List (QPL), which were administratively approved without requalification or change in the QPL, did not preclude consideration of the changed product by the contracting agency under a multi-year, requirements type, life cycle cost, negotiated procurement since section 4-109 of the Defense Standardization Manual 4120.3-M—the basic instruction on qualified products

and qualification procedures—places the primary responsibility to decide what modifications require reexamination and retesting of a product, and in the absence of a clear showing of arbitrary or capricious action, the administrative determination is acceptable to the United States General Accounting Office.

To Arnold and Porter, April 4, 1973:

Further reference is made to your letter dated July 20, 1972, and subsequent correspondence, protesting on behalf of Dumont Oscilloscope Laboratories, Inc., against the award of a contract to Tektronix, Inc., under request for proposals (RFP) F41608–72–R–G590 (RFP–G590), issued at Kelly Air Force Base, Texas.

RFP–G590, issued on December 23, 1971, contemplated a multi-year, requirements type, life cycle cost (LCC) contract for the supply of a total estimated quantity of 3600 oscilloscopes. The procurement was restricted to manufacturers whose products qualified for inclusion in the applicable Qualified Products List (QPL), and 50 percent of the requirement was set aside for labor surplus area concerns. Twenty-two pages of the solicitation were devoted to instructions and formulae to be applied in the evaluation of offers under the LCC concept.

RFP–G590, as amended, established February 24, 1972, as the closing date for receipt of initial proposals. Following discussions with all three offerors, the following best and final offers were received by May 16, 1972:

	Unit Price	Data
Tektronix	$1, 087	$17, 100
Dumont	1, 300	12, 165
Hewlett-Packard	1, 328	21, 000

Upon evaluation under the LCC provisions, Tektronix was determined to be the low offeror and award of the non-set-aside portion was made to it on July 14, 1972.

Dumont, a certified-eligible concern with a first preference, and also a small business, had first priority for negotiation of the set-aside portion of the procurement. The Tektronix, Hewlett-Packard and Dumont offers had been evaluated as follows pursuant to the ICC provisions of the RFP:

	Unit Price	Data	LCC & Transportation	Total Evaluated Unit Cost
Tektronix	$1, 087	$ 9. 50	$ 58. 71	$1, 155. 21
Hewlett-Packard	1, 328	11. 67	50. 79	1, 390. 46
Dumont	1, 300	6. 76	226. 77*	1, 533. 53

*Incorrectly stated in the initial administrative report as $220.01, an error which did not affect the basic positions of the parties.

In view of Dumont's higher combined LCC and transportation costs, an award to it of the set-aside at Tektronix' non-set-aside unit price of $1,087 would result in a total evaluated unit cost of $1,320.53:

Unit Price	$1,087.00
Data	6.76
LCC & Transportation	226.77
	$1,302.53

Under these circumstances, the award of the set-aside would be at a total evaluated unit cost $165.32 higher than the non-set-aside award, which when multiplied by the quantity set aside, 1800 units, would result in a cost differential of $297,576.

It was the Air Force position that award of the set-aside portion to Dumont could not be at a total evaluated life cycle cost to the Government greater than that under the non-set-aside portion. The elements of Dumont's total evaluated cost were acquisition cost, initial logistic costs, recurring costs and transportation. The last three elements were fixed, inasmuch as they were derived from data submitted with Dumont's proposal which were inserted in the LCC formulae set forth in the FRP. Acquisition cost, the only flexible element, was composed of Dumont's unit price of $1,300 and its unit technical data cost of $6.76. Assuming that Dumont's technical data cost remained unchanged, its unit price would have to be reduced to $921.68 in order not to exceed Tektronix' total evaluated unit cost to the Government of $1,155.21:

	Unit Price	Data	LCC & Transportation	Total Evaluated Unit Cost
Tektronix	$1, 087. 00	$9. 50	$58. 71	$1, 155. 21
Dumont	921. 68	6. 76	226. 77	1, 155. 21

Therefore, the procuring activity offered the set-aside portion to Dumont at a unit price of $921.68. Dumont rejected the offer and protested to our Office, contending that the offer deviated from the terms of the clause "Notice of Labor Surplus Area Set-Aside (1970 JUNE)" (Armed Services Procurement Regulation (ASPR) 1-804.2(b)(1)), which established the procedures for the negotiation of the set-aside portion of the procurement. You observe that the clause provides for award of the set-aside "at the highest unit price awarded on the non-set-aside portion * * *." Therefore, you maintain, the set-aside should have been offered to Dumont at Tektronix' "unit price" of $1,087. Award of the set-aside portion has been withheld pending our decision.

In response to your contention, the contracting officer stated:

The protestor did not completely quote the solicitation clause extracted from ASPR 1-804.2. The clause actually says the set-aside portion "* * * shall be awarded at the highest unit price awarded on the non-set-aside portion, *adjusted to reflect transportation and other cost factors which are considered in evaluating bids on the non-set-aside portion* * * *" The price of $921.68 was calculated by considering the transportation and other evaluation factors, including life cycle costing, used in determining the low offeror on the non-set-aside portion. The Air Force of course desires to purchase an oscilloscope representing the lowest overall (life cycle) cost to the Government. The solicitation included evaluation factors which converted the contractor's proposal informa-

tion such as mean time between failure and time to calibrate into the projected life cycle cost of ownership. All offerors were aware of the evaluation procedures to be used in determining the low offeror. All knew that the non-set-aside portion could be awarded to a contractor not offering the lowest unit purchase price. The award instead would be made to the company whose offer represented the low life cycle cost of ownership. During the Air Force's meetings with contractor representatives of 10–14 Apr. 1972, the contracting officer discussed these facts with each representative. *Each representative was presented an example of how the set-aside unit price would be calculated based on the consideration of all cost factors. In fact, in the example used, the set-aside portion would have been awarded at a unit purchase price lower than on the non-set-aside portion. The Dumont reprcsentative requested and was provided a copy of the example.* The Air Force contends the contractor was fully aware of how the set-aside unit price calculations would be made and that not until after the award price and the set-aside offer were revealed did they protest the manner of set-aside unit price calculation. They have protested because they may accept a price of $1,087 but have rejected the price of $921.68. The Air Force contends this "after-the-fact" protest is prejudicial to the other offerors who bid in light of the same facts in the possession of Dumont. [Italic supplied.]

There is nothing of record which contradicts that part of the contracting officer's statement which we have underscored. It therefore appears that 3 months before its protest was filed, Dumont was explicitly informed that an award of the set-aside could be made at a unit purchase price below that made on the non-set-aside portion. Although for this reason this aspect of your protest was untimely filed, we have elected to consider it because it raises a following significant question relative to the proper method for determining the unit purchase prices under the labor surplus set-aside portion of a life cycle cost procurement.

The life cycle cost procurement method rests upon the premise that it is logical, in procuring an item, to consider its total anticipated life cost, rather than merely its purchase price. The concept was explained as follows on page II–35 of RFP–G590:

PHILOSOPHY OF LIFE CYCLE COSTING

In accordance with the Armed Services Procurement Act of 1947, it is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest over-all cost to the government. In furtherance of this policy, *award of this contract will be made to that responsive and responsible offeror whose product results in the lowest total cost of ownership to the government computed in accordance with the award evaluation criteria contained herein.* Cost of ownership is defined to include the compilation of acquisition costs, inital logistic costs, and those recurring costs associated with the management, operation, and maintenance of the item called for by this solicitation for the projected life cycle period set forth herein. [Italic supplied.]

Additionally, section D–5 of the solicitation advised offerors "Award shall be made on the basis of the lowest evaluated [Life Cycle Cost Target] whether that total is on the One-Year basis or the Multi-Year basis."

These provisions, in conjunction with the LCC evaluation procedures set forth in the RFP, make it unmistakably clear that the unit purchase price of the item was only one of several cost factors to be

considered in the evaluation of offers. The criterion for award under the instant RFP was not the purchase price of the item, but the target life cycle cost.

The labor surplus set-aside program is designed to benefit labor surplus areas by assuring the placement of contracts with labor surplus area concerns. The "Notice of Labor Surplus Area Set-Aside" clause provides for conducting "negotiations" with labor surplus area concerns for award of the set-aside portion. "Negotiation" within this context does not mean bargaining in order to obtain the lowest possible price on the set-aside, which would be inconsistent with the policy of favoring labor surplus area concerns. Rather it means offering the set-aside portion to labor surplus area concerns at the "highest unit price awarded on the non-set-aside portion * * *."

Insofar as the Department of Defense is concerned, however, the policy of benefitting labor surplus areas is circumscribed by a statutory prohibition against the use of appropriated funds for the payment of a price differential on contracts made for the purpose of relieving economic dislocations. *See* section 724 of the Department of Defense Appropriation Act, 1973, Public Law 92–570, 86 Stat. 1200, October 26, 1972.

In order to avoid paying a differential, costs to the Government other than the unit purchase price must be considered. Therefore, the "notice of Labor Surplus Area Set-Aside" clause provides that "The set-aside portion shall be awarded at the highest unit price awarded on the non-set-aside portion, *adjusted* to reflect transportation and *other cost factors* which are considered in evaluating bids on the non-set-aside portion * * *." For example, under an f.o.b. origin solicitation, if a set-aside concern is farther from the destination than the concern which was awarded the non-set-aside portion, the set-aside concern must accept a lower unit purchase price in order to offset its higher freight cost to the Government. [Italic supplied.]

We believe a parallel situation exists with regard to the life cycle cost factors which were considered in the evaluation of offers on the non-set-aside portion. As we observed above, award of the set-aside to Dumont at the non-set-aside unit purchase price of $1,087 would result in a cost differential of $297,576. In other words, the projected total cost to the Government of the set-aside award made for the purpose of relieving economic dislocation would exceed the cost under the unrestricted award by almost $300,000. By adjusting the unit purchase price offered to Dumont on the set-aside to $921.68, the Air Force avoided the payment of this differential. We regard this action as being required by the statutory prohibition against the payment of price differentials, and therefore your protest, as to this issue, is denied.

Apart from the method for determining the unit purchase price at which the set-aside would be offered, you contend that Tektronix' unit price and life cycle costs are so unreasonably low that they should not be used as the basis for computing the set-aside offer. You maintain that Tektronix' unit price of $1,087 was unreasonably low because it resulted from an "auction," constituted a "buy-in," was a "token" offer, and that Tektronix' projected life cycle costs are understated. We rejected these arguments for the reasons set forth below.

It has been administratively reported that during:

> * * * negotiations with each of the offerors during the week of 10–14 Apr 1972 [the] Air Force did, as allowed by ASPR 3–805.1(b) inform each offeror that the Government considered his price high based on a recent award [to Hewlett-Packard] of a multi-year requirements contract for ruggedized 50 MHz oscilloscopes. The Government's position was that the nonruggedized oscilloscope should logically cost less than the ruggedized model. All offerors were told the Government would carefully weigh all factors in considering the commercial oscilloscope vis-a-vis the ruggedized oscilloscope on the Hewlett-Packard requirements contract.
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> * * * * * * *
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> * * * The Air Force only availed itself of the opportunity of informing each offeror that their price was considered high. We used the price for the ruggedized oscilloscope only as a basis for supporting our position. We specifically cautioned the offerors *not* to think the price of $1338 [under the Hewlett-Packard contract] was the highest at which an award would be made.

It is your position that these discussions indicated to offerors "a price which must be met to obtain further consideration," an auction technique which is prohibited by ASPR 3–805.1(b).

Our Interim Bid Protest Procedures and Standards require protests alleging improprieties other than those contained in a solicitation to be filed "not later than 5 days after the basis for protest is known or should have been known, whichever is earlier." 4 CFR 20.2(a). We believe it was obligatory upon Dumont, if it regarded itself to have been subjected to an "auction" in mid-April, to have protested at that time and not 3 months thereafter. Accordingly, we regard this issue as untimely raised.

You next maintain that Tektronix' price represents a "buy-in," which is defined as follows in ASPR 1–311(a):

> (a) "Buying in" refers to the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (i) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (ii) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract. Such a practice is not favored by the Department of Defense since its long-term effects may diminish competition and it may result in poor contract performance. Where there is reason to believe that "buying in" has occurred, contracting officers shall assure that amounts thereby excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on procurements subject to cost analysis.

However, the Air Force regards the use of a multi-year procurement under RFP–G590 to have effectively eliminated the probability of a

"buy-in." It also observes that the only "follow-on" contract Tektronix could hope to obtain would be the set-aside portion of the instant procurement, which would be awarded to it at the same price as the non-set-aside award, thus precluding the "recovery" of any "losses." Additionally, since the item being procured is on a QPL, the Air Force considers that "the opportunity for recovery of costs through the medium of change orders is remote." As further substantiation for its belief that Tektronix' price was not below cost, the Air Force states that Hewlett-Packard has informally shown an interest in accepting award of the set-aside at a unit purchase price of $1,092.75, only $5.75 per unit higher than Tektronix', and which reflects Hewlett-Packard's low projected life cycle costs.

In view of the above, we cannot conclude that a "buy-in" has occurred. In this connection, however, it should also be noted that our Office would not be in a position to legally object to the award of a contract even if it were established that Tektronix had "bought into" the procurement. *See* 50 Comp. Gen. 50, 54 (1970); 50 *id.* 788, 790–91 (1971).

You also contend that Tektronix' unit purchase price of $1,087 was a "token" offer. A "token" offer is generally construed to mean an unrealistically low offer on a small part of the non-set-aside portion of a procurement, designed to entitle the offeror to first priority for award of the set-aside portion at the highest price awarded for any part of the non-set-aside portion. This practice, and the unfair advantage it has afforded bidders on partially set-aside procurements, were described in our decision which is reported at 38 Comp. Gen. 686 (1959). The "Notice of Labor Surplus Area Set-Aside" clause appearing in RFP–G590 specifically reserves the Government's "right not to consider token bids or other devices designed to secure an unfair advantage over bidders eligible for the set-aside portion."

Under the terms of the "Notice of Labor Surplus Area Set-Aside" clause, the offerors fall within the following order of priority for negotiation of the set-aside portion:

1. Dumont (Group 1. Certified-eligible concerns with a first preference which are also small business concerns.)
2. Hewlett-Packard (Group 4. Other certified-eligible concerns with a second preference.)
3. Tektronix (Group 6. Other persistent or substantial labor surplus area concerns.)

We therefore agree with the Air Force's observation that the amount of Tektronix' offer on the non-set-aside portion did not advance its priority for negotiation of the set-aside portion. Additionally, should Dumont and Hewlett-Packard decline the offer of the set-aside, Tektronix would be offered the set-aside at the same, not a higher, price

than was awarded on the non-set-aside portion. Under these circumstances, we believe the Air Force was correct in not regarding Tektronix' offer as "token" in nature.

The evaluation factor of $58.71 per unit added to Tektronix' offer represents projected unit life cycle costs of $52.64 and unit transportation costs of $6.07. You contend that Tektronix' projected life cycle costs are so low as to form an invalid basis against which to evaluate the Dumont offer. Tektronix' life cycle costs are "conjectural," you assert, because Tektronix has modified its product since the performance of previous life cycle tests, in which the Air Force states "almost the same results" were obtained. Furthermore, you state that a projected unit cost of $52.64 for item management and maintenance over a 10-year period is simply so low as to "raise serious questions of credibility" and to be "unrealistic" and "incapable of accomplishment."

Life cycle costs are divided into initial logistics costs and recurring costs. Initial logistics costs include the cost of initial reproduction and distribution of technical data, cost of file maintenance for the first year, and management costs for new items introduced into the inventory. Dumont's initial logistics costs, which were slightly more than $1 per unit above Tektronix', did not significantly affect the LCC evaluation and are not truly at issue in the protest.

Recurring costs include technical data management, item management and maintenance costs. Dumont's recurring technical data management and item management costs, although over $7 per unit more than Tektronix', were also not a decisive factor.

The predominant recurring cost element was maintenance, i.e., what it was projected to cost the Air Force, over a period of 10 years, for repair labor and materials and preventive maintenance labor. These costs were derived from a series of 8 equations set forth in the solicitation. Although many of the values used in the equations were entered by the Government, some values were entered by each offeror in its proposal.

Equation 1, all values in which were entered by the Government, established for all offerors that each item to be procured was expected to be used a total of 13,200 hours.

Equation 2 established a Mean Time Between Failure (MTBF) for each product. Based upon a TBF submitted by each offeror for his product, which was then divided by a uniform discrimination ratio, it was projected that Tektronix' and Hewlett-Packard's instruments would have a Mean Time Between Failure 2½ times longer than Dumont's product.

Under Equation 3, Equation 1 was divided by Equation 2 in order to obtain the expected number of failures of each item during 10 years

of use. In view of its shorter MTBF, Dumont's product was expected to fail 2½ times more frequently than the products of the other offerors.

Equation 4 was used to determine the repair labor cost per failure. Of the six values used in this equation, two were entered by the offerors. Dumont's repair labor cost per failure was approximately two to three time that of the other offerors.

Similarly, Equation 5 established the projected repair material cost per failure. The offerors inserted two of the four values used in this equation. Dumont's repair material cost per failure was approximately 10 percent below Hewlett-Packard's and 60 percent above Tektronix'.

From Equation 6 was derived the estimated manhours per month required for preventive maintenance. The solicitation restricted "preventive maintenance" to the cost of recalibration of each instrument at 6-month intervals. Each offeror inserted the manhours required for calibration of its instrument. From this equation, it was projected that Dumont's product would require approximately four to five times more manhours for preventive maintenance than those of the other offerors.

Having obtained the time required for preventive maintenance under Equation 6, Equation 7 was used to determine the cost of preventive maintenance per item procured. Utilizing the preventive maintenance manhours per month derived from Equation 6, together with other values (including base labor rate) entered by the Government, it was concluded that the cost of preventive maintenance of the Dumont item would exceed that of the other offerors by factors of approximately four to five.

Equation 8, used to compute the maintenance cost per item procured, was stated as follows on page II-27 of the RFP:

Maintenance cost per Unit = [Expected failures during Projected Inventory Usage Period—1] [Labor Cost/Failure + Material Cost/Failure] + [Preventive Maintenance Cost/Item]

The result of this computation was that the total maintenance cost per unit for Dumont's product was from approximately 4½ to slightly more than 5 times its competitors' costs. In this connection, we note that Hewlett-Packard's projected life cycle costs were even lower than those of Tektronix.

Thus, it can be seen that *cost* information submitted by the offerors in their proposals either constituted or influenced the calculation of the following life cycle cost elements:

Initial Logistics Costs

1. Technical data management
2. Item management costs

Recurring Costs

3. Technical data management
4. Item management
5. Repair labor cost per failure
6. Repair material cost per failure

Tektronix' cost under each of these elements were less than Dumont's. However, even if Tektronix' lower costs for these six elements were applied to Dumont's offer, Dumont's total life cycle costs would remain substantially higher than Tektronix'.

Therefore, the determinative offeror-entered values in the LCC evaluation were time between failure and manhours to accomplish calibration:

Time between failure. With respect to their products, Tektronix and Hewlett-Packard each entered a time between failure which was 2½ times greater than that of Dumont. Equation 3 of the maintenance life cycle cost evaluation converted this information into a projection that Dumont's product would fail 2½ times more frequently than the products of its competitors during 10 years of use. Equation 8 embodied the assumption that each failure would be attended by repair labor and material costs. Tektronix' repair labor and material costs were lower than Dumont's. However, as we observed in the preceding paragraph, this difference did not determine the ultimate result of the LCC evaluation. The critical aspect was the projected higher *frequency* of failure of the Dumont product.

Manhours to accomplish calibration. Preventive maintenance cost per item was another element of the maintenance life cycle cost evaluation. The solicitation restricted "preventive maintenance" to the recalibration of instruments and fixed the frequency of recalibration and base labor rate. The only variable element in the calculation was the manhours required to accomplish calibration, which was entered by each offeror with respect to his product. Based upon the offerors' entries, it appeared that the manhours required to calibrate Dumont's instrument were almost four times greater than to calibrate Tektronix', and five times greater than for Hewlett-Packard's product. Since all other values of Equation 7 were uniformly predetermined, it followed that the projected preventive maintenance costs of Dumont's product were approximately four to five times greater than those of the other offerors.

It is clear that the MTBF and manhours required for calibration which Tektronix ascribed to its product were the decisive elements contributing to its favorable life cycle cost position. Any allegation by Dumont that Tektronix' projected life cycle costs raised "serious questions of credibility," or were "conjectural," "unrealistic" or "incapable of accomplishment" must address those elements to a signif-

icant degree. However, Dumont has adduced no specific evidence that Tektronix overstated the MTBF of its instrument or understated the time necessary to calibrate it. Rather, Dumont's allegation that Tektronix' projected life cycle costs are so unrealistic that they should be disregarded rests upon two bases: (1) a comparison with Dumont's life cycle costs and (2) the fact that Tektronix' product has been modified since previous life cycle cost testing.

The first basis upon which Dumont relies is that its projected life cycle costs are "realistic" and Tektronix' are "unrealistic." This is no more than an assertion that Dumont's life cycle costs should be accepted as the standard of realism. However, Dumont has presented no persuasive reason why Hewlett-Packard's life cycle costs, which are the lowest of all, are not an equally valid standard of realism.

Dumont's argument that Tektronix' projected life cycle costs are "conjectural" is based upon the fact that Tektronix' product has been modified since previous life cycle tests. With knowledge of these modifications, the Air Force has concluded:

> * * * there will be no or only a small difference between [Tektronix'] actual and proposed recurring costs. Any difference would not come close to the difference between Tektronix' and Dumont's projected recurring costs.

The procuring agency has the expertise and the primary responsibility for the evaluation of the technical information upon which this conclusion rests. In the absence of evidence that the evaluation of this information was arbitrary, we are not in a position to advise the Air Force that it should reject as "unrealistic" the projection of Tektronix' life cycle costs.

We also observe that the solicitation contains provisions for price adjustment and product testing which would deter an offeror from deliberately understating the projected life cycle cost of his product. Award under RFP–G590 was made on the basis of the lowest evaluated *target* life cycle cost, i.e., the preaward computation of life cycle cost based upon the offeror's predicted values as set forth in the equations we have discussed above. The final amount to be paid the contractor, however, is based upon *measured* life cycle cost. Under its contract for the non-set-aside portion of this procurement, Tektronix will be paid its total target price ($1,087 for each unit plus $9.50 per unit for data) only if its measured life cycle cost is equal to or less than its target (bid) life cycle cost. If Tektronix' measured life cycle cost exceeds its target life cycle cost, the amount to be paid it shall be reduced, pursuant to a formula set forth in the RFP, "because the contractor has provided hardware with demonstrated values less than his predicted values which were used as the basis for award."

With regard to the determination of measured life cycle cost, the contractor is required to submit his product for reliability acceptance

testing by the Government. If no failures occur during this testing, the values submitted by the contractor in his proposal will be used in the postaward computation of measured life cycle cost. If failures do occur, records are kept of the materials required and manhours spent to correct the failures. This information is then utilized in the postaward computation of measured life cycle cost. Similarly, if the MTBF computed from failures observed during the postaward testing meets specification requirements but is less than that bid by the contractor, the degradation to reliability will result in a downward price adjustment. Additionally, a series of postaward maintenance tests are to be performed on the contractor's product, including disassembly and reassembly of the oscilloscope; correction of five simulated faults; and the realignment and recalibration of intentionally misaligned instruments. The time required for these procedures is also used in the postaward computation of measured life cycle cost.

Subsequent to the filing of your initial protest, in which the above issues were raised, you made the additional allegation that the product being procured from Tektronix under the set-aside portion was not that which was on the QPL. Tektronix' failure to supply its qualified product, you assert, should result in the cancellation of Tektronix' contract for the non-set-aside portion and the award of the remaining non-set-aside and entire set-aside quantities to Dumont as the lowest responsible, responsive offeror.

Section B–31 of RFP–G590, entitled "Notice—Qualified End Products (1969 DEC)," provides in pertinent part:

> Awards for any end items which are required to be qualified products will be made only when such items have been tested and are qualified for inclusion in a Qualified Products List identified below * * * at the time set for opening of bids, or the time of award in the case of negotiated contracts.

Prior to the issuance of RFP–G590, the Air Force had tested and approved for inclusion on the applicable QPL Tektronix' 453 Mod 703H oscilloscope. By letters dated October 12 and November 15, 1971, and January 18, 1972, Tektronix requested the Air Force to approve certain proposed changes to the 453 Mod 703H. The proposed changes included a larger cathode-ray tube (CRT) viewing area, increased the acceleration potential for the CRT from 10KV to 14KV, eliminated panel controls and features not required by the governing specifications, simplified calibration, and replaced certain parts with less costly ones.

All of the proposed changes were described in detail by Tektronix and a 453 Mod 703H incorporating the changes was offered to the Air Force for testing. However, after reviewing the proposed changes, the Air Force advised Tektronix by letter of January 25, 1972:

You are hereby notified that the production changes to the Textronix 453 MOD703H that are contained in your letters dated 12 Oct 1971, 15 Nov 71, and 18 Jan 1972 are approved. No requalification or Qualified Products List (QPL) change is required for these production changes.

Therefore, it is the Air Force's position that Tektronix' 453 Mod 703H was an approved QPL item when the non-set-aside portion of the instant procurement was awarded approximately 6 months later.

You contend that the Air Force has permitted Tektronix to make, without qualification testing, changes in its 453 Mod 703H which are so substantial as to result in essentially a new product. In effect, you state, Tektronix has substituted an untested new product for that which was previously tested and approved for listing on the QPL.

Defense Standardization Manual 4120.3-M, which is the basic instruction concerning qualified products and qualification procedures, provides in section 4-109:

Re-examination of a qualified product shall be required by the preparing activity under any of the following conditions:
a. The manufacturer has modified the product or changed the material or processing sufficiently so that the validity of previous qualification is questionable.

* * * * * * *

Retest will be required, as necessary, based on the determination from examination of data. The preparing activity will determine, based upon the extent of specification or product changes and other available data, whether products are to be removed from the QPL until retested and whether such action is to be delayed pending the outcome of the tests or receipt of additional data, as appropriate. If it is determined that the products should remain on the QPL, a maximum time limit will be established for submission of the samples or test data, as applicable, before removal.

In our view, these provisions establish that it is primarily the responsibilty of the agency to decide what modifications are sufficient to require a reexamination and to determine from such reexamination whether a retest is necessary. Further, we note that, based upon its technical judgment as to the significance of the changes, an agency may determine that removal of the product from the QPL is not required even when retesting is considered to be necessary.

The instant case is not one in which changes were made in a qualified product without the knowledge and approval of the agency. Tektronix described the proposed changes to the Air Force, which after consideration thereof, clearly determined that the modifications to Tektronix' product did not make the validity of its previous qualification questionable. Our Office is not equipped to consider the technical sufficiency of such determinations, and since such determinations are matters primarily of administrative discretion, we will not substitute our opinion for that of the technical activity assigned the duty of determining product acceptability, absent a clear showing of arbitrary or capricious action.

As indicated above, we have concluded that the method used by the

Air Force to compute the unit purchase price on the set-aside portion was proper; that Tektronix' unit purchase price and projected life cycle costs are a valid basis from which to make that computation; and that our Office will not disturb the determination of the procuring agency that Tektronix is supplying a qualified product. It follows that if Dumont should decline the offer of the set-aside at a unit purchase price of $921.68, the set-aside may be offered to Hewlett-Packard at a unit purchase price of $1,092.75. If Hewlett-Packard in turn rejects the offer of the set-aside, it may be awarded to Tektronix at the same unit purchase price of $1,087 obtained under the non-set-aside portion.

In view of the foregoing, your protest is denied.

[B-176592]

Military Personnel—Reservists—Death or Injury—Disability Benefits—Two Distinct Periods

A Navy Reservist who sustained a back injury on June 5, 1971, the day he reported for a 14-day period of training, and who was found physically fit to resume training on June 14, 1971, completing training on June 18, 1971, and who when recalled to extended active duty effective September 28, 1971, reported in sick and continued to be treated for his back injury until discharged on March 9, 1972, for physical disability, is entitled to the disability benefits prescribed by 10 U.S.C. 6148(a) and 37 U.S.C. 204(i) for the period of training during which he was physically unfit, and notwithstanding the intervening period of apparent recovery—a time during which the member was not entitled to disability benefits—the member unable to perform the extended active duty to which ordered because of the back injury is entitled to disability benefits from the date of reporting on September 28, 1971, until his case was settled on March 9, 1972.

To M. W. Minnis, Department of the Navy, April 4, 1973:

Further reference is made to your letter dated March 28, 1972 (file reference FM:JR:ar), with enclosures, requesting an advance decision in the case of FA Robert M. Durniak, USNR-R, 116-40-5816, concerning the period of his entitlement to disability pay and allowances under the provisions of 10 U.S. Code 6148, in the circumstances described. Your letter was forwarded to this Office by endorsement of the Comptroller of the Navy, dated July 19, 1972 (file reference NCF-4 7220/MPAC), and has been assigned Submission Number DO-N-1162 by the Department of Defense Military Pay and Allowance Committee.

The file shows that by orders dated May 28, 1971, Mr. Durniak was called to active duty for training for a 14-day period aboard the *USS MASSEY*. He reported for that duty June 5, 1971, and on the same date slipped and fell aboard ship, apparently sustaining a back injury. He was transferred that day to the Naval Hospital, St. Albans, New York, where he was admitted as an in-patient and underwent

treatment for low back pain, which treatment we understand included traction for 6 days.

On June 14, 1971, Mr. Durniak was examined orthopedically at the Naval Hospital, found fit for duty and was discharged with orders to report to the commanding officer, *USS MOALE* for completion of his ordered period of active duty for training since the *USS MASSEY* had been deployed. On June 17, 1971, he was further examined and found qualified for release from active duty and the record seems to indicate that he was released on June 18, 1971.

By Active Duty Orders Serial 159/1205/72, dated September 3, 1971, issued by the Commandant of the Third Naval District, Mr. Durniak was called to extended active duty for a 24-month period, effective September 28, 1971, and required to undergo a pre-active duty physical examination prior to reporting for such active duty. On September 7, 1971, he was preliminarily examined at Whitestone Naval Reserve Training Center, New York, but the fit for duty decision was held in abeyance pending additional orthopedic consultation at the Naval Hospital, St. Albans, New York. On September 14, 1971, after that latter examination, the member was found fit for full duty and on September 28, 1971, reported for his tour of extended active duty.

The first day of his extended active duty he reported into sick call at his active duty station, and it is reported that the medical officer in charge there recommended that the member's call to active duty be delayed and he continue in a Reserve status pending medical re-evaluation. As a result, the member's active duty orders of September 3 were canceled and on October 5, 1971, he was returned to the Naval Hospital, St. Albans, as an out-patient for further orthopedic consultation and treatment for low back disorder.

On October 12, 1971, Mr. Durniak submitted a formal request to be excused from Reserve drills and for a medical discharge due to his back problems, contending continued pain in his back as a result of the June 5 injury. In response to that request, by orders dated November 16, 1971, the Chief of Naval Operations ordered him to again report to the Naval Hospital for treatment of his condition and directed the Commandant, Third Naval District, to issue him a Notice of Eligibility for pay and allowances while hospitalized, with such benefits to continue until final disposition of his case was effected. On December 7, 1971, the member was issued a Notice of Eligibility for disability benefits under 10 U.S.C. 6148, which stated, among other things, that he was to report to the Naval Hospital, St. Albans, for admission, evaluation, etc., and that pay and allowances were authorized while hospitalized and would continue until final disposition was effected.

On December 9, 1971, the member reported to the Naval Hospital and was instructed to return home pending appearance before a Medical Board on December 22, 1971. The case was then referred to a Physical Evaluation Board, which was convened on January 26, 1972. The findings of the Physical Evaluation Board were that Mr. Durniak had a 10 percent disability due to (1) chronic low back pain and (2) vertebral muscle spasm, which findings and recommendation were agreed to by the member on February 4, 1972, and he was discharged from naval service on March 9, 1972, by reason of physical disability.

You say that on the basis of the Notice of Eligibility dated December 7, 1971, a disability pay record was opened for the member on December 15, 1971, effective June 19, 1971, the date following the expiration date of his 2 weeks of active duty for training, and that he has been paid disability pay and allowances for the period June 19, 1971, through January 31, 1972. However, you say that because of a corrected medical statement from the Naval Hospital, St. Albans, New York, dated February 9, 1972, showing that the member was found fit for duty on June 14, 1971, further payment of disability pay was suspended and you now request a decision on the proper period for which the member is entitled to receive disability payments.

The act of June 20, 1949, Ch. 225, 63 Stat. 201, which amended section 4 of the Naval Aviation Personnel Act of 1940, Ch. 694, 54 Stat. 864, as amended, and presently codified as 10 U.S.C. 6148, provides in pertinent part:

> (a) A member of the Naval Reserve * * * who is ordered to active duty * * * for any period of time, and is disabled in line of duty from injury while so employed * * * is entitled to the same pension, compensation, death gratuity, hospital benefits, and pay and allowances as are provided by law or regulation in the case of a member of the Regular Navy * * * of the same grade and length of service. For the purpose of this subsection, a member who is not in a pay status shall be treated as though he were receiving the pay and allowances to which he would be entitled if serving on active duty.

The provisions of law concerning entitlement to pay and allowances during periods of disability under the above law are codified in 37 U.S.C. 204(i), and the provisions of law governing disability retirement or separation are contained in 10 U.S.C. 1201–1221.

The legislative history of the 1949 act establishes that it was the intention of Congress that non-regular members of the uniformed service disabled in line of duty under the conditions prescribed therein should be kept in a pay status until their hospitalization is completed and their case finally settled, that is, while awaiting a final decision of their case. In this regard, we have held that the standard to be applied in determining a member's right to receive disability benefits while he is temporarily disabled by an injury incurred in line of duty,

is his physical inability to perform military duty and not the duties of his civilian employment. *See* 43 Comp. Gen. 733 (1964) and 47 *id.* 531 (1968).

It is clearly evident that the event which initiates a member's right to such disability benefits is a determination by service medical authority that, as a result of an in line of duty injury, the member is unable to perform his military duty. Conversely, the event which terminates a member's right to such pay under the law is the service medical determination that a member has recovered the ability to perform military duty or when a final disposition is made in his case. *See* 52 Comp. Gen. 99 (1972), copy enclosed.

In view of the determination by the service medical officer that Mr. Durniak was incapacitated to perform his military duty during the period June 5–13, 1971, and was hospitalized during that time, it would be proper to include in the computation of disability benefits to which Mr. Durniak was eligible, the pay and allowances received by him during that period. However, it would appear that since Mr. Durniak was found physically able to perform military duty during the period June 14, 1971, the day he was discharged from the hospital as being "fit for duty," to June 18, 1971, when he was released from active duty for training and apparently did perform such military duty as required during that period and received active duty pay and allowances therefor, such rights as he had to disability benefits under 10 U.S.C. 6148(a) and 37 U.S.C. 204(i) terminated on June 13, 1971.

In his letter of October 12, 1971, Mr. Durniak alleges the continued existence of a disabling back condition subsequent to June 18, 1971, and that he was examined and apparently treated by a civilian physician. While the member says that he continued to have pain in his low back and that such condition limited his ability to pursue his civilian occupation, even if we presume such statements to be true, such statements would not support a claim that he was disabled to perform his military duty between June 18, 1971, and September 14, 1971. In fact, the record shows that he underwent four service medical examinations during the period June 14, 1971, to September 14, 1971, all of which essentially showed that he was considered fit for military duty without limitation during that time and we must presume that, in the absence of proof to the contrary, Mr. Durniak was in fact fit for such military duty.

The fact that there was an intervening period in this case during which there was an apparent recovery to perform military duty from the June 5 injury, does not, in our opinion, require a holding that a member is not entitled to resume receiving disability pay and allowances during any subsequent period when it is service medically determined that the member's condition which relates to an original in

line of duty injury reoccurs so as to require rehospitalization or his disability is otherwise contemporaneously determined by proper medical authority to be such as to clearly preclude the performance of military duty. *Cf.* 39 Comp. Gen. 498 (1960) and cases cited.

While the matter is not entirely free from doubt, since Mr. Durniak was again found to be physically unable to perform his ordered military duty by competent service medical authority upon reporting for extended active duty on September 28, 1971, it is our view that disability benefits provided under the provisions of 10 U.S.C. 6148(a) and 37 U.S.C. 204(i), to which he was previously entitled, should be resumed from that date. Since his case was not finally settled until March 9, 1972, the date on which he was medically discharged from the service, such disability benefits should continue through that date, if otherwise proper. It is understood, of course, that the disability pay and allowances paid to him for the period June 19, 1971, the day following his release from active duty for training, to September 27, 1971, the day before he was again found unable to perform his ordered military duty by service medical authority, to which he was not entitled as indicated above, is to be set off against such entitlement and his pay account adjusted accordingly.

[B–156058]

Compensation—Simultaneous Benefits Rule—Wage Board Position Conversion and General Schedule Rate Increase

The simultaneous benefits rule in section 531.203(f) of the Civil Service Commission Regulations (CSCR) is not for application to a wage board employee who came under the General Schedule (GS) on January 9, 1972, the date increases in GS rates became effective, whether the employee transferred to GS or he was brought under GS by position conversion. If transferred, in the absence of a contrary agency regulation or policy, 44 Comp. Gen. 518 applies and the use of the highest previous rate rule (CSCR 531.203(d)(4)) will provide the maximum benefit to the employee. If a position conversion, both under CSCR 539.203, as well as agency regulations which require similar treatment in a transfer or promotion, the GS rate increases operating on GS rates the day immediately preceeding the effective date of the increase, the new rates are the basis for fixing the GS salary rate of the employee.

To the Chairman, United States Civil Service Commission, April 6, 1973:

Further reference is made to your letter of October 17, 1972, requesting our decision concerning the application of 5 CFR 531.203(f) which provides for the processing of simultaneous personnel or pay changes in the order which gives the employee the maximum benefit.

The specific situation presented is that of fixing an employee's salary rate upon promotion from a wage board position to a position under the General Schedule on January 9, 1972, the same date that

increases in the General Schedule became effective at the employing agency here concerned. *See* Executive Order 11637, December 22, 1971, and the conversion rules contained in Federal Personnel Manual Letter 531–42, dated December 27, 1971.

You say there has been presented to the Commission the case of a Government employee who was promoted from wage grade 12 to grade GS–7 on January 9, 1972, the same date the increase in the General Schedule became effective. The employee's wage rate was $10,500 per annum, which fell between steps 5 and 6 on the new schedule and between steps 7 and 8 on the old schedule. The agency where the employee worked placed the employee in step 6 of grade GS–7 in the new schedule with a salary of $10,563 per annum. If the old schedule had been used, the employee would have been entitled to step 8 ($10,584 per annum) and would then have been converted to the corresponding step 8 ($11,167 per annum) under the new schedule.

Section 531.203(f) of the Commission's regulations provides:

> * * * When a position or appointment change and entitlement to a higher rate of pay occur at the same time, the higher rate of pay is deemed an employee's existing rate of basic pay. If the employee is entitled to two pay benefits at the same time, the agency shall process the changes in the order which gives the employee the maximum benefit.

Your letter fails to indicate whether the employee actually transferred from a wage board position to one under the General Schedule or whether the employee together with his position was brought under the General Schedule. If the former then it appears that our decision 44 Comp. Gen. 518 (1965) would be for application. As indicated in that decision, in the absence of an agency regulation or policy to the contrary the highest previous rate rule as contained in the Commission's regulations, 531.203(d)(4) would permit selection of a rate in the General Schedule which gives an employee the maximum benefit. This obviates any consideration of the simultaneous benefits rule contained in section 531.203(f) of the regulations.

We note than when an employee together with his position is brought into the General Schedule the manner of fixing his compensation in the General Schedule is specifically set forth in section 539.203 of the Commission's regulations which provide in pertinent part as follows:

> § 539.203 *Rate of basic pay in conversion actions.*
>
> When an employee occupies a position not subject to the General Schedule and the employee and his position are initially brought under the General Schedule pursuant to a reorganization plan or other legislation, an Executive order, a decision of the Commission under section 5103 of title 5, United States Code, or an action by an agency under authority of § 511.202 of this chapter, the agency shall determine the employee's rate of basic pay as follows:
>
> (a) When the employee is receiving a rate of basic pay below the minimum rate of the grade in which his position is placed, his pay shall be increased to the minimum rate.
>
> (b) When the employee is receiving a rate of basic pay equal to a rate in the grade in which his position is placed, his pay shall be fixed at that rate.

(c) When the employee is receiving a rate of basic pay that falls between two rates of the grade in which his position is placed, his pay shall be fixed at the higher of the two rates.

Under the above regulations as well as agency regulations which require similar treatment in a transfer or promotion from a wage board position to one in the General Schedule, we do not view the simultaneous benefits regulations as being applicable. This is so because when the conversion or promotion occurs on the same date as a general increase in General Schedule rates the only legal General Schedule rates are those in effect on that day. In other words the new General Schedule increases operate on the General Schedule rates in effect the day immediately preceding the effective date of the General Schedule increases. These situations are similar to where a promotion from one grade to another is effective on the same date as a General Schedule increase. *See* 40 Comp. Gen. 184 (1960).

In the instant case assuming that the employee was transferred from a wage board position to a General Schedule position and that agency regulations required adjustment of his existing compensation to the nearest General Schedule rate (precluding application of the employee's highest previous rate) then the rate of $10,563, fixed for the employee in the General Schedule, was correct.

[B–158315, B–159829]

Transportation—Freight—Charges—Delivery Requirement

The holding in *United Van Lines, Inc.* v. *United States*, 448 F. 2d 1190, that a motor carrier may retain payment made of line-haul transportation charges for a shipment of serviceman's household goods destroyed while in temporary storage at destination awaiting delivery is not for general application since other contracts of carriage provide significant legal reason for confining the *United* decision, and because the Court did not consider the many carrier tariffs, quotations, or commercial bills of lading which impose liability on the motor carrier or freight forwarder. Entitlement to transportation charges where household goods are destroyed or stolen while in temporary storage at destination before delivery depends in each case upon the facts and controlling contract provisions in tariffs, tenders, and bills of lading. Charges paid where goods have been destroyed or stolen should be recovered.

To the Secretary of the Army, April 9, 1973:

We refer to the letter of March 16, 1973, from the Acting Assistant Secretary of the Army (FM), with enclosure, concerning *United Van Lines, Inc.* v. *United States*, 448 F. 2d 1190 (1971) (United). In that case the Court of Appeals for the District of Columbia Circuit held in effect that when a motor carrier receives payment of the line-haul transportation charges for a shipment of serviceman's household goods placed in temporary storage at destination pursuant to our regulations (5 GAO 3075), it is entitled to retain the amount paid although the

goods were never delivered to the consignee, but were destroyed in a fire while in temporary storage.

In view of that decision the Acting Assistant Secretary asks whether carriers may be allowed transportation charges and related services for shipments of household goods which are destroyed by fire while stored in transit.

In several recent fire or theft cases which superficially at least contain facts resembling those in the *United* case, we have found other provisions of the contract of carriage which provide significant legal reasons for confining the *United* decision to that particular case, in which the judgment has been satisfied. Also, we note that many carrier tariffs or quotations or commercial bills of lading contain provisions which impose on the motor carrier or freight forwarder common carrier liability for loss of or damage to the household goods while they are in temporary storage for various periods. Such provisions were not brought to the attention of or considered by the Court in *United*.

For these reasons we believe that for the present time the entitlement of the motor carrier or freight forwarder to receive and retain the line-haul transportation charges where household goods are destroyed or stolen while in temporary storage at destination and before delivery to the consignee depends upon the facts and controlling contract provisions in tariffs, tenders, and bills of lading, in the individual case.

In these circumstances, military disbursing officers should not pay bills of motor carriers or freight forwarders for line-haul transportation charges and related services where it is known that household goods were destroyed by fire or otherwise (or stolen) while stored in transit. Also, if in the same circumstances, the bills have already been paid, the charges should be recovered in the usual manner, consideration being given to any applicable limitation which may restrict the period during which such collection may be made. Any protests to the refusal to pay or collection action may be forwarded here or to our Transportation and Claims Division for consideration. *See* the attached copy of our letter of March 28, 1973, B–159829, to the Commander, Military Traffic Management and Terminal Service, in which among other things we suggest that the Commander advise the respective disbursing offices of the payment procedures to be observed in these kinds of cases.

[B-176212]

Military Personnel—Dependents—Proof of Dependency for Benefits—Children

Children provisionally adopted by a Navy member while stationed in Great Britain pursuant to the Adoption Act of 1958 (7 Eliz. 2, C.5) Part V, Section 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all other benefits incident to the dependency status while the member resides in Great Britain in view of the fact that although the provisional adoption order only authorizes custody and removal of the children from Great Britain for adoption elsewhere, section 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order. However, unless the children are actually adopted by the member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children.

To the Secretary of the Navy, April 9, 1973:

We refer further to letter dated June 6, 1972, with enclosures, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), Department of Defense Military Pay and Allowance Committee Submission No. SS-N-1158, requesting an advance decision regarding the entitlement of AFCM George C. Abatsis, U.S. Navy, SN 201 89 24, to dependents' allowance for his provisionally adopted children.

The record shows that in the Bury St. Edmunds County Court, England, Petty Officer Abatsis and his wife were issued a provisional adoption order for Charles Mark Abatsis (formerly Kenneth Mark Powell) on October 22, 1968, and that a similar order was issued for Una Mary Abatsis (formerly Mary Ryan) on June 16, 1970. Subsequently the children were registered in the Adopted Children Register at the General Register Office, London, England, under the surname of Abatsis. Certificates of birth for Charles Mark Abatsis, born August 28, 1967, and for Una Mary Abatsis, born September 27, 1969, have been issued by the register office.

On July 15, 1970, the member filed an application for dependents' allowances for both children, supported by copies of the provisional adoption orders and certificates of birth. The application was disapproved by the Navy Family Allowance Activity, Cleveland, Ohio 44199, on August 14, 1970, for the reason that the children were not adopted by virtue of the provisional adoption orders. On September 21, 1970, the activity reaffirmed the prior determination.

Our decision is requested as to whether a British provisional adoption order may qualify the subject of such order as a dependent with respect to payment of travel allowances and to all other benefits incident to the status of a dependent adopted child. It is stated that it conceded that Charles and Una Abatsis are in fact dependent upon Petty Officer Abatsis for support.

The provisional adoption orders in question read in pertinent part as follows:

It is ordered that the applicant(s) be authorised to remove the infant from Great Britain for the purpose of adopting him/her under the law of or within the country in which the applicants are domiciled and that the applicant(s) do have the custody of the infant pending his/her adoption as aforesaid.

Each order also provides for an entry to be made in the Adopted Children Register.

The Adoption Act of 1958 (7 Eliz. 2, C.5), Part V, section 53 states as follows:

Provisional Adoption by Persons Domiciled Outside Great Britain. (1) If the court is satisfied, upon an application being made by a person who is not domiciled in England or Scotland, that the applicant intends to adopt an infant under the law of or within the country in which he is domiciled, and for that purpose desires to remove the infant from Great Britain either immediately or after an interval, the court may, subject to the provisions of this section, make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the infant for the purpose aforesaid, and giving to the applicant the custody of the infant pending his adoption as aforesaid.

(2) An application for a provisional adoption order may be made, in England to the High Court or the county court, and in Scotland to the Court of Session or the sheriff court.

(3) A provisional adoption order may be made in any case where, apart from the domicile of the applicant, an adoption order could be made in respect of the infant under Part I of this Act, but shall not be made in any other case.

(4) Subject to the provisions of this section, the provisions of this Act, other than this section and sections sixteen, seventeen and nineteen, shall apply in relation to a provisional adoption order as they apply in relation to an adoption order, and references in those provisions to adoption, to an adoption order, to an application or applicant for such an order and to an adopter or a person adopted or authorised to be adopted under such an order shall be construed accordingly.

It is stated in the letter of the Assistant Secretary of the Navy that sections 16 and 17 vest the adopted person with certain rights of inheritance from the adopting parents and divest him of certain rights of inheritance from his natural parents. Section 19 establishes the adopted person as a citizen of the United Kingdom when the adopter holds such citizenship. Pursuant to section 53(4), *supra*, other provisions of the act apply to a provisional adoption order in the same manner as they apply to an adoption order. Consequently, it is said, sections 13 (1), (2), and (3) of the act define the rights, duties, obligations, and liabilities of the adopting and natural parents in respect to the provisionally adopted children.

Those sections state:

(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

(2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relations as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them in the same relation as to a lawful father and mother.

(3) For the purpose of the law relating to marriage, an adopter and the person whom he has been authorised to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorised by a subsequent order to adopt the same infant.

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

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

In this connection we referred to Report No. 1359 of the Committee on Military Affairs, United States Senate, 70th Congress, second session, on H.R. 12449, which later became the act of February 21, 1929, Public Law 791, 45 Stat. 1254, which first added the words "adopted children" to the definition of the term "children" for the purpose of payment of increased allowances. At page 2 of the report it was said that:

It is evident that it was the intent of Congress to include such [legally adopted minor] children in the acts referred to, as such adopted children are, to all intents and purposes, legitimate children of the adopting parent *and constitute obligations to such parent equal in respect to natural children.* [Italic supplied.]

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

The effect of an adoption decree is to transfer to the adoptive parent the right to the exclusive custody of the child, the right to control its education, the duty of obedience owed by the child, and all other legal consequences and incidents of the natural relation, subject, however, to such limitations and restrictions as may be by statute imposed. While proceedings for custody of a child are usually for custody during minority and subject to modification from time to time, a decree of adoption terminates the relationship between the natural parents and the child and is permanent and continues for life. The newly af-

filiated connection between the child and the adopting parent is expected to endure as a result of the adoption proceedings, as indicated by the fact that the surname of the child is usually changed to that of the adoptive parent. 2 Am Jur 2d Adoption sec. 84.

The cases cited in the Assistant Secretary's letter, *Re R.* (*an infant*) (1962) 3 All E.R. 238, *Re M.* (*an infant*) (1964) 2 All E.R. 1017, and *Re G.* (*an infant*) (1962) 2 All E.R. 173, appear to support the view that a provisional adoption order is no more than a custody order. However, in none of these cases was the question of the relationship resulting from the order at issue, nor was there consideration of the effect of Part V, section 53(4) of the Adoption Act of 1958, in regard thereto.

While by its terms a provisional adoption order only authorizes custody and the removal of a child from Great Britain for the purpose of adoption elsewhere, Part V, section 53(4) of the Adoption Act of 1958, with the exception of provisions relating to inheritance and citizenship, provides that the provisions of the act shall apply in relation to a provisional adoption order as they apply in relation to an adoption order. Therefore, the rights, duties, obligations and liabilities specified in sections 13(1), (2), and (3) of the act, *supra*, which vest in and are exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock, apply to a provisional adoption order while the parties concerned reside in Great Britain.

In view of the foregoing, as an otherwise qualified person not domiciled in Great Britain is not eligible for an adoption order, it appears to us that a provisional adoption order is of a dual nature. By its terms it grants authority to the recipient to lawfully obtain the custody of a minor and to remove him from Great Britain for the purpose of adoption under the law of, or within the country of the applicant's domicile. Apparently, entry in the Adopted Children Register and the issuance of a new birth certificate serves both to indicate the expected permanency of the relationship as well as to facilitate adoption elsewhere.

While the child and the person who is granted a provisional adoption order continue to reside in Great Britain, the above statutory provisions seem to establish substantially the same legal relationship (except for purposes of inheritance and citizenship) as would be created by an adoption order.

Therefore, while the matter is not free from doubt, it is concluded that the children in question may be regarded as the member's adopted children within the contemplation of 37 U.S.C. 401 while the member continues to reside in Great Britain.

It is clear, however, in view of the provisional nature of the orders in question, that after the member is transferred to a permanent station outside of Great Britain, there would be no basis to continue to regard these children as the member's adopted children unless they are actually adopted.

Therefore, if otherwise qualified, George C. Abatsis, AFCM, U.S. Navy, is entitled to dependents' allowances for Charles Mark Abatsis, and Una Mary Abatsis, who may be considered to be his adopted children while resident in Great Britain.

[B-177763]

Bids—Evaluation—Delivery Provisions—Location Determination—Impracticable to Estimate

Bids under a solicitation that did not provide for the evaluation of transportation costs, state destination points, or include a gross shipping weight and dimensions clause, for an f.o.b. origin shipment of torpedo batteries to be delivered over an 8- to 22-month period properly were evaluated without transportation costs in accordance with paragraph 19-208.4(b) of the Armed Services Procurement Regulation (ASPR), which provides for f.o.b. origin shipment when it is impracticable to estimate any tentative or general delivery points. Therefore, a bidder advantageously located geographically with respect to earlier shipments who would have been the low bidder if transportation costs were evaluated is not entitled to consideration on the basis the invitation did not specifically exclude transportation costs from bid evaluation, and that ASPR 19-30.1 (a) and (b) and 2-407.5(i) provide for evaluating transportation costs. However, future solicitations, when appropriate, should state that transportation costs will not be evaluated.

To Wachtel, Wiener & Ross, April 10, 1973:

Reference is made to your protest filed in this Office on January 9, 1973, and subsequent correspondence, on behalf of Molecular Energy Corporation, Livingston, New Jersey, against award of a contract pursuant to invitation for bids (IFB) No. N00017-73-B-1107 to any firm other than itself.

The subject IFB was issued by the Navy Purchasing Office, Washington, D.C., on September 11, 1972, for a quantity of 305 MK 67 Mod 1 torpedo batteries (including 5 first article units), f.o.b. origin, pursuant to a requirement of the Naval Ordnance Systems Command. Bids were opened on November 14, 1972, and a total of three bids were received as follows:

Yardney Electric Company	$1,094,035.00
Molecular Energy Corporation	1,094,950.00
Gould, Incorporated	1,862,075.85

Upon learning on January 8, 1973, that the Navy intended to award a contract to Yardney as the low responsive bidder, you protested to this Office contending that Yardney was improperly determined the

low bidder because the evaluation did not include the addition of transportation costs. It is your position that the Navy was required to include in the evaluation the transportation costs of the batteries to their ultimate destinations, as well as the costs of shipping Government-furnished silver for inclusion in the batteries to the respective bidders' plants, and that when such costs are added Molecular is the low evaluated bidder. Although the invitation includes no specific reference to the evaluation of transportation costs, no listing of destination points for deliveries, or a gross shipping weight and dimensions clause, you contend that the statutory and invitation requirement for award to the low bidder, "price and other factors considered," as implemented by applicable provisions of the Armed Services Procurement Regulation (ASPR), requires the evaluation of transportation costs. In this connection, you point out that ASPR 19-301.1 (a) and (b), respectively, provide that in the evaluation of f.o.b. origin bids the contracting officer "shall" consider both the transportation costs for the item being procured and any Government-furnished property; and that ASPR 2-407.5(i), "Other Factors To Be Considered," provides:

> * * * If pursuant to 19-301.1 bids are on an f.o.b. origin basis transportation costs to the designated destination points shall be considered * * *.

Furthermore, you contend that the Navy is in possession of the information, including transportation costs, necessary to a proper evaluation of the bids without obtaining additional information from the bidders. In this regard, you point out that the destination points are known because the large quantity of batteries purchased since 1962 have all been shipped to seven locations; that the quantities to be shipped to each of the seven locations are relatively certain; and that the weight of the batteries is easily ascertainable and will not vary materially because of the precise and rigid specifications. Moreover, you contend that because Molecular is geographically closer to all of the destination points, addition of the transportation costs to its bid price results in its becoming the low bidder "*no matter which of the contemplated destination points is chosen*" and regardless of the quantities shipped to the destination points. You also contend that when the cost of transporting the silver is considered Molecular's bid is even more advantageous.

Finally, you contend that, contrary to its present position, the Navy initially believed the transportation costs were a required evaluation factor. In this connection, you have furnished affidavits from two Molecular employees to the effect that the contracting officer told them on several occasions that he was in the process of evaluating transportation costs to determine the low bidder. These employees were re-

portedly told that the evaluation was based upon the assumption that an equal number of batteries would be shipped to both the east and west coasts and that the weight was fixed at 835 pounds by averaging the weight of 17 batteries in stock.

It is the contention of the Navy that "it was impracticable to determine either general or tentative delivery points for the MK 67 Mod 1 torpedo batteries at the time the referenced solicitation was issued" and, therefore, transportation costs were not included as an evaluation factor in accordance with ASPR 19-208.4(b), which states:

> When the purchasing office and the requiring activity determine that it is impracticable to estimate any tentative or general delivery points for the purpose of evaluating transportation costs, proposals shall be solicited f.o.b. origin only * * * and evaluation will be made without regard for transportation cost.* * *.

The Navy points out that while historically there have been seven destination points to which these torpedo batteries have been shipped, their ultimate destinations are too speculative to provide a basis for a reasonably accurate evaluation of transportation costs. In this regard, the Navy notes that, at the time the IFB was issued, fleet needs were as follows:

	Units
Yorktown, Virginia	50
Earle, New Jersey	50
Keyport, Washington	150
Concord, California	50

It is reported, however, that 2 days after Molecular's protest was filed with this Office the fleet's requirements had changed as follows:

	Units
Yorktown, Virginia	50
Charleston, South Carolina	65
Earle, New Jersey	50
Keyport, Washington	60
San Diego, California	25
Concord, California	50

It is, therefore, the Navy position that "* * * from a comparative analysis of these figures that the Command was not (and is not) in a position to estimate with sufficient accuracy the ultimate destination points of these batteries as they were and are continually subject to substantial change." The Navy also notes that significant and varying numbers of batteries have been shipped to these seven destination points under prior procurements. Furthermore, the Navy points out that at least for the last three procurements, transportation costs were

not included in the evaluation because destinations were unknown at the time of solicitation and award.

The Navy also contends that it is difficult to estimate realistically general delivery points because of an 8- to 22-month delivery period and the following variables:

(a) Submarine force levels as determined by naval operations. These force levels are often dictated, and therefore changed, by new construction schedules and budget constraints. Such determinations are often made on short notice. (b) Inter-fleet and intra-coast transfers of submarines. Such transfers are often made on short notice. (c) Continual changes in stocking levels of the subject batteries as a consequence of (i) battery usage rates, (ii) number of required exercise firings, (iii) weapon system acceptance tests torpedo shots, (iv) number of torpedo proofing runs conducted, (v) battery units needed for surveillance testing, (vi) unpredicted battery problem areas requiring correction and (vii) fluctuations in training requirements of the several fleets, necessitating revisions in local usage rates of the subject batteries.

The Navy insists that the provisions of the invitation are consistent with the decision not to include transportation costs in the evaluation. It is pointed out that section D, Evaluation Factors for Award, provides that the contract will be awarded to the responsible bidder whose bid will be the most advantageous, price and other factors considered, and " 'Other factors' shall include all of those evaluation factors which are described in this Section D." Although two factors are listed thereafter, transportation costs are not included. It is also noted that this provision conforms to ASPR 2–201(a), section D(i), which requires the inclusion of a statement of the exact basis upon which bids will be evaluated and award made, including any Government costs to be added as factors for evaluation. Furthermore, the Navy points out that no destination points were listed and that section H advised that bids were to be on an f.o.b. origin basis, with allocation instructions to be issued at least 8 weeks before the time of delivery. As further evidence of its position, the Navy points out that the invitation did not include the guaranteed shipping weight and dimensions clause required by ASPR 19–210.

The crux of your position is that the provisions of the invitation and applicable regulations require the contracting officer to include consideration of transportation costs in determining the low bidder. As you correctly point out, the invitation does not specifically state that transportation costs would be excluded from the evaluation, and cited provisions of ASPR specifically call for the consideration of such factor. Furthermore, you have cited decisions of this Office which state that, as a general proposition, the cost of transportation from the f.o.b. origin delivery point to destination is a matter for consideration by the Government in evaluating the bid most advantageous to it, and which reject the argument that the failure to specifically mention transportation costs as an evaluation factor in the solicitation preclude its con-

sideration in the evaluation. 10 Comp. Gen. 402 (1931); 37 *id.* 162 (1957); B–155312, January 15, 1965; B–156207, March 24, 1965; B–162881, June 9, 1968.

On the other hand, the Navy correctly points out that ASPR and the decisions of our Office recognize that transportation costs should be disregarded where it is impracticable to estimate any tentative or general delivery points. ASPR 19–208.4(b); B–150656, March 20, 1963, from which the following is quoted:

> The record clearly indicates that the Department of the Navy was fully aware of our decisions * * *. However, it is reported that in the instant case the Bureau of Ships, the requiring activity, was and still is unable to anticipate even the general locations where the material would be used because of the probability that the units may be installed in vessels at any of numerous shipyards. It is obvious that transportation costs cannot be included as a bid evaluation factor where destinations are unknown.

We believe it is clear from the record that at the time this invitation was issued the Navy concluded that it was impracticable to determine tentative or general delivery points and that the low bidder would be determined on the basis of the low f.o.b. origin price without regard to transportation costs. In this connection, the Navy has furnished our Office a supplemental report concerning your contention that the contracting officer advised Molecular after bid opening that he was evaluating transportation costs to determine the low bidder. Navy personnel deny that any such statement was made. However, it is reported that an evaluation of transportation costs was made solely to determine whether the consideration of such costs would in fact change the relative standing of the bidders in order for the Navy to determine whether to address the merits of your protest. In the circumstances, we believe such action is not of any particular significance.

We have reviewed the cited cases. The underlying principle in these cases is that transportation costs should be evaluated on f.o.b. origin bids whenever possible. We have urged contracting agencies to indicate destination points in solicitations calling for origin bids so that bidders would be in a better position to prepare their bid prices. Even where solicitations have failed to specifically provide that the Government would evaluate transportation costs to destination points we have approved the evaluation of such costs under certain circumstances. Thus, in B–155312, *supra*, we found it was proper for the agency to consider the Government's cost of shipment in the bid evaluation although the solicitation did not specifically list transportation costs as an evaluation factor, since the solicitation did call for origin point shipping information for the obvious purpose of computing transportation costs. *See also* B–156207, *supra*.

On the other hand, we have recognized that it is not feasible for a contracting agency to evaluate transportation costs where the destina-

tion points are unknown. B–150656, *supra.* Further, we have held it is not proper to evaluate transportation costs where the solicitation states that such costs will *not* be evaluated. B–159188, September 28, 1966. This is in accordance with the general rule that bids must be evaluated on the basis of the method specified in the solicitation. B–173444, December 21, 1971; B–172107(1), July 19, 1971.

It is the Navy's position that transportation costs cannot feasibly be evaluated because actual or even tentative destination points are not known, and that the solicitation precluded such an evaluation because transportation costs were not listed among the "other factors" to be considered under section D of the solicitation. In this regard, Yardney insists that it bid on the basis that transportation costs would not be evaluated.

There is merit to the agency's position. We are not unmindful of your argument that Molecular would become low bidder because of its geographical location if transportation costs were considered. We note, however, that Newport, Rhode Island, is one of the seven possible destination points. If all, or most, of the batteries were shipped to Newport, it is not clear to us that Molecular (located in New Jersey) would be lower than Yardney (located in Connecticut) even considering the costs of transportation.

In any event, as Navy points out, the regulations do not call for the contracting agency to evaluate transportation costs in these circumstances and the invitation did not provide for the evaluation of such costs. Therefore, we cannot conclude that the Navy's determination to evaluate the bids without considering transportation costs is arbitrary or otherwise improper. In view of this conclusion, we need not consider whether the cost of transporting the Government-furnished silver should be evaluated since, as you recognize, the relative standing of bidders will not be affected in either case.

Accordingly, the protest is denied. However, in order to avoid confusion on the part of bidders in the future, we are recommending to the Secretary of the Navy that solicitations should state in appropriate cases that transportation costs will not be considered in the evaluation.

[B–170618]

Subsistence—Per Diem—Actual Expenses—Employees Undergoing Training

The payment to Federal employees who participate in training away from their official station of actual subsistence expenses instead of per diem in lieu of subsistence as authorized by 5 U.S.C. 5702(c) when in unusual circumstances the per diem provided is insufficient to cover expenses is not precluded by 5 U.S.C. 4109, the authority to reimburse an employee for various expenses of training

including the cost of necessary travel and per diem "instead of subsistence" (formerly "in lieu of subsistence") under 5 U.S.C. subchapter I of chapter 57, since nothing in the legislative history of the Government Employees Training Act indicates an intent to restrict employees undergoing training to reimbursement for subsistence on a per diem basis as opposed to actual subsistence expenses. Furthermore 5 U.S.C. 5702(c) provides for payment of actual subsistence expenses in unusual circumstances when authorized per diem is insufficient, and the authority to pay actual subsistence expenses depends upon entitlement to per diem.

To the Secretary of the Treasury, April 11, 1973:

We refer to the letter of the Assistant Secretary of the Treasury for Administration dated February 13, 1973, by which our decision is requested as to whether Federal employees participating in training away from their official stations may be reimbursed actual subsistence expenses instead of a per diem in lieu of subsistence as authorized by 5 U.S. Code 5702(c).

The question arises because the language in 5 U.S.C. 4109 which authorizes the payment of expenses in connection with the training of Government employees provides that the agency may pay or reimburse the employee for various expenses of training including the cost of necessary "travel and per diem instead of subsistence under subchapter I of Chapter 57 of Title 5, U.S. Code." In the codification of Title 5 of the U.S. Code in 1966, the latter-quoted language was substituted for that originally contained in section 10 of the Government Employees Training Act, Public Law 85-507, July 7, 1958, 72 Stat. 327, 332, 5 U.S.C. 2309 (1964 ed.), which provided for payment or reimbursement of "travel and per diem in lieu of subsistence in accordance with the Travel Expense Act of 1949, as amended, and the Standardized Government Travel Regulations." The provisions of 5 U.S.C. 5702(c) which appear in subchapter I of Chapter 57 are as follows:

(c) Under regulations prescribed under section 5707 of this title, the head of the agency concerned may prescribe conditions under which an employee may be reimbursed for the actual and necessary expenses of the trip, not to exceed an amount named in the travel authorization, when the maximum per diem allowance would be much less than these expenses due to the unusual circumstances of the travel assignment. The amount named in the travel authorization may not exceed—

(1) $40 for each day in a travel status inside the continental United States; or

(2) The maximum per diem allowance plus $18 for each day in a travel status outside the continental United States.

We find nothing in the legislative history of the Government Employees Training Act to indicate that the wording adopted with respect to the payment of per diem was intended to restrict employees undergoing training to reimbursement for subsistence on a per diem basis as opposed to the reimbursement of actual subsistence expenses. Further, it is noted that 5 U.S.C. 5702(c) authorizes the payment of actual subsistence expenses in unusual circumstances when the authorized reimbursement on a per diem basis would not be sufficient to cover

the costs incurred by the employee. It is significant that reimbursement on a per diem basis was provided as the means of paying employees' subsistence expenses and that payment of actual subsistence expenses was authorized as an exception thereto.

Since there is no evidence that Congress intended to preclude payment of actual subsistence expenses, and since authority to pay actual subsistence expenses is dependent upon an entitlement to per diem, we do not interpret the subject wording in 5 U.S.C. 4109 as precluding the reimbursement of employees on an actual subsistence basis while they are in a training status, provided such reimbursement is otherwise authorized under the controlling law and regulations.

The submission is answered accordingly.

[B-176763]

Contracts—Negotiation—Prices—Technical Status of Low Offeror

Under a National Aeronautics and Space Administration (NASA) solicitation for on-site data processing services on a cost-plus-award-fee basis which indicated both technical and cost factors would be accorded substantially equal weight, NASA PR 3-805.2 does not preclude consideration of cost—evaluated in terms of cost realism, and probable and maximum cost to the Government—as a significant factor in determining the most advantageous proposal, and NASA properly selected the low offeror whose proposal although containing minor weaknesses was relatively equivalent technically to the only other acceptable offer received. A spread of 81 points between the two proposals, the low offer scoring 649 points out of a possible 1,000, as compared to 730, does not automatically establish that the higher rated proposal was materially superior, for although technical point ratings are useful as guides, the question of superiority depends on the facts and circumstances of each procurement.

Contracts—Negotiation—Changes, Etc.—Reopening Negotiations—Wage Determination Change

The incorporation in a procurement by the National Aeronautics and Space Administration (NASA) of a wage determination received from the Department of Labor after selection of a contractor but before contract award without conducting further negotiations and allowing offerors to submit revised proposals for on-site data processing services although contrary to NASA PR 12.1005-3 was not an abuse of administrative discretion because the validity of the contractor selection was not affected and the relative cost position of the two acceptable firms responding to the request for proposals did not change, notwithstanding the insignificant errors made by NASA in determining the affects of the wage determination and, furthermore, the unsuccessful offeror was not only aware of its competitor's proposed costs but was apprised in a debriefing of how its proposal was assessed.

To Reaves, Pogue, Neal and Rose, April 11, 1973:

This is in reply to the August 11, 1972, letter from Computing and Software, Incorporated (CSI), and to your subsequent correspondence on its behalf, protesting the proposed award of a contract by the National Aeronautics and Space Administration (NASA) under re-

quest for proposals No. 5–73679–711, issued by the Goddard Space Flight Center.

The solicitation is for on-site data processing services for a 3-year period, on a cost-plus-award-fee basis. Three proposals were received by the closing date of April 27, 1972. Following discussions with three offerors, NASA's Source Evaluation Board (SEB) evaluated the proposals. One proposal was found to be unacceptable. The CSI proposal was found to be "acceptable as submitted." The proposal submitted by a joint venture headed by Computer Sciences Corporation (CSC) was found to be "acceptable" except for certain "weaknesses and deficiencies" which were "not major" and "expected to be correctable in final contract negotiations without major impact on the cost." Evaluation of the cost proposal indicated that CSC's final proposed ceiling price was more than $7 million lower than that proposed by CSI; and that the CSC's estimated costs were significantly lower than CSI's estimated costs. The source selection official decided that there were no technical considerations which outweighed the cost advantage of the CSC proposal, and selected CSC for award. On August 16, 1972, a debriefing was held during which CSI was informed of NASA's assessment of its proposal.

On August 25, 1972, the Department of Labor (DOL) issued Wage Determination 72–118, and by letter of September 20, 1972, advised NASA that the Wage Determination was applicable to this procurement. This was contrary to DOL's advise to NASA on June 5, 1972, that no wage determination was applicable. NASA then decided to incorporate the Wage Determination into the contract to be awarded without conducting further negotiations. It estimated that incorporation of the Wage Determination would increase the toal costs of the CSC and CSI proposals, but that there would be no significant change with respect to the cost differences between the two proposals.

Subsequently, NASA obtained a proposal from CSI, the incumbent contractor, for furnishing services for a 4-month period following expiration of its contract on January 23, 1973, and a proposal from CSC for providing such services on a month-to-month basis. Both proposals incorporated Wage Determination 72–118. NASA utilized these proposals to prepare "more precise cost estimates" of the effect of the Wage Determination on the original proposals, and concluded that CSI's costs remained substantially higher than CSC's. The selection official considered these revised estimates and on January 30, 1973, confirmed the selection of CSC. Award has not been made pending resolution of the protest, and CSI has continued to provide services under an extension of its current contract.

You raise several objections to NASA's selection of CSC. First, you state that cost was a dominant evaluation factor, contrary to the

provisions of the RFP which you contend stressed technical excellence. Second, you assert that NASA cannot properly award a contract in this procurement that incorporates Wage Determination 72–118 without giving offerors an opportunity to submit offers based on the Wage Determination. Third, you claim that NASA's evaluation of proposals based on incorporating the Wage Determination was erroneous and that a proper evaluation would indicate that the CSI cost proposal is higher than the CSC proposal only by an insignificant amount, so that CSI's technical superiority should result in award to it. In addition, you claim that CSC obtained an unfair advantage when NASA released to CSC information proprietary to CSI, and that negotiations were not properly conducted with CSI.

Section A of the RFP contains the following provision:

COMPETITIVE PROPOSAL EVALUATION

Separate technical, business management and cost/price evaluations are performed. Interrelationship of the three is assessed consistent with NASA Regulations concerning the consideration of cost and other factors in making contract awards.

The technical evaluation is conducted in accordance with weighted technical evaluation criteria established and approved prior to the receipt of proposals. This evaluation produces a numerical score (points).

Business Management capability is evaluated to determine the offerors' acceptability (or lack of) as measured against business management evaluation criteria (not weighted). It is not scored.

Cost proposals are evaluated to (a) assess the realism of the proposed cost/price and (b) determine the probable cost to the Government including any improvements to be required by the Government. If total or cost element ceilings are included, the evaluation will also determine the maximum probable cost to the Government for each proposal.

Evaluations are based upon information in the proposals and data from Government and other sources.

Evaluation Criteria are included in each applicable Part of the RFP.

Paragraph 2.1.1.3 of the RFP sets forth the five main items to be considered in the evaluation of technical proposals, in decreasing order of importance. Part III of the RFP states the following:

COST/PRICE EVALUATION CRITERIA

Proposals will be evaluated to establish, for each proposal evaluated:

(a) the realism of the proposed cost/price,
(b) the probable cost to the Government, including any improvements to be required by the Government and
(c) if ceiling limitations are involved, the maximum cost to the Government for the proposed effort.

While proposed costs will not be point-scored in the evaluation of proposals in response to this Request for Proposal, the cost proposed for the contract period and phase-in will be analyzed and examined relative to a decision on source for the procurement.

In addition, you refer to Article XI of section B of the RFP and to NASA Procurement Regulations 3.805–2 and 3.405–5 as being relevant to this issue. Article XI entitled "Award Fee," provides that "the contractor may earn a portion of the award fee * * * for continued high level performance at lowest possible cost * * * and for

contractor initiated innovations and accepted improvements in the services provided." NASA PR 3.405–5, dealing with the use of cost-plus-award-fee contracts notes that "NASA procurement objectives will be advanced if the contractor is effectively motivated to exceptional performance." NASA PR 3.805–2, entitled "Cost-Reimbursement Type Contracts," states that "estimated costs of contract performance and proposed fees should not be considered as controlling in cost-reimbursement contracts," and that "the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government."

You assert that these provisions establish exceptional performance as the primary evaluation factor and substantially minimize the importance of cost, and that as a result the CSI proposal maximized technical performance. You claim that had it been made aware of NASA's interest in cost, CSI could have submitted a proposal to provide technical performance of minimum acceptability with a substantial reduction in proposed costs. You state that this competition was not equitable because while "CSC was proposing the minimum technical performance at a low cost, the protester was proposing maximum technical performance at substantially higher cost, and NASA quietly changed the paramount evaluation factor from technical to cost."

We do not agree that the RFP minimized cost considerations. We think that the solicitation, especially part III, clearly indicated that evaluation of cost would play a significant role in the selection of an offeror. The RFP and regulatory provisions you cite do not negate the significance of the cost factor. Article XI of the RFP and NASA PR 3.405–5 are concerned with contractor's performance after award, and do not, in our opinion, indicate how proposals are to be evaluated. NASA PR 3.805–2 states that estimated costs and proposed fees should not be considered as controlling in selecting an offeror for award; however, it does not preclude consideration of cost as a significant factor in determining which proposal would be most advantageous to the Government, and in fact estimated costs and proposed fees "may become controlling if all other factors are substantially equal." 50 Comp. Gen. 390, 407 (1970).

In this regard, we note that NASA does not agree with your assertion that CSI's proposal was technically superior to the CSC proposal. It states that the two proposals were "considered to be relatively equivalent technically." On the other hand, you claim that the point scores awarded to each proposal by the SEB establishes the superiority of the CSI proposal.

The record indicates that the CSI proposal received a final technical score of 730 out of a possible 1,000 points, while the CSC proposal

received 649 points, and that certain weaknesses were noted in the CSC proposal by both the SEB and the source selection official. However, both offerors were regarded as "well qualified to provide the required services" and the CSC proposal was described as "technically strong" and as demonstrating "a good understanding of the requirements." In view of these statements in the NASA procurement file, we have no basis for questioning NASA's position that CSI's technical proposal was not significantly superior to CSC's technical proposal. The fact that there is a spread of 81 points between the two proposals does not automatically establish that the higher rated proposal is materially superior. We believe that technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. B-173677, March 31, 1972 (summarized at 51 Comp. Gen. 621); 50 Comp. Gen. 246 (1970). In the instant situation, the record does not establish that NASA abused its discretion in determining that the point spread between the CSI and CSC proposals, which correspond to a difference of 8.1 points on a 100 point scale) did not indicate the material superiority of the CSI proposal.

You also refer to our decision of September 25, 1972 (52 Comp. Gen. 161), in which we held that as a matter of sound procurement policy an RFP should advise offerors of the relative importance of price in relation to the other listed evaluation factors. In that case, the RFP did not indicate the relative importance of cost in the evaluation and you claim that a "virtually identical" situation exists here. We do not agree. In 49 Comp. Gen. 229 (1969), cited 52 Comp. Gen. 161, *supra*, we said that when a point evaluation formula is to be used, offerors should be informed as to the evaluation factors and the relative importance of each factor. We further said that "notice should be given as to any minimum standards which will be required as to any particular element of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other." *id.* 230–231. In 52 Comp. Gen. 161, *supra*, we said that "each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality."

We believe it is clear from this solicitation that both technical and cost factors were considered important in the evaluation and, absent any contrary indication, were to be accorded substantially equal weight. The solicitation did not state that the technical factor would

be paramount or that the cost factor would be subordinate to the technical factor. Rather the solicitation stated that each of the listed factors in section A of the RFP (technical, business management, and cost/price) would be evaluated and considered consistent with the NASA regulations. As we stated above, NASA PR 3.805–2 does not, in our view, preclude consideration of cost as a significant factor in determining which proposal is most advantageous to the Government. The regulation clearly means that an offeror's proposed costs should not be considered as controlling. This does not preclude significant consideration in an evaluation of the agency's assessment of the offeror's cost proposal in terms of cost realism, probable cost to the Government and, where ceiling limitations are involved, the maximum cost to the Government for the contract performance.

You also contend that proper negotiations were not conducted with CSI because NASA did not inform CSI that its proposal was weak or deficient because of its relatively higher cost. However, the record does not establish that during the course of negotiations NASA regarded the CSI proposal as weak because of its cost or for any other reason. As indicated above, it was only after negotiations had been completed and the two acceptable proposals had been finally evaluated that the selection official weighed the respective technical merits and cost considerations of each proposal and determined that acceptance of the CSC proposal would be in the Government's best interests. Furthermore, even if the CSI proposed cost was regarded originally as too high, NASA was not required to offer such information to CSI. 52 Comp. Gen. 161, *supra*. Under these circumstances, there is no basis for your claim that negotiations were improperly conducted.

In your letter of October 6, 1972, you argue that NASA could not properly incorporate the new Wage Determination in this procurement without conducting further negotiations and allowing offerors to submit revised cost proposals. You point out that NASA was in violation of its own regulation, PR 12.1005–3, by deciding to incorporate the Wage Determination after selection of a contractor but before award. NASA admits that it waived its own regulation to incorporate the Wage Determination, but claims that a further round of proposals was not required because the validity of the original selection of the CSC proposal was not affected. In B–177317, December 29, 1972, also involving NASA's decision to incorporate Wage Determination 72–118 into a contract without seeking revised proposals, we held that since the relative cost position of the two firms concerned did not change, it was not an abuse of discretion for NASA to decline to solicit revised proposals. We think such reasoning applies equally to this case.

You assert, however, that incorporation of the Wage Determination in this procurement does affect the relative position of CSC and CSI. You state that NASA has been unable to properly determine the actual effect of the Wage Determination on CSI's proposal, and NASA made a variety of errors in trying to do so. You claim that NASA should have properly evaluated the CSI proposal at $25,415,353, and that this should have been reduced by another $500,000 to allow for disruption costs. Thus, you maintain that the proper figure NASA should have used for comparison purposes is $24,915,353. Since this figure is very close to the figure NASA computed for the CSC proposal, you claim that a proper evaluation by NASA of the effects of the Wage Determination on the cost proposals could easily have resulted in the selection of CSI for the award.

NASA has informed us that it utilized "each company's detailed projection of the effect that the wage determination would have on its wage structure" found in the interim proposals submitted by both companies during the pendency of this protest. NASA has made it clear that in so doing it considered only upward adjustments in labor rates as required by the Wage Determination. You state, however, that the increase in wages is attended by a decrease in overhead, G and A, and award fee and certain downward changes in labor costs. In this regard, you state:

> With the minimum rates as specified by the Labor Department the wages earned by employees are very significantly increased, eliminating much of the necessity for providing an attractive fringe benefit program, resulting in a substantial reduction in labor overhead costs. Off-site contract administration costs could also be reduced due to a decrease in turnover of personnel which would eliminate the need for some staff recruiters.
>
> The G&A expenses could likewise be reduced since some of the fringe benefits provided from this cost pool would no longer be required to avoid turnover in these personnel. The percentage allocation for G&A would also be significantly reduced since the labor costs would be substantially increased by application of the higher labor rates.
>
> The award fee range could also be reduced since the application of these higher labor rates eliminates much of the risk of exceeding labor rate ceilings. The award fee pool could be further reduced since these increased labor rates would provide a higher level of technical expertise resulting in increased job performance and earning a higher percentage of the available fee.
>
> A quick review of our cost proposal submitted in response to your RFP 5-73679-711, indicates our costs for labor overhead, G&A and Fee could be reduced by one to two million dollars or more as a result of applying these increased labor rates as specified by the Labor Department wage determination.

To support your assertions that NASA erred both mathematically and in its failure to consider the downward adjustments described above, you describe in your letter of March 12, 1973, each of the areas in which you claim NASA improperly computed CSI's revised costs. In the area of direct labor alone, you allege that NASA made seven significant errors, essentially due to NASA's failure to take into account proposed revisions and reductions in staffing and certain wage

rates and to the use of incorrect labor categories, as well as to errors in computation. In the area of overhead, you assert that with the higher wage rates CSI's 30 to 40 percent labor turnover rate is being reduced to a 10 to 15 percent rate, which permits the reduction of the support staff by four personnel. This, you state, would eliminate not only wage costs for the four employees, but such things as payroll taxes, insurance, and other overhead items. You further claim that such things as fringe benefits in the G&A expense pool were reducible in light of the increased wages, and that a G&A rate lower than that originally proposed is therefore made possible. With respect to fee, you assert that the high level of technical expertise and increased stability brought about by the increased wages "will earn a substantially higher portion of the available award fee pool, and the increased labor costs will produce a higher cost base on which to compute the pool." You state that under the Wage Determination the maximum award pool should be 5 percent, as compared to the 8 percent originally proposed by CSI, because you expect an increase in the performance award from 50 percent to 80 percent to result from increased stability of the work force. This, you state, would permit a decrease in the maximum award fee while still allowing you an overall 4 percent fee as originally proposed.

At a conference held in our Office on March 23, 1973, NASA explained in detail the basis for its evaluation. It admitted that some mathematical errors were made, but claimed that they resulted in an overstatement of CSI's proposal price by only approximately $50,000. NASA also admitted that it ignored a reduction of 1 man year, in computing second year labor costs, as insignificant. The remaining differences NASA ascribed to its using the original proposal figures and RFP requirements rather than to what was indicated in CSI's 4-month extension proposal. Thus, NASA did not consider any reductions in wages, but only increases required by the Wage Determination. Similarly, it did not consider staffing changes, such as elimination of positions or the changing of certain positions to lower paying ones. NASA also pointed out that the labor categories it utilized were based on the personnel experience requirements of the RFP. The record also establishes that NASA did not consider any change in overhead, G&A, and fee, since it doubted that reductions in these areas "bear any reasonable relationship to Wage Determination 72–118." With regard to CSI's fee structure, NASA also asserts that there is no evidence that it "would have been other than as proposed if a Wage Determination had been made applicable during the original competition, since CSI's proposed costs were generally higher in all areas." In addition, NASA has prepared an analysis, a copy of which was provided

to you, which indicates NASA's belief that CSI's overhead and G&A expense pools would increase as a result of the higher wage scales, rather than decrease.

We have recognized, as you point out, that a significant change in required man-hours would bring about some impact on indirect costs, and that the extent of the impact is "a matter of individual allocation of overhead rates and other indirect costs" and cannot be readily determined by a procuring agency. 50 Comp. Gen. 619, 626 (1971). It may also be that there would be some kind of impact on indirect costs because of the change in wage rates, and that NASA could not effectively measure that impact. However, your figures indicate that NASA overstated your G&A by less than $121,000. Therefore, even if you are correct with respect to the appropriate G&A rate, it does not appear that the overall reduction in the CSI proposal would be significant. B-177317, *supra.*

We have carefully reviewed the respective approaches of NASA and CSI in determining the affects of Wage Determination on the CSI proposal. While it is clear that NASA's estimates were not entirely free from error, it does not appear that those errors were significant. Furthermore, we agree with NASA's basic approach of considering only the direct and necessary effects of incorporating the Wage Determination. Furthermore, even were we to assume that you are correct about the effects of the Wage Determination on the CSI proposal, it would not then be unreasonable for us to further assume that, to at least some extent, there would be a similar effect on the CSC proposal. We think that NASA's approach was reasonable under the circumstances, and that NASA is basically correct when it points out that your approach really involves the submission of a new proposal. While you cite 50 Comp. Gen. 619, *supra*, to indicate that the submission of revised proposals is appropriate under the circumstances of this case, we held only that the circumstances of that case provided a valid reason for the contracting officer to reopen the negotiations. In this situation, however, we think NASA could properly refuse to request or consider revised proposals after CSC had been selected considering that CSI was not only aware of its competitor's proposed costs but was apprised, in a debriefing, of how its proposal was assessed by NASA. B-177317, *supra.*

Your claim that CSC was afforded an unfair competitive advantage by release of CSI's proprietary information concerns NASA's release of the existing CSI contract to CSC. You state that the copy of the contract furnished to CSC contained the overtime rate limitation, overtime hour limitation, G&A rate ceiling, award fee range, and labor overhead ceiling, "thus enabling CSC to calculate within 2 per-

cent the wage rates to be used in the protestor's proposal * * *." In reply, NASA states:

> The overtime rate and hour limitation were released. They are lump sum figures, e.g., for the first year 34,000 hours and $128,436 and are not considered to be proprietary. This is a mission type contract—there is no level of effort nor any other indication of hours in any other part of the contract. The G&A and Labor O/H ceilings were deleted from the copies of the contract that we released. The award fee range was released. NASA Headquarters has taken the position that there is nothing privileged about fee, award fee, award fee range or award fee earned.
>
> From the information that was released it is impossible to calculate wage rates to be used.

In view of this statement and in the absence of any additional information in the record before us that supports your claim, we must conclude that NASA did not release CSI's proprietary information to CSC, nor was CSC afforded an unfair competitive advantage.

For the foregoing reasons, we do not believe that NASA has abused its discretion in the handling of this procurement. Accordingly, your protest is denied.

[B–170675]

Compensation—Wage Board Employees—Conversion to Classified Positions—Rate Establishment—Cost-of-Living Allowances

In establishing pay rates for wage board (WB) employees in Hawaii and Guam whose positions are converted to the General Schedule (GS), Part 539 of the Civil Service Commission (CSC) regulations, which provides for setting an employee's GS salary at a rate closest to his basic WB rate prior to conversion is for application and thus as the pyramiding of cost-of-living allowances cannot be avoided, the employee is assured of retaining his basic compensation for retirement purposes. However, when employees transfer to GS positions, their salaries are determined pursuant to the "highest previous rate rule" in Part 531 of the CSC regulations and, therefore, only if the Commission amends the rule to the effect that the basic (gross) compensation of a WB position from which an employee transfers should be related to the statutory step rates of the GS grade without regard to the cost-of-living allowance, will 45 Comp. Gen. 88 be considered superseded.

To the Chairman, United States Civil Service Commission, April 12, 1973:

We refer further to your letter of November 3, 1972, requesting our views on several questions before the Commission on the fixing of pay for employees in Hawaii and Guam whose positions are converted from the wage board system to the General Schedule (GS), or when such employees transfer from wage board positions to positions under the General Schedule.

As you point out when wage board positions are converted to General Schedule, Part 539 of the Civil Service Commission regulations are controlling. Such regulations provide for setting the em-

ployees' pay at the rate of the appropriate GS grade that is closest to, but not less than, the employees' rate of basic pay prior to conversion. However, when employees transfer from wage board positions to General Schedule positions their salaries are determined pursuant to the "highest previous rate rule" as contained in Part 531 of the Commission regulations.

It appears that the questions before the Commission include (1) wage board supervisory positions in Hawaii where it is stated the scheduled rates of basic pay for certain levels contain an element related to the cost-of-living allowances received by GS employees there, and (2) wage board employees on Guam who receive a 25 percent "recruitment and retention incentive." Your letter states with reference to (2) above that while the incentive provision is not part of the scheduled wage rates, it is defined to be included in an employee's rate of basic pay and is used in the computation of overtime and other compensation and benefits, such as retirement and life insurance.

Your letter states the Commision view to be that the cost-of-living allowances which the employees will receive under GS should not be taken into account in fixing an employee's rate of basic pay upon conversion to GS. We understand that specific data is not available in the involved cases to show what effect this would have upon the basic rate determination within the GS rate range. Apparently, however, employees so converted would realize an approximate increase of from 15 to 25 percent in gross rate. It is pointed out, however, that if the GS cost-of-living allowance is deducted from the employee's rate of basic pay the employee would suffer a loss of benefits, such as a reduction in the amount of civil service annuity contrary to the stated purpose of Part 539 regulations.

Additionally your letter refers to three of our decisions. The first decision is 50 Comp. Gen. 332 (1970) wherein we agreed with the Commission view that night differential be included in the rate of basic pay for purposes of Part 539 regulations.

The second decision referred to is 45 Comp. Gen. 88 (1965) which permitted an exception to our holding in B-154096, September 23, 1964. The latter cited decision had indicated that when an employee under the prevailing rate (wage board) system moves—but not his position—to a position under the General Schedule his basic salary should be fixed at a rate which when increased by a 25 percent cost-of-living allowance (payable to GS employees in Alaska) would not cause him to suffer a loss in salary. That holding was designed to avoid the pyramiding of rates occasioned only by a change in pay system. *See* 37 Comp. Gen. 285 (1957). The exception set forth in 45 Comp. Gen. 88 is to the effect that where wage rates are derived from prevail-

ing rates and the elements of cost-of-living differentials and the like included therein are not discernible it would not be necessary to compare the gross rate of compensation of a wage board position (basic compensation) with the gross compensation of the GS position (basic compensation plus cost-of-living allowance) for purposes of determining the employee's basic salary rate in the GS position. We thus recognized that in certain situations a basic rate in the GS position could be selected comparable to the salary received in the wage board position and that an employee would then be entitled to a cost-of-living allowance on the basic rate of the GS position.

We stress that 45 Comp. Gen. 88 involves an application of the Commission's highest previous rate rule under Part 531 of the Commission regulations rather than Part 539 conversion regulations. The third decision is 51 Comp. Gen. 656 (1972), which involved the proper method of determining an employee's salary rate in Hawaii whose wage board position was converted to the General Schedule. Under the General Schedule the employee receives a cost-of-living allowance which is not a part of basic compensation. It was held that the salary rate of the employee was for determination under Part 539 of the Commission regulations rather than Part 531. While not specifically so stated that decision recognized that the regulations in Part 539 precluded any consideration of the principle expressed in B–154096 of September 23, 1964, and referred to in 45 Comp. Gen. 88 Thus, as far as concerns the application of Part 539 of the regulations the pyramiding of cost-of-living allowances cannot be avoided and an employee is assured of retaining his basic compensation for retirement purposes.

With reference to actions involving the highest previous rate rule under Part 531 of the Commission regulations, we do not on the record before us concur that the decision in 45 Comp. Gen. 88 should be reversed. However, if the Commission would amend its regulations concerning the highest previous rate rule to indicate that in situations involving such rule the basic compensation (gross compensation) of the wage board position from which an employee is transferring should be related to the statutory step rates of the GS grade without regard to the cost-of-living allowance then we would regard 45 Comp. Gen. 88 as being superseded. In this connection we point out that an agency would still be able to select a lower salary rate applicable to any other step in the GS grade to which the employee is transferring.

[B-177445]

Sales—Disclaimer of Warranty—Erroneous Description—Best Available Information

The description of a surplus lot of wrenches in a Sales Letter issued by the General Services Administration (GSA) having been made as indicated in Standard Form 114–C on the best information available as shown in the turn-in document from the disposal activity, in the absence of knowledge on the part of GSA that one group of wrenches had been misdescribed, or that the disposal activity acted in bad faith, the sales contract may not be rescinded. The property was offered for sale on an "as is" or "where is" basis, without warranty, and had the purchaser inspected the wrenches prior to bidding as cautioned by the Sales Letter, the misdescription would have been readily apparent to him. B–176387, Jan. 3, 1973; B–173680, Dec. 10, 1971; 50 Comp. Gen. 28 (1970); and B–167926, Jan. 15, 1970, overruled.

To Frederick J. Hass, April 13, 1973:

We refer to your letter of November 10, 1972, requesting rescission of General Services Administration (GSA) contract No. GS-09-DP-(S)-0606, because of a misdescription of property in Sales Letter No. 9DPS(SF)-73-30 under which the contract was awarded.

The Sales Letter was issued by GSA on August 28, 1972, and contained the following description of property under Item 17:

WRENCHES, open end, consisting of approx. the following 3/8 x 9/16, 2196 ea.,
7/16 x 1/4, 2139 ea.,

Adjustable 2873 ea.
14/16 x 1'', 20 ea.
1-1/16 x 1-1/8,35 ea.
13/16 x 7/8, 275 ea.
11/16 x 3/4, 150 ea.
7/8 x 3/4, 100 ea. *UNUSED*

When GSA opened bids for the sale on September 20, 1972, it noted that you were the highest bidder for this item at $911, and the contracting officer therefore awarded you the contract for the item on September 27, 1972. After the property had been paid for, and delivery had been made, you requested a refund because there was no adjustable wrenches in the lot, as represented. Thereafter GSA denied your request and advised you of your right to submit the matter to this Office.

The record shows that the California State Agency for Surplus Property reported the property in question to GSA for sales action, and the Agency's description of the item was carried forward by GSA into the Sales Letter. There is no indication that the GSA sales office had any knowledge of the misdescription. The Deputy Chief Surplus Property Officer, Department of Education, State of California, by letter of December 18, 1972, to GSA, confirmed the misdescription shown on its reporting document for the item, in pertinent part as follows:

Upon investigation of facts leading to the preparation of this lot I find that the "adjustable" wrenches were actually "combination" or "alligator" type wrenches and the term 'adjustable" was used because the wrench is applicable to a range of nut sizes.

The Sales Letter issued by GSA carried the following pertinent provision preceding the description of the property:

This Office is offering for sale the following property, "as-is, where-is" on a competitive bid basis. This Offering is subject to the General Sale Terms and Conditions (Standard Form 114C, January 1970 Edition), and Special Sealed Bid Conditions (Standard Form 114C–1, January 1970 Edition), which are incorporated herein by reference, and such other special terms and conditions as may be contained herein. A copy of Standard Form 114C and Standard Form 114C–1 are on file and will be made available upon request.

On page 6 of the Sales Letter bidders were warned: "BIDDER IS CAUTIONED TO INSPECT THE PROPERTY."

Condition No. 1 of the General Sale Terms and Conditions (Standard Form (SF) 114–C, January 1970 Edition) also invites, urges and cautions the bidder to inspect the property to be sold prior to submitting a bid. Condition No. 2 further advises bidders that the property is offered for sale "as is" and "where is" and states that the description of the property is "based on the best information available to the sales office," without warranty as to quantity, kind, character, quality, weight, size or description.

In this regard, we have been advised by representatives of GSA and the Defense Supply Agency that the phrase "best information available to the sales office" was placed in the January 1970 revision of SF 114C to implement our holding in B–160014, October 27, 1966. In that case, we made the following statements in denying a request for an adjustment in the price of a sales contract which arose out of a misdescription of surplus sales items by employees of a holding activity:

Surplus sales offices receive property for disposition from many holding activities which, in turn, have acquired the items from a still greater number of using activities which are the installations declaring the goods surplus. Sales personnel generally rely upon the records certified to them by the holding activities in preparing the property descriptions which are inserted in disposal invitations and are under no duty to make any inspection of the items themselves in preparing for the sale. Relief can only be granted where the misdescription is the result of some act on the part of sales personnel themselves. The rule of "let the buyer beware" prevails with respect to misdescriptions resulting from the fault of employees of the holding activities.

* * * * * * *

Since the erroneous description involved in this case originated at the holding activity level and was in no way compounded by the Government sales personnel, we must deny your request for an adjustment in the contract price.

Since the phrase in question was inserted in SF 114C to assure that the Government would be insulated from liability arising out of a misdescription of property by holding activity employees, we must conclude that, in the absence of bad faith (or such gross negligence as to necessarily imply bad faith) on the part of holding activity em-

ployees in describing sales items, rescission of a surplus sales contract containing the above phrase cannot be granted where the sales office had no knowledge of such misdescription and used the best information available in describing the property in the sales document. See *Lipshitz & Cohen* v. *United States*, 269 U.S. 90 (1925); *Alloys and Chemicals Corporation* v. *United States*, 163 Ct. Cl. 229 (1963). In this regard, we are advising GSA that, to the extent prior decisions of this Office may be inconsistent with the foregoing, they should no longer be followed. *See* B-176387, January 3, 1973; B-173680, December 10, 1971; 50 Comp. Gen. 28 (1970); B-167926, January 15, 1970.

Based on our review of the record in the instant case, we must conclude that the description of the property by the GSA sales office was made on the basis of the best information available to that Office, as set out in the turn-in document from the California State Agency for Surplus Property. Further, there is no indication that GSA had any knowledge of the misdescription, or that the State Agency acted in bad faith in describing the wrenches.

In the circumstances, and since the error would have been readily apparent to you if you had inspected the wrenches prior to bidding as you were cautioned to do by the sales letter, we must deny your request for rescission of the sales contract.

[B-133972]

Compensation—Double—Military Personnel in Civilian Positions—Payment Approved

Notwithstanding the rule that a person on active military duty may not be employed to perform services as a civilian employee of the Government and that any member who by mistake or otherwise is so employed may not receive the compensation of the civilian position, a Navy enlisted member erroneously employed for a temporary intermittent period of civilian service by the Council on Environmental Quality may nevertheless be paid in view of the fact had the civilian compensation been paid, the member could retain the payment under the *de facto* rule or the erroneous payment could be waived under 5 U.S.C. 5584. Since no payment occurred, it is appropriate to consider for the purposes of the waiver statute that the administrative error and "overpayment" arose at the time the member entered on duty with the understanding of a Government obligation to pay for his services.

To the Acting Administrator, General Services Administration, April 16, 1973:

We refer to the letter of September 27, 1972, signed by you as Acting Administrator of General Services and Mr. Russell E. Train, Chairman of the Council on Environmental Quality, concerning the allowance of $420.86 as compensation to Mr. John W. Wilmer, Jr., during the period of his temporary intermittent employment by the Council on Environmental Quality. Prior to the payment of any compensation

for services rendered it was discovered that an administrative error had been made in making the appointment to the civilian position inasmuch as Mr. Wilmer was at that time on active duty as an enlisted member of the United States Navy.

You recognize the well established rule that a person on active duty in the military forces of the United States may not be employed to perform services as a civilian employee of the Government and that any member who by mistake or otherwise is so employed may not receive the compensation of the civilian position. *See* 49 Comp. Gen. 444 (1970). However, you have submitted the question of paying Mr. Wilmer for the civilian services he performed for our consideration in view of the fact that waiver of collection action under 5 U.S. Code 5584 would have been possible had the compensation in question been paid. You indicate that GSA would have authorized a waiver in this case since the total amount involved was less than $500, since Mr. Wilmer did not make a secret of the fact that he was on active military duty at the time of his employment, and since you consider that collection of an amount paid would have been against equity and good conscience and not in the interest of the United States. You feel that the discovery of Mr. Wilmer's erroneous appointment before any compensation had been paid to him for the services rendered should not justify placing him in a worse position than would have been the case had compensation been paid to him for such services.

It is the position of this Office that without regard to the provisions of 5 U.S.C. 5584, a member of the Armed Forces on active duty who is mistakenly employed for service in a civilian capacity is entitled to retain any payments he has received for services performed under the rule applicable to *de facto* employment. *Cf.* 38 Comp. Gen. 175 (1958); 40 *id.* 51 (1960). However, under the *de facto* rule the individual involved may retain only the salary payments he has received and is not entitled to be paid any balance of salary remaining due at the time the deficiencies in his employment were discovered and his employment terminated.

There are many situations not covered by the *de facto* rule in which erroneous actions by Government personnel result in payments to employees in excess of their entitlement. Also there are situations in which Government error results in the improper reduction or withdrawal of an employee's pay. In recent years the Congress has provided a specific statutory remedy permitting administrative adjustment of employee claims arising out of such situations. *See* 5 U.S.C. 5584, 5596. One of the primary reasons for enactment of such legislation was to relieve the Congress of the need to consider private legislation for the relief of individuals whose claims, though equitable, could not be paid because no legal basis for payment existed.

The case presented by you involves a situation in which an individual has an equitable claim for compensation for services rendered which, in law, cannot be paid because an error was made by the Government.

Under the statute providing for adjustment of claims based upon overpayments caused by administrative error through no fault on the part of employees involved, recovery may be waived. Such waivers apply to the full employee indebtedness. Any repayments to the Government which might have been made prior to a waiver determination having been reached are refunded to the overpaid employee.

Ordinarily, where an administrative error has been discovered in sufficient time to avoid the making of an erroneous payment, there is not involved a situation calling for waiver as no overpayment has occurred and the employee involved is paid precisely what is due him for the services rendered. Under the general rule, there is no basis for relief in the instant case.

However, the instant situation does contain a unique element setting it apart from the usual case of error discovered prior to payment. Mr. Wilmer has not been paid anything for the services he rendered the Government. Moreover, he would not only have been entitled to consideration for waiver if he had been paid, but, indeed, under the *de facto* rule referred to he would have been entitled to retain the amount involved as a matter of right. It, therefore, seems appropriate, where no payment at all is provided for services rendered, to consider for purposes of the waiver statute, that the administrative error and "overpayment" arose at the point in time when Mr. Wilmer entered on duty with the understanding of a Government obligation to pay for his services. Particularly does this seem so when it is recognized that refunded overpayments ultimately waived are redisbursed to the employees involved.

In the circumstances, bearing in mind the intent of the Congress as expressed in the legislation cited—that individuals should not be penalized as a result of Government errors—we would not object to payment for services rendered by Mr. Wilmer.

[B-167486, B-172733]

Compensation—Overtime—Traveltime—Emergencies

Air safety investigators who pilot private, rented, or agency-owned aircraft to proceed to the scene of an accident, or use commercial airlines, are not entitled to overtime compensation for travel outside their regular workweek since the travel is not inseparable from the work performed, and the mode of travel does not constitute an arduous mode of transportation in view of *Griggs* v. *United States*, dated November 24, 1967, Ct. Cl. No. 336-65, which holds that overtime for investigators is payable only for overtime work performed on-site accident in-

vestigations and when the "jump-seat" in the aircraft cockpit is occupied while traveling on commercial airlines. Furthermore, 28 Comp. Gen. 547 held, with respect to the effect of 28 Comp. Gen. 183 on the general rule that overtime is not payable solely because of official travel outside the basic workweek, that no rigid rule may be stated for determining when traveltime is compensable at overtime rates.

To Thomas M. Gittings, Jr., April 16, 1973:

This refers to your letters of July 13, 1972, and January 11, 1973, making additional claims on behalf of Mr. Garnett E. Lowe, Jr., for overtime compensation for travel performed outside of his regular scheduled duty hours as an employee of the Civil Aeronautics Board and the National Transportation Safety Board.

Mr. Lowe presently has pending in the United States Court of Claims a suit for the recovery of overtime compensation for the period May 1960 to May 1966 as an employee of the Civil Aeronautics Board, *Garnett E. Lowe, Jr.* v. *United States*, Ct. Cl. No. 302–69. You previously advised us that a motion to dismiss this suit was delivered to the Department of Justice on June 29, 1971, to be held in escrow pending the issuance of a satisfactory settlement by our Office pursuant to the holding in the Commissioner's decision in the case of *Griggs* v. *United States*, dated November 24, 1967, Ct. Cl. No. 336–65. Also, that motions to dismiss all of the claims (except Leon B. Cuddeback) involved in the similar case of *Abbott et al.* v. *United States*, Ct. Cl. No. 317–71 were filed with the Department of Justice to be held pending settlement of such claims by the Department of Transportation or our Office. As to the *Lowe* case a Certificate of Settlement was issued on March 24, 1972, by our Transportation and Claims Division (General Claims) and transmitted to the National Transportation Safety Board, Department of Transportation, for payment. The Certificate of Settlement, issued consistent with the *Griggs* case, was returned to our Office by letter of July 21, 1972, from the National Transportation Safety Board, with the notation that you, as counsel for Mr. Lowe, advised the National Transportation Safety Board not to accomplish payment because Mr. Lowe intends to litigate certain portions of his claim that have been disallowed. The other claims involved in the *Abbott* case had been transmitted to the Department of Transportation by our Office for settlement.

By letter of July 13, 1972, you submitted an additional claim on behalf of Mr. Lowe for 215 hours of overtime performed by him in a travel status aboard commercial carriers predicated upon 28 Comp. Gen. 183 (1948) which authorized the inclusion of traveltime for purposes of overtime pay incident to work required under emergent conditions performed by rail safety investigators employed by the Interstate Commerce Commission. Similar additional claims were submitted in 1972 for each claimant (party) involved in the *Abbott* case.

By your letter of January 11, 1973, you requested a decision covering the compensability of the traveltime performed by the plaintiff and other air safety investigators, outside of their regular workweek. You submit that since an examination of the record in the *Griggs* case establishes that neither party brought the holding in 28 Comp. Gen. 183 to the Commissioner's attention, such holding should be extended to Mr. Lowe and to other air safety inspectors so as to permit payment of overtime compensation for commercial flights. You say that air safety inspectors are required to proceed to the scene of an accident at any hour of the day or night on any day of the year. In some instances the air safety inspectors have piloted private, rented, or agency-owned aircraft to the scene of an accident. You consider this type of travel to be inseparable from work performed and as such compensable as overtime. In the alternative, you submit that time spent in piloting privately owned, rented, or agency-owned aircraft to and from the scene of an accident outside of regularly scheduled work hours constituted an "arduous mode of transportation" and as such compensable as overtime.

In 28 Comp. Gen. 183 (1948) it was held quoting from the syllabus that:

> *Time consumed* by safety, signal, and locomotive inspectors of the Interstate Commerce Commission, outside of their regular daily or weekly tours of duty, or on holidays, in traveling to and from the scene of train or locomotive accidents by regularly scheduled trains, in day coaches, or railroad business cars, or on freight work or special trains, or in privately owned automobiles, may be regarded as work and all such time in excess of 40 hours in any one workweek is compensable at overtime rates pursuant to section 201 of the Federal Employees Pay Act of 1945.

That decision was predicated on the ground that the travel was inseparable from work under the particular facts there considered.

In response to a submission from the Secretary of the Army as to the effect of 28 Comp. Gen. 183 upon the general rule that additional compensation was not payable "solely because of official travel outside the basic workweek," we stated in 28 Comp. Gen. 547 (1949) that no rigid rule may be fixed or stated for determining in all cases when traveltime outside an employee's 40-hour tour of duty is compensable at overtime rates. It was further stated that in those cases where the payment of overtime compensation for traveltime has been authorized by decisions of this Office, the circumstances and conditions of the travel were so unusual as to warrant a conclusion that such travel was inseparable from "work" or "employment" within the meaning of the applicable overtime statutes. It was pointed out that since the facts of a particular case may vary considerably, no specific answer could be given to what is the basis of distinction to be used to determine whether traveltime outside the employee's tour of duty is compensable.

The decision in 28 Comp. Gen. 183 has been cited in numerous decisions as standing for the proposition that where the travel is indistinguishable from work, it may be counted for overtime pay purposes. It has never been considered, however, as standing for the proposition that travel under emergency conditions alone is compensable time for overtime pay purposes, nor to be considered, as you suggest, applicable to cases other than the one therein specifically considered. *See* 28 Comp. Gen. 547, *supra*. *Cf.* 41 Comp. Gen. 82, 85 (1961).

In the *Griggs* case the plaintiff, an air safety investigator of the Civil Aeronautics Board, was authorized overtime compensation only for the overtime work performed at on-site accident investigations and while traveling on commercial airlines occupying the "jump-seat" in the aircraft cockpit. The Commissioner in his report on the *Griggs* case found insofar as traveltime was concerned where travel was by commercial airline, or by other means allegedly under arduous conditions, as follows:

Claim for Overtime for Travel

The third, and smallest, category of plaintiff's claim concerns time he spent traveling in after-duty hours on commercial airline flights to and from the sites of accidents he was assigned to investigate. In the overwhelming majority of such instances, plaintiff flew as a commercial passenger, purchasing a ticket with a Government Transportation Request. While plaintiff was traveling in this status, he was not required to perform any work, and he traveled as would any passenger on a commercial flight. It is evident that travel of this type was an incidence of the performance of duty and does not constitute overtime work under section 205(b) of the Federal Employees Pay Act Amendments of 1954 (5 U.S.C. § 912b (1964)) which provides that "time spent in a travel status away from the official-duty station of any officer or employee shall be considered as hours of employment only when (1) within the days and hours of such officer's or employee's regularly scheduled administrative workweek, or (2) when the travel involves the performance of work while traveling or is carried out under arduous conditions." *Eg. Burich* v. *United States, supra,* 177 Ct. Cl. at 148–49, 366 F.2d at 990; *Byrnes* v. *United States, supra,* 163 Ct. Cl. at 177, 324 F.2d at 970; *Biggs* v. *United States,* 152 Ct. Cl. 545, 287 F.2d 593 (1961). Plaintiff claims further that approximately 10 per cent of his travel consisted of travel under arduous conditions. This item must be rejected, however, for there is no probative evidence in the record from which a determination or even a reasonable estimate may be made as to how much, if any, of this claimed percentage was actually under arduous conditions.

The last aspect of the plaintiff's claim for travel arises from the circumstances (1) that whenever all the passenger seats on a particular flight were filled, plaintiff and the other investigators were authorized to ride in the jump-seat located in the cockpit of the plane by filing a Form 160 ("Request for Access to Aircraft or Free Transportation"), and (2) that in every case where the investigator traveled on this basis using a Form 160, he was required to observe the operations of the aircraft and, upon his return to the office, to make a report on any unsafe conditions or procedures, or any safety violations he may have observed. Against this background, it is clear that such jump-seat travel by plaintiff involved the "performance of work" under section 205(b) of the Pay Act, as amended, and that overtime under those conditions is compensable. The record shows, moreover, (i) that during plaintiff's period of employment by the CAB, he spent a total of nine and one-half hours in jump-seat travel during which he was required to observe the aircraft's operations and submit a report; (ii) that of these nine and one-half hours, three were within the ambit of his normal work days; and (iii) that six and one-half hours occurred during weekends or

represented work in excess of eight hours on a regular work day for which plaintiff is entitled to recover overtime, with the amount of recovery to be determined pursuant to Rule 47(c).

The above report is consistent with the law and decisions applicable to the claims here involved. We therefore consider such report which rejected traveltime claimed for commercial flights and certain traveltime claimed under allegedly arduous conditions as the correct basis for the settlement of Mr. Lowe's and similar claims. Moreover, we do not regard the piloting of aircraft as arduous work in the absence of other factors such as those referred to in our decision in 41 Comp. Gen. 82, *supra*.

[B-177482]

Bids—Mistakes—Intended Bid Price Uncertainty—Correction Inconsistent With Competitive Bidding System

The refusal to permit an error in the low bid for the construction of spacecraft assembly and encapsulation facilities to be corrected because the low bidder failed to establish the bid price intended, and to disregard the bid did not obligate the National Aeronautics and Space Administration to consider the original bid, to query the bidder as to its desire in the matter before disregarding the bid, or to withhold award pursuant to NASA PR 2.406-3(e) pending the General Accounting Office decision on the merits of the mistake in bid claim. To permit waiver of bid rejection would be tantamount to allowing the ostensible low bidder to stand on its bid or withdraw, and to accept the original bid if still low when corrected and not prejudicial to other bidders would not be proper if the public confidence in the integrity of the competitive bidding system would be adversely affected. Furthermore, the bidder failed to request award at the original price if bid correction was not permitted.

Contracts—Protests—Abeyance Pending Court Action—Consideration Nonetheless by General Accounting Office

Notwithstanding the general policy of the General Accounting Office (GAO) is not to issue a decision on the merits of a protest where the material issues involved are likely to be disposed of in litigation before a court of competent jurisdiction, since the order of the United States District Court in connection with a mistake in bid claim reasonably contemplates a decision from GAO, the merits of the case have been considered.

To Hudson, Creyke, Koehler, Brown & Tacke, April 16, 1973:

Reference is made to your letter of February 16, 1973, and previous correspondence, protesting, on behalf of Woerfel Corporation and Towne Realty Company (a joint venture) (hereinafter Woerfel), award to any other bidder under invitation for bids (IFB) 10-024-3, issued by the John F. Kennedy Space Center (KSC), National Aeronautics and Space Administration (NASA).

The IFB was issued September 22, 1972, for the construction of

spacecraft assembly and encapsulation facilities (SAEF) Nos. 1 and 2. Bids were opened October 24, 1972, with the following results:

Woerfel	$4,169,651
Morrison-Knudsen Company (M–K)	4,761,000
Heyl and Patterson, Inc.	5,101,000

The Government estimate for the work was $5,134,320. Because Woerfel's bid was significantly lower than the other bids and the estimate, the contracting officer suspected a mistake and requested Woerfel on October 24, 1972, to review the bid. By letter of the same date, Woerfel advised that a gross clerical error in the amount of $476,000 had occurred and requested that its bid be corrected to $4,645,651. On October 25, 1972, the contracting officer requested Woerfel to submit documents substantiating the mistake and the bid intended. By letter dated October 26, 1972, Woerfel submitted work-sheets and other data and stated that the mistake arose from failure to add the price of electrical work to the mechanical work price, $1,648,800, to obtain a correct subtotal of $2,173,800 for the two items. Had the correct subtotal been added to the other items, it was alleged that the correct bid would have been $4,640,383. Woerfel stated that it believed the documentation would allow NASA "* * * to make a favorable award of this contract to us * * *."

After consideration of the documentary evidence submitted in support of the alleged error, NASA's Director of Procurement made the following determination (quoted in pertinent part) dated November 10, 1972:

A review of the supporting documentation confirms the bidder's allegation that the quotation for the electrical work, as required by Section 16 of the specifications, was omitted from recapitulation sheet and was not elsewhere included in the bid. However, such review fails to confirm, in a clear and convincing manner, the amount of the intended bid. The amount of the Holloway quotation, $525,000, which is specified on Page 8 of 9, was not included in the Woerfel/Towne bid; however, it is not clear whether the bidder actually intended to use this quotation or that of a competitor, Famco, for the electrical effort.

The exact amount of Famco's quote prior to bid opening is subject to conjecture; the bid confirmation letter is dated October 26, 1972 and the Woerfel/Towne stamp indicates receipt on October 30th. In this letter, Famco reduces its original quotation (apparently given telephonically prior to bid opening) of $528,000 by $58,000 ($28,000 for vendor material reductions and $30,000 for its own labor and material cuts). Woerfel/Towne may have intended to use the latter quote because recapitulation sheet 1 of 9 shows "Electrical Famco —29,000 (apparently a recording error) —30,000," but there is no indication that these amounts were subtracted from the total of the bid submitted. Regardless, based on the contention of a $525,000 omission (Holloway sheet 8 of 9) the corrected price per this computation would have been $4,699,383. Also, the contractor in correcting his bid by incorporating the $525,000 electrical subcontractor quote failed to adjust the $300,000 overhead and profit figure in his original bid.

In cases such as this where the evidence is clear and convincing as to the existence of a mistake but not as to the bid intended, the Comptroller General has consistently ruled that the mistaken bid may be disregarded. See 17 Comp. Gen. 492,493 and 17 id. 536,537. Accordingly, it is hereby determined that the bid of Woerfel Corporation/Towne Realty may be disregarded under this procurement and award made to the next low responsive and responsible bidder.

By letter of November 14, 1972, NASA communicated this determination to Woerfel and stated that the bid was being disregarded. The contract was awarded to M–K the same day. On November 15, 1972, Woerfel sent a telegram to NASA which read in part:

* * * THE WOERFEL CORP HEREBY PROTESTS THE PROPOSED AWARD OF THE ABOVE CAPTIONED CONTRACT TO MORRISON AND KNUDSON [SIC] CO OF BOISE IDAHO BECAUSE IT IS IN THE BEST INTEREST OF THE GOVERNMENT TO AWARD THE CONTRACT TO WOERFEL CORP AT THE REVISED AMOUNT OF FOUR MILLION SIX HUNDRED FORTY THOUSAND THREE HUNDRED EIGHTY THREE DOLLARS WHICH IS $120,617 LOWER THAN THE BID SUBMITTED BY MORRISON KNUDSON [SIC] CO. WE REQUEST THAT OUT MISTAKE IN BID STATEMENT DATED 26 OCTOBER 1972 BE FORWARDED TO THE CONTROLLER GENERAL FOR DETERMINATION

By telegram dated November 17 and letter of November 27, counsel for Woerfel protested to our Office. It was alleged that NASA erred in refusing to permit correction of Woerfel's bid and in disregarding Woerfel's bid. Woerfel requested that award be made to it at its original bid price, pending a determination of the merits of the mistake in bid request and that, if correction was proper, the contract price could be adjusted accordingly.

Counsel for Woerfel subsequently filed Civil Action No. 72–311 (*Woerfel Corporation and Towne Realty Company (A Joint Venture)* v. *Dr. James C. Fletcher, Administrator, National Aeronautics and Space Administration and Morrison-Knudsen Company, a corporation*) in the United States District Court for the Middle District of Florida, Orlando Division, on December 26, 1972. Plaintiff demanded judgment as follows: declaring that defendant, NASA, acted unlawfully, arbitrarily, and capriciously in awarding the contract in question to the defendant M–K; vacating and setting aside the unlawful contracts awarded to M–K; temporarily restraining the defendants from performing under the contract; temporarily and permanently enjoining the defendants from performing under the contract; directing NASA to reconsider the offers submitted, including plaintiff's, or alternatively issuing a new IFB; and providing other relief as might be just and proper. By order of January 15, 1973, the court denied the application for a temporary restraining order, stating in part that:

Should the Comptroller General determine that NASA acted erroneously and that the contract should be withdrawn from Morrison-Knudsen, permitting the contract to be withdrawn after more than one-twelfth (1/12) had been completed would still not have as serious complications as holding the contract in abeyance as plaintiff requests * * *

As to the other matters alleged in the complaint, a pretrial conference has been scheduled for April 24, 1973, and a trial date of April 30, 1973, has been set. In this regard, it is the policy of our Office not to issue a decision on the merits of a protest where the material issues

involved are likely to be disposed of in litigation before a court of competent jurisdiction. B–174052, August 29, 1972. However, since the District Court order reasonably contemplates that our Office will render a decision, we will consider the protest on the merits at this time. 52 Comp. Gen. 161 (1972).

For the reasons which follow, we find no basis to sustain the protest.

The initial question for determination is your contention that NASA's decision denying correction of the Woerfel bid was erroneous. To permit correction of an alleged error in bid prior to award, the bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred and the intended bid price. 49 Comp. Gen. 480, 482 (1970) and NASA PR 2.406–3(d)(2). The weight to be given such evidence is a question of fact to be considered by the administratively designated evaluator of the evidence. 51 Comp. Gen. 1 (1971). After a review of the record, we conclude that NASA's determination was reasonable, since it is not possible to ascertain the intended bid price from the bidder's workpapers. If the intended price for the electrical work was $525,000, as indicated on page 8 of 9 of the workpapers, addition of this amount, plus an adjustment in the insurance and bond costs based on a percentage of the cost, would yield a corrected bid price of $4,699,383. On the other hand, if the $59,000 deduction on Famco's electrical price (noted on page 1 of 9 but not otherwise included in the calculations) was meant to be deducted from the total bid price of $4,699,383, the corrected bid price would be $4,640,383, as contended by Woerfel in its October 26, 1972, letter. Another possibility is that the $59,000 amount was meant to be deducted from the $525,000 electrical quote before the application of insurance and bond factors, which would produce a third bid price. It cannot be determined from the workpapers which of these possibilities, if any, represents the intended bid price. In any event, since in one place in the worksheets the bidder is using one electrical subcontractor's quotation and in another place indicates a $59,000 deduction from another electrical subcontractor, it is not clear which subcontractor's quotation the bidder intended to rely upon in preparing the bid.

However, notwithstanding the decision denying correction, you further contend that NASA officials erred in disregarding Woerfel's bid and proceeding to award the contract to M–K. You allege that NASA acted arbitrarily and in violation of NASA PR 2.406–3(e), which provides, *inter alia*, that a bidder, as a matter of right, may have his claim of mistake determined by the Comptroller General and that all doubtful cases will be forwarded to the Comptroller General

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for advance decision. Section 2.406–3(d)(5) of the regulations provides further:

> Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the Government or determined by the contracting officer to be reasonable, or there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders, in which case it may be rejected. The attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

Several decisions of our Office are cited which you contend support "* * * the right of a bidder who claims mistake to be entitled to award at the original bid price, if the corrected price would still be lowest * * *." 52 Comp. Gen. 258 (1972); B–174957, May 30, 1972; B–173031, September 17, 1971; and 42 Comp. Gen. 723 (1963). Particular reliance is placed upon B–165405, October 24, 1968, which permitted the original erroneous bid to be considered for award since acceptance of such a bid would not be prejudicial to other bidders where the evidence clearly indicated that the bid would have been lowest even if corrected. The decision quoted section 1–2.406–3(d)(5) of the Federal Procurement Regulations, which is similar to NASA PR 2.406–3(d)(5). In summary, your contention is that, in light of the NASA regulations and decisions of our Office, after NASA officials refused to correct Woerfel's bid, they were not only permitted but obligated to consider Woerfel's original bid as submitted, or, at the very least, obligated to query Woerfel as to its desire in the matter before disregarding the bid. It is also contended that NASA should have withheld award to M–K pending a decision on the merits of Woerfel's mistake in bid claim by our Office. You point out that not only did NASA fail to ask Worefel if it would accept the contract at the original bid price, but also that Woerfel was allowed no time to express its intent since the notice that its bid was being disregarded was sent on the same day the contract was awarded to M–K.

Normally, where a bidder alleges a mistake after bid opening, he is not then free to waive his right to have the bid rejected because of mistake. To permit a bidder to do so would be tantamount to allowing the ostensible low bidder to elect, after bid opening, whether to stand on the bid, or withdraw it, depending upon which course of action appeared to be in his best interests. 37 Comp. Gen. 579, 582 (1958). However, as the decisions you have cited point out, our Office has permitted acceptance of an original bid where the bidder established that an error had been made in the bid, but has not established the intended bid price. The rationale of those decisions has been that where it is clear that the corrected bid would still have been lowest, even though the amount of the intended bid could not be clearly proved

for the purpose of bid correction, no prejudice to the other bidders would result by acceptance of the original bid.

Before considering the propriety of NASA's decision to disregard Woerfel's bid, it must be determined whether the evidence clearly shows that the bid would have remained low if corrected. In Woerfel's October 26, 1972, letter, after adding the omitted $525,000 electrical price, appropriate upward adjustments were made for insurance and bond costs; however, the $300,000 overhead and profit figure was unchanged. The $300,000 amount represents approximately 7.7 percent of the original, uncorrected subtotal for the nine items of work involved ($3,852,235). Therefore, it is conceivable that if the $525,000 electrical price had been included in the total estimate for the work, the bid price could have been $4,756,763, allowing for the overhead and profit and insurance and bond costs. Further, we note that while Woerfel has alleged an omission of $525,000 for the electrical work, the Government estimate for that work was approximately $700,000.

In 48 Comp. Gen. 748 (1969), our Office considered a request for correction where the Government estimate for the omitted work item was $31,000, the low bidder claimed omission of a $21,000 quote, and correction on the basis claimed would have made the bid only about $500 lower than the next low bid of $272,464. We held that, under the circumstances, the facts were not sufficiently clear to warrant correction, stating:

> The correction of mistakes in bid has always been a vexing problem. It has been argued that bid correction after bid opening and disclosure of prices quoted compromises the integrity of the competitive bidding system, and, to some extent at least, this is true. For this reason, it has been advocated that the Government should adopt a policy which would permit contractors to withdraw, but not to correct, erroneous bids. We do not agree completely with this position, since we believe there are cases in which bid correction should be permitted. We do agree that, regardless of the good faith of the party or parties involved, correction should be denied in any case in which there exists any reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby. The present case, it seems to us, falls in this category.

In our view, the instant case falls within this rule and on this basis alone a claim for correction or withdrawal of the claim of error must be denied.

Moreover, even if it is assumed that Woerfel's corrected bid is clearly lowest, we find no basis in the regulations or the decisions of this Office to conclude that NASA erred in disregarding the bid. NASA PR 2.406-3(d)(5) is, on its face, inapplicable to the circumstances here, since it deals with the situation where a bidder fails or refuses to furnish any evidence in support of a suspected or alleged mistake. In B-165405, *supra*, and B-168673, April 7, 1970, similar regulatory language was cited for the purpose of providing guidance in the consideration of the original bid in situations where the low

bidder had indicated his willingness and desire, prior to the decision on correction, to accept award at the original bid price if correction were denied. *See*, in this regard, 42 Comp. Gen., *supra*, at 725. In the instant case, we do not regard the language in Woerfel's October 26, 1972, letter concerning a "favorable" contract award as indicating that Woerfel desired award at the original bid price if correction were denied. Moreover, even after denial of correction, the only request in Woerfel's November 15, 1972, telegram to NASA was that award be made at the corrected price. The first indication of a desire to be awarded the contract at the original price is Woerfel's November 17, 1972, telegram to our Office. This was 3 days after award to M–K.

Our decision B–173031, *supra*, likewise is distinguishable from the facts of the present case in that the low bidder specifically requested award at the original bid price if correction were not permitted. As for decisions B–174957 and B–176111, *supra*, the former involved a situation where the bidder failed to furnish evidence as to its intended bid price, and in the latter we held that since the Government erred in failing to determine that a mistake had been made, award at the original price was not legally enforceable and the bidder should be given the option of withdrawing its bid or waiving the mistake, the alternative following on the statement of the bidder to our Office that withdrawal was not an acceptable solution. Further, in this respect, *see* B–164910, October 25, 1968, where it was held:

> It is true that in certain cases where a bidder has established that an error had been made in its bid but not its intended bid price, our Office has authorized acceptance of its original bid on the basis that it was the lowest bid and, therefore, not prejudicial to other bidders. It should be noted that in those cases, the bidder had advised the contracting officer that if he could not permit correction of the bid that the bid be considered for award as originally submitted. * * *.

Under the circumstances presented, we conclude that NASA was not obligated to consider Woerfel's original bid or to query Woerfel as to its willingness to accept award at the original bid price. Nor did NASA PR 2.406–3(e) impose an obligation to withhold award to M–K pending our decision on the merits of the mistake in bid claim. Finally, it would have been improper for NASA to have followed the course of action suggested in your November 27, 1972, letter to us, that is, award to Woerfel at the original bid price followed by determination of the mistake in bid claim. B–164910, *supra*.

From the foregoing, it must be concluded that the administrative actions taken in regard to Woerfel's bid were proper. Accordingly, the protest is denied.

[B-176060, B-177845]

Transportation — Transit Privileges — Storage-in-Transit — Misrouted Shipment

Where because of failure to properly route February 9, 1967, shipments of Army tractor trucks, which were delivered during February, the Government was not entitled to the transit privileges accorded the shipments and erroneously paid the carrier on the basis of through rates, the additional freight charges filed February 9 and July 27, 1971, based on higher local rates from transit point to destination, are barred since the claim was not received by the General Accounting Office within 3 years of payment in May, 1967, as required by section 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66). The cause of action for freight charges accrues upon delivery, extended on interstate shipments transported for the United States to 3 years from date of payment, refund, or deduction, whichever is later, and no refund or deduction being involved, the extended period of limitations commenced to run on dates of payment in May 1967 and expired during May 1970.

To the Illinois Central Railroad Company, April 17, 1973:

Reference is made to your claims under freight bills AR-85059, AR-85060, and AR-85062 for additional freight charges of $176 on each of three shipments of army tractor tanks which were tendered to the rail carriers on February 9, 1967, at the Letterkenny Army Depot, Culbertson, Pennsylvania, and from there transported to Fort Knox, Kentucky, where they were delivered during February 1967. The additional amounts claimed represent the differences between the freight charges of $352 originally billed and paid during May 1967 to your company for the transportation services rendered on each shipment, computed at the balance of the through rate published from Paterson, New Jersey, to Fort Knox, Kentucky, which applies on certain shipments accorded transit privileges at Culbertson, and the higher charges now claimed based on the local rate applying from the transit point to destination because the transit privilege did not apply via the routing designated on the bills of lading.

Since the transit basis of charges does not apply on any of the three outbound shipments, payment of the additional amounts claimed turns on the question of whether such claims were timely filed with the General Accounting Office. Your claims for the additional charges of $176 on each of the shipments were first received in our Office on February 9 and July 27, 1971 (two were received on the latter date).

The claim papers were returned to your company by our Transportation and Claims Division with the explanation that section 322 of the Transportation Act of 1940, as amended, 49 U.S. Code 66, prevented their consideration because the claims were not received in our Office within the 3-year period of limitations specified in such provision of law and thereunder are forever barred. In view of the action taken by our Transportation and Claims Division, your reclaims for the $176 on each of the shipments are being considered as requests for

review of the final actions of the Transportation and Claims Division which in effect refused payment of such claims.

The shipping records here show that the three shipments were tendered to the Western Maryland Railroad Company for transportation under bills of lading AT–058735, AT–058736, and AT–058731. The payment records show that after delivery of the shipments at Fort Knox, Kentucky, your company as the final destination carrier, billed the Government $352 on each of shipments for the transportation services and the freight charges were paid in the amounts billed on May 14, 16, and 18, 1967, under disbursing officer vouchers 107734, 097389, and 097390.

In the computation of the freight charges initially billed on each of these shipments, your company computed the charges by use of the through carload rate of $1.56 per 100 pounds which is published from Paterson, New Jersey, to Fort Knox, Kentucky, less a credit for the inbound charges paid at 78 cents per 100 pounds on the freight movement to Culbertson, Pennsylvania, plus a transit charge of 10 cents per 100 pounds.

The through rate on shipments accorded transit privileges at Culbertson, Pennsylvania, was authorized at the time the shipments moved by item 6 of Traffic Executive Association—Eastern Railroads Section 22 Quotation A–757–F, but item 23 requires adherence to the other provisions of the quotation. Item 21 provides that the application of the transit privilege cannot affect the integrity of the through rate insofar as the applicable routes are concerned. Since the through rate did not apply via the routing of the inbound and outbound shipments, as shown on the outbound bills of lading, the transit privilege never had application, and the proper charges on the outbound shipments were those computed at the local rate published from Culbertson, Pennsylvania, to Fort Knox, Kentucky. Also the freight charges on the movements into the transit point at Culbertson, Pennsylvania, were assessed and paid at the carload rate applying from Paterson, New Jersey, and no adjustment in the inbound charges was necessitated by the fact that the transit privilege was not applicable on the involved shipments.

Under section 322 of the Transportation Act of 1940, as amended by Public Law 85–762, 49 U.S.C. 66, every claim for the payment of transportation charges cognizable by the General Accounting Office is barred unless such claim is received in the General Accounting Office within 3 years (not including time of war) from the date of:

(1) accrual of the cause of action, or
(2) payment of the charges for the transportation, or
(3) subsequent refund for overpayment of such charges, or
(4) deduction made pursuant to that section, whichever is later.

The general rule is that a statute of limitation begins to run when a judicially enforceable cause of action accrues. *Missouri Pac. R. Co.* v. *Austin*, 292 F. 2d 415 (1961); *Sweetser* v. *Fox*, 134 P. 599, 602 (1913), wherein it is stated:

> It is a rule of universal application that a cause or right of action arises the moment an action may be maintained to enforce it and the statute of limitations is then set in motion. The test, therefore, is can an action be maintained upon the particular cause of action in question? If it can, the statute begins to run.

The cause of action for freight charges accrues upon acceptance of the shipment by the consignee or upon the carriers' tender of delivery of the shipment at destination. *Chesapeake & O. Ry. Co.* v. *Wiener*, 58 N.W. 2d 918 (1953). *See also* 49 U.S.C. 16 (3)(e). On the shipments here involved the carrier's cause of action for the freight charges from Culbertson, Pennsylvania, to Fort Knox, Kentucky, accrued upon delivery of the shipments at destination in February 1967. However, on interstate shipments transported for the United States Government, the period of limitations is extended to include 3 years from the date of payment, refund, or deduction, whichever is later. Since there were no refunds or deductions on these shipments, the extended period of limitations commenced to run on the dates of payment in May 1967 and expired during May 1970.

The case of *Chicago, and N.W.* v. *Connor Lumber and Land Co.*, 212 F. 2d 712 (1954), referred to in your letter of May 9, 1972, file 5-G-MRA 85062-B, is not in our view controlling here. In that case, as well as in *Arkansas Oak Flooring Co.* v. *Louisiana & Arkansas Ry. Co.*, 166 F. 2d 98 (1948), referred to in that decision, the charges on the shipments into the transit points were assessed and paid at lesser rates than those applicable on a local bases. The application of such lower charges, however, was conditioned upon the subsequent reshipment of the transit equivalents certified by the shippers. The courts found in the cited cases that a cause of action could not accrue for any additional amounts that might be due until such time as the shipper certified the transit equivalents moving outbound or the transit time period expired.

Here the cause of action is for the freight charges from Culbertson, Pennsylvania, to Fort Knox, Kentucky, and the cause of action accrued upon delivery of the outbound shipments at destination. Your company had 3 years from the date of delivery or the date of payment to file a claim with our Office for those freight charges.

The fact that the Western Maryland Railroad Company later detected the misrouting and brought it to the attention of the shipping agency is not material. Nor is the fact that the Government shipping agency agreed to cancel the transit application relevant. Under the terms and conditions of Quotation A-757-F, the application of the

through transit rates was void from the inception of the outbound shipments because of the misrouting.

A cause of action for the proper charges on these outbound shipments thus accrued upon delivery at the destination and upon payment of the charges initially billed. See *Seaboard Air Line Railroad Co.* v. *Red Diamond Mills*, 128 F. Supp. 606, 608.

Since your claims for the additional amounts of $176 on each of the three shipments were not received in the General Accounting Office within the 3-year time period allowed for filing your claims here, the action taken by our Transportation and Claims Division in advising you that such claims were forever barred and that they were not payable by our Office appears correct and is sustained.

[B-178084]

Compensation—Night Work—Basic Compensation Determinations—Leave and Overtime

The night differential authorized in 5 U.S.C. 5343(f), as enacted by Public Law 92-392, approved August 19, 1972, may be considered basic pay for purposes of annual and sick leave, and overtime pay for regular or irregular hours worked in view of the fact the legislation was enacted to unify the long established principle and policies for setting the pay of prevailing rate employees, including the Coordinated Federal Wage System and decisions of the Comptroller General of the United States.

To the Chairman, United States Civil Service Commission, April 17, 1973:

Further reference is made to your letter of March 13, 1973, requesting our views as to whether the night differential authorized by 5 U.S. Code 5343(f), as enacted by Public Law 92-392, approved August 19, 1972, 86 Stat. 568, is included in basic pay of a prevailing rate employee for purposes of annual and sick leave and overtime pay for regular or irregular overtime hours which an employee may work.

Section 5343(f) provides as follows:

> (f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—
>
> (1) amounting to 7½ percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and
>
> (2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.
>
> A night differential under this subsection is a part of basic pay.

You point out that the night differential is provided for "regularly scheduled nonovertime work." You note that similar wording in overtime statutes has been construed to mean that an individual must actually perform at his job in order to qualify for overtime compensation (other than callback overtime). This interpretation of the word

"work" has led you to the conclusion that night differential would not be payable for hours in a leave status since the employee is not actually "at work." This interpretation is buttressed by the provision in 5 U.S.C. 5545(a) which states that for General Schedule employees nightwork is regularly scheduled work between the hours of 6 p.m. and 6 a.m., and includes periods of leave with pay during those hours if the periods of leave with pay during a pay period total less than 8 hours. Accordingly, Federal Personnel Manual (FPM) Supplement 532–1, January 16, 1973, Subchapter S8–3h, provides that wage employees are paid at their basic rates (excluding night shift differential) during periods of compensable leave.

You state that you have had a number of questions regarding the correct interpretation of 5 U.S.C. 5343(f). In considering such questions you have found statements in Senate Report No. 92–791, May 16, 1972, pages 4 and 5, and House Report No. 92–339, July 8, 1971, pages 15 and 16, which indicate that it is the intent of Congress that the night differential be included for leave purposes. The House statement reads as follows:

> Section 5343(f) authorizes the payment of uniform night differentials to prevailing rate employees assigned to the second or third shifts. A differential of 7½ percent of the employee's scheduled rate will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours fall between 3 p.m. and midnight. A differential of 10 percent will be paid when a majority of the regularly scheduled nonovertime hours fall between 11 p.m. and 8 a.m. Section 5343(f) specifically provides that night shift differentials are to be considered a part of base pay. Thus, such differentials will be included in rates of basic pay for purposes of computing overtime, Sunday, and holiday pay, and deductions for retirement and group life insurance. It is anticipated by the committee that the Civil Service Commission, in administering the provisions of this section, may issue regulations governing such matters as the treatment of night differential when a prevailing rate employee (otherwise entitled thereto) is: (1) excused from work on a holiday, (2) traveling on official business, (3) absent on leave, or (4) temporarily assigned to a different tour of duty.

In view of the congressional statements you seek our advice in the matter.

With respect to including night differential in an employee's basic rate of pay for computing overtime pay for regular or irregular overtime hours worked, you note that section 5544(a) of Title 5, U.S. Code, which previously read "an employee whose basic pay is fixed * * *" was changed to read "an employee whose pay is fixed * * *." While you do not attach any special significance to the change in the wording of the statute from "basic pay" to "pay," you would like our views as to whether it is proper to include the night differential in an employee's rate of pay for the purpose of computing the amount of his overtime pay.

Under the Coordinated Federal Wage System, which was in effect prior to the effective date of Public Law 92–392, a night differential

was included in basic pay for purposes of annual and sick leave, and overtime pay. Federal Personnel Manual Supplement 532–1, Subchapter S8–4c. Our decisions also have held that night differential is included in leave and overtime situations involving a wage board employee. 26 Comp. Gen. 212 (1946); 23 *id.* 962 (1944).

In summarizing the purpose of the legislation here involved House Report No. 92–339, page 6, states in pertinent part the following:

> The major provisions of the bill may be summarized as follows:
> *One*—enacts into law the long established principle and policies for setting the pay of prevailing rate employees.
> *Two*—makes the following changes in the current operating systems and procedures:
>
> * * * * * * *
>
> (d) Provides a 7½% pay differential, nationwide, for scheduled non-overtime work during the second shift (3 p.m. until midnight) and 10% for the third shift (11 p.m. until 8 a.m.). Currently the premium pay depends on the prevailing custom of each labor market area.

Senate Report No. 92–791, page 3, in giving the background information concerning this legislation, states the following:

> * * * The Coordinated Wage System was established in 1968 by the Civil Service Commission as a result of an Executive order issued by President Johnson. This succeeded in requiring equitable coordination of wage board practices among all Federal agencies. The next logical step is enactment of this legislation to establish the system in law.

In light of the above our view is that night differential should be included in basic pay for annual and sick leave purposes and that it is proper to include night differential in an employee's rate of pay for the purpose of computing the amount of his overtime pay.

[B–175208]

Contracts—Negotiation—Evaluation Factors—Point Rating—Competitive Range Formula

The elimination from negotiation of the incumbent contractor and 12 of the other 20 offerors responding to a request for proposals to operate and maintain an Air Force Base under a 1-year cost-plus-a-fixed-fee contract by a Source Selection and Evaluation Board without regard to price, as prescribed by paragraph 3–805.2 of the Armed Services Procurement Regulation, on the basis the numerical scores for organization, management, phase-in planning, prior experience, and qualifications of key individuals were not within the competitive range established was proper as the use of the point rating system is an appropriate method for determining which proposals are within a competitive range, and while predetermined scores for selecting offers within a competitive range is contrary to the flexibility inherent in negotiated procurement, the competitive range must be decided on the actual array of scores achieved.

Contracts—Protests—Award Withheld Pending General Accounting Office Decision—Exceptions

The award of a contract for the operation and maintenance of an Air Force Base while a protest from the incumbent contractor was pending was in accord with paragraph 2–407.8(b)(3) of the Armed Services Procurement Regulation (ASPR), which prescribes that an award may be made during the pendency

of a protest if the items are urgently needed, delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will otherwise be advantageous to the Government. Prompt award of the new contract, which called for an increased scope of work, was required in order to meet the planned starting date and to avoid the risk of labor problems and, furthermore, the contracting agency complied with ASPR 2-407.8(b)(2) by notifying the General Accounting Office of intent to award on the date the award was made.

To the AVCO International Services Division, April 18, 1973:

Reference is made to your telefax of May 26, 1972, and subsequent correspondence, protesting against the elimination of your proposal from consideration for award of a contract under request for proposals No. F25607-72-R-0001, issued by Offutt Air Force Base, Nebraska.

The RFP was for the operation and maintenance of Glasgow Air Force Base, Montana, for 1 year starting on July 1, 1972, on a cost-plus-a-fixed-fee basis. Twenty offers were received and were technically evaluated by a Source Selection and Evaluation Board (SSEB) without regard to price. As a result of the numerical scores assigned to each proposal by the SSEB, 13 proposals, including AVCO's, were eliminated from the competitive range. Negotiations were then conducted with the remaining seven offers, and award was made to the Tumpane Company, Incorporated, on June 13, 1972, notwithstanding the pendency of your protest.

Section D of the RFP contained the following provision:

1. CRITERIA TO BE USED IN THE EVALUATION OF PROPOSAL:

a. Based on the acceptability of other considerations herein after stated, this contract is to be awarded on the basis of the lowest proposal based on the Government's Staffing Plan (work force) and the proposer's management personnel that will assure the Government of satisfactory contract performance. In addition to the price, certain other criteria will be considered in making this award. These other criteria include, but are not limited to, the following in the order of their importance:

(1) The proposal shall be responsive to this solicitation and the proposer shall be determined responsible pursuant to ASPR Section 1, Part 9.
(2) Organization and Management
(3) Cost to the Government
(4) Phase-in Planning
(5) Prior Experience
(6) Qualifications of Key individuals

b. For the purpose of technically evaluating the proposal, the following five criteria will be weighed, utilizing the percentages cited:

(1) Organization—35% (Contractor must be organized so as to provide continual, uninterrupted support to insure that the USAF mission is not jeopardized. Proper placement and relationship of functions and personnel assigned are essential to orderly and satisfactory performance of the contract.)

(2) Management—35% (Proposer must demonstrate good management practices and a management concept to achieve maximum efficiency from the work force.)

(3) Phase-in Planning—15% (The proposer's management and organizational concepts must assure the continuity of mission requirements during phase-in period though a limited labor force may be available to the proposer to fill a portion of the positions required; e.g., the proposer must show planned hiring of personnel to fill positions currently manned by the on-board contractor personnel.)

(4) Prior Experience—10% (Proposer must be able to rapidly undertake the awarded contract and perform effectively and satisfactorily.)

(5) Qualifications of Key Individuals—5% (Essentially, certain key people must have the level of experience and technical expertise as required by the technical specifications.)

c. In establishing the weighed criteria of paragraph 1b(1) through (5) above, proposers are advised that the five criteria are NOT exclusive of those additional criteria cited in paragraphs 1a(1) through (6) above. Moreover, the five criteria are not mutually exclusive of one another and in many instances, are closely related and overlapping.

The five SSEB members were given evaluation worksheets along with instructions to rate each subfactor listed on the worksheets on a scale of 0 to 100, with 80 representing "the mean average of acceptability, determined * * * by the comparison of the individual proposal with all proposals received," according to the Air Force. The subfactors appearing on the worksheets, and the weights assigned to each, were as follows:

	EVALUATION FACTORS	WEIGHT
Part I	General Quality and Responsiveness of Proposal	
	a. Completeness and thoroughness	5
	b. Grasp of problem	10
	c. Responsiveness to terms, conditions, and time of performance	2
Part II	Organization, Personnel and Facilities	
	a. Evidence of Good Organization and Management Practice	20
	b. Qualifications of personnel	3
	c. Phase-in Planning	5
	d. Experience in similar or related fields	3
	e. Record of past performance	3
Part III	Final Technical Evaluation	
	a. (I) General Quality and Responsiveness of Proposal	1
	b. (II) Organization, Personnel and Facilities	3

To determine the numerical rating for each subfactor, the Board members used a list of "considerations" which consisted of some 34 questions concerning the proposals and offerors. For example, the Board considered such questions as "Have all essential data required by the Request for Proposal been included?", "Does the proposal recognize and differentiate between the simpler and the more difficult performance requirements?", "Does the proposal evidence the breadth and depth of management capability appropriate to the project? Is there evidence of stability of job tenure in upper management echelons?", and "Is the quality of personnel as set forth in the proposal generally supported by the salary scales?."

On the basis of the worksheet computations, scores ranging from 91.06 to 61.41 were given to the proposals. The Air Force reports that each of the seven highest rated proposals were less than two points apart, while more than two points separated the 7th and 8th ranked proposals, and that this was the primary basis for determining that only the first seven proposals were in the competitive range. The 7th ranked proposal was scored at 87.83; the 11th ranked AVCO proposal had a score of 81.62.

In a memo dated May 31, 1972, the contracting officer stated:

AVCO was eliminated from the competitive range for the following reasons:
a. Evaluation of their management proposal revealed that their management staffing and concept was substantially inadequate.
b. In many areas their personnel would be used on both the O&M contract and the Army production contract. In the event the production contract is not renewed on 28 Feb 1973, it will be necessary that the Air Force assume considerable costs previously and presently being charged to the Army contract.
c. Notwithstanding the following would have precluded favorable consideration for award: AVCO has employed five individual general managers during their three year tenure. In the opinion of the Air Force staff at Glasgow, none of these individuals had the desired ability to fill such a position.
d. The controller could not or would not provide essential cost information to Air Force personnel and when provided, proved in most instances, to be incorrect and/or inadequate as evidenced by copy of DCAA Audit Letter (attached). After many complaints and much persuasion by the Air Force, he was replaced. However, very little improvement has resulted.
e. AVCO has proposed a phase-over cost which is unacceptable.
f. AVCO alleges a phase-over cost of $665,550; AF estimates allowable costs of approximately $176,550.
g. AVCO's proposal was underpriced due to applying 75% material to unburdened labor cost; amount of underpricing is $324,258.

In subsequent correspondence to us, however, the Air Force indicates that this memo consists of "reflections" of the contracting officer which do not accurately represent the views of the SSEB members concerning AVCO's proposal. This correspondence states that neither phase-over costs nor AVCO's ability to provide required financial data was considered by the Board in the technical evaluation of proposals, and that the element of prior experience was evaluated solely on the basis of "face value representation" as contained in the proposals, thereby precluding the contracting officer's "judgment" from contributing to the SSEB evaluation. We have also been furnished a letter dated July 19, 1972, written by the Chairman of the SSEB, which indicates that the Board regarded the organization and management areas as the principal weakness of AVCO's proposal. In this regard, the letter states:

b) A review of AVCO's proposal strongly suggests that the AVCO organizational structure was developed for the intended purpose of removing key essential management personnel from the pricing base line in order to reduce the proposed total contract price. The organization was not established which would assure effective management and responsive utilization of personnel for the performance of the proposed contract. The company's proposal relegated many key functions within the management structure that cannot be responsive to other requirements. Some examples are:
1) AVCO proposes that the O&M Project Manager have complete administrative and operational control over the Glasgow AFB O&M operation. A very nebulous relationship is described in the proposal that links the General Manager to the Project Manager. It is therefore apparent that one or the other of the functions is not required on the O&M contract.
2) The Contract Manager is omitted from the O&M functions except as advisor to the Project Manager.
3) AVCO proposes that the Controller function as advisor to the Project Manager. The general accounting function which should be the prime recipient of advice from the Controller is twice removed from the Controller. We believe that the proposed O&M accounting requirements dictate that the Controller

supervise the general accounting function as part of his subordinate organization.

4) The Contract Administrator functions as staff advisor to the Project Manager with no apparent tie-in to the operational elements. The work order procedure indicates that Mountain Plains and Safeguard work orders flow through the Contract Manager; however, the Contract Manager function is not placed in the proposed organization in such a manner as to preclude operational bottlenecks.

AVCO's proposal states that these functions are intended to advise the O&M Project Manager and other Montana contract operations in their particular area of responsibility. We believe the contractor's proposal was weak in this regard because the proposed O&M contract performance requires a fulltime Contract Manager and Controller to administer the day-to-day activities that are expected to develop.

In addition, our file contains a "Contracting Officer's Statement of Facts" dated June 27, 1972, which identifies weaknesses and deficiencies in the AVCO proposal. The statement sets forth points similar to those made by the SSEB Chairman in the above-quoted letter, and also identifies problems in the areas of aircraft services, supply, civil engineering, and organization with respect to the functions of morale and recreation, safety and housing. It also indicates that AVCO's prior experience at Glasgow AFB was considered to be "only a part of the scope of this new procurement."

You claim that your proposal was improperly eliminated from competition. You state that the Air Force did not adhere to the evaluation factors set forth in the RFP in evaluating the proposals received with respect to cost. You assert that your cost proposal was significantly lower than Tumpane's and that this fact alone should have led to negotiations with you. In addition, you question how your proposal could have been so deficient so as to be outside the competitive range when you had been the incumbent contractor since June 2, 1969, and had never received notice of inadequate performance. You also assert that the contracting officer had a personal bias against AVCO, as indicated by comments regarding your past performance in his May 31, 1972 memo, and that this bias was reflected in the evaluation process and was responsible for the rejection of your proposal.

Paragraph 1a of section D of the RFP sets forth certain criteria "in the order of their importance." The third listed factor was cost to the Government. Paragraph 1b, however, provided for a technical evaluation based on four of the factors listed in paragraph 1a, excluding cost. The record reveals that the 13 proposals receiving the lowest scores on this evaluation were rejected, and you claim that this indicates that cost was not considered in accordance with the RFP provisions. While the RFP provisions regarding cost appear to be somewhat vague, we think they may be reasonably interpreted to mean that price was to be considered in making an award only if proposals were regarded as acceptable with respect to the other criteria listed.

This is in accordance with Armed Services Procurement Regulation (ASPR) 3-805.2, which states that the award of a cost-reimbursement type contract should be based primarily on a determination as to which contractor can perform the contract in a manner most advantageous to the Government, and not on the basis of lowest proposed cost or fee. *See* 50 Comp. Gen. 16 (1970); 50 *id.* 390 (1970). The Air Force has advised us that the SSEB recommendation that negotiations be conducted only with the three highest rated technical proposals was not adopted and that "the contracting officer * * * determined that proposals submitted by the seven highest technically ranked firms more clearly established a competitive range * * *." The Air Force further states:

> In determining the competitive range, the SSA [contracting officer] in counsel with the SAC Procurement staff gave appropriate consideration to the elements of fixed, semi-fixed and proposed (estimated) cost items of all proposals. * * * Additionally, the SSA concluded that negotiations with those companies submitting technical proposals inferior to the selected seven companies would not result in a more favorable contract than could be negotiated with one of the seven companies determined to be within a competitive range, price and other factors considered.

Our review also indicates that three of the seven firms selected for negotiations, including Tumpane, submitted initial price proposals that were lower than yours. Although you claim that phase-in costs (which you estimate at $679,950 as opposed to the contracting officer's estimate of $176,550) should have been considered if award to another firm was contemplated, we do not believe that either the RFP or general principles of Federal procurement law required such consideration for determining the competitive range in view of your relatively low technical score. Accordingly, it does not appear that the establishment of the competitive range was improper with respect to your arguments concerning cost considerations.

In addition, however, you claim that the method used to decide which firms were within the competitive range was "arbitrary and without merit" and caused 13 firms to be "summarily eliminated." You claim that such elimination was contrary to our decision B-174208, April 6, 1972, in which we quoted from 50 Comp. Gen. 670 (1971) the statement that "A proposal is to be considered within a competitive range unless it is so high in cost or so inferior technically that the possibility of meaningful negotiation is precluded." You point out that as the incumbent contractor you were well aware of the requirements to be met and that any questionable areas of your proposal could have been easily clarified during meaningful negotiations. We do not agree with these contentions. We have recognized that the use of a point rating system in evaluating pertinent factors is an appropriate method for determining which proposals are within a competitive range. 47

Comp. Gen. 252 (1967); B-174589, March 28, 1972; B-176077(1), January 26, 1973. While we have objected to the use of a predetermined score for selecting offers within a competitive range as being contrary to the flexibility inherent in negotiated procurements, 50 Comp. Gen. 59 (1970), we have stated that the competitive range must be decided on the basis of the actual array of scores achieved. B-171857(2), May 24, 1971. Thus, when several offers are received in response to a solicitation, it is for the contracting officer to determine the relative desirability and technical adequacy of the proposals received, and we will not question that determination in the absence of a clear showing that the determination was arbitrary. 48 Comp. Gen. 314 (1968); 51 *id.* 621 (1972). The quoted language from 50 Comp. Gen. 670, *supra*, stems from situations in which all but one or two offerors were eliminated from the competitive range for technical reasons notwithstanding the frequently higher prices of the remaining offeror(s). *See* 50 Comp. Gen. 670; 47 *id.* 252 (1967); 45 *id.* 417 (1966). It does not require enlarging the competitive range to include proposals which are relatively inferior so as to be unacceptable when there is adequate competition both with respect to price and technical considerations. *See* 49 Comp. Gen. 309 (1969). Therefore, although you were the incumbent contractor, your relatively low rating on the technical evaluation, with a numerical score more than six points lower than the lowest rated proposal found to be in the competitive range, provided a reasonable basis for the rejection of your proposal. B-171857, *supra*.

There remains for consideration, however, your claim that the evaluation itself was tainted by the allegedly biased attitude of the contracting officer. As indicated above, the contracting officer apparently did not have a very high opinion of AVCO's prior performance at Glasgow. The Air Force states that the contracting officer was entitled to his opinion, but maintains that his "knowledge of AVCO's past performance or the quality of such performance on the then current contract was not considered by or communicated to the SSEB." Instead, the Air Force claims that evaluation of past performance and prior experience was based on "the facts and information represented by the proposer's proposal (e.g., testimonial letters of performance)," and that the SSEB did not investigate or obtain information regarding past performance from any other source. We note, however, that included among the "considerations" used by the SSEB in evaluating proposals were the following questions, listed under "Record of Past Performance:"

(1) Has the offeror held previous cost type contracts with the agency or other Government establishments?
(2) Were schedule commitments generally met?

(3) Did the contractor solve his own technical problems, or did he rely heavily upon the technical staff of the agency?
(4) Was there an unusually high number of contractual problems which might be attributed to inflexibility, naivete, or lack of cooperation on the part of the contractor?
(5) If there were significant cost over-runs, were they due to an incompetently low initial cost estimate, or to valid problems which could not have been anticipated?
(6) Does the proposer have an acceptable business and financial rating by Dunn and Bradstreet?

The information upon which answers to these questions could be based was not required by the RFP to be included with proposals and in fact was not included in AVCO's proposal. Nevertheless, offerors, including AVCO, were evaluated on the basis of these "considerations." Such an evaluation clearly required either personal knowledge of AVCO's prior performance or documentation regarding it distinct from the proposal itself. We are advised that the SSEB consisted of the Glasgow Air Force Base Commander and personnel from Strategic Air Command deputates. While this record does not establish that the views of the contracting officer, who is stationed at Glasgow Air Force Base and thus is subordinate to the Base Commander, were related to or considered by the SSEB, it does suggest that the evaluation was at least partially based on information external to the proposals, despite the Air Force assertions to the contrary.

Although we do not accept the Air Force position with respect to how the evaluation of past performance or prior experience was accomplished, we are unable to conclude that the evaluation process was substantially prejudicial to you or that the elimination of your proposal was the result of bad faith on the part of the contracting officer or other Air Force personnel. We note that past performance counted for a relatively minor percentage of the total evaluation points awarded, and it appears that your proposal was not in the competitive range because of relatively low scores received in other areas of the evaluation. In this respect, the Air Force states that "AVCO's proposal lacked the degree of excellence to qualify as one of the companies within the competitive range for this procurement," and as noted above, the SSEB believed your proposal was weak in the important areas of management and organization. The record provides no basis for our taking exception to that statement. Accordingly, we must conclude that rejection of your proposal and the subsequent award to Tumpane were not illegal or improper.

In your letter of July 10, 1972, you question the award to Tumpane of a contract that deviated from the Government's staffing plan included as Appendix D to the RFP. That plan, which indicated "estimated personnel requirements" of 416, was "established as the 'level of effort' required for the performance of the proposed contract" by paragraph 3a(b) of section D of the RFP. The Air Force reports that

initial proposals were to be prepared on that basis, but that it was anticipated that the staffing levels were subject to change during contract negotiations. The fact that such a change was negotiated with Tumpane has no bearing on the original evaluation and determination of what proposals were in the competitive range.

You also question why the Air Force made award while your protest was pending, especially in view of your offer to continue providing operation and maintenance services beyond the June 30, 1972, expiration date of your contract for zero fee. ASPR 2-407.8(b)(3) provides that an award will not be made during the pendency of a protest unless the contracting officer determines that the items to be provided are urgently required, or that delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will otherwise be advantageous to the Government. The Air Force has advised us that award had to be made without further delay to meet the planned starting date of the new contract, which called for an increased scope of operations and maintenance work, including the support of mission aircraft, and that a "prolonged contractor transition period would have increased the risk of encountering labor problems * * *." Notice of intent to award was furnished our Office on June 13, 1972, pursuant to ASPR 2-407.8(b)(2), and award was made on that date. Our Office cannot object to the award under these circumstances. 49 Comp. Gen. 369 (1969).

For the foregoing reasons, your protest is hereby denied.

[B-177284]

Bids—Two-Step Procurement—Technical Proposals—Late Receipt

Where a literal application of the late receipt provisions in a Request for Technical Proposals would preclude consideration of late proposals, reliance by the General Services Administration on the decisions of the Comptroller General of the United States holding that acceptance of late proposals or amendments may be considered under step one of a two-step procurement issued pursuant to subpart 1-2.5 of the Federal Procurement Regulations was proper and consistent with the philosophy that the first step of a two-step procurement is intended to be a more flexible process than the more formal second step in order to maximize competition and, furthermore, a limitation on the time for submitting proposals is primarily for the Government's benefit. However, future solicitations should advise offerors that proposals under step one will be treated in strict accordance with the terms of the socilitation, and of the consequences of failing to submit timely proposals. Modifies 51 C.G. 372, 45 C.G. 24, B-160324, dated Feb. 16, 1967 and April 5, 1967.

Bids—Two-Step Procurement—Addenda Acknowledgment

Under a two-step procurement, the failure of offerors to acknowledge receipt of amendments to the first step of the solicitation as provided in the Request for Technical Proposals does not require rejection of their proposals since any defects in the acknowledgment of amendments in the first step of a two-step procurement

may be waived by the Government to maximize competition, which is the fundamental purpose of the two-step procedure. Moreover, unlike procedure under a formally advertised procurement, consideration of an offer that failed to acknowledge an amendment to the first step would not be prejudicial to other offerors in view of the fact there is no public opening of proposals or submission of prices, and as a result no binding contract arises from the acceptance and evaluation of a technical proposal. Furthermore, the purpose of amendments is conformity to the substantive content of an amendment and not conformity with the acknowledgment requirement.

To McNutt, Dudley, Easterwood & Losch, April 19, 1973:

Further reference is made to your telegram of October 18, 1972, and subsequent correspondence, on behalf of the Donovan Construction Company and Incorporated Systems Company, protesting the consideration by the General Services Administration of certain proposals submitted in response to a request for technical proposals (RFTP). The RFTP was issued under two-step formal advertising procedures pursuant to the authority of subpart 1–2.5 of the Federal Procurement Regulations.

Step one of the solicitation, as amended, required that unpriced technical proposals be submitted by 3:00 p.m., October 6, 1972. Seven proposals were timely received. Two proposals, those of CRS/CM of Houston, Texas, and MNMT Associates, Incorporated, of Chicago, Illinois, were received late. The record indicates that at 1:35 p.m., on October 6, a representative of CRS/CM informed the contracting officer by telephone that CRS/CM's proposal had been put on an Eastern Airlines plane at Houston on October 5, but that the proposal had been lost by the airline. CRS/CM then hand-carried another copy of the proposal to Washington, D.C., where it was received by the GSA at 10:17 p.m., October 6.

The proposal of MNMT Associates, Incorporated, was not received by the GSA until October 10. The insured mail receipts from the Post Office indicate that the proposal was not mailed until 2:40 p.m., October 6, only 20 minutes prior to the deadline for submitting proposals.

The RFTP provides in regard to late technical proposals:

(a) Proposals received at the issuing office designated above after the close of business on the date set for receipt thereof (or after the time set for receipt, if a particular time is specified) will not be considered unless: (1) they are received before the invitation for Bids in Step Two is issued; and either (2) they are sent by registered mail, or by certified mail for which an official, dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, and it is determined by the Government that the late receipt was due solely to delay in the mails for which the Offeror was not responsible; or (3) if submitted by mail, it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence if receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against

the chance that it will be required as evidence that a late proposal was timely mailed.

(c) The time of mailing of late proposals submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the Offeror furnishes evidence from the Post Office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the Offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

Applying the above provisions to the facts of the subject case, it is evident that a literal interpretation of the RFTP would necessitate rejection of the proposals of CRS/CM and MNMT Associates, Incorporated, as untimely. The administrative report states on page 3:

* * * neither [late proposal] met the second condition to be eligible despite late receipt. Neither had been sent by registered or certified mail and one had not been mailed until twenty minutes prior to the specified time for submission so that late delivery was obviously not due to delay in the mails.

However, the fundamental purpose of two-step procurement procedures is set forth in subpart 1–2.5 of the Federal Procurement Regulations which provides in pertinent part that:

§ 1–2.501 General.

(a) Two-step formal advertising is a method of procurement designed to promote the maximum competition practicable when available specifications are not sufficiently definite to permit a formally advertised procurement in accordance with Subparts 1–2.2, 1–2.3, and 1–2.4. It is a flexible procedure and is especially useful, in procurement of complex and technical items, to prevent the elimination of potentially qualified producers from the competitive base.

Under this provision, although the second step is conducted in accordance with the strict rules of a formal advertising procedure, the first step is intended to be a more flexible process whereby the goal of maximized competition will be accomplished. "Thus, we have held that under certain circumstances during the first step, the request of and acceptance by the contracting officer of a new or amended technical proposal from a proposer after the expiration of the date for submission of proposals * * * was proper and consistent with the philosophy of the two-step procurement procedures." 51 Comp. Gen. 372, 377 (1971). *See also* 45 Comp. Gen. 24 (1965) and B–160324, April 5 and February 16, 1967. As we stated in the latter case, "The purpose of placing a limitation on the time for submitting proposals is primarily for the Government's benefit."

In your letter of December 11, 1972, you assert that the GSA Administrative Report's reliance on B–165898, February 10, 1969, as authority for this position that the time limitation in the present

RFTP need not be strictly enforced, is misplaced. It is your contention that "the RFTP therein did not contain the strict language found in the instant RFTP which states that '*Proposals received* * * * *after the time set for receipt* * * * *will not be considered.* * * *'" In that case, the contracting agency proposed to reject a proposal under step one as late but we concluded that the late bid regulations need not be followed to the letter on the first step of a two-step procurement. In our opinion, GSA's reliance on our prior decisions as authority for the proposition that the time limitation need not be strictly enforced under step one was reasonable. Therefore, we cannot object to the General Services Administration's consideration of the late proposals of CRS/CM and MNMT Associates.

However, we also believe that step one solicitations should appropriately advise offerors of the consequences of failing to submit timely proposals. While we have consistently sustained agency determinations to consider late proposals under step one proceedings for the reasons stated above, we believe such administrative actions should be consistent with the provisions of the solicitation. Therefore, we are advising the General Services Administration by letter of today, copy enclosed, that late technical proposal clauses used in future step one solicitations should appropriately advise offerors of the rules to be applied with respect to such proposals. Further, we are advising the Administrator that in our view late proposals under step one should be treated in strict accordance with the terms of the solicitations, and that any decisions of our Office to the contrary are hereby modified accordingly.

You also object to the consideration of certain proposals because of the failure of the offerors involved to acknowledge receipt of certain amendments as required by the RFTP. The RFTP provides in this regard that the "Prospective Offerors are required to acknowledge receipt of all amendments to this Request for Technical Proposals, giving the number and date of each." The record indicates that the protesting firm and Clapp & Holmes fully complied with this requirement. Two other firms (L Group and MNMT) acknowledged receipt of the amendments, but after the time for submission of proposals. Inter Built Systems Company's proposal included the statement "Amendments to Items 1 thru 8 respectively, prebid dated and acknowledged." Owens-Corning Corporation advised, after submission of its proposal that "Eight Addendum * * * have been received and all changes have been made as directed." Total Integrated Systems, Incorporated, after the deadline for submission of technical proposals, advised that "We acknowledge receipt of all amendments through Amendment 8 issued on the above project." CRS/CM's late proposal acknowledged that "The Proposal was prepared in response to * * *

Volumes 1 and 2 and subsequent amendments." Finally, Consultant Networks, Incorporated, stated in a letter of October 25 that "We acknowledge receipt of all amendments."

It is our view that any defects in the acknowledgment of amendments in the first step of a two-step procurement may be waived by the Government in an attempt to achieve the maximum competition which is the fundamental purpose of the two-step advertising procedure. The reasoning which requires the rejection of a bid for failure to acknowledge an amendment in a formally advertised procurement is not applicable here. To consider a bid in that situation "is prejudicial to other bidders and leaves an option to the nonacknowledging bidder to decide after bid opening whether to make himself eligible for award by producing evidence to show that he considered the unacknowledged amendment or to avoid the award by remaining silent." B–165150, September 16, 1968. However, in the first step of two-step formal advertising, the legal implications are entirely different. There is no public opening of bids, prices are not submitted, and no binding contract arises from the acceptance and evaluation of a technical proposal.

It should be noted that the RFTP does not state that failure to conform with this requirement will render the technical proposal ineligible for consideration. What is desired, as the GSA report states, is "conformity to the substantive content of the amendments, rather than conformity with a requirement to acknowledge their receipt * * * And evaluation of the technical proposals will disclose conformity or nonconformity to the performance requirements expressed in the amendments." Since we fail to find any prejudice which would result from consideration of the proposals of the offerors who failed to acknowledge amendments properly, we have no objection to consideration of those proposals.

For the reasons set forth above, we must sustain the administrative conclusion to evaluate all of the proposals submitted to determine their acceptability for participation in the second stage of the two-step formally advertised procurement.

[B–177909]

Subsistence—Per Diem—Rates—Lodging Costs—Application of "Lodgings-Plus" System

In the application of the "lodgings-plus" provision of section 6.3c of the Standardized Government Travel Regulations to determine the average daily lodging costs for the purpose of establishing per diem rates for civilian employees of the Department of Defense assigned to prolonged temporary duty at locations where hotel and motel accommodations are limited and employees rent living quarters at or near the temporary duty station, there is for inclusion the expenses that

are ordinarily included in the price of a hotel or motel room, such as rent of an apartment, house or trailer, furnished or unfurnished; rental of furniture, including stoves, refrigerators, television sets, and vacuum cleaners; utilities, maid and cleaning charges; telephone and other user fees, but not the expenses incurred for tips, housekeeping items, and telephone installation. Furthermore, section 6.3c permits the establishment of a specific per diem rate when the use of the lodgings-plus system is not appropriate.

To the Secretary of the Navy, April 19, 1973:

This refers to letter of January 8, 1973, from Mr. James E. Johnson, Assistant Secretary of the Navy, Manpower and Reserve Affairs, forwarded here by the Per Diem, Travel and Transportation Allowance Committee on January 18, 1973, PDTATAC Control No. 73–1, for an advance decision as to the propriety of including the cost of various items in determining the average daily lodging costs in prescribing the per diem rate of a civilian employee of the Department of Defense on temporary duty.

It is stated that many civilian employees of the Department of Defense, due to the nature of the duty to be performed, are frequently assigned to prolonged temporary duty at locations where accommodations at hotels or motels are extremely limited. This requires that employees secure living quarters by renting furnished and unfurnished apartments, houses or trailers at or near the temporary duty station. A decision is requested whether the following items may properly be included as lodging costs from which an average cost of lodging may be derived for the purpose of determining the payable per diem rate:

a. rent of an apartment, house or trailer, furnished or unfurnished;
b. rental charges for furniture such as stoves, refrigerators, chairs, tables, beds, sofas, televisions, and vacuum cleaners;
c. purchase costs of housekeeping necessities such as bedding, towels, wash cloths, cleaning supplies, dishwares, utensils, pots and pans, curtains, and throw rugs;
d. payment of utilities including electricity, natural gas, water, fuel oil, and sewer charges;
e. payment of special user fees such as cable TV charges and plug in charges for automobile head bolt heaters;
f. payment of maid fees and cleaning charges;
g. payment of telephone installations and user fees;
h. tips paid to maids and personnel providing services.

The question submitted concerns the application of the "lodgings-plus" provision of subsection 6.3c of the Standardized Government Travel Regulations (SGTR) which provides as follows:

c. *When lodgings are required.* For travel in the continental United States when lodging away from the official station is required agencies shall fix per diem for employees partly on the basis of the average amount the traveler pays for lodgings. To such amount, i.e., the average of amounts paid for lodging while traveling on official business during the period covered by the voucher, shall be added a suitable allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, if the result is not in excess of the maximum per diem, will be the per diem rate to be applied to the traveler's reimbursement in accordance with the applicable provisions of this section. If such result is more than the maximum per diem allowable such maximum will be the per diem allowed. No minimum allowance will be authorized for lodging

since those allowances are based on actual lodging expenses. * * * An agency may determine that the lodgings-plus system as prescribed herein is not appropriate in given circumstances as when quarters or meals, or both, are provided at no cost or at a nominal cost by the Government or when for some other reason the subsistence costs which will be incurred by the employee may be accurately estimated in advance. In such cases a specific per diem rate may be established and reductions made in accordance with this section provided the exception from the lodgings-plus method is authorized in writing by an appropriate official of the agency involved.

Section 5701 of Title 5 of the U.S. Code defines "per diem allowance" as "a daily flat rate payment instead of actual expenses for subsistence * * *" and subsistence is defined as "lodging, meals, and other necessary expenses for the personal sustenance and comfort of the traveler."

The term lodging as used in the statute and regulations refers to a temporary place of abode used by an employee at a temporary duty station away from his headquarters, and the cost of lodging in the usual situation relates to the cost of a hotel or motel room plus sales tax, if any. It does not include tips. Those items of expense listed in the Assistant Secretary's letter which are for accommodations or services ordinarily included in the price of a hotel or motel room may be used in the computation of lodging costs. We do not, however, consider the cost of installation of a telephone or the costs incident to purchase of housekeeping items as proper for inclusion. In summary, items a, b, d, f, and telephone use fees in g, are viewed as proper for consideration as a lodging cost. With regard to item e, if such facilities in the area concerned are ordinarily included in the price of a room, the costs thereof may likewise be considered as a lodging cost. Item h, tips paid to maids and personnel providing services, is not a cost ordinarily included in the cost of hotel or motel room and accordingly may not be viewed as a lodging cost for the purposes of the regulation.

We believe, in view of the circumstances explained in the letter, namely, prolonged periods of temporary duty where employees secure accommodations in apartments, houses or trailers, all of which presumably have housekeeping facilities, that administrative consideration should be given to that part of section 6.3c of SGTR which provides that a specific per diem rate may be established when an agency determines that the lodgings-plus system is not appropriate in given circumstances.

[B–176901]

Contracts—Requirements—Guarantees—"No Guarantee" Effect

A contract awarded under a Federal Supply Service invitation for bids which solicited in the Scope of Contract provision the "normal supply requirements" for electronic data processing tapes, and which included in the Estimated Sales

provision the clause "no guarantee is given that any quantities will be purchased" is not an invalid contract or a contract that is unenforceable for lack of mutuality, for under the rule of contract construction, the intent and meaning of a contract is not determined from an isolated section or provision but from the entire contract, and the "no guarantee" clause appearing in the Estimated Sales provision rather than the Scope of Contract provision containing the requirments language is indicative the clause refers to the schedule of previous purchases, or to estimates reflected in the Estimated Sales provision, and not to the purchase obligations of the Government under the contract.

Contracts—Requirements—Estimated Amount Basis—Alternative Bidding Basis

The Federal Supply System in the procurement of the Government's requirements for electronic data processing tapes finding it unfeasible to contact the many using agencies to obtain estimates of future requirements in order to provide a basis for bidding as required by section 1-3.409(b)(1) of the Federal Procurement Regulations (FPR), properly listed past sales in the solicitation as a reasonable alternative, and the fact that the prior purchase figures if updated would have reflected a significant increase is no basis to conclude bidders were misled or that the invitation for bids was defective, nor is there a basis to object to the solicitation for failing to include a maximum limit on the contractor's total obligation since FPR 1-3.409(b), which is stated in permissive language, imposes no mandatory direction to specify maximum and minimum quantity limitations when not feasible to do so.

To Sellers, Conner & Cuneo, April 20, 1973:

We refer to your letter dated September 1, 1972, and subsequent correspondence, written on behalf of Wabash Tape Corporation (WTC), in which you protest the award of any contract under solicitation No. FPNHM-R-28954-A-9-1-72, issued by the Federal Supply Service, General Services Administration. The solicitation was issued on August 1, 1972, and requested bids for furnishing electronic data processing tape (herein called "tape"), to cover the normal supply requirements of using agencies for an annual period commencing March 1, 1973, and terminating February 28, 1974. Pursuant to a determination of urgency made by GSA on February 22, 1973, a contract was awarded despite the pending protest. WTC did not submit a bid on the subject solicitation.

In your correspondence, you assert a number of bases for the protest, which include the following:

I. * * * any contract awarded under subject IFB would be unenforceable due to lack of mutuality.
II. * * * GSA estimates contained in subject IFB were misrepresented by GSA.
III. * * * WTC's status as a prospective bidder on subject IFB has been prejudiced by Government actions on WTC's current GSA contract and all bidders have been prejudiced by the defective IFB.

In consideration of this protest, the following two provisions of the IFB, under Special Provisions and Schedule, respectively, are particularly relevant:

I. SCOPE OF CONTRACT:

(a) This invitation provides for the *normal supply requirements of all Federal agencies* (except the Senate, the House of Representatives, the Architect of the

Capitol and any activities under his direction and the U.S. Postal Service), including wholly-owned Government corporations, and the Government of the District of Columbia, for delivery within the 49 States (excludes Alaska) and Washington, DC of Size II tape; and for delivery within the 48 contiguous States (excludes Alaska and Hawaii) and Washington, DC of Sizes I, III, IV and V tapes, and resultant contracts will be used as primary sources for the articles or services listed herein. Articles or *services will be ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures.* As it is impossible to determine the precise quantities of different kinds of articles and services described in the invitation that will be needed during the contract term, *each contractor whose offer is accepted will be obligated to deliver all articles and services of the kinds contracted for that may be ordered* during the contract term, EXCEPT: [Italic supplied.]

* * * * * * *

ESTIMATED SALES.—The figures in the first column show previous purchases for the period March 1, 1971 through February 28, 1972, as reported by the previous contractors, or estimates of anticipated volume where the item is new or its coverage of primary users has been extended. *No guarantee is given that any quantities will be purchased.* The absence of such a figure indicates that neither reports of previous purchases nor estimates of requirements are available.

Although GSA has discussed in its report several types of contractual arrangements to demonstrate that the procurement arrangement called for in the IFB is valid regardless of its characterization as to type, we believe that there is no doubt that the arrangement contemplated was that of a requirements contract. It is beyond question that "requirements" type contracts are valid contracts. See *Brawley* v. *United States*, 96 U.S. 168 (1877); 37 Comp. Gen. 688 (1958). Such contracts are valid under the theory that where one party agrees to let another party fill its actual requirements during a certain period, and the second party agrees to fill such requirements, these promises constitute a valid consideration. *See* B–158239, March 11, 1966; 1A *Corbin on Contracts* 156; *Williston on Contracts*, Third Edition, Section 104A. It is your contention, however, that any contract awarded under the IFB would be unenforceable for lack of mutuality because the IFB contains the clause, "*No Guarantee is given that any quantities will be purchased.*"

You argue, citing *Willard, Sutherland and Company* v. *United States*, 262 U.S. 489 (1923), that inclusion of the "no guarantee" clause negates any obligation by the Government to purchase any definite amounts of tape, thus rendering the contract unenforceable. You state that use of the "no guarantee" language creates an anomaly in that, "on the one hand, it would appear that a valid and enforceable requirements type contract exists; and on the other hand, this intent is negated by express language which states that nothing may be purchased." In support of this proposition, you also rely on *Updike, Trustee* v. *United States*, 69 Ct. Cl. 394 (1930). The contract involved in that case provided that the contractor shall furnish coal "as may be ordered" and "purchase of a definite quantity is not guaranteed." You point

out that in *Updike*, the court determined that a contract which included the words "purchase of a definite quantity is not guaranteed" was unenforceable for lack of mutuality. You point out that with reference to the "no guarantee" language the court stated:

> If this statement means what is says, we are unable to see how the Government was bound to take any definite quantity, since it was distinctly understood that the purchase thereof was not guaranteed.

Id. at 405. The court reasoned that some meaning had to be given to the "no guarantee" clause, and that it had no place in the contract unless it was there solely for "the purpose of making it clear that the Government did not agree to take any definite amount." Therefore, the court held that the contract was unenforceable.

You maintain that the same reasoning applies with respect to the language in the subject IFB. You state that "The 'no guarantee' language must be given some meaning and the only purpose for which it was included in the contract was to make it clear that the Government does not agree, in the language of the *Updike* case, 'to take any definite amount.'" You therefore urge that any contract awarded under the terms of the instant IFB would be unenforceable for lack of mutuality.

While, of course, we do not question the validity of the reasoning applied by the court in reaching its decision in the *Updike* case, we do not believe that reasoning is applicable to the situation here. It is a rule of contract construction that the intent and meaning of a contract are not to be determined by the consideration of an isolated section or provision thereof, but that the contract is to be considered in its entirety and each provision is to be construed in its relation to other provisions and in light of the general purpose intended to be accomplished by the contracting parties. 46 Comp. Gen. 418 (1966).

Under the "Scope of Contract" provision of the subject IFB, it is stated that the "invitation provides for the normal supply requirements of all Federal agencies" (with certain exceptions not here pertinent) and the "resultant contracts will be used as primary sources" for the tapes listed therein. In addition, it is provided that the tapes "will be ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures." In this connection, section 101-26.401 of the Federal Property Management Regulations (FPMR) provides that "All executive agencies shall procure needed articles and services from Federal Supply Schedule contracts in accordance with the provisions of the appropriate Federal Supply Schedule" and FPMR 101-26.401-1 provides that "Federal Supply Schedules are mandatory to the extent specified in each schedule." The applicable FSS, FSC Group 74, Part XI, Electronic

Data Processing Tape, contains language identical to that contained in the "Scope of Contract" provision of the subject IFB. Therefore, as the court said in *Harvey Ward Locke* v. *United States*, 151 Ct. Cl. 262, 266 (1960), another leading case on requirement type contracts, mutuality is not lacking where there is the "reasonable expectation by both parties that there will be requirements on which the bargain is grounded." Also, see *United States* v. *Purcell Envelope Co.*, 249 U.S. 313 (1919), where it was held that the contractor's expectation of business was substantial and in effect this was the contract consideration; and the *Locke* case, *supra*, wherein the court noted that the contractor's chance of obtaining awards of some of the Government's requirements "by being in the schedule * * * had value in a business sense."

When the "no guarantee" clause is viewed in light of the foregoing and in the context in which it is used in the subject IFB, we do not believe it may reasonably be construed as negating an otherwise enforceable requirements contract. In this connection, it is significant that it does not appear in the "Scope of Contract" provisions, but in the "Estimated Sales" provision. Viewed in the context of that provision, we believe it is clear that the "quantities" to which "no guarantee' refers are those in the preceding sentence, that is, the figures in the first column of the schedule showing previous purchases as reported by contractors, and estimates where those figures are not available.

You next contend that the subject IFB contained misrepresentations of estimates of tapes. You state that GSA did not make a bona fide attempt to determine what its actual needs would be under the subject procurement, even though it knew that the estimates on the prior procurement were unrealistic and misleading in light of actual purchasing history.

In this regard, you point out that WTC informed GSA more than two months prior to the release of the subject IFB that extraordinary purchases were being made under its present contract. You state that despite GSA's knowledge of the actual needs of using agencies, the estimates contained in the IFB were not revised and remained essentially the same as those used in connection with the previous year's procurement. You therefore contend that GSA failed to use the best available information as to its needs and that the estimates used were inaccurate. You maintain that these actions are contrary to decisions of this Office such as B–173356, September 27, 1971, wherein we stated that "* * * a showing of good faith required that a determination of estimated requirements be based on the best information available at the time the estimates are formulated."

It is GSA's position that the invitation does not purport to set forth any representation, or even any definitive estimate of what

future needs may be. Rather, GSA asserts that the invitation merely set forth informational data on past experience. It is reported that this method is used because it is not administratively feasible to contact all the using agencies to obtain estimates on forecasts of quantities of tape items to be purchased. It is further reported that the data of past sales contained in the IFB are compiled by contracting officials from monthly reports submitted by a contractor who held the immediate prior contract for an item in question, and merely reflects an annual record of prior sales as reported by that contractor. Thus, GSA declares that the figures which are characterized by you as "estimates" are, in fact, actual sales for a stated period and not estimates of future needs.

Our Office has held, with respect to requirement contracts, that where the quantities for the various items to be procured are not known, the solicitation must provide some basis for bidding, such as providing estimated quantities for the various items. *See* B–161875, October 1, 1967. *See also* FPR 1–3.409(b)(1). It is our view that in procurements such as this, where it is not administratively feasible to contact the many using agencies to obtain estimates of future requirements, the listing in the solicitation of past sales is a reasonable alternative. While the figures presented in the first column of the subject IFB schedule were represented as being purchases for the period March 1, 1971, through February 28, 1972, they were obviously intended to serve as a guide to prospective bidders in determining whether to bid and on what basis. Therefore, we believe they should be as accurate and current as possible. In this connection, it is GSA's position that while it was aware of the increased orders being placed with WTC from March through June 1972, at the time the IFB was issued on August 1, 1972, the contractor was approaching a delinquency situation and there was a large volume of back orders. Therefore it is not clear that the purchase figures for March through June would have reflected a significant increase. Although we believe it would have been better administrative procedure to have updated the "purchases" figures to include purchases reported for March through June 1972, we perceive no basis for concluding that the bidders were misled or that the IFB was thereby defective.

You also claim that because of "excessive ordering" by using agencies under WTC's current contract, WTC suffered a severe economic blow which prohibited it from considering additional business. Therefore, you contend that WTC, through no fault of its own, was precluded by the improper acts of the various agencies from competing for this contract.

The question of excessive ordering under WTC's contract was settled by a supplemental agreement (Amendment No. 3) entered into on

September 14, 1972, between WTC and GSA. Under this agreement, WTC waived "any and all claims it may have against the Government arising under the contract as of and including the date of this agreement." In our opinion this agreement resolves WTC's claim of excessive ordering.

You further maintain that the IFB violated that portion of FPR 1-3.409(b), which provides in relevant part that "the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and in such event, shall also contain appropriate provision limiting the Government's obligation to order." You submit that GSA had no justification for refusing to include a maximum limit of the contractor's total obligation under the contract. You therefore assert that the IFB should have contained such a limitation and was defective since it failed to do so.

GSA reports that since the invitation in question provided for the normal requirements of using agencies and GSA had no means of controlling the issuance of orders by those agencies, it was not feasible to set forth in the invitation a maximum quantity limitation for a stated period (monthly or annual).

Our Office held in B-170814, January 4, 1971, that the relevant portion of FPR 1-3.409(b), above, is stated in permissive language which does not impose a mandatory direction to the procurement activity to specify maximum and minimum quantity limitations when the imposition of such limitation is not feasible. In the circumstances of this case, we find no basis to object to the solicitation for failing to include a maximum limit of the contractor's total obligation. However, the subject IFB does include maximum order limitation and consolidation of requirements provisions.

You also contend that known definite quantity requirements for the tape exist and should be purchased under separate definite quantity contracts rather than under the subject arrangement. However, GSA denies the contention and you have presented no evidence to support it.

In view of the foregoing, we find no legal basis for disturbing the award. Accordingly, your protest is denied.

[B-176985]

Contracts—Negotiation—Evaluation Factors—Point Rating—Advantage to Government

The award of a cost-plus-incentive fee contract for Radio Receiving Systems to the low offeror whose proposal numerically scored on the seven technical criteria points established and evaluated as to Past Performance/Management and cost considerations offered the greatest value to the Government was a proper exercise of administrative discretion in view of the fact a Source Selection Review Board, pursuant to Army Procurement Procedure 1-403.52, concluded the tech-

nical proposal of the complainant was not technically significantly superior, and since both offerors were rated acceptable as to Past Performance/Management and cost considerations. Furthermore, the technical differences between the two proposals did not warrant the incurrence of additional costs where the realism of estimated costs was administratively assessed and price was considered an evaluation factor as evidenced in the handling of the use of Government property.

Records—Access to Government Records by Public—Administrative Documents Submitted to the General Accounting Office

The administrative documents considered in a protest to a contract award that consisted of internal Government communications containing staff advice and evaluations of contractors' proposals by Government personnel will not be released by the United States General Accounting Office since the documents are not subject to release in accordance with the exemptions in paragraph 10e of Army Regulations 345–20.

To Fried, Frank, Harris, Shriver & Kampelman, April 20, 1973:

We refer to your letter dated December 18, 1972, and prior correspondence, concerning your protest on behalf of Sanders Associates, Incorporated, against the award of a cost-plus-incentive fee (CPIF) contract to AEL Service Corporation under request for proposals No. DAABO7–72–R–0280, issued by the Army Electronics Command, Fort Monmouth, New Jersey.

The RFP was issued on February 29, 1972, for the design, fabrication, installation, system integration and testing of three each Receiving Systems, Radio, AN/USQ–( ), Engineering Development Models, Engineer Test/Service Test (ET/ST) type, plus repair parts, technical data and ancillary items, including an option for a training program.

Section D of the RFP contained the following statement of the criteria for proposal evaluation and their relative importance:

D.1 *BASIS FOR AWARD*

Any award to be made will be based on the best over-all proposal with appropriate consideration given to Technical Proposal, Past Performance/Management, and Cost Consideration in that order of importance.

Of the 3 factors set forth above, Technical Proposal, by far, is the most important factor and bears greater weight than the other 2 factors combined.

Of the last 2 factors, Past Performance/Management bears the greater weight.

To receive consideration for award, a rating of no less than "acceptable" must be achieved in each of the 3 factors.

In addition to a detailed listing and description of the factors and subfactors of the technical proposal criteria, and a description of the past performance/management criteria, the RFP provided the following, with respect to cost consideration:

c. *Cost Consideration:*

(1) *Cost Proposal:* In evaluating the quoter's proposed cost, the Government's concern is to determine the prospective contractor's understanding of the project and their ability to organize and perform the proposed contract.

(2) *Cost Realism:* As part of proposal evaluation and in order to minimize potential or built-in cost growth, the Government intends to evaluate the realism of quoter's proposed costs in terms of the quoter's proposed approach. Proposals may be penalized to the degree that the proposed costs are unrealistically low.

To assist the Government in evaluating this area, quoters are required to furnish the following information—a brief but comprehensive statement concerning the estimating procedures utilized in preparing this offer to specifically include a description of the organization for estimating.

(3) *Rent-Free Use of Government Production and Research Property, ASPR 13-502 and 13-503:* (ASPR 3-501(b) D (vi)). Any competitive advantage which may arise from the rent-free use of Government Production and Research Property shall be eliminated by adding to each offer/quotation for which such use is requested an evaluation factor equal to the rent allocable to this contract which otherwise would have been charged for such use as computed in accordance with ASPR 13-404.

The solicitation established April 14, 1972, as the closing date for receipt of offerors' proposals. Five timely proposals were received by the procuring activity, including submissions from Sanders and AEL. One of the proposals was found not to fall within the competitive range. On April 24, 1972, the four remaining proposals were submitted for evaluation by a technical team comprised of approximately 30 experienced engineers. Cost proposals were withheld from the technical team until after May 30, 1972. Technical clarifications were requested from the offerors on May 15 and 16, 1972, and technical addenda were received from all four proposers on May 19, 1972. Each proposal was numerically scored under the technical criteria listed in section D of the RFP. In regard to the seven evaluation factors under the technical proposal portion, Sanders and AEL achieved identical scores under "Material." However, Sanders was considered superior to AEL as to each of the remaining six factors, with the difference in score between Sanders and AEL ranging from approximately 1 to 8 points. When the scores of the seven factors and subfactors were weighed and averaged, Sanders' score under the technical area exceeded AEL's by approximately 20 points, where the maximum attainable point count was 320. The technical evaluation team concluded that Sanders had submitted the best proposal from a technical standpoint, also recognizing that AEL had submitted a good proposal. The evaluation team determined that the other two proposals were unacceptable considering the technical scores they had attained. A recommendation was made on May 26, 1972, by the technical evaluation team that an award be made to either Sanders or AEL. The contracting officer, however, made a determination that all four proposals were either acceptable or susceptible of being made acceptable. Pursuant to this determination, technical discussions and cost negotiations were conducted with each of the four offerors during the period of June 5, 1972, through June 12, 1972. These discussions did not result in any revisions to the technical scoring.

The "Past Performance/Management" and "Cost Consideration" areas were not numerically scored, although respectively they were approximately one-fourth and one-fifth as important as the "Technical Area." AEL and Sanders were deemed acceptable in the "Past Performance/Management" area. The cost proposals of both AEL and Sanders are reported to be realistic, reflecting an adequate understand-

ing of the Government requirements, and both were therefore considered satisfactory in this area. The procuring activity concluded that any cost realism variance was not sufficient to permit discrimination between the two offerors on this point.

All four remaining offerors were advised on June 14, 1972, that their best and final offers were to be received by June 16, 1972. The best and final offers submitted on that date did not change the technical scoring.

Upon consideration of the evaluation results, the contracting officer selected the proposal of Sanders as representing the greatest value to the Government since it achieved the highest technical merit rating, had a satisfactory record of past performance, and was judged to be satisfactory in the cost consideration evaluation.

The contracting officer's recommendation for an award to Sanders was submitted to the Fort Monmouth Procurement Board of Awards for review on June 21, 1972. On June 26, 1972, the Board of Awards unanimously disapproved the proposed award because it was felt that the differences revealed by the technical evaluation were not significant enough to warrant awarding the contract for a higher cost figure when considered with the satisfactory ratings achieved by both AEL and Sanders in the past performance/management and cost consideration evaluation categories. Subsequently, a Department of Defense funding problem developed resulting in the procurement being placed in a "hold" status until August 25, 1972.

A Source Selection Review Board appointed by the Director, Procurement and Production, USAECOM, performed a review of the selection on September 6 and 7, 1972, and concluded that the Sanders' technical proposal was not significantly superior. In view thereof, and since both offerors were rated acceptable in the past performance/management and cost areas, it was concluded that award should be made to AEL because its target price was $2,384,836 less than Sanders. AEL received an award on September 12, 1972.

Basically, it is your contention that award to AEL was contrary to the applicable RFP evaluation criteria and Armed Services Procurement Regulation. You point out that under the stated evaluation formulae, technical, past performance/management, and cost should have received evaluated weights of 51, 25, and 24 percent, respectively, and that upon application of such weights Sanders' proposal would clearly receive the highest overall score. With regard to the technical proposals, you state that Sanders received a "superior" rating and AEL was rated as "marginally acceptable," for a better than 8 percent advantage.

You also say that it can be inferred from portions of the administrative report furnished you that Sanders received or should have received a higher rating for the second most important factor, past performance/management. In this connection, you express doubt that

AEL could match Sanders' record with respect to the small percentage of overruns on a large dollar volume of contracts, and state further that there is no other company with Sanders' experience and expertise in developing the equipment involved here.

With respect to cost considerations, the least important of the evaluation criteria, it is your position that the record indicates that Sanders outscored AEL under a proper application of that factor as spelled out in the RFP. In this connection, you assert that cost considerations were not concerned with the quantum of costs, but rather with the realism of the proposed costs insofar as indicating the offeror's understanding of the project and its ability to prevent cost overruns. You point out that Sanders' experience and record of performance in this field leave no room for doubt as to its higher rating in understanding the project and as to its cost realism. Furthermore, you refer to portions of the administrative report as indicating the contracting officer's conclusion that Sanders' proposed costs were more realistic than AEL's. You also quote the following sentence from the ECOM cost analysts' report on the Sanders' cost proposal:

> The cost proposal of Sanders Associates is realistic considering material is adequate and properly priced, the man hours proposed are very close to all Government estimates, the man hours are properly priced, the overhead rates are proper and the fee is reasonable.

Based upon the foregoing, you contend that there is no way that AEL could have received an overall rating as high as Sanders and, therefore, the award was improperly made to AEL. You contend that award was erroneously based upon the fact that AEL's proposed costs were more than $2 million lower than Sanders' proposed costs, contrary to the express terms of the RFP, ASPR, sound procurement policy and decisions of our Office. In other words, it is your contention that while the RFP provided that costs would be evaluated on the basis of realism in relation to offeror understanding of the project and ability to meet the target costs, they were in fact evaluated on the basis of which offeror proposed the least "number of dollars." You also point out that whereas Sanders proposed a target fee of 8 percent, a share ratio for underruns of 80/20, with a maximum fee of 15 percent, and a share ratio for overruns of 80/20 up to a zero fee, 95/5 up to a negative fee of $80,000, AEL's contract contains a target fee of 8.5 percent, a share ratio for underruns of 50/50, a share ratio for overruns of 85/15, and no negative fee. Furthermore, you argue that the cost evaluation criteria were in accord with ASPR provisions which recognize that in cost-reimbursement type contracts estimated costs and proposed fees should not be considered controlling (ASPR 3–805.2) and that in research and development contracts award should be made to the organization having the highest competence (ASPR 4–106). In this connection, you have cited several decisions of our Office in which we have recognized and approved such principles.

Finally, you contend that the contracting officer abdicated his responsibility to exercise his independent judgment in selecting the contractor, contrary to ASPR 3–801.2, and accepted the decision of the Source Selection Advisory Council, even though the technical and cost evaluation committees who actually evaluated the proposals recommended award to Sanders.

With regard to the latter contention, the applicable regulation sets forth the contracting officer's responsibility with respect to entering into contracts and as to price negotiations. While the regulation states that determination of the suitability of the contract price rests with the contracting officer, it recognizes that he may seek the assistance of various specialists or "higher authority" in resolving matters related to effective contracting. Delegation of authority No. 3–71, signed by the Commanding General, USAECOM, on January 5, 1972, limits the authority of contracting officers to sign contracts without approval of higher authority to those not in excess of $100,000. Army Procurement Procedure (APP) 1–450.1 requires that where limitations are imposed by the cognizant head of procuring activity, the contracting officer shall ensure that proposed awards shall be reviewed by Board of Awards in accordance with APP 1–403.52. Furthermore, section 1–403.52(a) of the Army Procurement Procedure requires Board of Awards review of all contracts of $10,000 or more, with certain exceptions not here relevant, and requires that the Board advise the contracting officer of its findings and recommendations based upon its review of the inputs from members of the contracting officer's team. From the record in this case, it is clear that the contracting officer followed the required procedure and agreed with the recommendations of the review authorities.

In connection with its review of the evaluation, the Source Selection Review Board reports in a memorandum dated September 8, 1972, that in view of the overwhelming importance of the technical proposal, it was necessary to go into the evaluation in considerable depth. The Board concluded that the grading of the various subfactors of the technical proposals was generally consistent with the back-up information and score applied. However, the Board felt that there were insufficient discriminators in connection with the technical approach. Therefore, the evaluations conducted were reviewed and members of the evaluation team were interviewed.

A memorandum prepared by a member of the Board in connection with your protest states it was evident to the Board that the CEFLY LANCER program is not dependent on a major technological breakthrough. Instead, it is stated that the program requires systems integration of several standard subsystems which were either Government furnished or contractor procured requiring limited development for installation on the aircraft. It is pointed out that the technical prob-

lems for the contractor are to integrate the individual subsystems already developed into a unified system; develop necessary interface subsystems; design the installation on the aircraft, including the particular problems of antenna installation; and calibrate and check-out the complete system. Although there is a technical interface with the ground control contractor, there are definitive specifications for this interface, thereby alleviating any undue risk. Further, it is indicated that fundamental to the technical success of the program are the Position Location, Data Link, and Intercept capability of the system. It is reported that analysis of the composite scores revealed that the most significant technical aspects such as Position Location and Data Link were masked by so many other factors that the Board could not depend on the raw numerical total scores as truly indicative of the technical merit of the proposals. It is reported that the Board concluded that the point scores for technical merit rating could only be used as a guide. Therefore, the Board felt it necessary to go deeper into the technical evaluation since the absolute values or differences in technical merit scores could not be used as the discriminating factor to distinguish between the technical proposals.

With regard to Position Location, both proposals were reported to be good. Sanders received a higher point score (23.4 compared to 21.7 out of 27.5 points) because its proposal was somewhat more specific. However, the Board did not consider the difference in score to be significant in this area.

With regard to the Data Link, the engineering specialist, notwithstanding the difference in point score (13.4 for Sanders and 11.9 for AEL out of 15.3), stated that there was no standout choice, both being completely acceptable.

With regard to general design, it is reported that engineering testimony before the Board disclosed that there was no substantial difference between AEL and Sanders, although Sanders received a score of 3.0 compared to 2.9 for AEL out of a 4.0 point maximum. An engineer concerned with evaluation of mechanical aspects of general design reported that neither Sanders nor AEL stood out against the other in this area. Thus, the Board concluded that the point spread did not support any substantial technical difference betwen the two proposals.

The Board then examined the area of past performance/management, and concluded that both Sanders and AEL were acceptable in this area. The Board also considered the area of cost consideration, first in connection with the cost proposal, and second, in connection with cost realism. When rated against the independent Government cost estimate for each proposer it was determined that Sanders was about 10 percent over the Government cost estimate and AEL was about 10 percent under the estimate. The Board examined the possibility of overruns, from the standpoint of potential Government ex-

posure, and determined that even with a 28 percent overrun on the part of AEL, that cost to the Government would still be less than Sanders preforming without an overrun. The Board concluded that both Sanders and AEL were acceptable in the area of cost consideration. In conclusion, the Source Selection Review Board was not convinced that the Sanders proposal was superior to the extent that it warranted the expenditure of the extra funds indicated by the Sanders proposal over the AEL proposal. The Board therefore concluded that the award should be made to AEL as the low offeror with a completely acceptable technical proposal.

In 50 Comp. Gen. 246 (1970), our Office considered a case involving a negotiated procurement for research and development services to be performed on a cost-plus-a-fixed fee basis. There an award was made to the offeror (TI) which had proposed the lower estimated cost, even though a competitor (SRL) received a higher technical merit rating. The contracting activity specifically determined that the differences in the technical proposals, which were regarded as insignificant, did not justify paying a price differential. In indicating that the determinative element in the decision was the considered judgment of the procuring agency concerning the significance of the differences in the technical proposals, we stated:

> In response to SRL's allegation that the lower cost estimate submitted in the technically inferior TI proposal was considered as controlling, we are advised that the technical differences in the two proposals did not warrant the incurrence of additional costs that would have been occasioned by accepting SRL's proposal. In fact, the technical evaluation team considered the difference in point scores to be insignificant. * * *.
>
> * * * We view the award to TI as evidencing a determination that the cost premium in making an award to SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3-805.2 and 4-106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors. * * * 50 Comp. Gen. at 248-49.

We believe the situation in the instant case is analogous to that in the above quoted decision. The "Past Performance/Management" proposals of AEL and Sanders were regarded as acceptable. The "Cost Consideration" proposals of each was also regarded as acceptable. Further, the procuring agency found that with regard to the "Technical" area, no significant superiority distinguished the two proposals.

You contend, however, that the prospect of a $2 million cost saving is illusory, since such "savings" would be realized only if AEL were able to perform at its *estimated* costs. Since a cost-reimbursement contract was to be used, we agree that the cost of performance could not be known until after performance was completed. It appears from the record, however, that the Army did not merely accept the proposed

estimated costs but prepared an independent cost estimate for evaluation purposes. The Army therefore assessed the realism of all costs proposed by both Sanders and AEL. In these circumstances, we believe that it is proper to give weight to a comparison of proposed costs and independently estimated costs. 50 Comp. Gen. 390, 410 (1970).

In support of your contention that the award was improperly determined on the basis of the quantum of dollars, which was not an evaluation criterion, you cite 52 Comp. Gen. 161 (1972). The case involved two fixed-price-incentive contracts in which "price" was not made a specific factor in the section of the RFP listing the specific evaluation factors and in which the relative importance of price was not spelled out in the solicitations, but was incorporated as an evaluation factor through Standard Form 33A, paragraph 10(a). We stated:

* * * Nothing in the ASPR provision requires the elimination of price as a listed evaluation factor. What is required is the listing of all factors other than price which are to be considered in the evaluation of proposals. While the RFP's indicated that price would be considered, since price was not listed in section "D" of the RFP's, offerors were not informed of its relative importance vis-a-vis the evaluation factors which were listed. This failure to show the relative importance of price is contrary to the longstanding view of our Office that intelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. 49 Comp. Gen. 229 (1969). We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is hardly served if offerors are not given any idea of the relative values of technical excellence and price. We believe a complaint is justified if in such circumstances a materially superior offer is rejected in favor of one offering a lower price. *However, that is not the case here. It is our understanding that the Air Force found little difference in the technical quality of the offers at issue. Consequently, an award selection based on price difference cannot be regarded as prejudicial to Serve-Air and the failure of the RFP's to indicate the relative weight of price as an evaluation factor cannot affect the validity of the proposed awards.* [*Italic supplied.*]

In the instant case, "price" as such was not included in the evaluation criteria. However, "Cost Proposal" and "Cost Realism" were so listed and the relative weight of "Cost Consideration" was stated. It is clear that these factors will determine the ultimate "price" or "cost" to the Government and offerors were apprised of their importance and weight. Furthermore, the record indicates that AEL's cost proposal was considered from the stand-point of realism and considered acceptable. In this connection, we note that the Cost Analysis and Cost Realism Statement of AEL's proposal, dated June 24 and supplemented September 6, 1972, states:

The cost proposal of AEL is realistic considering material is adequate and properly priced, the man hours proposed are very close to all Government estimates, the man hours are properly priced, the overhead rates are proper and the fee is reasonable.

You have referred to Government Solicitation No. DAAB07-73-Q-0170 as evidencing the method the Government would use to indicate if and when estimated costs and proposed fee are to be factors in the award evaluation. Specifically, solicitation No. -0170 contains a parallel section "D.3 c. Cost Consideration" to that found in the subject

RFP. In addition, in clause D.3 c. of solicitation No. 0170, the following statement was added:

> Consideration must be given to the estimated cost of the contract performance and the proposed fee in the evaluation for award.

Therefore, you argue that the absence of a similar statement in the instant solicitation should be interpreted to mean that estimated costs and proposed fee would not be considered. We cannot agree. We believe that a statement such as the one quoted above is appropriate in order to emphasize the importance of cost in the evaluation of proposals.

However, we do not believe that the absence of such a statement in the solicitation may be interpreted to mean that price would receive no consideration in the award selection.

In this regard, we note that under the last listed factor under "Cost Consideration," namely, "Rent-Free Use of Government Production and Research Property, ASPR 13-502 and 13-503," it is provided that any competitive advantage which may arise from the rent-free use of Government production and research property shall be eliminated by adding an evaluation factor. This indicates, of course, that price was to be considered a factor in the evaluation.

In regard to your contention that Sanders was required by the Government negotiators to propose a less advantageous fee arrangement than AEL, the contracting officer states that the terms were the subject of negotiation and "not something imposed" by the Government. Further he states that he attempted to negotiate the terms he regarded most appropriate for each proposal.

In summary, we find that although Sanders received a higher point score in the initial evaluation of technical proposals and the contracting officer initially recommended award to Sanders, Army procedures required that the award selection be reviewed at a higher level within the Army. As a result of this review it was determined that the point spread between Sanders and AEL did not give a precise picture of the relative merits of the technical proposals and that in fact the proposals were substantially equal in technical merit. On the other hand, it was determined, based on the Army's analysis of the cost proposals of the two firms, that AEL's proposal was significantly more advantageous from a cost standpoint. It was the considered judgment of the reviewing evaluators, after weighing both technical and cost factors, that an award to AEL would be in the best interests of the Government.

We do not find that the Army's judgment was unreasonably exercised. An evaluation of the type conducted here must be sufficiently flexible to permit reasonable decisions by the Government evaluators as to which proposal best meets the needs of the Government. While we believe that technical point ratings are useful as guides for intelligent decision-making in the procurement process, there is no basis in law or regulation for concluding that evaluation scores prepared at the initial level of the evaluation process are binding on the agency

evaluators at the higher level. Rather, the process should permit the reviewing board evaluators to use the point scores together with their own judgments as to the relative merits of the proposals.

With regard to the significance of cost in the evaluation, it should be emphasized that the Army did not simply rely on the estimated costs of performance as submitted by the offerors. We can understand your objections to a cost evaluation based solely on each offeror's estimation of costs under a cost-reimbursement type contract. The procurement regulations make it clear that undue emphasis may not be placed on such cost estimates. ASPR 3-805.2 and 4-106.5(a). However, we think it is appropriate and perhaps even an obligation of the contracting agency to independently evaluate the proposed costs and consider such independent evaluation in the award selection.

In negotiated procurements of this kind it is incumbent upon the contracting activity to select the successful contractor on some reasonable basis consistent with the evaluation factors set out in the solicitation. We think that standard has been met in this case.

During our consideration of this matter we reviewed those portions of the Army records which contain the Source Selection Review Board findings. As indicated above, we received from the Army a memorandum for record prepared on October 18, 1972, by a member of the Board in response to the protest. Neither of these documents has been released to Sanders because Army states that they "consist of internal Government communications containing staff advice and evaluations of contractors' proposals by Government personnel and, thus, these documents are not subject to release in accordance with the exemptions set forth in paragraph 10e of AR 345-20." In accordance with our long-standing policy in this regard, we have honored the Army's request that this information not be released to the parties, unless it has otherwise been made public. (52 Comp. Gen. 198 (1972)).

From our review of the record in the instant case, we are unable to conclude that the Department of the Army has arbitrarily exercised the discretion committed to it in evaluating the offers or in making an award to AEL.

Accordingly, your protest is denied.

[B-177313]

Compensation—Wage Board Employees—Federal Wage System—Job-Grading—Conversion *v.* Demotion in Grades

When an employee's grade in a prevailing rate position is reduced as the result of the initial application of job-grading standards under the Federal Wage System, Public Law 92-392, during the period beginning November 17, 1972, and ending October 1, 1974, the employee may retain his pay indefinitely, but for those employees whose grades are reduced other than because of initial conversion, 5 U.S.C. 5345, as enacted by the Public Law, is for application with a maximum of a 2-year period for salary retention since the law in establishing the principles and policies relating to blue collar workers generally covered under the Coordinated Wage System, continued recognition of the practice of a

2-year pay retention period for demotions, and an indefinite pay retention period for initial conversions.

To the Chairman, United States Civil Service Commission, April 20, 1973:

Further reference is made to your letter of February 6, 1973, requesting our decision as to the propriety of the Civil Service Commission's regulations providing for indefinite pay retention when an employee's grade is reduced as the result of the initial application of job-grading standards under the Federal Wage System, Public Law 92–392, 5 U.S. Code 5341, during the period beginning November 17, 1972, and ending October 1, 1974. Federal Personnel Manual Supplement 532–1, issued January 16, 1973, contains the procedures on which you have requested our decision and all references in this decision will be to that issue.

You state that under section 5346 of Title 5, U.S. Code, as amended by Public Law 92–392, approved August 19, 1972, 86 Stat. 564, the Commission is required to establish and maintain a job-grading system for all prevailing rate positions included in the statutory wage system. As a consequence of establishing and implementing a uniform job-grading system, it is likely that some prevailing rate employees may suffer, through no fault of their own, a reduction in pay on the *initial* application of job-grading standards to their positions after converting to the new statutory wage system.

Section 9(a)(1) of Public Law 92–392, 5 U.S.C. 5343 note, provides, in part, as follows:

> Except as provided by this subsection, an employee's initial rate of pay on conversion to a wage schedule established pursuant to the amendments made by the Act shall be determined under conversion rules prescribed by the Civil Service Commission. * * *.

The effective date for Public Law 92–392 (except for nonappropriated fund employees) is November 17, 1972, and on that date most prevailing rate employees were automatically converted to the statutory wage system. As of that date, however, all appropriate job-grading standards had not been issued and in other cases, agencies had not had an opportunity prior to that date to apply job-grading standards under the former system (the Coordinated Federal Wage System).

Pursuant to S10–3, FPM Supplement 532–1, the initial application of job-grading standards during the period from November 17, 1972, to October 1, 1974, is considered as part of the conversion process. In line with this provision the Commission has provided indefinite pay retention for those employees whose grades were or would be reduced during that period because of the initial application of job-grading standards (S10–8). For employees whose grades are reduced other than because of initial conversion, the provisions of 5 U.S.C. 5345, as enacted by Public Law 92–392, are for application with a maximum of a 2-year period for salary retention (S9–1).

You say that a question has arisen as to the Commission's authority to provide for indefinite pay retention in the circumstance described above and request our decision on the matter.

Section 5345, Title 5, U.S. Code, as enacted by section 1 of Public Law 92–392 provides in pertinent part as follows:

> (a) Under regulations prescribed by the Civil Service Commission, * * * a prevailing rate employee—
>
> * * * * * * *
>
> is entitled to basic pay at the scheduled rate to which he was entitled immediately before the reduction in grade or reassignment * * * for a period of 2 years from the effective date of the reduction in grade or reassignment, * * *.

Regarding the pay of an employee upon conversion to the statutory wage system, section 9(a)(2) of Public Law 92–392 provides as follows:

> In the case of any employee described in section 2105(c), 5102(c) (7), (8), or (14) of title 5, United States Code, who is in the service as such an employee immediately before the effective date, with respect to him, of the amendments made by this Act, such amendments shall not be construed to decrease his rate of basic pay in effect immediately before the date on which such amendments become effective with respect to him. In addition, if an employee is receiving retained pay by virtue of law or agency policy immediately before the date on which the first wage schedule applicable to him under this Act is effective, he shall continue to retain that pay in accordance with the specific instructions under which the retained pay was granted until he leaves his position or until he becomes entitled to a higher rate.

The legislative history indicates that the purpose of the statute is to enact into law established principles and policies related to blue collar employees of the Federal Government which previously were handled administratively. Prior to the enactment of Public Law 92–392 the majority of the employees covered by that law were under the Coordinated Federal Wage System (CFWS) or were being converted to it. Under CFWS an employee's existing rate of pay was retained for 2 years when he was changed to a lower grade or reassigned to a lower-pay wage position through no fault of his own. However, an employee, who was changed to a lower-pay position upon initial conversion from the old wage system to CFWS, generally retained his pay indefinitely.

Considering the foregoing it would appear that the Congress, in enacting section 9(a) did not intend the provisions concerning demotions to be applicable to conversions to a uniform wage system. In that connection it is noted that subsection 9(a)(2), which in addition to providing pay retention with respect to rate of basic pay received by an employee immediately before the effective date of the amendments, provides for the continuation of previously authorized pay retention rights "in accordance with the specific instructions under which the retained pay was granted." This necessarily recognizes the previous practice of 2-year pay retention for demotions, and indefinite pay retention for initial conversions. 5 U.S.C. 5345 would accordingly not be applicable to conversions.

In view of the above it is our opinion that the Commission's action

in providing for indefinite pay retention when a Federal employee's grade is reduced as the result of the *initial* application of standards under Public Law 92–392 for the period beginning November 17, 1972, and ending October 1, 1974, is legally proper.

[B–177507]

Cities, Corporate Limits—Per Diem for Military Personnel—Temporary Duty at Headquarters

An officer who when released from his duty station at a university is assigned to the Pentagon in Arlington, Virginia, with temporary duty en route at the Center for Naval Analyses, also located in Arlington 2 miles from the Pentagon, and who establishes a residence within commuting distance to both duty points, is not entitled to per diem since the boundaries of Arlington County are considered to be comparable to the corporate limits of a city within the contemplation of paragraph M1150–10a of the Joint Travel Regulations (JTR) and, therefore, the officer is not in a "travel status" within the meaning of JTR M3050–1 while performing temporary duty at his permanent duty station as defined in JTR M1150–10a.

Subsistence—Per Diem—Temporary Duty—En Route to New Permanent Duty Station

Under paragraph M4156, case 13 of the Joint Travel Regulations, change 232, effective June 1, 1972, a member of the uniformed services who receives permanent change-of-station orders which direct temporary duty en route at a location in the area of his old or new permanent duty stations and who occupies his permanent residence from which he may commute daily to his temporary duty station, will be entitled to per diem and travel allowances while performing such duty as if he had not been detached from his old station or as if he had reported to his new permanent station.

General Accounting Office—Claims—Settlement—Precedent Status

The fact that the Claims Division of the United States General Accounting Office erroneously allowed a claim affords no basis for concluding that other similar type claims should be allowed contrary to the provisions of the Joint Travel Regulations as construed by the decisions of the Comptroller General of the United States and, furthermore, collection action will be taken to recoup the amount erroneously paid.

To J. W. Stasiak, Department of the Air Force, April 23, 1973:

This refers to your letter dated November 1, 1972, in which you request an advance decision concerning the propriety of payment of per diem in the case of Major John M. Davey, USAF, SSAN 038–24–1370, while performing temporary duty at the Center for Naval Analyses, Rosslyn, Virginia, during the period July 4 (6) to October 2, 1970. Your request had been assigned PDTATAC Control No. 72–57 by the Per Diem, Travel and Transportation Allowance Committee. We have also received a similar claim of Major Robert W. Sample forwarded by your letter dated November 9, 1972, and received in this Office January 23, 1973.

By permanent change-of-station orders dated June 1, 1970, as amended, Major Davey was relieved from his duty station, University of Rochester, Rochester, New York, and assigned to Headquarters, United States Air Force, located at the Pentagon, with temporary duty en route at the Center for Naval Analyses which along with the Pentagon is located in Arlington, Virginia. The temporary duty as

shown by the orders, was for the period July 5 through October 2, 1970, and it appears that the officer reported at his temporary duty station on July 6, 1970. You point out that the PCS and TDY points are located in Arlington County, Virginia, approximately two miles apart.

You say that Major Davey established a residence at 3552 Valley Drive, Alexandria, Virginia, to which his dependent traveled on July 31, 1970. You also say that dependent travel and a dislocation allowance incident to the permanent change of station were paid on August 19, 1970. You indicate Major Davey's residence was located within commuting distance of both his permanent station and his temporary duty point.

Concerning the claim of Major Sample, it is indicated that he received orders almost identical to those received by Major Davey. His orders directed a permanent change of station from University of Rochester, Rochester, New York, to Headquarters, United States Air Force, Pentagon, Arlington, Virginia, with temporary duty en route at the Center for Naval Analyses, Arlington, for the period July 6, 1971, to September 30, 1971. It is stated that he established a residence in Alexandria, Virginia, on August 10, 1971, and his dependents traveled there and he was paid a dislocation allowance and dependent travel.

In your request you refer to certain provisions of Air Force Manual 177–103 and 34 Comp. Gen. 427 (1955) which you say prohibit payment of temporary duty allowances when the temporary duty point is within the limits of the new permanent duty station. You say that the above cited authority also requires a member to be in a travel status to be eligible for per diem allowance and you refer to the provisions of paragraph M3050–1 of the Joint Travel Regulations which defines the term travel status.

You also enclosed a copy of a similar claim in the case of Lieutenant Colonel William H. Ritchie, USAF, which claim was certified for payment by our Claims Division (now Transportation and Claims Division) in settlement dated January 27, 1972. However, the settlement did not indicate the basis for approval.

In view of this, you request that decision be rendered on the following questions which pertain to Major Davey's case, but appear to be applicable to Major Sample's case also.

a. May TDY be considered as having been performed away from his permanent duty station for the entire period (4 July–2 Oct 1970) of TDY?
b. May TDY be considered as having been performed away from his permanent duty station for only that period for which a residence was not established (4 July–31 July 1970)?
c. May TDY be considered as not being performed away from his permanent duty station?

Temporary duty is defined in paragraph M3003–2a of the Joint Travel Regulations, as duty at one or more locations other than the permanent station, at which a member performs temporary duty under

orders which provide for further assignment, or pending further assignment, to a new permanent duty station or for return to the old permanent station upon completion of the temporary duty.

When a member is performing temporary duty as defined above, he is considered to be in a travel status, such status being the basis for entitlement to travel and transportation allowances. Paragraph M3050–1 and 2, item 1, Joint Travel Regulations. However, paragraph M3050–3 of those regulations provides that travel status terminates when a member returns to his permanent duty station or when he reports at a new permanent duty station.

Paragraph M1150–10a of the Joint Travel Regulations defines a permanent duty station in pertinent part as the post of duty or official station to which a member is assigned or attached for duty other than temporary duty or temporary additional duty, the limits of which will be the corporate limits of the city or town in which the member is stationed, but if not stationed in an incorporated city or town, the official station is the reservation, station, or established area, or, in the case of large reservations, the established subdivision thereof having definite boundaries within which the designated post of duty is located.

Under the provisions of paragraph M4201–5 of the Joint Travel Regulations, per diem is not authorized for any travel or temporary duty performed within the limits of the permanent duty station, with the exception of day of arrival at or return to the permanent duty station.

It has been held that when a member is directed to proceed to a particular city for temporary duty and later report to another installation in the same city for duty, his travel status ends upon his arrival in that city and no right to per diem accrues for such temporary duty. B–121605, October 25, 1954 and 34 Comp. Gen. 427 (1955).

In our decision 37 Comp. Gen. 669 (1958) it was held in a case involving temporary duty en route to a permanent station the two points being in close proximity to each other, but not within the same corporate limits, the member was entitled to per diem since he was considered as being in a travel status irrespective of the proximity of the stations involved. However, that conclusion was based on the pertinent provisions of paragraph M1150–10a of the regulations and the fact that the two stations in that case, namely, North Island and Miramar, California, were considered as distinct localities for purposes of determining travel status questions.

A similar determination was reached in our decision B–138517, February 27, 1959, involving a permanent change of station to Washington, D.C., with temporary duty en route at Arlington, Virginia. Again, as in 37 Comp. Gen. 669 (1958) a definite distinction between Washington, D.C., and Arlington, Virginia, may be drawn, since Arlington is considered a separate locality from Washington, D.C., and is not within the corporate limits of the latter place.

Unlike the situations described in 37 Comp. Gen. 669 and the decision of February 27, 1959, no such distinction involving separate cities or towns is applicable in the cases before us. Both the Pentagon and the Center for Naval Analyses are located in Arlington, Virginia. In this connection, Arlington occupies a unique position being a small urban county with no incorporated cities or towns within its boundaries.

Formerly Arlington County was a part of the District of Columbia and is governed as a single unit the same as if it were an incorporated city. In these circumstances, it is our view that a permanent duty assignment at a station in Arlington County should be considered as a permanent duty assignment within the corporate limits of a city (boundaries of the County) within the contemplation of paragraph M1150–10a of the regulations.

Since Arlington County has definite boundaries within which the temporary duty station, Rosslyn, and the permanent duty station, the Pentagon, are located, it is our view that Major Davey may not be considered as being in a "travel status" for per diem purposes within the meaning of paragraph M3050–1 of the regulations while performing temporary duty at Rosslyn, since the periods of temporary duty which he performed must be considered as being performed at his permanent duty station, as defined in paragraph M1150–10a of the Joint Travel Regulations. *Cf.* 50 Comp. Gen. 729 (1971).

Accordingly, question a is answered in the negative and question c in the affirmative.

In view of the answers to questions a and c, question b need not be answered. However, your attention is invited to paragraph M4156, case 13 of the Joint Travel Regulations, change 232, effective June 1, 1972. That paragraph provides that a member who receives permanent change-of-station orders which direct temporary duty en route at a location in the area of his old or new permanent duty station and who occupies his permanent residence from which he may commute daily to his temporary duty station, will be entitled to per diem and travel allowances while performing such duty as if he had not been detached from his old station or as if he had reported to his new permanent station.

Since payment is not authorized in Mayor Davey's case, the voucher will be retained here. Moreover, the fact that a similar claim mentioned above was allowed by our Claims Division affords no basis for concluding that other similar type claims should be allowed contrary to the provisions of the Joint Travel Regulations as construed in our decisions. Collection action will be taken to recoup the amount paid in the above-mentioned settlement of January 27, 1972.

Also, Major Sample's claim will be settled on the basis of this decision.

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