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[B-190068]

Fees—Professional Examinations—Military Personnel

Air Force medical officer who performed temporary duty under orders issued at his personal request that he be temporarily assigned to San Francisco, California, to take Part II of the American Board of Pediatrics examination, and who was released from active duty several weeks later, is not entitled to payment of examination fees which he paid prior to taking Part I of the examination before entry on active duty, since applicable service regulations limit payment of such expenses to "career" officers.

Travel Expenses—Military Personnel—Personal Convenience—Travel To Take Professional Examinations

Travel of Reserve officers, serving limited active duty periods, to take medical board examinations shortly before their release from active duty should not ordinarily be authorized at Government expense nor should their examination fees be reimbursed since such trips are primarily a matter of personal convenience and benefit, unrelated to service requirements.

In the matter of Dr. James L. Sutphen, January 3, 1978:

This action is in response to a letter dated July 8, 1977, from Captain R. W. Lewis, USAF, Accounting and Finance Officer, Hickam Air Force Base (AFB), Hawaii, requesting an advance decision as to whether payment by the Air Force may be made to Doctor James L. Sutphen, SSAN 287-42-1949, 983 Sharon View Drive, Newark, Ohio 43055, for reimbursement of $250 he paid to the American Board of Pediatrics, Inc., as a fee to take the national board examination in pediatrics.

Doctor Sutphen indicates he became an inactive Reserve member of the uniformed services on February 10, 1973, through the Berry Plan, which is a program implemented pursuant to section 4(j) of the Selective Service Act of 1967, as amended, 50 U.S.C. App. 454(j) (1970). Under the Berry Plan a physician who is obligated to perform 2 years of active military service, if so ordered by his draft board, may apply for a Reserve commission, be deferred from active duty to complete his medical education, and be brought to active duty for the 2-year period at a mutually agreeable time thereafter, generally upon the completion of the residency period of medical training.

On January 15, 1975, while the claimant was still in an inactive Reserve status and apparently in the latter stage of his residency training, he paid the $250 fee in question to the American Board of Pediatrics in order to take the professional examination conducted by that organization. It is indicated that this examination and similar examinations given by medical specialty boards are designed to provide a uniform basis for evaluating a physician's professional qualifications and are used to determine whether the individual meets the prerequisites of being certified as fully qualified to proficiently practice, teach, and provide consultation independently within a specialized area of medical science. It is further indicated that the examination in pedi-

atrics is given in two parts and that 2 years of practice are required between the completion of Part I and Part II of the examination. It is stated that the claimant successfully completed Part I in May 1975, prior to being called to active duty in the Air Force.

The claimant was subsequently called to active duty in the Air Force on July 2, 1975, and was assigned as a medical officer to Hickam AFB, Hawaii, to complete his obligatory term of active service. On or about April 22, 1977, while still on active duty, he traveled from Hickam AFB to San Francisco, California, for the sole purpose of taking Part II of the pediatrics examination, under temporary duty orders which purported to authorize reimbursement "for all necessary travel expenditures including $250 registration and/or admission fees." Such orders were issued at the claimant's request. Less than 2 months later, on June 10, 1977, he was released from active duty and returned to civilian life.

The claimant appears to have already received travel and per diem allowances incident to his trip to San Francisco. He has expressed the belief that he is also fully entitled to reimbursement of the $250 fee mentioned in the travel orders, since he was a Reserve member when he paid the fee and took the first part of the examination. He explains further:

> It is my understanding that the policy of the Air Force is to pay all fees associated with board exams for physicians in accordance with AFR 169-4, para. 5, and AFR 36-20. As the Pediatric boards are somewhat unusual in that the applicant must pass two parts, it is necessary, I feel, to interpret the regulation as covering both parts of the exam. To do otherwise would exclude effectively all Berry Plan pediatricians who are completing the standard two-year service requirement. Many medical specialty boards require only one examination without an interval period and are covered under the regulation. Berry Plan physicians taking these exams are therefore funded without question.

The Finance and Accounting officer, however, expressed doubt concerning the propriety of making payment on a separate voucher covering the fee, apparently because the claimant paid the fee and took the first part of the examination prior to his entry on active duty.

Air Force Regulation (AFR) 36-20, May 26, 1966, cited by the claimant, is entitled "USAF Officer Career Motivation Program." The program as described is apparently designed to generally enhance career motivation and "to create and maintain maximum harmony between the individual Air Force officer and his environment." This regulation, however, does not mention or authorize the payment of fees in connection with the performance of official duty.

The other service regulation cited by the claimant, AFR 169-4, December 12, 1975, is entitled "Professional Board Examinations, Specialty Badges and Training Affiliation Agreements," and does authorize the travel of officers at public expense to take professional board examinations, provided that certain conditions are met. With

respect to the matter of reimbursement of fees and expenses, subparagraph 5(a) of the regulation provides as follows:

> a. Air Force Policy. Since certification is an integral part of a *career* officer's professional training, Air Force policy is to reimburse a candidate for expenses incident to his or her application and examination. [Italic supplied.]

It thus appears that a member must be a "career" officer in order to qualify for reimbursement of expenses, and this requirement is consistent with the provisions of AFR 169–4, dated March 20, 1974, in effect at the time the claimant paid the fee. The March 20, 1974 regulation specifically precluded reimbursement to Reserve officers who were serving a limited tour of duty or who had indicated an intent to leave active duty. Also, neither regulation makes any provision for approving payment of fees for officers not on active duty.

In the present case, there is no indication that the claimant requested approval, nor could he have received approval under the regulations, for payment of the fee at the time he paid it in January 1975, before he was called to active duty. Also, it seems clear that he did not have any intention of becoming a "career" medical officer in the Air Force; instead, he served the limited tour of active duty he was obligated to perform and apparently secured his release from active service at his earliest opportunity. Hence, it is our view that he is not authorized reimbursement of the fee in question under the applicable Air Force regulations. *Cf.* B–149869, October 16, 1962, and B–165780, March 12, 1969.

Moreover, the circumstances under which the member was authorized travel at Government expense on temporary duty in connection with his April 1977 trip to San Francisco to take Part II of the examination are questionable in our view. Paragraph M3050, Volume I, Joint Travel Regulations (1 JTR), provides that members of the uniformed services are entitled to travel and transportation allowances only while in a travel status "upon public business." Paragraph M6454, 1 JTR, specifically provides that "expenses incurred during periods of travel under orders which do not involve public business * * * are not payable by the Government." These provisions of the Joint Travel Regulations are founded upon the basic and well-established principle that travel allowances authorized for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with the requirements imposed upon them by the needs of the services over which they have no control, not for expenses of travel induced by personal reasons. See 55 Comp. Gen. 1332 (1976); 49 *id.* 663 (1970); 33 *id.* 196 (1953); 9 *id.* 490 (1930); and *Perrimond* v. *United States*, 19 Ct. Cl. 509 (1884). (To the same effect concerning travel by civilian employees, see 55 Comp. Gen. 1332, *supra;* and 16 *id.* 850 (1937).) In particular,

we have previously held that expenses incident to travel performed by an officer of the uniformed services to take a medical board examination are nonreimbursable, notwithstanding the issuance of orders purporting to authorize travel at public expense, where it appears that such travel is primarily for the officer's personal convenience and benefit, and it is not demonstrated that the travel is performed for the accomplishment of the purposes and requirements of his service. See 33 Comp. Gen. 196, *supra.*

It may be that service regulations authorizing reimbursement to qualified Regular and career Reserve medical officers for travel expenses and fees incurred in the process of acquiring specialty board certifications under certain circumstances are valid. See B–149869, and B–165780, *supra.* However, it is our view that such reimbursement may not properly be authorized for medical officers obligated to perform only limited tours of active duty or who have indicated an intent to leave active duty, in the absence of facts clearly demonstrating in each case a need by their parent services for their certification, since it is evident that certification of those officers would ordinarily be a matter of personal benefit and convenience unrelated to service requirements.

We note in this regard that paragraph 3c of AFR 169–4, December 12, 1975, provides as follows concerning officers stationed outside the continental United States who wish to take Part II of a medical specialty examination:

> c. Officers stationed overseas who wish to take Part II of the professional specialty boards, or a single or combined examination may return to the CONUS for examination if the following requirements are met:
> (1) When ordered overseas they were eligible to serve overseas 2 or more years;
> (2) After completing the examination and returning to their overseas station, they still have at least 6 months to serve in current tour overseas;
> (3) They can be spared from their duties; and
> (4) Appropriated funds are available locally to defray the cost of travel and expenses incident to the examination.
> NOTE: Only overseas major commands may waive the requirements in (1) and (2) above.

The record shows that requirements (1) and (2) were waived in this case, although no reason for such waiver is shown. In our view where the officer is not a career officer and has a short time remaining to serve on his active duty obligation, it would be proper to allow the officer to take leave and travel at his own expense to take the examination. Or, at most, he could be allowed to travel on "permissive orders" at no expense to the Government. See 1 JTR, paragraph M6453. We note in this regard that paragraph 3b, AFR 169–4, March 20, 1974, specifically provided that a Reserve officer serving a limited tour of duty is not entitled to reimbursement of fees but may be granted "permissive orders" to take examinations. While

that statement does not specifically appear in the current AFR 169–4, the requirements thereof appear to be in accordance with our views in the matter and are consistent with the purpose of the regulation—to authorize payment of such expenses for "career" officers.

Accordingly, the claim for the $250 fee is denied, and the voucher, which may not be paid, is retained. In the particular circumstances of this case, since the travel performed was authorized under applicable regulations, no further action with respect to those payments is required. However, further action should be taken to prevent travel payments in similar situations in the future.

[B–189712]

Funds—Federal Grants, etc., To Other Than States—Change of Grantee

Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital. Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed.

Appropriations—Fiscal Year—Availability Beyond—Federal Aid, Grants, etc.—Alternate Grantees

Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application.

In the matter of the Cancer Research Institute, Los Angeles—change of grantee, January 5, 1978:

This decision is in response to a request from the Director of the National Institutes of Health (NIH), Department of Health, Education, and Welfare, for our opinion as to whether moneys obligated in fiscal year 1974 for construction of the proposed Los Angeles County—University of California Cancer Hospital and Research Institute remain available for construction of just the Research Institute at the University of Southern California (USC), notwithstanding the fact that the period for obligation of the funds in question has expired.

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The facts concerning this matter are as follows. In late 1972, Los Angeles County and USC submitted a joint application for a grant under section 408(b) of the Public Health Service Act, 42 U.S.C. § 286b(b) to cover a portion of the cost of constructing a single facility on County land to house both a hospital and a cancer research institute. In the application it was estimated that the total project would cost approximately $38 million with $12 million sought from the National Cancer Institute (NCI), a division of NIH, $6 million provided by USC, and the remaining $20 million provided by the County. The grant funds which would be provided by NCI together with moneys furnished by USC were intended to cover the research portion of the facility occupied by the Institute, while the County's portion was to have paid, in effect, for the nonresearch hospital component.

The application indicated that USC would be responsible for the Research Institute, which would be headed by a scientist from USC who was in charge of the Comprehensive Cancer Research and Demonstration Center. The head of the Institute would also serve as project director for construction of the entire facility. Moreover, the Institute would be staffed by USC investigators.

After the County/USC application was reviewed by NCI and was approved by the National Cancer Advisory Board, a grant was awarded in the amount of $6 million. However, notwithstanding the joint nature of the application, the award was made solely to the County because only one institution could be listed as grantee for accounting reasons. Subsequently, the full $12 million award was approved in April 1974. The moneys so obligated came from funds appropriated by Public Law 93–192, the Department of Health, Education, and Welfare Appropriation Act, 1974 and were available for obligation until June 30, 1975.

Although the grant had already been approved, construction was delayed because of problems related to the proposed site and the design of the facility. During this period costs escalated, until by January 1977 the County's share had risen to approximately $40 million, while the USC and NCI shares remained unchanged. The County officials had decided to include the County's obligation as part of a general bond issue that had to be approved by two-thirds of the County's voters. When the bond issue was voted on, the necessary two-thirds requirement was not reached and as a result the County became unable to carry on with its share of the overall construction project.

The sole issue presented to us is whether in these circumstances it would be legally permissible for NCI to approve a revised application to be submitted by USC in which USC would be substituted as grantee for the County, notwithstanding the fact that the period for obligation of these funds has expired. In this regard it should be pointed

out that before a change of grantee would be approved by NCI, USC's revised application would receive a thorough review. After an initial review by the California State Department of Health the application will be evaluated by NCI staff aided by a team of consultants made up to the extent possible of the same individuals that reviewed the original application. The purpose of this review will be to determine that the new application fulfills the same needs and purposes and is of the same scope as the original application. It is the position of NIH that if the revised application is determined to so fulfill the same needs and purposes as the original application, the County's withdrawal should not prevent the Research Institute from being constructed with the funds originally obligated for this purpose. In this regard, the Director states in pertinent part as follows:

> Assuming the original and revised applications are found to be comparable, it would be our view that issuance of an award to USC would just constitute a technical shift of the grantee designation from the County to USC. As first submitted the original application was both from the County and USC and only because of Federal accounting requirements was the original grant made only to the County. USC was responsible for that portion (the research institute) of the first proposal which will be encompassed by the revised application. The original need for the research institute continues to exist.

As a general rule, when a recipient of an original grant is unable to implement his grant as originally contemplated, and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternate grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. See B–164031(5), June 25, 1976. As that opinion states, this result follows pursuant to section 1311 of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200.

Thus, in B–114876, January 21, 1960, we considered the question of whether an alternate grantee designated to replace the original grantee, who became unable to implement the grant, could receive the award from the appropriation current at the time the original grant was approved or whether the appropriation current at the time the grant was made to the alternate is available. In our decision we advised the State Department that the award to the alternate grantee had to be recorded as an obligation against the appropriation current at the time the grant to the alternate grantee was executed. We explained our decision as follows:

> The awards here involved are made to individuals based upon their personal qualifications. Whether the award is considered an agreemnt or a grant, it is a personal undertaking and where an alternate grantee is substituted for the original recipient, there is created an entirely new and separate undertaking. The alternate grantee is entitled to the award in his own right under the new agreement or grant and not on behalf of, on account of, or as an agent of, the original grantee. It seems clear that the award to an alternate grantee is not a continuation of the agreement with, or grant to, the original grantee executed under a prior fiscal year appropriation, but is a new obligation.

However, our Office has recognized, in somewhat analogous circumstances exceptions to this general rule set forth above. Most significantly in B–157179, September 30, 1970, we advised the Attorney General that the unexpended balance of grant funds originally awarded to the University of Wisconsin could properly be used to engage Northwestern University in a new fiscal year to complete the unfinished project. Essentially, we took this position because the designated project director had transferred from the University of Wisconsin to Northwestern University and was viewed as the only person capable of completing the project. We also found that the original grant to the University of Wisconsin was made in response to a *bona fide* need then existing and that the need for completing the project continued to exist. Our decision in that case analogized the circumstances of that case to the situation involving replacement contracts concerning which we take the position that the funds obligated under a contract are, in the event of the contractor's default, available in a subsequent fiscal year "for the purpose of engaging another contractor to complete the unfinished work, provided a need for the work, supplies, or services existed at the time of execution of the original contract and that it continued to exist up to the time of execution of the replacement contract." See 34 Comp. Gen. 239 (1954).

A subsequent opinion to a Member of Congress, B–164031(5), June 25, 1976, *supra*, disapproved a proposed transfer of a loan guarantee and interest subsidy from the Fort Pierce Memorial Hospital in Fort Pierce, Florida, to the Mount Sinai Medical Center located in Miami, Florida, after the expiration of the period of availability of the original fiscal year allotment from which the guarantee for the Fort Pierce Hospital had been made. Since the hospitals involved were located approximately 125 miles apart and served different communities, we concluded that the transfer to Mount Sinai would not be a "replacement" in the sense of a continuation of the original guarantee and subsidy to Fort Pierce. The Miami project, we held, "must be viewed as a new and separate undertaking. * * * "

Although we disapproved the proposal involved in that case for the reasons stated above, we acknowledged that "it may be possible in certain situations to make an award to an alternate grantee after expiration of the period of availability for obligation where the alternate award amounts to a 'replacement grant' and is substantially identical in scope and purpose to the original grant."

We believe that the present case is a clear example of just the type of situation contemplated in that decision where the alternate proposal amounts to a replacement grant rather than a new and separate undertaking. First, the purpose of the instant grant appears to be the same as the original grant, *i.e.*, to construct a cancer research facility

in the Los Angeles County area. Although the original facility that would have been constructed would also have included a hospital, it is clear that the $12 million grant from NCI was intended, together with the $6 million to be provided by USC, to cover the cost of constructing the research portion of the facility. The nonresearch hospital component, which will not now be built, was to be financed entirely with County funds. Also, since the research facility will be constructed at essentially the same location as originally planned, albeit on land owned by the University rather than the County located no more than several hundred yards away from the original site, it will obviously serve precisely the same area that would have been served by the originally proposed facility. Furthermore, as indicated in the submission as well as the site visit report, the original strong need for the facility in the Los Angeles County area continues to exist.

Moreover, and perhaps most significantly, the original application that was submitted in 1972 was filed jointly by both Los Angeles County and USC. The application indicated that the University would be responsible for the research institution which would be headed by a scientist from USC who would also serve as project director for the entire facility, and would be staffed by USC investigators. In fact, as noted above, only because of Federal accounting requirements was the original grant made only to the County. Had both the County and USC been named as grantees, the problem with which we are now faced might have been resolved by a simple amendment of the approved grant application. See B–74254, September 3, 1969. The Director states that it is NIH's view that if the proposals are comparable, "issuance of an award to USC would just constitute a technical shift of the grantee designation from the County to USC." In this regard it should again be pointed out that NCI will, prior to deciding whether to make this award to USC, carefully review USC's application to assure itself that the two applications fulfill the same needs and purposes and are of the same scope.

Accordingly, should NCI ultimately decide that the original and revised applications are comparable and that the need still exists, we would have no objection to its approving the change in grantee from Los Angeles County to USC and charging the award to the original appropriation.

[B–189604]

Contracts—Negotiation—Evaluation Factors—Out-of-Pocket Costs—COCO *v.* GOCO Plants

Cost comparisons required by Arsenal Statute for determination whether supplies can be obtained from Government-owned, contractor-operated (GOCO) factories on economical basis may be made by comparing fixed priced offers from

contractor-owned and -operated plants with out-of-pocket cost estimates from GOCO plants and such comparisons are not prohibited by Cost Accounting Standards Act.

In the matter of the Olin Corporation, January 18, 1978:

Olin Corporation (Olin) protests the action of the U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois (Army) in allowing GOCO plants (Government-owned, contractor-operated) to compete under Request for Proposals (RFP) No. DAAA09–77–0028 and the basis on which offers from GOCO plants will be evaluated. Olin contends that permitting GOCO plants to submit estimates for cost reimbursement contracts while requiring COCO plants (contractor-owned, contractor-operated) to propose firm fixed prices is unfair and contrary to the decisions of this Office. It further contends that evaluating GOCO proposals on the basis of "out-of-pocket" costs violates the Cost Accounting Standards Act (CASA), 50 U.S.C. App. § 2168 and those standards issued thereunder which require all contractors including those operating GOCO plants to estimate and allocate indirect costs consistently and proportionately over all projects.

In this connection, Olin did not specifically invoke CASA until a conference held in this Office on September 15, 1977. The Army considers the CASA issue untimely under our Bid Protest Procedures, 4 C.F.R. § 20 (1977) because it was not raised within 10 days of the time the basis of protest was known or should have been known by Olin. In our opinion, the argument regarding the applicability of CASA is a consistent elaboration of Olin's objections to unfair competition between GOCO and COCO plants rather than a separate ground for protest. Thus, we believe the issue was raised in a timely manner and should be decided on its merits.

The RFP as issued on January 4, 1977, called for proposals for providing 12,100,000 rounds of .38 caliber special high velocity ammunition (PGU–12–B(YK)). It stated that a firm fixed price contract was contemplated but consideration of other types of contracts was not precluded. Olin submitted the only proposal, but requested relaxation of some technical requirements and deletion of RFP clauses pertaining to CASA and the Certificate of Current Cost or Pricing Data required by Armed Services Procurement Regulation (ASPR) § 3–807.3. It maintained that the PGU–12–B(YK) was the commercial equivalent to another .38 caliber round which was listed in its catalog and had been sold in substantial quantities to the general public. Although it contended that the PGU–12B(YK) was exempt from the cost or pricing data requirement, it did not submit DD Form 633–7 which the RFP and ASPR § 3–897.3(j)(1) required from offerors claiming such exemption.

The contracting officer questioned whether the PGU-12-B(YK) had been sold commercially and concluded that it did not meet the standards permitting exemption from the requirement for submission of certified cost or pricing data. The price negotiations continued but Olin did not agree to provide the required cost or pricing data.

During negotiations, the Army obtained an estimate of "fully allocated" costs from the Lake City Ammunition Plant which is a GOCO facility operated by Remington Arms Company, Inc. (Remington) under a cost reimbursement contract with the Army. When Olin continued to refuse the cost or pricing data, Remington was asked to submit an "out-of-pocket" cost estimate. This estimate was obtained on July 8, 1977. The Army explains that fully allocated costs include all costs necessary to produce the required items including those costs which would still be expended whether or not the items were produced in the GOCO plant, while an out-of-pocket cost estimate excludes those costs which would be incurred by the GOCO contractor whether or not a particular contract was awarded to the GOCO plant.

On July 11, 1977, the contracting officer notified Olin that the RFP was cancelled. Olin then protested to this Office on July 14, 1977, at which point the Army reinstated the RFP and issued an amendment, dated July 19, 1977, increasing the total quantity to 23,248,000 rounds. (In this regard, the Army states that the RFP cancellation was inadvertent.) It also notified all offerors that operating contractors of GOCO plants could participate in the procurement and that their cost based proposals would be evaluated on an out-of-pocket cost basis with no evaluation factor added for their use of Government property and facilities. The amendment provided that award would be made on the basis of comparing the lowest out-of-pocket cost estimate of the GOCO proposals with the lowest evaluated cost of the COCO fixed price proposals.

As noted above, Olin objects to the requirement that COCO plants submit fixed price proposals which would be evaluated against out-of-pocket estimates for cost reimbursement contracts from GOCO plants.

We note that in *Olin Corporation*, 53 Comp. Gen. 40 (1973), Olin also contended that it was inequitable to compare a firm fixed price from a COCO offeror with a cost estimate from a GOCO offeror for a cost reimbursement contract. In that case, we stated:

> Army policy is to obtain direct fixed price competition among GOCO and COCO sources which are operated on that basis. However, where GOCO plants are operated under cost reimbursement type contracts, *precluding such competition*, cost comparisons are, in our view, necessarily utilized. [Italic supplied.]

We see no reason to alter our position in this regard.

Olin next contends that CASA prohibits out-of-pocket cost estimates from GOCO contractors and requires that the cost comparisons under

the Arsenal Statute be based upon formal proposals from both GOCO and COCO offerors and that such proposals fully comply with the requirements of CASA.

Specifically, the Arsenal Statute, 10 U.S.C. § 4532(a) provides that the Army shall have supplies made in factories or arsenals owned by the United States so far as those factories or arsenals can make the supplies on an economical basis. Under this provision, the term "factories" includes GOCO plants. The term "economical basis" means at an overall cost to the Government which is equal to or less than the cost if manufactured in a COCO plant. Such overall costs must be computed on the basis of actual out-of-pocket costs to the Government. See B–143232, December 15, 1960.

The requirements of CASA are applicable to both GOCO and COCO contractors, but in our opinion, CASA does not prohibit out-of-pocket cost estimates for purposes of the Arsenal Statute.

We see nothing in *The Boeing Company*, ASBCA No. 19224, February 18, 1977, 77–1 BCA 12,371, which Olin cites, to lend support for a position that CASA prohibits the use of out-of-pocket cost estimates when making cost comparisons for purposes of the Arsenal Statute. In that case, the Armed Services Board of Contract Appeals concluded that a head count method of allocating certain state taxes which had been permissible under ASPR, Section 15, was no longer acceptable under new tests for allocation of home offices expenses established under Cost Accounting Standard 403. Further, we see no useful analogies to be derived from any CASA required changes that may have occurred with regard to the definitions of "costs" for purposes of the Vinson-Trammell Act, 10 U.S.C. § 7300 (1970), the Renogotiation Act of 1951, as amended, 50 U.S.C. App. § 1211 *et seq.* (1970) or the Internal Revenue Code, 26 U.S.C. § 1 (1970) and their applications to Government contracts and contractors. To the extent that these statutes prescribe treatment of costs for Government contracts, they are concerned with the performance of such contracts after award. While Cost Accounting Standard 401 may require that a GOCO contractor use the same accounting practices in estimating costs in pricing contracts as are used in accumulating and reporting actual costs during performance; it does not explicitly or implicitly prohibit out-of-pocket cost estimates for purposes of the cost comparisons required by the Arsenal Statute.

When the solicitation to COCO offerors calls for fixed price offers, the Arsenal Statute requires a cost comparison between such offers and the GOCO out-of-pocket estimates for cost reimbursement contracts for purposes of determining whether the required supplies will be procured from a COCO plant or obtained from a GOCO plant. When it is determined that the supplies can be obtained on an economical

basis from a GOCO plant, it is the practice of the Army to cancel the socilitation pursuant to Army Munitions Command Procurement Instruction 1.390.2(g) (4) and to negotiate a fully funded cost reimbursement contract with the contractor operating the GOCO plant. Such contract must bear its full share of all overhead and indirect costs and must be in full compliance with CASA.

Olin contends that the Army is soliciting under the pretense that an award will be made under the RFP when, in fact, the Army is seeking market information in order to make the judgment as to whether it should procure from the GOCO contractor. ASPR § 1–309 states it to be general policy to solicit proposals only where there is a definite intention to award a contract. Solicitations for information purposes are prohibited except by request for quotations, when approved by an authority higher than the contracting officer and there is notification in the solicitation that the Government does not intend to make an award. At all times, the Army intended to obtain its needed supplies. The source of those supplies depends upon cost comparison. The RFP makes it clear that the decisive factor in source selection and method of procurement will be costs to the Government as determined by comparing COCO fixd prices with GOCO out-of-pocket estimates. As an experienced GOCO and COCO contractor, Olin is aware of this process.

At this point, there is no outstanding demand of the Army for the submittal by Olin of certified cost or pricing data. Therefore, the issues raised by Olin with regard thereto need not be discussed in this decision.

Accordingly, the protest is denied.

[B–190964]

Boards, Committees and Commissions—Members—Holding Over Beyond Expiration of Term

Commissioner was appointed to serve for 2-year period on newly created Commodity Futures Trading Commission. Upon expiration of that period no successor was nominated. Commission asks whether holdover provision of 7 U.S.C. 4a(a) (B) applies to commissioners first appointed to serve immediately following creation of Commission. Purpose of holdover provision is to avoid vacancies which may prove disruptive of Commission work. Thus, holdover provision does apply to those commissioners first appointed to the Commission.

Commodity Futures Trading Commission—Commissioners—Holding Over Beyond Expiration of Term—Compensation

Commissioner of Commodity Futures Trading Commission continued to serve beyond expiration of fixed period of appointment on April 14, 1977, pursuant to holdover provision of 7 U.S.C. 4a(a)(B). Commissioner's entitlement to compensation after expiration of first session of 95th Congress is questioned since statute provides that a commissioner may not continue to serve "beyond the expiration of the next session of Congress subsequent to the expiration of said

fixed term of office." The word "next" before "session" refers to the adjournment of a subsequent session of Congress. Therefore, the Commissioner may be compensated until expiration of the 2d session of the 95th Congress, or appointment and qualification of successor, whichever event occurs first.

In the matter of John V. Rainbolt—Commodity Futures Trading Commission—holdover period, January 19, 1978:

By letter of December 23, 1977, John G. Gaine, General Counsel, Commodity Futures Trading Commission, requested a decision as to whether John V. Rainbolt, II, a Commissioner of that Commission, may continue lawfully to receive compensation after the expiration of the 1st session of the 95th Congress.

The request involves the application of section 2(a)(2) of the Commodity Exchange Act, as amended by the Commodity Futures Trading Act of 1974, 7 U.S.C. § 4a(a), establishing the Commodity Futures Trading Commission. The pertinent part of that section is set forth below:

> Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, *except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office*, and except (A) any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (B) the terms of office of the Commissioners first taking office after the enactment of this paragraph shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years. [Italic supplied.]

Commissioner Rainbolt was one of five commissioners first taking office after the creation of the Commodity Futures Trading Commission. He was appointed to office for a two-year period, which expired on April 14, 1977, and since that time he has continued to serve under the holdover provision in 7 U.S.C. § 4a(a). As of the time of Mr. Gaine's letter to this Office, Commissioner Rainbolt had not been reappointed, nor had a successor been appointed and qualified.

The legislative history of the Commodity Futures Trading Commission Act of 1974, which contains the language involved, offers little assistance in resolving the issues presented by this case. However, the pertinent language of 7 U.S.C. § 4a(a) is essentially the same as that in Public Law 86–619, approved July 12, 1960, 74 Stat. 407. The purpose of that act was "to make uniform provisions of law with respect to the terms of office of the members of certain regulatory agencies." The subject language was discussed in some detail during Committee hearings on that law. In view of the fact that the pertinent language of that act is virtually identical to the language of 7 U.S.C. § 4a(a), and that both acts were enacted for similar reasons, we believe that it is appropriate to utilize the legislative history of Public Law No. 86–619 in resolving the questions presented by Mr. Gaine's request.

The first issue is whether the holdover provision contained in 7 U.S.C. § 4a(a) applies to the commissioners first taking office after the creation of the Commission and whose terms of office were fixed by the President pursuant to subsection (B).

The legislative history of Public Law No. 86–619 indicates that the need for that statute arose due to the situation resulting when a regulatory Commission is at less than full strength during the period after a member's term expires and before his successor is nominated and confirmed. During such periods the work of a commission was delayed, which served not only to handicap the commission but also to deprive the public of the benefits and services of that commission. See House Report No. 1917, 86th Cong., 2d Sess. 2 (1960). In order to avoid such delays, it was proposed that Commissioners should serve until their successors were appointed and qualified. *Id.* at 3.

We previously construed the holdover provisions of Public Law No. 86–619, as they applied to the Federal Power Commission, in a letter of January 31, 1973, to Senator Warren G. Magnuson, Chairman of the Senate Committee on Commerce. We stated in that letter that the legislative history of Public Law No. 86–619 shows that the clear intent of Congress was to extend the term of office of commissioners of the Federal Power Commission so that it would not be prevented from acting on matters before it due to vacancies. We found nothing in the legislative history which would support a view that the Act was intended to apply only to commissioners appointed to full terms. Rather, we viewed the language in question as creating terms of office which do not necessarily expire at the end of a fixed period, but which continue until successors are appointed and qualify subject to the limitation on the length of the holdover. Therefore, we applied the holdover provision of the 1960 Act to a Federal Power Commissioner who had been appointed to less than a full term to fill a vacancy.

We believe that the same analysis applies to the case at bar. Under this view, commissioners first taking office after the creation of a commission would be eligible to serve the original term, including any time beyond that designated by the President because a successor had not yet been appointed and qualified. Accordingly, since we can discern no reason why the above rationale would not be applicable to the Commodity Futures Trading Commission, we conclude that the holdover provision in 7 U.S.C. § 4a(a) applies to commissioners first taking office after the creation of the Commodity Futures Trading Commission.

The second issue concerns the application of the holdover provision of section 4a(a) to Mr. Rainbolt. That provision provides that a commissioner may continue to serve beyond the expiration of the 5-year

period of his appointment, "* * * except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office * * *." Since Mr. Rainbolt's appointment expired on April 14, 1977, during the first session of the 95th Congress, the question is whether the above-quoted language would permit Mr. Rainbolt to serve until the expiration of the second session of the 95th Congress, or whether it serves to terminate his appointment at the expiration of the first session of the 95th Congress.

Mr. Gaine suggests that to construe the subject provision so as to terminate Mr. Rainbolt's appointment at the expiration of the first session of the 95th Congress would be to ignore the word "next" appearing in the phrase. He states that such a reading would conflict with the rule of statutory construction that effect must be given, if possible, to every word, phrase, and sentence of a statute. He continues:

> I have examined the holdover provisions of statutes which were enacted before and after the creation of the Commodity Futures Trading Commission. See, *e.g.*, 15 U.S.C. § 2053, establishing the Consumer Product Safety Commission, and the enabling statutes for the Civil Aeronautics Board (49 U.S.C. § 1321), the Interstate Commerce Commission (49 U.S.C. § 11), the Federal Trade Commission (15 U.S.C. § 41) and the National Transportation Safety Board (49 U.S.C. § 1902). These statutes all permit the affected commissioners to continue to serve beyond their fixed terms of office, and except in the case of the Consumer Product Safety Commission (where a commissioner may not holdover longer than one year), each of these statutes has an unlimited holdover provision until a successor is appointed and has qualified. Thus, Congress has frequently recognized that even lengthy holdover periods would be needed in order to provide for the orderly functioning of agencies and has made provisions for them.

We believe that the plain meaning of the statute compels the result urged upon us by Mr. Gaine. Moreover, the legislative history of Public Law No. 86–619 provides additional support for that result. See page 3 of House Report No. 1917, *supra*, which reads in pertinent part as follows:

> The committee amendment is designated also to meet the suggestion of the Bureau of the Budget that this additional period "until his successor is appointed and qualified" during which a Commissioner might serve should be limited to 60 days. In the consideration of the actual days of vacancy which have existed in the commissions involved, *it appeared that a 60-day period would be too limited and consideration was given to a longer period. However, a specification of any given number of days might raise a number of additional problems owing to the fact that it is possible that a stated number of days might carry over beyond the adjournment of a subsequent session of the Congress.* The committee accordingly proposes a change in the Senate bill to add language to the effect that the Commissioners concerned "shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." [Italic supplied.]

The report shows Congressional concern regarding continuity, as shown by the fact that consideration was given to a *longer* holdover period. Therefore, in interpreting the language of the holdover provision, to ignore the word "next" would have the effect of shortening

the holdover period, providing a result which runs contrary to the intent of Congress.

Since the language in 7 U.S.C. § 4a(a)(B) is similar to that in Public Law No. 86–619, we believe that Mr. Rainbolt's term does not terminate upon the expiration of the first session of the 95th Congress. Accordingly, Commissioner Rainbolt may continue to receive his salary and other appropriate disbursements as a member of the Commodity Futures Trading Commission until his successor is appointed and qualified or until the expiration of the second session of the 95th Congress, whichever event occurs first.

[B–188566]

Contracts—Negotiation—Competition—Preservation of System's Integrity—Reliance of Significant Misstatements

Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that *it determined* which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire" of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning.

Contracts—Negotiation—Offers or Proposals—Irregularities in Survey Report Submitted

Representations to NASA about methods, manner, and results of questioning of incumbent contractor's employees are not "subject to differing opinions" and differing results of later survey cannot reasonably be attributed to employees' memory lapses or unwillingness to respond to inquiries.

Contracts—Negotiation—Offers or Proposals—Evaluation—Improper—Based on Significant Misstatements in Proposal

Selected concern's submission of significant misstatement to NASA about method, manner, and results of survey of incumbent employees' willingness to accept employment with concern if successful in competition was material in evaluation leading to selection.

Contracts—Negotiation—Qualification of New Sources—Qualifying Data—Evaluation—Propriety

Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' *direct responses* formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract.

General Accounting Office—Recommendations—Contracts—Disqualification of Proposal

Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. *Cf. The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75–2 CPD 1940. Thus, recommendation is made under Legislative Reorganiza-

tion Act of 1970 that selected concern's proposal be excluded from consideration for award.

In the matter of Informatics, Inc., January 20, 1978:

By telegram of March 10, 1977, Informatics, Inc., protested the actions of the National Aeronautics and Space Administration's (NASA) Ames Research Center in selecting only Computer Sciences Corporation (CSC) for final negotiations under RFP 2–25841 for computer software services. NASA selected CSC, in part, because of the company's perceived competitive edge (that is a "discriminator" in favor of CSC) in the "Mission Suitability" evaluation standard of the RFP.

In its initial protest correspondence Informatics alleged that NASA improperly evaluated those parts of its proposal relating to the "Mission Suitability, Cost and Past Performance" evaluation standards of the RFP. Specifically, Informatics alleged:

> * * * Informatics not only fails to see that there was a significant discriminator in any area of Mission Suitability but rather believes that the totality of a proper evaluation would have revealed that Informatics in fact was superior in Mission Suitability, that there was a substantial cost risk associated with CSC's lack of commitment from critical Informatics' personnel (thereby completely negating any minute CSC cost advantage) and also that if past performance had been adequately assessed, the Board would have found Informatics to be substantially superior in this critical area of evaluation.

In further correspondence, Informatics raised additional grounds of protest titled, as follows: "Bias" (on the part of a NASA employee who evaluated proposals); "Relative Weights and Scoring Systems"; "Project Manager"; "Commonality"; "NASA Failure to Conform to PRD"; and "Proposed Scoring Analysis."

Because of the conclusions reached in our decision, we consider it necessary to discuss only the issue regarding CSC's alleged lack of a commitment from Informatics' employees.

The overall standards which NASA used to evaluate proposals were: Mission Suitability factors, Cost factors, Experience and Past Performance, and Other factors. The Mission Suitability factors were further divided into subfactors as follows:

Understanding the Requirement:
- (a) narrative summary
- (b) distribution of work force
- (c) staffing standards
- (d) approach to filling the positions

Management Plan:
- (a) approach for efficiently managing the work
- (b) work control procedures, training plans, etc.
- (c) project organization

Key Personnel:
- (a) capability of key personnel
- (b) judgment in identifying which positions are key

Corporate Resources:
- (a) availability of back-up for key personnel
- (b) availability of back-up for other personnel
- (c) "home office' management and technical assistance.

Under the subfactor entitled "Understanding the Requirement—Approach to Filling the Positions" offerors were to describe their approach to filling the positions described in the offeror's "narrative summary." The RFP further provided that a "plan for filling the positions initially shall be included, i.e., employee sources, etc."

Initial proposals were received from three firms, including Informatics and CSC. All three were found to be in the competitive range and were invited to oral discussions held during November of 1976.

NASA's procurement officer posed the following written question to CSC by letter dated November 10, 1976: "What is the nature of the commitment you have from the employees of the other incumbent contractor you have proposed to hire?" CSC's Director, San Francisco Operations, responded in writing by letter dated November 23, 1976, as follows:

> During June and early July of this year CSC West Coast marketing representatives and members of the divisional staff conducted a telephone survey of the local PMI/Informatics technical staff. The purpose of the survey was to discuss professional opportunities at CSC and to ascertain the staff's willingness to join CSC should their company's local business base suddenly contract as a result of this specific procurement. In contrast to letters of intent and/or contingent offers of employment, this manner of assessing the retention index was considered the least disruptive to ongoing work and least disquieting to the overall staff morale of the other incumbent.
>
> *The gross result of the survey indicates an overwhelming desire of the incumbent staff (well over 80%) to remain in the Bay Area and to continue their technical work at ARC as employees of CSC.*
>
> The statistical findings of the survey are based on a sample of 60 individual interviews conducted after working hours, during evenings and on weekends. *Of the 60 persons surveyed, 36 stated they would join CSC should CSC become the successful bidder. Another 10 persons thought they would join CSC's staff, but had preferred to remain uncommitted until the time that CSC is actually successful in this procurement.* Of the remaining persons, 8 would probably join CSC in order to continue their ARC projects, 3 had no opinion, and 3 would definitely not join for personal reasons.
>
> *Therefore, 46 of the 60 persons surveyed, which represents 77 percent of the sample, would join CSC if invited to do so.* Another 8 persons (13 percent) would probably be favorably inclined toward a professional relationship with CSC should CSC be successful in this recompete (SIC). The potential incumbent retained labor base, consisting of 54 persons, is more than adequate to staff the 45 positions CSC has identified in its proposed Staffing Plan.
>
> As a matter of record,when CSC originally bid for the Simulation Laboratory Support Service contract in 1970, the contract preceding NAS 2-7806, the telephone survey was used effectively. In that procurement, CSC had retained on behalf of ARC 97 percent of the incumbent staff when, in fact, the survey showed that an 80-percent retention rate was probable. [Italic supplied.]

Subsequent to receipt of best and final offers, the Source Evaluation Board made its final evaluation and presented its findings to the Source Selection Official. On February 28, 1977, Informatics was informed of NASA's intention to conduct final negotiations for the award with only CSC. NASA's reasons for selecting CSC were set forth by the responsible NASA selecting official as follows:

> Following the presentation of the Board, I summarized the key issues to consider in making my decision. It is clear that CSC has the competitive edge in Mission Suitability. With regard to Cost, the differences are so slight, they

are not a significant discriminator. Even though cost is not considered a significant discriminator, it is noted that our evaluations concluded that the probable cost of doing business with CSC is slightly lower than the other competitors.

There is also no basis for a discriminator in our Experience and Past Performance Factor evaluation or in our Other Factor evaluation.

Because of the higher Mission Suitability score and since Mission Suitability is the only area where we found significant discriminators, I chose Computer Sciences Corporation for final negotiations and award to perform the Computer Software Services for Ames Research Center.

Informatics, after filing the protest with our Office, said it was also informed by NASA that "[It] had found the probable costs of CSC and Informatics to be within one percent of each other and that the two offers were judged equal or about equal in Past Performance * * * [Understanding the Requirement, Management Plan, Key Personnel, and Corporate Resources]." Informatics was also told that the "single discriminator" between the two proposals was in one Mission Suitability subfactor—(Understanding the Requirement—Distribution of Workforce) where Informatics was assigned a lesser score.

Notwithstanding the divergent scores in the "single discriminator" area, Informatics was further informed by NASA that the difference between the proposals was not great. As NASA said in its April 4 letter to Informatics:

Our selection of Computer Sciences Corporation's (CSC) proposal on the basis of its Mission Suitability attractiveness is not intended to mean that we considered the Informatics proposal to be poor nor is it to be implied that we consider Informatics to be a firm unsuited for the work identified in our procurement. We viewed your offer as a very good proposal and considered you in the Competitive Range up to the point of selection. We did not, therefore, find any overwhelming weaknesses in your proposal, so even though we may present some findings as "weaknesses" our view is that we found more strengths in the CSC offer than we found in the Informatics offer and our choice was one good offer over another good offer.

Expanding on its initial ground of protest relating to CSC's alleged lack of labor resources commitment from Informatics' employees (to be hired by CSC in the event CSC was selected for award), Informatics later alleged that the "statements made by CSC to the Source Evaluation Board (a) about the conduct of a telephone survey regarding solicitation of Informatics' employees, and (b) the result of the solicitation are erroneous and misleading."

NASA's procurement officer's initial comments on the "lack-of-labor—resources commitment" issue raised by CSC were that "[T]hey [CSC] provided a good explanation as to how they could successfully fill the positions" and that "[W]e [NASA's proposal evaluation board] could find no basis for not believing the CSC statements." Further, the comments show that the procurement officer thought it was important for an offeror to be able to demonstrate that it would obtain the needed workforce.

The Assistant Administrator for Procurement, NASA, subsequently replied to the "commitment" issue raised by Informatics as follows:

(1) Offerors were required to have commitments only for positions considered "key";

(2) CSC proposed committed key personnel (all eight of whom are currently employees of CSC and all of whom have expressed willingness to work on the instant procurement);

(3) With regard to staffing of the non-key personnel involved in the Informatics' ground of protest, NASA supports the procurement officer's positions that "CSC provided a good explanation as to how they could successfully fill the positions and that the [Board] could find no basis for not believing the CSC statements";

(4) The Informatics employees whom CSC proposed to use for "non-key personnel" positions were not "critical" in that comparable skills were available either from within CSC or the local labor market; hence, GAO and court precedent cited by Informatics for the proposition that it was improper for NASA to rely simply on the representations of CSC regarding the availability of "critical employees" is not applicable;

(5) CSC's confidence in obtaining the services of non-key personnel is backed up by its offer to absorb any costs which might be incurred if CSC decided not to hire locally (that is, not to hire Informatics' employees).

GAO AUDIT

Our Office made an audit to investigate further the accuracy of the statements, quoted above, made by CSC to NASA about the results of a CSC telephone survey which allegedly showed the commitment of Informatics' labor-resources to CSC in the event CSC should be awarded the contract in question.

CSC represented to NASA that, of the 60 Informatics employees surveyed during June and early July 1976, 36 said they would join CSC should CSC become the "successful bidder"; 10 thought they would joint CSC but preferred to remain uncommitted until CSC was actually successful in the procurement; 8 said they would probably join CSC; 3 had no opinion; and 3 said they would definitely not join CSC.

We interviewed 61 of a total of 95 Informatics employees identified as working with the company in June and July 1976 in programming support contracts at Ames Research Center. (The remaining 34 persons were no longer employed by Informatics, or were said to be on leave or out of town.) Fifty-nine persons said they had not been contacted by CSC during the June-July 1976 time period. Of the two who

had been contacted, only one said it was by telephone, and both said their discussions were in the context of a personal contact with an acquaintance at CSC.

When asked about contacts after July 1976, 37 of the 59 persons who had not been contacted during the June-July 1976 time period said they had had personal discussion with CSC representatives of possible future employment. All 37 indicated by date or by reference that their contacts had occurred after the March 1977 announcement of CSC's selection. The remaining 22 persons said they had had no direct contact with anyone from CSC on the subject of employment.

We allowed CSC, Informatics, and NASA to comment on the results of our audit.

The CSC Director, San Francisco Operations, who signed the letter to NASA responding to the "commitment" question which contained the statements about the telephone survey has submitted an affidavit which reads as follows:

I am employed by the Computer Sciences Corporation as Director, San Francisco Operation, which has responsibility for Computer Sciences' contracts at the Ames Research Center of the National Aeronautics and Space Administration.

I have been employed in that capacity since 1973.

As part of my duties as Director, I was in charge of the efforts to bid on NASA RFP No. 2-25841 issued May 11, 1976, which now forms the basis of the protest by Informatics-PMI.

My duties included supervision of the Company's activities in canvassing incumbent Informatics-PMI employees to determine their commitment to their work, to the Ames Research Center, and to the San Francisco area.

These activities extended over a period of time, beginning in the winter of 1975-1976 and extending through July of 1976.

The survey was conducted by means of talking with Informatics-PMI employees directly, asking certain Informatics-PMI employees and others questions about their fellow employees and telephone calls by Computer Sciences' employees to incumbent informatics-PMI employees.

The purpose of the survey was to gather information about the incumbent employees which would allow us to conclude whether or not these employees would remain at Ames if the identity of the contractor changed. [Italic supplied.]

The type of facts which we sought included, for example, whether they owned a house in the area, marital circumstances, whether they were involved in community activities, whether they had children in the local schools, whether and where their spouse was employed, etc.

As information was obtained about the Informatics-PMI staff, notes were compiled and a tally was made of the number of incumbent employees who we had concluded would be likely to accept employment with Computer Sciences, the number who were not likely to stay, etc. [Italic supplied.]

On the basis of the notes and tallies of the survey, our previous experience in hiring incumbent employees at Ames Research Center, and our considerable past hiring experience with contracts throughout the country, we prepared the response to NASA's interrogatory.

And based on the foregoing, I was absolutely convinced that CSC could fully staff the work required by the REP in the manner as described in our proposal.

CSC's counsel also furnished comments on the results of our audit and the above affidavit as follows:

(1) The affidavit provides facts that led CSC employees to believe that a number of incumbent employees would be available to staff the contract work;

(2) The correctness of CSC employees' belief is confirmed by the fact that now, 1 year later, CSC has in hand a significant number of employment applications from Informatics' employees at Ames Research Center;

(3) As CSC does not seek "commitments" from prospective employees currently employed by an incumbent contractor because of the practice's "unsettling effect on employees," all that GAO should consider is whether CSC and NASA had a reasonable basis for their conclusions covering the number of Informatics' personnel that would be retained by a new contractor;

(4) As a result of CSC's thorough study of the potential of hiring the Informatics staff, CSC concluded that it could hire incumbent employees;

(5) GAO's audit seems to contain a misinterpretation of the information which CSC submitted to NASA in response to a query about the company's staffing plans. That is, it concludes that the survey was made only by telephone during a short period of time. The language, on review, seems to allow the interpretation which GAO has made, but it is not conclusive and perhaps the CSC selection of words was unfortunate in view of the actual efforts made by CSC. Nonetheless, the matter is one subject to differing opinions;

(6) Even if the CSC submission was a misstatement, GAO must consider whether the misstatement was material in the evaluation of proposals in the light of CSC's reasonable conclusion—that it could hire at least 45 Informatics employees based on steps taken to assure itself that incumbent employees could be hired;

(7) CSC did not ask the incumbent's staff if they would take a job in the event CSC was successful but to confirm that they had ties to the area which increased the probability that they would seek employment with the successful contractor;

(8) In many cases CSC did not need to contact Informatics' employees in order to determine the probability that they would join CSC in in the event of award; in other cases information about Informatics' employees was requested by persons not representing CSC; as to others it is surely possible that they were reluctant to discuss their employment intentions with GAO or Informatics' officials or that they simply do not remember.

ANALYSIS

CSC clearly represented to NASA that 60 Informatics' employees had been interviewed by telephone during June and early July 1976, and that the responses formed the basis for the numbers and categories of employee commitments reported to NASA. CSC now admits that it determined which Informatics' employees would be "likely to

accept employment" based on indirect questioning "beginning in the winter of 1975–1976 and extending through July 1976" about facts mainly relating to the employees' community ties.

Thus the manner in which CSC actually conducted the survey is at complete variance with the manner represented to NASA. Further, the "likely-to-accept-employment" conclusion made by CSC is also at complete variance with the CSC representation to NASA that "36 [Informatics' employees] stated they would join CSC should CSC become the successful bidder." Manifestly, the remaining CSC representations to NASA concerning the 24 other employees allegedly interviewed are also completely at variance with the actually conducted survey since the representations clearly state that Informatics employees' direct responses rather than CSC conclusions about "likely responses" prompted the representations. We therefore reject CSC's argument that the CSC representations to NASA are "subject to differing opinions."

Moreover, the results of our audit of Informatics' employees—in combination with the statements inthe CSC affidavit—confirm that the manner of the actual survey and the reported results are also completely at variance with the CSC representations to NASA. Thus, we cannot attribute the varying survey results to employee "memory lapses" or unwillingness to respond to our inquiries.

We have also examined a document, entitled "Report of Investigation," containing the results of interviews which NASA obtained from several employees of Informatics and CSC concerning the circumstances of the CSC representation. Analysis has also been made of comments which CSC and Informatics submitted to our Office on the report.

We find nothing in the interviews which supports the November 23, 1976, CSC representations that *direct responses* of Informatics' employees formed the basis for the numbers and categories of employee commitments contained in the representations. Specifically, we find nothing in the interviews supporting the CSC representations that:

1. The gross result of the survey indicates an *overwhelming desire* of the incumbent staff * * * to * * * continue * * * as employees of CSC[;]
2. * * * 60 individual interviews [were] conducted after working hours, during evenings and on weekends[;]
3. Of the 60 persons surveyed, *36 stated they would join* CSC should CSC become the successful bidder. Another *10 persons thought they would join* CSC's staff * * *. Of the remaining persons, *8 would probably join* CSC * * *, *3 had no opinion*, and *3 would definitely not join* * * *[;]
4. Therefore, *46 of the 60 persons surveyed*, which represents 77 percent of the sample, *would join CSC* if invited to do so. [Italic supplied.]

The remaining CSC arguments are essentially of a single thread although advanced separately. Thus, CSC argues that a "misstatement" resulting from an "unfortunate" selection of words should not be

considered material since CSC had a reasonable basis—stemming from data collected under its actual survey—to conclude that it could fully staff the proposed contract.

It is clear that the CSC misstatement was relied upon by NASA in evaluating CSC's proposal. The record shows that the procuring officer thought it was important for an offeror to be able to demonstrate that it would obtain the needed work force—otherwise NASA would never have asked CSC to specify the "nature of the commitment [CSC had] from the employees of the * * * incumbent contractor * * * [CSC] * * * proposed to hire." The number of Informatics' employees proposed to be used by CSC represents a significant portion of the contract work force. Further, it is apparent that the misstatement furnished to NASA had to be used to some extent in assigning CSC a superior score in the "Understanding the Requirement—Work Force Distribution Plan" evaluation subfactor of the RFP and in assigning CSC a score equal to Informatics' score in the "Understanding the Requirement—Approach to Filling the Positions (Initial Staffing)" evaluation subfactor. Since the maximum score that could be assigned in these subfactors was more than 12 times the present total scoring differential between the proposals, it is not possible for us to find that the misstatement was other than material.

Further, in our view, it is not appropriate to speculate—as CSC apparently would have us do—that CSC's proposal could have received the same score even if the survey had been correctly described. In this view, it is also inappropriate to take note of CSC's post-selection efforts in regard to recruitment of Informatics employees.

DECISION

We conclude that CSC's employee submitted a significant misstatement concerning the manner and the results of the survey in question. In the course of discussions in negotiated procurements contracting agency representatives frequently ask for information from an offeror. The agency has a right to rely on the factual accuracy of the responses. Given the importance of such discussions and the delays and other difficulties which would be experienced if agency personnel were required to verify each response, we believe that the submission of a misstatement, as made in the instant procurement, which materially influences consideration of a proposal should disqualify the proposal. The integrity of the system demands no less. Any further consideration of the proposal in these circumstances would provoke suspicion and mistrust and reduce confidence in the competitive procurement system. *Cf. The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75-2 CPD 194.

We are therefore recommending that NASA exclude CSC's proposal from consideration for award under the RFP. This recommendation is made under the authority of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176.

Protest sustained.

[B-190440]

Vehicles—Government—Transportation of Dependents of Employees on Temporary Duty—Criteria—Length of Assignment and Government Interest

Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable.

In the matter of the American Federation of Government Employees, Local 2814 and Federal Railroad Administration, January 20, 1978:

This action is in response to a letter dated October 3, 1977, from Mr. Henry B. Frazier, III, Executive Director, Federal Labor Relations Council, requesting our ruling on a negotiability matter concerning the American Federation of Government Employees (AFGE), Local 2814 and the Department of Transportation, Federal Railroad Administration, FLRC No. 77A-65. The matter involves a proposal by AFGE which would permit Federal employees to transport their legal dependents in Government vehicles while performing official business, subject to certain conditions.

The proposal in question is set forth below:

Section E. Employees assigned GSA vehicles will have the right to transport their legal dependents while traveling in GSA vehicles, subject to the following conditions:

1. The immediate supervisor must be notified in writing of such travel by dependents by the submission of a planned itinerary in advance, which identifies the dependents and relationship of the dependents.
2. The employee is on a planned itinerary requiring an absence of more than sixty (60) hours from his duty station.

The AFGE states that a similar provision was included in a Federal Railroad Administration order effective January 20, 1972, following negotiations on that point between the agency and the AFGE. The union believes that the proposal is not in conflict with law.

The Department of Transportation's position is set forth in a July 26, 1977, letter to the Federal Labor Relations Council. The Department states that it is of the opinion that the above-quoted proposal is nonnegotiable because it contravenes 31 U.S.C. § 638a(c) (1970). It further states that the inclusion of a similar provision in

prior Federal Railroad Administration regulations does not overcome the prohibition contained in the cited statute. Section 638a(c) states, in pertinent part:

> Unless otherwise specifically provided, no appropriation available for any department shall be expended—
>
> * * * * * * *
>
> (2) for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necessary and then only as to such latter cases when the same is approved by the head of the department concerned. * * *

Section 638a(c)(2) does not define the term "official purposes." It provides only that the term does not include the transportation of employees between their homes and places of employment, except in certain specified cases not relevant here. In construing section 638a (c)(2), this Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of employees.

The AFGE proposal would allow an employee's dependents to accompany him in a Government vehicle from the employee's residence or headquarters to his temporary duty station incident to an assignment which would require an absence of more than a specified time period. The proposal does not purport to authorize the transportation of dependents for any purpose when the employee himself would be prohibited from performing travel. Of course, if the employee used the Government vehicle to transport a dependent for other than "official purposes," he would be subject to the sanctions set forth in section 638a(c)(2). See *Clark* v. *United States*, 162 Ct. Cl. 477 (1963), in which the Court of Claims held that a 90-day suspension of an employee was sufficient punishment when he permitted his wife to drive a Government vehicle on personal business, on a few occasions. Thus, under the AFGE proposal the Government vehicle could be used only for "official purposes" and the transportation of any dependents could only be made incident to such use.

Determinations concerning Government interest with regard to section 638a(c)(2) are primarily to be made by the administrative agency concerned within the framework of applicable laws. 54 Comp. Gen. 855 (1975) and B-164184, June 21, 1968. However, in making determinations with regard to Government interest, an agency should consider the possible increased liability of the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for damages suffered by such dependents through any negligence of the employee. Furthermore, employees should be advised that their dependents are

not authorized to drive Government vehicles. Since such dependents are not "employees" within the meaning of the Federal Tort Claims Act, the Government would apparently not be liable for damages suffered by a third party occasioned by the negligence of the dependent. Moreover, it appears that should damage result from the negligence of the dependent such person might be held liable not only to the third party, but also to the Government for any damage to the Government vehicle.

Other factors for consideration would be the availability of space in the Government vehicle and the possible disruption in routine which might be caused by a large number of dependents accompanying an employee. Also, since GSA vehicles are involved, the contract agreement should be approved by GSA. The specific conditions of each particular situation will, no doubt, suggest additional factors for consideration. Since determinations should be made on a case-by-case basis, as opposed to a blanket policy, we suggest that the agency retain authority to make the required determination on a case-by-case basis.

Accordingly, where the transportation of a dependent in a Government vehicle is such that the dependent merely accompanies an employee on an otherwise authorized trip scheduled for the transaction of official business, and the agency involved makes a determination that it is in the Government's interest for the dependent to accompany the employee (for instance, for morale purposes), we do not believe that the provisions of section 638a(c)(2) would be violated. Thus, we are of the view that the provisions of 31 U.S.C. § 638a(c)(2) do not, by themselves, serve to make the AFGE proposal nonnegotiable.

[B-191019]

Bids—Acceptance Time Limitation—Extension—After Expiration—Acceptance of Renewed Bid—Effect on Competitive System

A bid, once expired, may be accepted when revived by bidder provided such acceptance does not compromise integrity of competitive bidding system.

Bids—Acceptance Time Limitation—Extension—After Expiration—Initial Refusal and Delay in Reviving Low Bid—Award to Second Low Bidder *v.* Solicitation Cancellation

Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency.

In the matter of the Veterans Administration—request for advance decision, January 23, 1978:

The Veterans Administration (VA) has requested an advance decision on the award of a contract for the addition to Building Num-

ber 1, VA Hospital, Huntington, West Virginia, project number 581–036.

Bids for the project were received on October 27, 1977, with the two lowest bidders being as follows:

1. Edward L. Nezelek, Inc. (ELN)	$5,927,600
Alternate #1 (new parking lot)	74,660
2. Santa Fe Engineers (SFE)	6,430,000
Alternate #1	46,000

The two remaining bids ranged upwards to $6,904,000.

The bids provided for a 30 calendar day acceptance period, and consequently expired by their terms on November 26, 1977. The VA states that on November 1, 1977, ELN was requested to review and confirm its bid. Pursuant to that request, ELN orally advised the VA that it "had submitted a bid with errors" and requested a meeting with officials of the VA which was held on November 11, 1977. ELN presented its worksheets at that meeting and it is agreed by agency officials that 3 items of work were not included in the bid. It is reported that price quotations had not been obtained for these missing items before the bid opening, but that the estimated costs for these items were obtained *after* bids were received. The record shows that the value of the work omitted from the bid was of the magnitude of $150,000–$250,000.

Since ELN had not considered the 3 items in formulating its bid and therefore could provide no evidence as to the amount of its intended bid, but was able to demonstrate that a mistake had been made, the VA advised the firm that in accordance with Federal Procurement Regulations (FPR) § 1–2.406–3(a)(2) (1964 ed., amend. 165) it could withdraw, but not correct, its erroneous bid. Under the circumstances, ELN decided to verify its original bid, and a letter to that effect was dictated and signed by one of the firm's representatives before he left the meeting.

According to the agency, it was unable to award the contract by the bid expiration date (November 26, 1977) and consequently requested ELN to extend the bid acceptance period to December 9, 1977. The agency states that on November 28, ELN called and advised that it was its intention to extend the bid acceptance period for the "bid actually intended," i.e., as corrected, and that ELN was told "this was not acceptable." On November 29, 1977, the VA received a telegram from ELN stating that "we are precluded from complying with your request to extend period for acceptance of our proposal * * *."

Thereafter, in a telephone conversation, ELN indicated it still wanted to pursue bid correction and when advised by the VA that this was "not realistic," ELN advised it wanted extra time to "reconsider

the situation." On that same day, SFE was contacted and requested to extend its bid acceptance period for 45 days. According to the VA, "interest was expressed but they [SFE] needed some time to make a decision."

It is reported that on November 30, 1977, ELN telephoned the agency and stated that it "definitely decided not to extend" the bid acceptance period. Also on that date, SFE called and expressed its willingness to extend its bid for 30 days.

On November 30, 1977, ELN filed a bid protest with this Office, stating that:

> * * * [T]he bidding period for the addition to building #1 at the [VA] Hospital, Huntington, West Virginia has expired. For that reason * * * ELN, Incorporated will protest any intent on the part of the Veterans Administration to award this project to any previous bidder.

By mailgram dated December 8, 1977, ELN advised the VA that it would extend its original bid to January 8, 1978. On the same date, ELN withdrew the protest. Both ELN and SFE have subsequently extended their bids to February 15, 1978. It is SFE's contention that ELN's refusal to extend the bid acceptance period "rendered its bid void upon the expiration of the originally specified period."

We have held that in proper circumstances, the Government may accept a bid, once expired, which has subsequently been revived by the bidder. *Riggins & Williamson Machine Company, Inc., et al.*, 54 Comp. Gen. 783, 788 (1975), 75-1 CPD ¶ 168; *Guy F. Atkinson Company, et al.*, 55 Comp. Gen. 546, 550 (1975), 75-2 CPD ¶ 378. The reason for this rule is that since expiration of the acceptance period confers on the bidder a right to refuse to perform a contract subsequently awarded, the bidder may waive such right if, following expiration of the acceptance period, he is still willing to accept an award on the basis of the bid as submitted. 46 Comp. Gen. 371 (1966); *Guy F. Atkinson Company, et al., supra.*

Nonetheless, there still must be considered the effect an award to ELN would have on the competitive bid system. 42 Comp. Gen. 604 (1963). In the cited case we concluded that the award to the low bidder who had deliberately selected a 20-day acceptance period rather than the usually contemplated 60-day period, allowed his bid to expire before award, and waited more than 2 weeks to grant a bid extension when requested, would compromise the integrity of the competitive bid system *because* the low bidder in effect sought and gained an advantage after bid opening not sought by other bidders— the advantage of renewing its bid in short increments or allowing it to lapse as his interests dictate.

We have not previously considered a case with a combination of events such as occurred here—where a mistake is alleged, but the

original bid is affirmed; where the original bid, as affirmed, lapses before acceptance and a request for extension is specifically denied by the bidder; where a protest is filed with the apparent purpose of seeking GAO sanction for cancellation and resolicitation after other bids have been exposed; and finally where the original bid is reinstated more than a week after extension was specifically denied. We think these events clearly bring the case within the rule of 42 Comp. Gen. 604, *supra*, in that it is apparent that ELN sought to limit the rights of the Government to award a contract as ELN's own particular interests dictated. Thus, we think ELN's on-again, off-again behavior adversely affected the integrity of the competitive bid system such that the interests of the Government would not be well served by awarding a contract to ELN.

Contrasted with the foregoing are the actions of SFE in this procurement. Although its bid also expired on November 26, 1977 (it had no reason to assume it would be awarded a contract and thus there would be no reason to extend its bid), that firm promptly agreed to the extension as requested, and assumed the risks of the marketplace for the period of that extension. Thus, we believe the SFE extension properly falls within the rationale of 46 Comp. Gen. 371, *supra*, and that SFE should not be precluded from reviving its bid.

Accordingly, with respect to the question of whether the invitation should be cancelled, unless it is concluded that the prices bid by SFE are clearly unreasonable, or other factors which are not apparent on the record are discovered which would warrant cancellation, we are of the opinion that no "compelling reason" exists to cancel the invitation and resolicit at a later date. FPR § 1-2.404-1 (1964 ed.).

[B-190749]

Contracts—Specifications—Failure To Furnish Something Required—Samples

Where specification is clear and definite and fully sets forth requirements of Government, and there are no characteristics which cannot be described adequately in the applicable specification, agency erroneously required submission of bid sample. Therefore, in circumstances, bidder who did not submit sample prior to opening may be considered for award even though invitation for bids (IFB) required bid sample be furnished by opening date. 16 Comp. Gen. 65, modified.

Contracts—Specifications—Samples—Effect of Furnishing or Failure To Furnish on Contract Award—Competitive System

Where IFB fully sets forth requirements of Government, bidder obtains no undue advantage by not submitting required sample before bid opening and integrity of competitive bidding system is not hindered, because Government may require bidder to perform in accordance with the specifications notwithstanding failure to submit sample. 16 Comp. Gen. 65, modified.

In the matter of the D. N. Owens Company, January 25, 1978:

D. N. Owens Company (Owens) protests the award of a contract by the Bureau of Prisons (Bureau) to M.S. Ginn & Company (Ginn) for file folder insert assemblies. The Invitation for Bids (IFB) No. 100–4493 required that a bid sample be furnished at bid opening as part of the bid. Of the five bids received, only Owens submitted a bid sample. Owens contends that Ginn's bid should have been rejected as nonresponsive for failure to submit the bid sample, and that Owens should receive the award.

In accordance with Federal Procurement Regulations (FPR) § 1–2.202–4(e) (1964 ed.) the IFB provided that:

> *BID SAMPLES:* (a) One sample of the File Folder Insert Assembly must be furnished as a part of the bid, and received before the time set for opening bids. Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.
>
> (b) Failure of samples to conform to all such characteristics will require rejection of the bid. Failure to furnish samples by the time specified in the Invitation for Bids will require rejection of the bid, except that a late sample transmitted by mail will be considered under the provisions for considering late bids, set forth elsewhere in this Invitation for Bids.

However, the contracting officer relying on our decision in 16 Comp. Gen. 65 (1936) and Bureau of Prisons Policy Statement 12820A(c) gave Ginn the opportunity to submit its bid sample after opening. The Bureau policy statement provides in pertinent part:

> Failure to furnish a sample may be cured, but refusal to supply samples called for by the specifications * * * requires rejection of the bid. However it is advisable to give the bidder an opportunity to cure the deficiency after opening * * * if it is then not furnished, the bid may be rejected.

Upon submission of its bid sample, the Bureau made an award to Ginn as the low responsive, responsible bidder.

As a general rule, bid samples may not be used for determining a bidder's ability to produce the required item. B–164732, September 30, 1968. We have held that where the IFB calls for the submission of a sample for purposes of determining the responsiveness of a bid, the sample must be furnished within the time specified. See 37 Comp. Gen. 845 (1958). Therefore, where the language of the invitation states that a sample *must* be submitted or is *required* to be submitted with the invitation, the failure to do so ordinarily will make a bid nonresponsive and result in its rejection. 37 Comp. Gen. *id.*; B–172715, July 8, 1971. However, this rule applies only if the sample is required to show exactly what the bidder proposes to furnish and the *specifications cannot be stated with a sufficient degree of certainty* to permit acceptance of the bid without prior submission of a sample. See 17 Comp. Gen. 940 (1938).

FPR § 1–2.202–4(b) (1964 ed.) adheres to the above principle. This regulation provides in part that:

Bidders shall not be required to furnish a bid sample of a product they propose to furnish unless there are certain characteristics which cannot be described adequately in the applicable specification or purchase description, thus necessitating the submission of a sample to assure procurement of an acceptable product.

Thus we have stated that specification requirements such as, "shall have dried without tackiness or chalking" and "shall spread easily and sufficiently in one application," and properties of an item such as feel and texture constitute characteristics which cannot adequately be described in a specification and are properly matters for illustrating by bid sample. B–153890, July 30, 1964; B–152669, November 4, 1963. However, as we stated in 17 Comp. Gen. *supra* at 943 which amplified our decision in 16 Comp. Gen. *supra:*

* * * if the advertised specifications, as they should, fully set forth the requirements of the Government, and a bidder without submitting a requested sample with his bid, nevertheless proposes to meet the said specifications and is otherwise entitled to the award, it would usually appear in the interest of the Government to waive as an informality the failure to submit a sample and, by an acceptance of the proposal as submitted, to bind such bidder to strict compliance with the specifications. * * *

See B–173484, December 21, 1971.

As explained below, we are of the view, that the specifications in the IFB fully set forth the requirements of the Government and that Ginn's bid was properly considered for award. The IFB included Bureau specifications no. 4091 for file folder insert assemblies. This specification sets forth in definite clear terms, the size, type of paper, location of holes to be punched and tabs etc., for the folder. Moreover, the specification indicates how the folder insert assembly is put together. For example the specification requires:

* * * All leaves shall have rounded corners. Cloth gusset to be affixed to the last 3 leaves on both sides of each leaf, on the left side of each leaf. Cloth gusset material to be grey cambric or equal.

	Specifications For Each Leaf		
Assembly Parts	Body Size	Stock	Tabs Size & Location
#1	11′ W x 9⅝′ H	18 pt. Kraft	½′ x 6½′ top ½′ x 3′ side
* *	*	*	* *

As noted above, the IFB provided that "Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation." However, the solicitation contained no separate list of sample characteristics to be examined, FPR § 1–2.204–4(b), warranting submission of a bid sample. We have been informed by the Bureau that specification 4091, in fact, constituted the characteristics against which the bid samples were evaluated. We therefore conclude that the requirement for submission of a sample was unnecessary for

proper bid evaluation because a list of characteristics to be examined was not included in the solicitation and the specifications appear to be sufficiently definitive to permit adequate bid evaluation without a sample. Accordingly, the submission of the signed bid by Ginn, taking no exceptions to the IFB specifications, bound Ginn to its terms once award was made to it. See 17 Comp. Gen. *supra*; B–173484, December 21, 1971.

Owens questions whether the acceptance of a bid which does not contain a bid sample is in the best interest of the Government in that this practice allegedly undermines the integrity of the competitive bidding system by giving a bidder which does not submit a sample an opportunity to get out of its bid.

This is precisely the same argument which was addressed in our decision in 17 Comp. Gen. *supra:*

> * * * if a bidder fails to submit his sample before the bids are opened, the bid must stand by itself, and no action by the parties thereafter with respect to the sample may legally be viewed as altering such bid, or as affecting the contractual obligation, upon acceptance of the bid, to deliver materials strictly in accordance with the specifications. Under such circumstances it is not apparent how bidders might obtain any undue advantage by not submitting requested samples before the bids are opened.

We believe this rationale is applicable in this case because it is clear that the Government may require Ginn to perform in accordance with the advertised specifications irrespective of its failure to submit a sample prior to bid opening.

The referenced Bureau policy statement does not clearly delineate when the failure to submit a bid sample at opening may be waived. Moreover, we have been informed by the Bureau that the contracting officer did not make the finding in writing as to "why acceptable products cannot be procured without the submission of bid samples" required by FPR § 1–2.202–4(c) (1964 ed.). Therefore we are recommending to the Bureau that its policy statement be revised to adhere to the applicable regulations and decisions of our Office.

For the foregoing reasons, the protest is denied.

[B–189987]

Bids—Rejection—Nonresponsive—Information Requirements—Descriptive Data

Invitation for bids contained brand name or equal clause providing that if bidder proposed furnishing equal product bid must contain sufficient descriptive data to evaluate it. Where bidder furnished no descriptive data, furnishing similar product to agency under previous solicitation is not acceptable substitute for descriptive data requirement, and bid was properly rejected as nonresponsive.

Bids—Discarding All Bids—Prices Excessive

Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonbly priced and adequate

competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here.

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Bid Prices Excessive

Withdrawal of small business set-aside does not violate Government policy of setting aside percentage of procurements for small business where as here governing regulations were complied with.

Bids—Discarding All Bids—Resolicitation—Auction Atmosphere Not Created

Cancellation of solicitation after bid opening and subsequent resolicitation do not create "auction" atmosphere where solicitation was properly canceled due to unreasonable prices and lack of adequate competition.

In the matter of the Stacor Corporation; Isles Industries, Inc., January 26, 1978:

The Department of Agriculture, Forest Service (Forest Service), issued invitation for bids (IFB) No. R4–77–71 on August 19, 1977, for a quantity of drafting light tables. The IFB was a 100-percent small business set-aside and also required that the product offered should be a "Hamilton Dial-A-Light" or an equal product.

Seven bids were received by the date set for bid opening. The contracting officer determined that six of the bids were nonresponsive. On the basis that the remaining bid, that of the Stacor Corporation (Stacor), was unreasonably high (58 percent above the low bid), the contracting officer canceled the solicitation pursuant to Federal Procurement Regulations (FPR) §§ 1–2.404–1(a) and 1–2.404–1(b)(7) (1964 ed.). The contracting officer determined that there was not adequate small business competition and stated his intent to resolicit with full competition.

Isles Industries, Inc. (Isles), the apparent low bidder, protests the rejection of its bid as nonresponsive for failure to include descriptive literature and also protests the contracting officer's decision to cancel the solicitation and resolicit with full competition. Isles argues that the specifications listed in the IFB were sufficient to describe the product the Government wanted, and that since Isles stated no exception to the IFB, it was clearly offering what the Government required. Isles' main contention is that the policy underlying the descriptive literature clause—to enable the Government to evaluate bids to determine compliance with specifications—was fulfilled in this case because Isles had provided the Government with a similar product on the last Forest Service solicitation for light drafting tables. Isles argues that the product provided under the previous solicitation would meet all but two of the salient features listed in this IFB, and since it stated no exception in its bid, it clearly intended to provide those features as well.

Stacor protests the rejection of its bid as unreasonably high and the subsequent cancellation of the small business set-aside. Stacor argues that since all prices have been revealed, the cancellation will create an auction atmosphere. Additionally, this protester contends that since it is Government policy that a certain percentage of solicitations be set aside for small business, the cancellation and resolicitation with full competition violate that policy. Stacor also asserts that under these circumstances FPR § 1–2.404–1(b)(5) allows for negotiation under FPR § 1–3.214, and that it has offered to negotiate.

Stacor supports the contention that its price was reasonable with a number of arguments. It argues that it is improper to use Isles' low bid as a comparison since it was found to be nonresponsive. Also, Stacor alleges that most of the other bidders were large businesses and were bidding unrealistically low in an attempt to cause cancellation of the small business set-aside. Additionally, Stacor argues that the range of prices received in response to a Forest Service solicitation for a very similar item last year (IFB R4–76–30) was comparable to its price here. Stacor contends that the low item price on R4–76–30, $789.50, should be disregarded because the product delivered under the resultant contract was found to be unsatisfactory. The other prices, ranging from $905.79 to $1,169, Stacor contends are comparable to its unit price of $1,197. This is especially true, Stacor states, because the specifications in the present IFB were upgraded.

Finally, Stacor argues that, if there was inadequate small business competition, the Forest Service contributed to it by mailing IFB's to only 5 firms, as opposed to the 21 small businesses that were invited to bid on R4–76–30.

Responsiveness of Isles' Bid

Isles has stated that it was furnishing its own product as an equal to the brand name specified. The IFB contained the standard brand name or equal clause as specified in FPR § 1–1.307–6 (1964 ed. amend. 15), which provides, in pertinent part, that:

> (c)(1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirement of the invitation for bids, and (ii) estab-

lish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

The IFB also contained, in Clause 2(i) of the Supplemental Instructions and Conditions to SF–33A, the following requirement for descriptive literature:

(1) *Requirement for Descriptive Literature*
(1) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to compatibility with existing Government-owned equipment as provided in the attached specifications.
(2) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

The responsiveness of an "equal" bid submitted in response to a brand name or equal procurement is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise reasonably available to the purchasing activity. *Environmental Conditions, Inc.*, B–188633, August 31, 1977, 77–2, CPD 166; *Ocean Applied Research Corporation*, B–186476, November 9, 1976, 76–2 CPD 393.

Isles submitted no descriptive literature with its "equal" bid. Also, Isles admits that this IFB contained two salient features that the product it previously provided did not have. The Forest Service has stated that the product previously provided by Isles was unsatisfactory, and that was why the specifications were changed. Consequently, the information available to the Forest Service from its previous contract with Isles was not sufficient to permit the Forest Service to determine whether Isles was now offering a product that met the current requirements. Additionally, we have held that a statement by a bidder offering to meet all specifications does not substitute or compensate for inadequate descriptive data. 45 Comp. Gen. 312, 316 (1965). Stating no exception to the requirements of the IFB also comes within that rule.

Accordingly, Isles' bid was properly rejected as nonresponsive, and its protest is denied.

Propriety of Cancellation of the Solicitation

FPR § 1–2.404–1(a) (1964 ed. circ. 1) provides, in substance, that after bids have been opened award must be made to the lowest responsive, responsible bidder unless there is a compelling reason to reject all bids and readvertise. However, under FPR § 1–2.404–1(b) (1964 ed.

circ. 1), the invitation may be canceled after opening if prices on all otherwise acceptable bids are unreasonable, or if the bids received did not provide competition adequate to insure reasonable prices. That section, in pertinent part, states:

(b) Invitation for bids may be cancelled after opening but prior to award, and all bids rejected, where such action is consistent with § 1-2.404-1(a) and the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:

* * * * * * *

(5) All otherwise acceptable bids received are at unreasonable prices. (See § 1-3.214 concerning authority to negotiate in such situations.)

* * * * * * *

(7) The bids received did not provide competition which was adequate to insure reasonable prices.

Also with regard to small business set-asides, FPR § 1-1.706-3(b) (1964 ed. amend. 101) provides, in pertinent part, that:

(b) If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers the procurement of the set-aside portion from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw either a joint or a unilateral set-aside determination.

Contracting officers are clothed with broad discretion in deciding whether an invitation should be canceled, and our Office will not interfere with such a decision unless it is unreasonable. *Hercules Demolition Corporation*, B-186411, August 18, 1976, 76-2 CPD 173. Also, the determination of price reasonableness is basically a business judgment, with which we will not interfere absent a showing of abuse of discretion. *Falcon Rule Company, Aakron Rule Corporation*, B-187024, November 16, 1976, 76-2 CPD 418.

Stacor argues that nonresponsive bids cannot be used to determine that a responsible bid is unreasonably priced. However, we have held that nonresponsive bids may be used to determine price reasonableness unless there is evidence showing that to do so would be unreasonable. *McCarthy Manufacturing Company*, 56 Comp. Gen. 369 (1977), 77-1 CPD 116; *Support Contractors, Inc.*, B-181607, March 18, 1975, 75-1 CPD 160. In this case, Isles' bid was found to be nonresponsive for failure to provide descriptive literature, a factor that would be unlikely to greatly affect its price. Therefore, the use of this price to determine the reasonableness of Stacor's price was proper.

Stacor also contends that many of the bids were submitted by large businesses and were purposely unreasonably low in an attempt to cause the withdrawal of the set-aside and, therefore, should not be used to determine price reasonableness. Large business bids on small business set-asides, while nonresponsive, are regarded as "courtesy" offers and may be considered in determining whether small business bids submitted are reasonable. 49 Comp. Gen. 740 (1970); *Tufco Industries, Inc.*, B-189323, July 13, 1977, 77-2 CPD 21.

Also, while Stacor's prices may be close to the range of prices received on the previous solicitation, it was higher than the previous high bid and was much higher than the previous low bid.

Regarding Stacor's contention that FPR § 1-2.404-1(b)(5) permits negotiation under FPR § 1-3.214 when prices received under formal advertising are unreasonable and the Forest Service has not responded to Stacor's offer to negotiate, we note that the decision of whether to negotiate is within the agency's discretion—there is no requirement to negotiate.

It is our opinion, from the above, that Stacor has not shown that the Forest Service determination was without a reasonable basis, or that it constituted an abuse of discretion.

We cannot agree with Stacor's contention that the withdrawal of the small business set-aside violates the Government's small business policy, since FPR § 1-1.706-3(b) specifically permits such withdrawals in these circumstances. Also, while there is a policy to set aside a certain percentage of solicitations for small business, nothing in the Small Business Act or the FPR requires that a specific solicitation be set aside. See *W. O. H. Enterprises*, B-190272, November 23, 1977, 77-2 CPD 408.

Regarding Stacor's contention that cancellation and resolicitation after bid opening are improper because an "auction" atmosphere is created, where the cancellation is in accordance with the governing regulations, as in this case, an auction is not created. See *Silent Hoist & Crane Co., Inc.*, B-186006, June 17, 1976, 76-1 CPD 392; *Alco Metal Stamping Corp.*, B-181071, September 4, 1974, 74-2 CPD 141.

Finally, Stacor contends that if there was inadequate competition, the Forest Service contributed to it by not sending IFB's to all of the small businesses that it sent them to under the previous solicitation. According to the Forest Service, however, 10 bidders responded to the previous IFB; of those only 5 were small business, and 4 of those were offering the same product. Under these conditions, it seems reasonable for the Forest Service to have dropped the nonresponding and large firms from its mailing list and to have attempted to achieve adequate competition by soliciting a number of different firms.

Accordingly, Stacor's protest is also denied.

[B-188787]

Contracts—Negotiation—Prices—Best and Final Offer—Hourly Rates Reduced—Offer Rejected

As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, re-

jected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable.

Contracts—Protests—Conflict in Statements of Contractor and Contracting Agency

Contracting agency's allegation, disputed by protester, that oral request for best and final offers included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice.

In the matter of Analysis & Computer Systems, Inc., January 31, 1978:

Request for proposals (RFP) No. F19628–77–R–0061 was issued on October 29, 1976, by the Air Force Systems Command for the analysis of atmospheric sensor data. A cost-plus-fixed-fee contract was contemplated. Offerors were required to submit initial technical and cost proposals by November 26, 1976. Each offeror was also required to prepare a DD Form 633–4, "Contract Pricing Proposal (Research and Development)." Paragraph 29 of the RFP's Instructions, Conditions and Notices to Offerors advised:

29. COST AND PRICE ANALYSIS FORMS, DD Form 633–4. The Offeror is authorized to reproduce DD Form 633–4. In its preparation the Offeror shall employ all actual or estimated costs or pricing data as of the date of the proposal in preparing his price estimate; he should be prepared to make such data known to the Government Contracting Officer or his representative for use in evaluating such estimate together with any significant changes in such data which may have occurred subsequent to date of his proposal and prior to completion of negotiations on price.

The RFP also required the offeror to list by name an individual to be assigned to each of the following "labor categories": "Senior Math Analyst" (to work approximately 2,000 hours), "Program Analyst" (3,000 hours), "Junior Programmer" (4,000 hours), and "Technical Secretary" (250 hours).

Analysis & Computer Systems, Inc. (ACSI), was one of five firms that responded to the RFP. ACSI named in its initial proposal the three personnel as required. On the DD Form 633–4 submitted with its initial proposal, ACSI listed under "Direct Labor" the positions Senior Math Analyst, Math Analyst, and Junior Math Programmer, and an estimated number of hours, a rate per hour, and an estimated cost for each.

Initial proposals were evaluated by the contracting activity's technical staff, and negotiations were conducted with the five offerors. Negotiations were concluded on February 4, 1977, at which time offerors were orally advised by the buyer that best and final offers (BAFOs) would be due on February 9. The buyer states that his oral contact with the offerors on February 4 also included advice that any changes in a BAFO must be explained therein. A confirming letter dated February 4 was sent to each offeror, which stated in part:

* * * cut-off for negotiations and further discussion of your proposal is 5:00 PM, ET, Friday, 4 February 1977. You were further advised that your Best

and Final Offer must be received at this office on or before close of business 5:00 PM, ET, Wednesday, 9 February 1977. As a minimum, your Best and Final Offer should consist of a Current DD Form 633-4, Certificate of Current Cost and Pricing Data, dated 9 FEB 1977 and a letter confirming negotiations.* * *

The ensuing technical evaluations concluded that all proposals were essentially equal, with only minor deviations. Estimated cost, therefore, became the deciding factor.

ACSI's BAFO price was the lowest of those received. However, on the revised DD Form 633-4 submitted with its BAFO, ACSI reduced the hourly rates for the three positions listed from those in its initial proposal, resulting in a significant decrease in its estimated cost. The Air Force states:

* * * The submitted BAFO did not explain the basis for these significant rate reductions and left serious doubt in the mind of the contracting officer as to whether ACSI did, in fact, contemplate using the specified individuals for this effort or substitute other less costly and/or less qualified personnel. The latter action would have required a reevaluation of the ACSI offer. This would have involved a reopening of negotiations and a new BAFO for ACSI and the other offerors in order to maintain the integrity of the procurement process.

The referenced reevaluation would have been required by the following RFP provision:

The experience and technical competence of the on-site personnel, being a critical component in the successful completion of the work, shall be an important consideration in the technical evaluation. Any changes of proposed personnel after technical evaluation will require a technical *re-evaluation* of the total proposal.

The contracting officer determined that clarification of ACSI's offer was necessary before the price proposal could be evaluated. However, the contracting officer believed that such clarification, if obtained by him, would constitute a reopening of negotiations, which would be unfair to the other offerors, was not in the best interest of the Government, and would delay the award. He therefore had the Defense Contract Audit Agency (DCAA) obtain by telephone the actual current wage rates of the named personnel from ACSI, which he felt did not involve reopening negotiations. The Air Force states that this contact was made pursuant to paragraph 5 of the RFP's Instructions to Offerors and was contemplated by the instructions to the DD Form 633-4. The cited paragraph 5 provides:

By submission of this proposal, offeror, if selected for negotiation, grants to the contracting officer, or his authorized representative, the right to examine, for the purpose of verifying the cost or pricing data submitted, those books, records, documents and other supporting data which will permit adequate evaluation of such cost or pricing data, along with the computations and projections used therein. This right may be exercised in connection with any negotiations prior to contract award.

The instructions to DD Form 633-4 provided in pertinent part:

* * * the offeror must submit with this form * * * cost and pricing data (that is, data which is verifiable and factual and otherwise as defined in ASPR 3-807.3). * * *

* * * * * * *

* * * the cost or pricing data must be accurate, complete and current, and the judgment factors used in projecting from the data to the estimates must be stated in sufficient detail to enable the contracting officers to evaluate the proposal. For example, provide * * * justification for an increase in labor rates * * *.

The rates given DCAA were considerably higher than those proposed in ACSI's BAFO and approximated the rates in the initial proposal. The contracting officer states that an examination of the information obtained indicated that the BAFO rates "were a serious understatement of the rates that are presently being paid to the three named personnel." He concluded that if there were no personnel changes, award to ACSI:

* * * would have caused a serious Cost/Risk factor to occur and raised the spectre of a built-in cost overrun at some point in the future.

Therefore, because of the inability of this contracting officer to ascertain what personnel were to be used in ACSI proposal, and because of the possibility of a built-in overrun * * * [the contracting officer] determined ACSI to be an unacceptable offeror.

Award was made to RDP, Inc. In the April 6 notice of award sent to ACSI, the contracting officer stated:

Your proposal, although judged technically acceptable, failed to provide cost trackability and justification regarding changes made in your Best and Final Offer (BAFO) to labor rates, thereby raising doubt as to the personnel you intended to use in contract performance. As specified in the solicitation, the experience and technical competence of the assigned personnel were a critical and important consideration in the evaluation of proposals. Your BAFO, as received, raised serious doubt as to whether the personnel you originally proposed were still contemplated to be used.

ACSI argues that the request for a BAFO did not indicate a necessity to, as the letter rejecting its proposal stated, "provide cost trackability and justification regarding changes made * * * to labor rates." ACSI asserts that it fully complied with the requirements in the February 4 request for BAFOs. In this connection, ACSI denies that it was advised by telephone on February 4 to justify changes in its BAFO. ACSI also argues that the contracting officer's conclusions reached on the basis of the information obtained by DCAA were erroneous and improperly drawn.

In a negotiated procurement, all offerors in the competitive range are free to revise their proposals, including price, in response to a request for BAFOs. In fact, it is not uncommon for an offeror to withhold its lowest price until the BAFO. See *Fordel Films, Inc.*, B-186841, October 29, 1976, 76-2 CPD 370.

The Air Force argues that ACSI was adequately advised in the solicitation that price revisions in its BAFO had to be accompanied by justification, specifically in paragraph 29 of the RFP and the instructions to DD Form 633-4, set out above. The Air Force also relies on the oral advice allegedly given ACSI by the contract specialist on February 4.

In our view, the cited RFP provisions do not explicitly require an offeror to submit with its BAFO substantiation for price reductions. While it might be argued that implicit in the RFP provisions is a requirement for justification for price reductions which would cause an offeror to so justify, this situation is distinguishable from that in, for example, *Electronic Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD 15. There, the written request for BAFOs specifically advised that revisions must be accompanied by complete and detailed support, and we approved the rejection outright of a BAFO deficient in detailed support. Concerning the alleged oral advice from the contract specialist, which ACSI denies having received, although we recognize that a protester has the burden of affirmatively proving its case, *Reliable Maintenance Service, Inc.—request for reconsideration*, B-185103, May 24, 1976, 76-1 CPD 337, since the written request for BAFOs issued as confirmation of the oral request (see Armed Services Procurement Regulation § 3-805.3(d) (1976 ed.)) did not require justification for any changes, we do not consider the contract specialist's record of his oral advice on that subject as conclusive. We note here that as a result of this protest the contracting activity has modified its written request for BAFOs to include the following instruction:

> You are advised that a best and final offer containing changes from your previously negotiated proposal, which are not adequately explained, or which fail to provide complete traceability from your previous position may not be considered credible in the final evalution and selection, and may become a specific minor factor in the technical/cost/price realism area. Such changes may affect the acceptability of your offer and could render your offer unacceptable.

Thus, ACSI's proposal should not have been rejected merely because ACSI "failed to provide cost trackability and justification regarding changes made" in its direct labor rates. However, an offeror runs the risk of the rejection of a BAFO if it fails to clearly demonstrate its merits. See *Kinton Corporation*, B-183105, June 16, 1975, 75-1 CPD 365. Thus, we must consider whether the contracting officer's determination that ACSI's BAFO was unacceptable based on the changes made therein and the information obtained by DCAA was reasonable.

As stated above, the contracting officer had two problems with the BAFO: (1) doubt as to the personnel to be used in contract performance, and (2) the possibility of a substantial cost overrun.

Although ACSI did not enter in the BAFO names different than those in the initial proposal, it did not repeat those names with the changes in the hourly rates. In view thereof, and since the importance of the on-site personnel to the project was clearly expressed in the solicitation, it would certainly have been prudent to explain the re-

ductions, notwithstanding that an explanation may not have been explicitly required by the RFP and the request for BAFOs. In this connection, the awaree, who also reduced the direct labor rates in its BAFO, specifically indicated a change in personnel. Under the circumstances, we believe that the contracting officer's concern about a possible change in personnel was not unreasonable.

In regard to the possibility of a substantial cost overrun even if the personnel named initially were to be utilized, we have recognized that in a cost-plus-fixed-free contract, evaluated costs provide a sounder basis than proposed costs for determining the most advantageous proposal. *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60 (1975), 75–2 CPD 35; 52 *id.* 870, 874 (1973). The determination of the realism of proposed costs is a matter for the judgment of procuring officials and will not be subject to objection from our Office unless there is no rational basis therefor. *Educational Computer Corporation*, B–187330, November 30, 1976, 76–2 CPD 460. We believe that the unexplained direct labor cost reduction in the BAFO could reasonably cause the contracting officer to doubt the realism of the proposed costs. We emphasize here that although we have agreed with ACSI that justification for changes in its BAFO was not explicitly required, it remained ACSI's responsibility, as stated above, to submit a clear and unambiguous proposal.

The contracting officer states that he did not contact ACSI directly for clarification because such contact would have constituted a reopening of negotiations, which would have been unfair to the other offerors. Parenthetically, we note that a request that an offeror explain a price reduction which does not afford an opportunity to modify or revise a BAFO does not constitute "negotiations" within the meaning of the procurement regulations. B–170989, B–170990, November 17, 1971.

Nevertheless, under the circumstances and since ACSI raised reasonable concerns in the contracting officer's mind by its unclear BAFO, we cannot criticize the contracting officer's caution in attempting clarification by utilizing the procedure involving DCAA. Although ACSI alleges that the information obtained by that mechanism confused rather than clarified the situation, consideration of such information in conjunction with the unexplained BAFO reductions was not unreasonable.

The protest is denied.

[B–190023]

Contracts—Protests—Timeliness—Small Business Set-Aside—Administrative Determination—Not for GAO Review

Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely

and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, General Accounting Office does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination.

Contracts—Negotiation—Cost, etc., Data—Price Analysis Requirement

Comparison of proposed prices with each other and with independent Government estimate satisfies regulatory requirement that price analysis be conducted.

Contracts—Negotiation—Evaluation Factors—Criteria—Same for Small and Large Business

In unrestricted procurement, it is improper to evaluate proposal submitted by small business differently from how proposals of large business are evaluated.

Contracts—Negotiation—Evaluation Factors—Point Rating—Price Consideration

Where agency evaluates proposals by numerically scoring proposals under each of four evaluation factors, it is not improper under circumstances of case for price to be scored on basis of entire "spread" of points available, so that total available points are awarded to lowest proposed price and less points, mathematically determined, are awarded to other proposed prices.

Contracts—Negotiation—Awards—Initial Proposal Basis—Competition Sufficiency

Contract awarded on basis of initial proposals without discussions is proper where solicitation notified offerors of such possibility and agency determines that there was adequate competition resulting in fair and reasonable price.

In the matter of Francis & Jackson, Associates, January 31, 1978:

Francis & Jackson, Associates (FJA) has protested the award of a contract to Auerbach Associates, Inc., pursuant to request for proposals (RFP) No. DACA73–77–R–0014, issued by the Department of the Army's Corps of Engineers for non-personal services to perform an analysis and study in connection with improving management of the Corps' Program, Planning and Civil Preparedness Division, Directorate of Military Construction.

FJA raises four basic objections:

(1) The RFP was improperly issued on a competitive basis since it contained alleged proprietary material that FJA had submitted in a prior unsolicited proposal;

(2) That in view of FJA's alleged small business and labor surplus area status, the RFP should not have been issued on an "unrestricted" basis;

(3) That the evaluation of proposals submitted under the RFP was defective in that "price" was accorded greater weight than was established in the RFP and that a price and cost analysis was not performed as required by Armed Services Procurement Regulation (ASPR) § 3–807.2; and that the evaluation should have reflected FJA's status as a small business;

(4) That the ensuing contract was improperly awarded on the basis of initial proposals without discussions in derogation of 10 U.S.C. § 2304(g) (1970).

The RFP required the submission of proposals on a fixed price basis only, and stipulated that proposals would be evaluated on the basis of four factors of equal weight. Price was one of those factors. The three proposals received were evaluated with regard to the three technical factors by a panel of four evaluators. Out of a possible 75 total points (25 each) for the three technical factors, FJA received a composite score of 63.25, while Auerbach received 61 points, and Dynamic Research Corporation was scored at 59.5. The firms' proposed prices were $96,000, $67,487 and $152,102, respectively. Points for price were awarded on the basis of a direct linear scale starting with the maximum number of points (25) for the lowest price and correspondingly fewer points given to the other two prices depending upon the degree to which they exceeded the low price.

Accordingly, 25 points were added to Auerbach's technical score for a total of 86, 17 to FJA's technical score for a total of 80.25, and 1 to Dynamic's for a total of 60.5. Award was made to Auerbach on the basis of its proposal being most advantageous to the Government from the standpoint of price and other (technical) factors.

FJA's first two contentions will not be considered. Our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals shall be filed prior thereto. 4 C.F.R. § 20.2(b)(1). The assertions that the RFP was based on FJA's proprietary data and that the RFP should not have been issued on an unrestricted basis are clearly assertions that the solicitation was defective.

With respect to the first issue, FJA states it protested when it "was first notified of a possible open competitive procurement." However, the Corps reports that its "first notice * * * of FJA's concern for the alleged proprietary material was upon receipt of FJA's protest after the ward to Auerbach," and FJA concedes at another point that upon receipt of the RFP it "chose NOT TO PROTEST" because it anticipated that application of the evaluation criteria and proper negotiation techniques would result in recognition of the superiority of the proposal it would submit. Accordingly, we find the allegation clearly to be untimely filed. Moreover, we do not view the circumstances as giving rise to an issue which would warrant consideration of the allegation under the "significant issue" exception of 4 C.F.R. § 20.2(c).

With regard to the second issue, FJA appears to base its protest on information it obtained at a post-award debriefing. That information indicates that the contracting officer originally anticipated that the procurement would be set aside exclusively for small business participation but concluded that a set-aside was not feasible because none of the firms to be solicited was a small business or labor surplus area concern. FJA states that the contracting officer's conclusion was faulty because it has been a small business for more than two years and has offices in a labor surplus area. In this regard, the contracting officer states, and FJA denies, that he contacted FJA prior to issuance of the RFP and was advised that FJA was not a small business.

Even though FJA purports to base its second allegation on the information acquired at the debriefing, we think the thrust of the second protest allegation is that the procurement should have been set aside for small business because at least one firm, FJA, was a qualified small business prospective offeror for the procurement. Although FJA did not learn until after award why the procurement was not set aside, it did know, upon receipt of the RFP, that the procurement was unrestricted. If, in view of its alleged small business status, it believed a set-aside was appropriate, it should have protested the matter to the contracting officer at that time. In any event, because the decision as to whether a procurement should be set aside for small business is within the authority and discretion of the contracting agency, this Office generally is "reluctant" to second-guess an agency's decision not to set aside a procurement and has declined to consider a protest of such a decision. *Par-Metal Products, Inc.*, B–190016, September 26, 1977, 77–2 CPD 227; see also *Reliance Electric Company*, B–190287, B–190303, October 20, 1977, 77–2 CPD 313.

Turning to the second two allegations, we find the protest to be without merit, since the record indicates that the evaluation was proper and the decision not to conduct discussions was consistent with statutory and regulatory requirements.

With regard to the evaluation, the Corps states that the price analysis required by ASPR § 3–807.2 was in fact performed. In pertinent part, that section provides that price analysis may be accomplished in various ways, including the comparison of price quotations submitted (ASPR § 3–807.2(b)(1)(i)) and the comparison of proposed prices against an independent cost estimate prepared by the purchasing agency (ASPR § 3–807.2(b)(1)(v)). The Corps reports that both of these comparisons were made, and that Auerbach's low price of $67,487 was considered reasonable when compared with both the other

prices submitted and with the Corp's own estimate of $75,000. Nothing more in the way of a price analysis was required under the circumstances.

With respect to FJA's suggestion that the scoring of price proposals should have been adjusted to eliminate various competitive disadvantages suffered by small business and labor surplus area firms when in competition with large business concerns, we have held that in an unrestricted procurement it is "improper to score a small business proposal differently from one submitted by a large business solely on the basis of size." *Lamar Electro-Air Corporation*, B–185791, August 18, 1976, 76–2 CPD 170. Rather, all proposals must be evaluated on the basis of the announced criteria, without regard to any unspecified (in the RFP) factors such as small business size status. *See UCE, Incorporated*, B–186668, September 16, 1976, 76–2 CPD 249; *Signatron, Inc.*, 54 Comp. Gen. 530, 535 (1974), 74–2 CPD 368; *AEL Service Corporation et al.*, 53 Comp. Gen. 800 (1974), 74–1 CPD 217.

FJA's main objection to the evaluation concerns the assignment of all 25 points to Auerbach's proposal and spreading out the other proposals over the entire 25 point range. FJA points out that the three technical factors were not scored in that way, and also questions how such a scoring of price can represent any "evaluation" at all with respect to whether a low price is "good because it is low" or no good "because it is too low." FJA also states that the scoring method is improper because the number of points awarded its proposal was dependent on the proposed price of the high offeror, and if that offeror had proposed a price of $330,000, then "FJA would have won."

Procuring activities have broad latitude in determining the particular method of proposal evaluation to be utilized. *Augmentation, Inc.*, B–186614, September 10, 1976, 76–2 CPD 235; *Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404; *BDM Services Company*, B–180245, May 9, 1974, 74–1 CPD 237. The only requirements are that the method provide a rational basis for source selection and that the evaluation itself be conducted in good faith and in accordance with the announced evaluation criteria. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76–1 CPD 325; *Tracor Jitco, Inc.*, 54 Comp. Gen. 896 (1975), 75–1 CPD 253 and 55 Comp. Gen. 499 (1975), 75–2 CPD 344; *EPSCO, Incorporated*, B–183816, November 21, 1975, 75–2 CPD 338. Agencies generally utilize numerical point ratings in "an attempt to quantify what is essentially a subjective judgment." 52 Comp. Gen. 198, 209 (1972). In many instances, both initial and best and final offers are evaluated through use of numerical techniques, see, e.g., *Bunker Ramo Corporation*, 56 Comp. Gen. 712

(1977), 77-1 CPD 427; *Applied Management Sciences, Inc.*, B-184654, February 18, 1976, 76-1 CPD 111, while in other instances the agency may numerically score only initial offers and will instead rely on a subjective analysis of best and final proposals. See 52 Comp. Gen. 198, *supra; Decision Sciences Corporation*, B-182558, March 24, 1975, 75-1 CPD 175. When numerical scoring schemes are utilized to evaluate proposals, technical factors are traditionally scored on the basis of the extent to which the evaluators, in the exercise of their good faith subjective judgments, believe proposals merit perfect or less than perfect numerical ratings. See, e.g., *Bunker Ramo Corporation, supra; Joseph Legat Architects*, B-187160, December 13, 1977, 77-2 CPD 458. Most often, the scores assigned by the evaluators are what is utilized in proposal evaluation. In some instances, however, the evaluator's scoring will be "normalized" so that the highest rated proposal is equated to a maximum score (e.g., 100 points). See 52 Comp. Gen. 382 (1972). Thus, competing technical proposals may all have close numerical ratings or may receive disparate scores which can cover the full range of points available.

Similarly, in evaluating price, agencies may utilize a variety of evaluation methods. They may, for example, consider cost without scoring that factor even though various other evaluation factors are scored. *Donald N. Humphries & Associates, et al.*, 55 Comp. Gen. 432 (1975), 75-2 CPD 275; *Marine Management Systems, Inc.*, B-185860, September 14, 1976, 76-2 CPD 241; *Charter Medical Services, Inc.*, B-188372, September 22, 1977, 77-2 CPD 214. They may, in some instances, quantify technical point scores in terms of dollar advantage by computing cost/quality ratios. *Shapell Government Housing, Inc.*, 55 Comp. Gen. 839 (1976), 76-1 CPD 161; *Corbetta Construction Company*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144; see also *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Price may also be evaluated by numerically scoring proposed prices and totaling the points awarded for both cost and other evaluation factors. See, e.g., *AEL Service Corporation, et al., supra; Dynalectron Corporation*, B-187057, February 8, 1977, 77-1 CPD 95; *Hansa Engineering Corporation*, B-187675, June 13, 1977, 77-1 CPD 423. When this latter evaluation approach is utilized, it is not uncommon for proposed prices to be scored, as in this case, with the lowest price being awarded the maximum possible point score. See, e.g., *Hansa Engineering Corporation, supra; Design Concepts, Inc.*, B-186880, December 22, 1976, 76-2 CPD 522; *Grey Advertising, Inc., supra;* see also *Computer Network Corporation; Tymshare, Inc.*, 56 Comp. Gen. 245 (1977), 77-1 CPD 31.

This is not to say that every possible evaluation approach would be appropriate in every instance. For example, in *Bell Aerospace Company*, *supra*, we found the agency's particular method of evaluating price to be questionable because it could have produced a misleading result and was inconsistent with the relative weights assigned to the evaluation criteria. 55 Comp. Gen. at 257–60. See also *Genasys Corporation*, 56 Comp. Gen. 835 (1977), 77–2 CPD 60, where we stated that "a more rationally founded method of evaluating cost should have been employed." 56 Comp. Gen. at 859. Similarly, the concerns expressed by FJA with regard to the evaluation scheme used in this case might have validity under certain circumstances, such as where the evaluation encompasses either a very low proposed price, which casts doubt on the validity of a technical proposal or which is associated with a technically unacceptable proposal, *Design Concepts, Inc.*, B–186125, October 27, 1976, 76–2 CPD 365; *cf. DOT Systems, Inc.*, B–185558, August 26, 1976, 76–2 CPD 186, or an absurdly high price which bears no apparent relationship to the effort proposed. In the former circumstances, of course, the inclusion in the point "spread" of a "too low" or unacceptable price could distort the intended evaluation results. In the latter situation, inclusion of a very high price, i.e., the $330,000 posited by the protester, can result in a "bunching" of scores for the other prices which in effect would improperly reduce or eliminate price as an evaluation factor. See *W. S. Gookin & Associates*, B–188474, August 25, 1977, 77–2 CPD 146; *Group Operations, Inc.*, 55 Comp. Gen. 1315 (1976), 76–2 CPD 79.

Here, however, we see nothing unreasonable or improper with the evaluation scoring scheme used by the Corps under the circumstances. The scored proposals were relatively close technically, the low proposed fixed price was regarded as reasonable, and the low price was below the Government estimate. Accordingly, we see no basis for objecting to the award of the full 25 points for price to the low offeror or to the award of 32 percent less points, which were mathematically rather than subjectively determined, to the protester's proposal when its proposed price was some 42 percent higher than the low offeror's price, and cannot conclude that the scoring was inconsistent with the criteria set forth in the RFP. That price happened to be the critical determinant of the successful offeror in this instance may be attributed to the fact that Auerbach's technical score was very close (within 2.25 points) to FJA's so that Auerbach's more significant superiority in terms of price overcame FJA's margin in the technical areas.

Finally, FJA objects to the Corps' failure to conduct written or oral discussions. FJA's primary contention in this regard is that "the

differences in the proposals * * * and the disparate prices preclude a determination of sufficient competition to assure the Government that fair and reasonable prices would be arrived at without discussions." FJA further suggests that discussions should be required in any procurement for the type of services involved herein "whenever the lowest priced proposer does not have the best technical proposal."

ASPR § 3-805.1(a), which implements 10 U.S.C. § 2304(g), provides:

> (a) Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:
>
> * * * * * * *
>
> (v) in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror.

In this regard, paragraph 7.1 of the Solicitation Instructions and Conditions, as well as paragraph 10(g) of Standard Form 33A, warned offerors that award might be made without discussions and that proposals should be submitted initially on the most favorable terms.

As indicated above, the Corps determined, on the basis of the three proposals received, that the most favorable proposal was that submitted by Auerbach and that Auerbach's low price was reasonable. We think this satisfies the regulatory requirement regarding adequate competition, and we are aware of no other requirement for discussions such as suggested by FJA. Accordingly, we are unable to object to the award on the basis of initial proposals. See *United States Towers Services*, B-185840, July 14, 1976, 76-2 CPD 44; *Imperial Products Co., Inc.*, B-186061, August 11, 1976, 76-2 CPD 155.

The protest is denied.

[B-190298]

Contracts—Negotiation—Offers or Proposals—Essentially Equal Technically—Price Determinative Factor

Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determinative criterion for award.

Contracts—Protests—Administrative Reports—Timeliness

Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period.

In the matter of the Telecommunications Management Corporation, January 31, 1978:

Telecommunications Management Corp. (TMC) protests the award of a contract to Rockville Consulting Group, Inc. (RCGI) for a study to evaluate the effectiveness and efficiency of the cable TV program of the Office of Minority Business Enterprise under solicitation No. 7–36549, issued by the U.S. Department of Commerce (Commerce) on August 8, 1977. TMC's primary contention is that Commerce ignored the evaluation criteria of the request for proposals (RFP) in making the award to RCGI.

The record shows that fixed-price proposals were received from three firms by the August 27, 1977, closing date established in the RFP. Of the proposals received, those submitted by TMC and RCGI were initially determined to be technically acceptable. After discussions were conducted with these two firms, on September 13, 1977, TMC and RCGI submitted their best and final offers at $56,640 and $47,249, respectively.

The technical proposals were evaluated by the Technical Proposal Evaluation Committee (Committee) with the result that TMC's proposal received a higher numerical score (78 out of 85 points) than RCGI's proposal (66 points). However, the Committee determined that either firm could adequately accomplish the study and therefore deferred to the Procurement Division for the final selection, "based on the best price and other Procurement Division staff concerns." The price evaluation resulted in TMC's proposal receiving an additional 29 points, for a total of 107 points, and RCGI's proposal receiving an additional 35 points, for a total of 101 points. Notwithstanding the fact that TMC's proposal received the higher number of points, on September 26, 1977, the contract was awarded to RCGI, the lower priced, lower scored offeror. TMC timely protested this action to Commerce and to our Office.

The RFP provided as follows with respect to award and evaluation of offers:

EVALUATION OF OFFERORS

By use of numerical and narrative scoring techniques, proposals will be subjectively evaluated against the evaluation factors specified below.

Award will be made to that offeror (1) whose proposal is technically acceptable and (2) whose technical/cost relationship is the most advantageous to the Government; and who is considered to be responsible within the meaning of Federal Procurement Regulations 1–1.12. Cost will be a significant factor in the award decision, although the award may not necessarily be made to that offeror submitting the lowest estimated cost. Likewise, award will not necessarily be made for technical capabilities that would appear to exceed those needed for the successful performance of the work.

FACTOR		POINTS
1. Timely delivery of Draft Report (Assurance of ability to deliver draft report)		5
2. Technical Approach		20
a. Offeror must submit a proposal that is technically responsive and achievable	10	
b. Soundness of Evaluation Methodology for evaluation	10	
3. Experience and Competence of Personnel		30
a. Quality of Personnel Assigned	15	
b. Personnel Experience with Similar Evaluation Tasks and Projects	15	
4. Experience and Competence of Proposing Firm		30
a. Specific related past evaluation experience	20	
b. Adequate staff size and availability to perform the task by completion date	5	
c. Plan developed for the overall management of the evaluation	5	
5. Price/Cost		35
Total Criteria Points		120

TMC asserts that the contracting officer arbitrarily disregarded the evaluation criteria set forth in the RFP in awarding the contract to RCGI, because price was allowed to become the determining factor in award selection. TMC's position is that price was already included as a factor in the evaluation scheme and therefore TMC should have received the award since its proposal received the "highest combined evaluation score." In this connection, TMC refers to our decisions in *Dynalectron Corporation*, B-187057, February 8, 1977, 77-1 CPD 95, and *Genasys Corporation*, 56 Comp. Gen. 835 (1977), 77-2 CPD 60, as establishing the validity of its protest.

We do not believe the cases cited by TMC compel the conclusion urged by the protester that "the subject contract award must be deemed improper by the GAO, and not allowed to stand." *Dynalectron Corporation, supra*, dealt with a situation where although the solicitation specified 3 main evaluation factors (listed in descending order of importance as technical, management, and financial) with 12 subcriteria, the evaluation of best and final offers was made on the basis of only 6 of the subcriteria, weighted disproportionately to the evaluation scheme set forth in the solicitation. We held that the evaluators improperly departed from the evaluation scheme selected. In *Genasys Corporation, supra*, we found the weighting system used in evaluation to be unobjectionable, even though the ratio between the evaluation factors was changed from that indicated in the RFP, because the order of importance of the factors was retained and because the individual factor weights did not exceed the ceilings listed in the RFP. In essence, both cases merely stand for the well-established proposition that "once offerors are informed of the criteria against

which their proposals are to be evaluated, it is incumbent upon the procuring agency to adhere to those criteria or inform all offerors of changes made in the evaluation scheme." 56 Comp. Gen. at 838.

That proposition arises out of the nature of the negotiated method of procurement. Since negotiation, unlike formal advertising, permits multiple evaluation factors, meaningful competition can be attained only if offerors are notified of these factors and given some reasonable information as to their weights. These factors and weights must be used in the actual evaluation. It would not be proper to induce an offer representing the highest quality and then to reject it in favor of a materially inferior offer on the basis of price. *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 368; *Charter Medical Services, Inc.*, B-188372, September 22, 1977, 77-2 CPD 214. Similarly, it would not be proper to select a materially higher cost offer on the basis of quality where the solicitation places major emphasis on cost or price. The point is that offerors should be given as good an idea as is reasonably possible—considering the subjectivity and uncertainty involved—of the basis for the competition.

In many cases, while the *relative* weights assigned to the various evaluation factors are set forth in the solicitation, the precise weights of—or, where a point scoring system is used, the maximum points allocated to—each factor and/or subfactor are not indicated. In such cases, award need not be made to the offeror whose proposal receives the highest number of evaluation points, since point scores need not determine the outcome of a competitive source selection, but are merely guides for decisionmaking by source selection officials whose job it is to determine whether technical point advantages are worth the cost that might be associated with that higher-scored proposal. See *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD 325 and cases cited therein.

On the other hand, where a solicitation sets forth the relative weights of evaluation criteria, including price, in the form of a precise numerical evaluation formula, and provides that the awardee is to be selected on the basis of the high score, the relative values of price and technical factors have been built into the formula, so that in effect the trade-off between cost and technical considerations is made when the evaluation formula is adopted rather than after the technical evaluation is completed. Therefore, if the source selection official, who is not bound by the scoring of the evaluation panel, see, e.g., *Grey Advertising, Inc., supra*, agrees with the scoring, the highest scored acceptable proposal should be selected for award. See *Hansa Engineering Corporation*, B-187675, June 13, 1977, 77-1 CPD 423.

In the instant case, we do not believe the award was contrary to the evaluation criteria set forth in the RFP. The evaluation section of the RFP established technical factors as worth some 85 points while price was worth 35 points, but did not state that award would be based on the highest point score attained by an offeror. Rather, the RFP stated that award would be made on the basis of a technically acceptable proposal offering the most advantageous technical/cost relationship.

Moreover, despite the higher technical score given the protester's proposal, the evaluators determined in effect that both proposals were essentially equal technically. Although the discretion to make such a determination is not unlimited and any such conclusion must be supportable, see *Charter Medical Services, Inc., supra*, that determination does not appear to be unreasonable in this case. In these circumstances, cost necessarily became the determinative criterion, and the fact that it did so does not mean that there was a change in the stated evaluation criteria. See *Computer Data Systems, Inc.*, B–187892, June 2, 1977, 77–1 CPD 384, *aff'd on reconsideration* August 2, 1977, 77–2 CPD 67; *Bunker Ramo Corporation*, 56 Comp. Gen. 712 (1977), 77–1 CPD 427, *aff'd on reconsideration* B–187645, August 17, 1977, 77–2 CPD 124; *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75–2 CPD 168. "In any case where cost is designated as a relatively unimportant evaluation factor, it may nevertheless become the determinative factor when application of the other, more important factors do not, in good faith judgments of source selection officials, clearly delineate a proposal which would be most advantageous to the Government to accept." *Bunker Ramo Corporation, supra*, 56 Comp. Gen. at 718. As we said in *Computer Data Systems, Inc.*, 77–1 CPD 384, *supra:*

> The designation of cost or price as a subsidiary evaluation factor means only that, where there is a technical advantage associated with one proposal, that proposal may not be rejected merely because it carries a higher price tag. It does not mean that when technical proposals are regarded as essentially equal, price or cost is not to become the controlling factor.

Thus, we find no merit to the protester's principal contention.

TMC also complains about the time it took Commerce to submit a report on the protest to this Office in view of the fact that performance of the protested contract was scheduled to be essentially completed three months after award. Our Bid Protest Procedures, 4 C.F.R. Part 20 (1977) anticipate that in most cases a report on a protest will be filed within 25 working days, 4 C.F.R. § 20.3(c). Our records indicate that the report was submitted within 25 working days after Commerce's receipt of our request for a report.

The protest is denied.

[B-190553]

Foreign Service—Home Service Transfer Allowance—Temporary Lodgings—"Reasonable Expenses"—Guidelines in 52 Comp. Gen. 78 Applicable

Employee transferred from Athens, Greece, to Washington, D.C., was authorized home service transfer allowance under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). Employee submitted claim of $33 per day for lodging portion of home service transfer allowance for days that he and family resided with relatives. Since section 251.1a of Standardized Regulations authorizes only "reasonable expenses," this Office applied ruling of 52 Comp. Gen. 78 (1972) which established guidelines for determining reasonableness of employees' claims for subsistence while occupying temporary quarters when they resided with relatives.

In the matter of John S. Gough—home service transfer allowance, January 31, 1978:

This action results from the appeal of Mr. John A. Gough, an employee of the Department of State, of the settlement dated August 25, 1977, by our Claims Division which denied his claim for home service transfer allowance.

Mr. Gough was reassigned from Athens, Greece, to Washington, D.C., effective May 21, 1976. Incident to that reassignment, Mr. Gough claimed expenses for the temporary lodging of himself and his family by residing with relatives in Baltimore, Maryland, from May 21 through May 25, 1976, and from June 5 through June 18, 1976, at $33 per day. During the intervening period, he occupied commercial lodging in Alexandria, Virginia, at a cost of $36 per day. The sole issue presented pertains to the reasonableness of the $33 per day for lodging that Mr. Gough paid to his mother-in-law.

The home service transfer allowance is authorized by section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). The allowance is defined at section 251.1a, as follows:

"Home service transfer allowance" means an allowance for extraordinary, necessary, and *reasonable expenses*, not otherwise compensated for, incurred by an employee incident to establishing himself at a post of assignment in the United States (Sec. 040a) between assignments to posts in foreign areas. [Italic supplied.]

One of the elements of the home service transfer allowance is for temporary lodging. Section 251.2c sets its scope:

a tempoary lodging portion designed to offset the room cost of accommodations in a hotel, pension, or other transient type quarters, including obligatory service charges. *A house or apartment may not be designated as "temporary lodging" unless the head of agency determines that it is occupied on a temporary basis.* The cost of meals and tips of all kinds are excluded. The amount paid under the temporary lodging portion is either the employee's daily expenses for allowable items or the maximum prescribed rate (Sec. 942.2), whichever is less. The temporary lodging portion is granted for periods during which expenses for temproray lodging were incurred within the time limits established in section 252.2. [Italic supplied.]

At the outset, we note that the above-quoted section states that a house or apartment may not be designated "temporary lodging" unless the head of the agency determines that it is occupied on a temporary basis. The record does not contain any indication that such a designation has been made. Accordingly, absent the requisite determination by the head of the agency Mr. Gough's claim may not be allowed. However, in the event that the proper determination is provided, the claim should not be allowed for the full amount claimed. Section 251.1a, quoted above, provides for the allowance of "reasonable expenses." With regard to the matter of reasonable expenses for lodging paid to an employee's relatives, this Office held in 52 Comp. Gen. 78 (1972) that for the purpose of reimbursing an employee for subsistence while occuping temporary quarters under the Federal Travel Regulations, an employee may not be reimbursed the same amount he would pay for commercial lodging or an amount based upon the maximum amounts allowable under regulation. Rather, the amount for reimbursement depends upon the circumstances of each particular case, such as the number of individuals involved, the extra work performed by relatives, and the need to hire extra help. The burden is on the employee to furnish sufficient information to permit a determination to be made. While our decision in 52 Comp. Gen. 78, *supra*, dealt with subsistence while occupying temporary quarters under the Federal Travel Regulations, we believe that the holding of the decision pertaining to reasonableness is equally for application to similar allowances, such as the temporary lodging portion of the home transfer allowance.

Finally, Mr. Gough details certain circumstances of a personal nature that he states necessitated the lodging of his family with relatives. An employee's rights with regard to entitlement to travel allowances are established by statute and regulation. Absent specific statutory authority, such rights may not be enlarged by any administrative official, regardless of any extenuating circumstances which may be present. 53 Comp. Gen. 364 (1973).

Accordingly, on the basis of the record before us we must sustain the action of our Claims Division in dissallowing the claim of Mr. Gough.

[B–190605]

Bids—Mistakes—Correction—After Bid Opening—Rule

Erroneous bid should not have been corrected, since cost proposal for items omitted from bid price was prepared after bid opening and correction would be recalculation of bid to include factors not originally considered.

In the matter of General Elevator Company, Inc., January 31, 1978:

General Elevator Company, Inc. (General), has protested prior to award the decision by the Government Printing Office (GPO) to per-

mit Free State Builders, Inc. (Free State), to correct a mistake in the low bid submitted under invitation for bids (IFB) No. 14120.

The IFB covered the renovation of elevators in Building 2 of GPO's Central Office. Four bids were received:

Free State	$248,608
General	421,091
Haughton Elevator Company	465,236
Technical Construction, Inc	558,276

Since Free State's bid was approximately 59 percent of the next low bid, GPO requested verification of its bid. Free State notified GPO that it had mistakenly failed to include in its bid, either by inadvertence or misinterpretation of the IFB, the following:

(1) removal of elevator divider beams;
(2) installation of new call buttons;
(3) remodeling of a window to install a louvre;
(4) barricades for one of the elevators; and
(5) relocation of beam A'B', to enable rear placement of the new elevator counter-weight.

To support the alleged mistake, Free State submitted copies of its original worksheets and those of its subcontractor and a notarized cost proposal for the omitted work in the amount of $16,402 prepared more than a month after the bid opening.

Based on the evidence submitted, the contracting officer determined that an error was made in the Free State bid and that it should be corrected to $265,010. The GPO Contract Review Board approved the correction.

However, the erroneous Free State bid should not have been corrected. The error arose because no prices were calculated for the parts of the work referred to above prior to the submission of the bid. Free State did not decide on a price for the omitted work until it was provided with an opportunity to present evidence of an error and the intended bid.

The rule which allows bid correction upon the establishment of evidence of mistake and the intended bid does not extend to situations where the bidder discovered the omitted factors after the bid was submitted and opened. As was stated in 37 Comp. Gen. 650, 652 (1958):

> * * * bids may not be changed after they are opened, and the exception permitting a bid to be corrected upon sufficient facts establishing that a bidder actually intended to bid an amount other than that set down on the bid form * * * does not extend to permitting a bidder to recalculate and change his bid to include factors which he did not have in mind when his bid was submitted * * *.

See also 50 Comp. Gen. 655, 660 (1971) and 52 *id.* 400, 404 (1973). The GPO determination to allow correction is in violation of the foregoing and therefore is improper.

Accordingly, General's protest is sustained.