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[B-188815]

Officers and Employees—Transfers—Relocation Expenses—Transfer Not Effected

Employees were personally informed that their function would be relocated on specific date. Preliminary offer of transfer, although advising that separations may be possible, offered agency assistance in relocating employees to receiving location or elsewhere on priority basis. Such preliminary offer of transfer constitutes communication of intention to transfer employees, and expenses incurred after that date should be further considered by certifying officer to ascertain whether they may be paid.

Officers and Employees—Transfers—Service Agreements—Failure to Execute

Agency intended to transfer employees and made firm offers of employment at new duty station. Employees did not execute service agreements because transfer was cancelled. Twelve-month service obligation prescribed by 5 U.S.C. 5724(i) (1970) is condition precedent to payment of relocation expenses. Since more than 2 years has elapsed since transfer was cancelled, service agreements need not be executed. However, employees must have remained in Government service for 1 year from date on which transfer was cancelled.

Orders—Failure to Issue—Reimbursement Authorized

Agency intended to transfer employees and made firm offers of employment at new station. Travel orders were not issued because transfer was cancelled. Absence of travel orders is not fatal to claims for relocation expenses if there is other objective evidence of agency's intention to effect transfer. In present case, written offers of employment at new location to begin at specific time constitutes such objective evidence.

In the matter of Orville H. Myers, et al.—relocation expenses—cancelled transfer, May 8, 1978:

By a letter dated December 9, 1977, Colonel William E. Dyson, USA, Executive of the Per Diem, Travel and Transportation Allowance Committee, forwarded a request from Captain R. C. Schildknecht, USAF, Accounting and Finance Officer, for a decision concerning the claims of certain civilian employees of the Air Force for relocation expenses incurred incident to a cancelled transfer.

The record indicates that the Air Force intended to transfer the headquarters of the Air Force Communications Service from Richards-Gebaur Air Force Base (AFB), Missouri, to Scott AFB, Illinois. On February 7, 1975, the civilian personnel officer at Richards-Gebaur AFB sent a preliminary offer of transfer to all civilian personnel affected by the transfer to ascertain whether they were willing to relocate. This action was followed by a letter dated April 25, 1975, from the civilian personnel officer at Scott AFB to each of the claimants advising them that their function had been transferred and making firm offers of employment to them at that location. However, on June 5, 1975, the Federal District Court for the Western District

of Missouri, Western Division, issued a preliminary injunction prohibiting the planned transfers. In response to this decision, the civilian personnel officer at Scott AFB cancelled the previously issued offers of employment on June 10, 1975. Since the transfer was cancelled, permanent change-of-station orders were never issued to the employees.

Acting in reliance upon the notice of transfer and the February 7, 1975 preliminary offer of transfer, each of the six claimants here began to relocate. Specifically, claimants Orville H. Myers, Harry J. Juvenal, Charles E. Lynch, Helen F. Wilson, and Raymond G. Dlugolecki entered into contracts to sell their homes near Richards-Gebaur AFB. In addition, Helen F. Wilson and Allen Z. Teters signed contracts to purchase new residences in the vicinity of Scott AFB, the intended new duty station. Each of the above contracts was executed by the claimants prior to receipt on April 25, 1975, of a firm offer of employment at Scott AFB, but after receipt of the preliminary notice of transfer of their function to that location. Thus, each of the claimants requests payment of certain real estate expenses. In addition, Ms. Wilson has claimed certain expenses incurred in connection with relocating to Scott AFB, where she ultimately obtained employment.

The certifying officer has raised three basic objections to paying the above claims. First, he notes that in each case the claimants entered into a real estate contract before receipt of a firm offer of employment at Scott AFB. Second, no service agreement was executed by the claimants, as required by 5 U.S.C. 5724(i). Finally, no travel orders were ever issued directing the claimants to transfer to Scott AFB.

With respect to expenses incurred incident to a cancelled transfer, we have held that, where a transfer has been cancelled and certain expenses would have been reimbursable had the transfer been effected, an employee may be reimbursed for expenses incurred in anticipation of the transfer and prior to its cancellation. B–177439, February 1, 1973. Further, when by reason of the cancellation the employee's duty station is not changed, we have treated the employee for reimbursement purposes, as if the transfer had been consummated and he had been retransferred to his former station. 54 Comp. Gen. 71 (1974).

The operative factors governing our decisions concerning reimbursement of expenses incurred incident to cancelled transfers are the agency's clear intention to effect the transfer, the communication of that intention to the employee, and the employee's good faith actions taken in reliance on the communicated agency intention. *Matter of Dwight L. Crumpacker*, B–187405, March 22, 1977. What constitutes

an agency's intention to transfer an employee depends on the facts in each case. Thus, we have held that a letter to the employee notifying him that his position was surplusage, coupled with an offer to help find another job, constituted a clear intention to transfer the employee. B–165796, February 12, 1969. There, we held that reimbursement of residence transaction expenses was proper even though the employee closed the sale of his house before being offered another position since he contracted to sell it after receipt of the surplusage notice. Similarly, we have held that an official announcement that all essential functions of an installation were to be relocated demonstrated a clear intention to transfer an employee. B–174051, December 8, 1971. Of course, if the employee separated from Government service before the transfer was consummated or cancelled, reimbursement may not be made. 52 Comp. Gen. 8 (1972).

Thus, the first question presented by the certifying officer is basically whether, at the time the employees here incurred the claimed expenses, they had been informed of an intention to transfer them. In the present case, each claimant received a preliminary offer of transfer of function on February 7, 1975. This notice stated specifically that the employee's function was scheduled to transfer to Scott AFB on or about July 1, 1975. Although the preliminary offer noted that employees may be affected by demotions or separations, the document basically stated that the affected employees would be entitled to accompany the function to the new location provided an appropriate position existed there. The notice further provided:

> * * * every effort will be made to locate an appropriate and acceptable position for you at this activity. In addition, you will be assisted in finding suitable placement opportunities at other Air Force and Department of Defense activities under the provisions of the DOD Nationwide Priority Referral System.

In view of the above authorities, we hold that the February 7, 1975 preliminary offer may be considered a definite communication of an intention to transfer the affected employees, and expenses incurred after that date should be further considered by the certifying officer to ascertain whether they are otherwise payable. The first question is answered accordingly.

The second issue presented is whether the claimants may be paid despite the lack of a service agreement in each case. The statutory basis for requiring the execution of a service agreement is found in 5 U.S.C. 5724(i), which provides that relocation allowances may be paid only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. In 54 Comp. Gen. 71 (1974) we held that an employee involved in a cancelled transfer either should be required to execute a second service agreement or

an amendment to the original service agreement should be issued designating the original duty station as the new duty station. In such cases the 12-month period of required service begins to run from the date on which the employee is advised of cancellation of the originally contemplated transfer. In that decision we noted that the service obligation created by the statute is not contractual, but is a statutory condition precedent to payment of relocation expenses. Thus, we held that an employee is bound by the 12-month service obligation even though he did not execute a service agreement. Therefore, where an employee has in fact been continuously employed for a 12-month period following a transfer, the condition precedent has been satisfied, and a service agreement need not be executed. *Matter of Stephen P. Szarka*, B–188048, November 30, 1977. Nevertheless, absent the execution of a service agreement or the actual satisfaction of the 12-month service obligation, there is no authority for an employee to receive or retain relocation expense reimbursement.

In the present case, the proposed transfer was cancelled before the claimants had the opportunity to execute service agreements. Since, however, more than 2 years have elapsed since the transfers were cancelled, the certifying officer may readily ascertain the extent to which each claimant in fact satisfied the 12-month service obligation. Accordingly, the actual execution of a service agreement is no longer required by the claimants here. However, before any reimbursement may be authorized, each claimant must have remained in the Government service for 1 year from June 10, 1975, the date on which the proposed transfers were cancelled.

The final issue raised by the certifying officer is whether the claimants may be paid despite the absence of travel orders in each case. Although the Federal Travel Regulations do not expressly state what constitutes the authorization of a transfer, travel orders are generally recognized as being the authorizing document. 54 Comp. Gen. 993, 998 (1975). Thus, in the ordinary case, the agency's intention to authorize a transfer is objectively manifested by the execution of travel orders. However, the absence of travel orders is not fatal if there is other objective evidence of the intention to make a transfer. *Dwight L. Crumpacker, supra;* B–173460, August 17, 1971.

The facts in the present case include written offers of employment at Scott AFB delivered to the employees, including the claimants, who were intended to be transferred to Scott. Those offers specifically state:

> If you accept this offer the transfer will be effected not earlier than 60 days from receipt of this specific notice. Your specific reporting date will be arranged with you later. Travel should commence in time to reach your destination on or before that date. Any travel for yourself and your dependents and transportation of household goods will be at government expense as authorized by applicable regulations. Travel orders will be issued by Richards-Gebaur prior to your departure.

We believe that the record sufficiently demonstrates that the Air Force intended to transfer such employees, and that the transfer was cancelled by reason of the injunction issued by the Federal District Court. The written offers of employment at Scott AFB, then, constitute the objective evidence of the intention to make a transfer required by our decision in *Crumpacker*. Thus, the absence of travel orders here does not prohibit reimbursement of otherwise allowable expenses.

The absence of travel orders remains, however, significant in the present matter since our decisions merely provide that an employee's eligibility for *certain* relocation expenses will not be adversely affected if they are incurred in anticipation of the transfer, where the transfer is subsequently consummated or cancelled. 54 Comp. Gen. 993 (1975). Thus, certain expenses, such as house-hunting travel or temporary quarters subsistence expenses, may not be reimbursed if incurred in anticipation of a transfer since the Federal Travel Regulations (FPMR 101-7, May 1973) require a specific authorization or provide that the period of the claim may not begin until the transfer is authorized. Certain residence transaction expenses may, however, be reimbursed, notwithstanding the absence of travel orders where the intended transfer is clearly manifested. See B-173460, *supra*.

The individual items of expense constituting the six claims should be administratively examined in order to ascertain the propriety of payment in accordance with the governing regulations and decisions of this Office. In this connection, we note that Mr. Orville H. Myers has claimed reimbursement of a loan discount or points. Such an item is generally regarded as a finance charge and, therefore, is not reimbursable. *Anthony R. Bayer, Jr.*, B-189591, September 19, 1977. Similarly, the claim of Mr. Harry J. Juvenal should be examined to ascertain whether a claimed "loan commission" likewise constitutes a nonreimbursable finance charge.

Disposition of these claims should administratively be made in accordance with the above.

[B-189887]

Pay—Readjustment Payment to Reservists on Involuntary Release—Conditions of Entitlement

A Reserve officer scheduled for release from active duty before completing 5 years of continuous active duty for purposes of entitlement to readjustment pay under 10 U.S.C. 687 (1970) requested and was granted a 6-week extension of service due to his wife's pregnancy. Prior to beginning service on the extension he was found medically unfit for release and was retained on active duty for physical evaluation, thus serving over 5 years' continuous active duty. His release from active duty was involuntary since he had requested augmentation to the Regulars or unconditional further duty three times in the preceeding 2 years but had been refused each time. Therefore, he is entitled to readjustment pay.

269-070 O - 78 - 2

In the matter of First Lieutenant Larry R. Hughes, USMCR, May 9, 1978:

This action is in response to a request dated December 15, 1977, from a disbursing officer at the Marine Corps Finance Center, Kansas City, Missouri, for a decision as to the entitlement of First Lieutenant Larry R. Hughes, USMCR, 536-46-4528, to readjustment pay. The request was approved for submission by the Department of Defense Military Pay and Allowance Committee on February 3, 1978, and assigned control number DO-MC-1285.

The primary question presented by this case is whether a Reserve officer who was scheduled to be involuntarily released from active duty before serving 5 years, and who was retained on active duty beyond 5 years for medical reasons, may be considered to have served over 5 years and released from active duty involuntarily so as to be entitled to readjustment pay.

Lieutenant Hughes, while serving on active duty with the Marine Corps, applied to the June 1974, December 1974, and June 1975 Officer Retention Boards for augmentation to the Regular Marine Corps. Each time he agreed unconditionally to accept further active duty as a Reserve or a Regular. He was refused augmentation and further active duty each time.

Lieutenant Hughes' expiration of active service date was originally May 1, 1976. In January of 1976, subsequent to a last unsuccessful application to the Officer Retention Board, he applied for a 6-week extension of active service because his wife was pregnant and the baby was due at the end of April. This request was approved and his expiration of active service date was changed to June 15, 1976.

On April 8, 1976, prior to his original expiration of active service date, Lieutenant Hughes was found unfit for release from active duty by a medical board. Accordingly, the orders releasing him from active duty on June 15, 1976, were revoked, and he was placed in a "held for the convenience of the Government" status. On September 1, 1976, the Secretary of the Navy, as a result of Physical Evaluation Board proceedings, found Lieutenant Hughes fit for duty. Accordingly, orders releasing Lieutenant Hughes from active duty on September 15, 1976, were issued, and he was released.

As of June 14, 1976, Lieutenant Hughes had completed 5 years of continuous active duty for purposes of 10 U.S.C. § 687 (1970), the provision of law providing entitlement to readjustment pay for reservists involuntarily released from active duty after serving continuously for at least 5 years.

Lieutenant Hughes believes he fulfills all requirements for entitlement to readjustment pay. He served the necessary length of time, and

he states that he had wanted to make a career of the Marine Corps and volunteered repeatedly for additional tours of active duty but was refused them. He further states that he was released solely because the Marine Corps wanted to release him and not because it was his desire, and that, therefore, his release was involuntary.

The Marine Corps, however, finds Lieutenant Hughes' entitlement to readjustment pay questionable, as it is uncertain as to whether his release can properly be considered involuntary for purposes of 10 U.S.C. § 687. This is because Lieutenant Hughes' request for the 6-week extension due to his wife's pregnancy was granted, and he did not subsequently submit an unconditional request for further active duty. The Marine Corps indicates that if Lieutenant Hughes had never been granted the pregnancy extension, or, if subsequent to it he had unconditionally requested further active duty, his release would, in its opinion, have met the requirements of involuntariness. Lieutenant Hughes contends in response that the fact that he was granted the pregnancy extension is immaterial since it was revoked when he was discovered physically unfit for release. The Marine Corps, however, states that only his release on June 15 was revoked, and that the pregnancy extension was not.

Section 687 of title 10, United States Code, provides in pertinent part:

> (a) * * * a member of a reserve component * * * who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment * * *.

The purpose of this provision is to encourage reservists to make a career of military service by providing those who wish to do so some financial protection in the event that they are separated against their wishes after being out of the civilian work force for a substantial length of time. B–174398, December 9, 1971; B–169541, December 22, 1970; *id.*, October 29, 1970.

Lieutenant Hughes clearly wanted to make a career of the Marine Corps. This is shown not only by his statements to that effect but by the fact that he applied for augmentation to the Regular Marine Corps three times. Furthermore, he unconditionally agreed to accept further active duty as either a Reserve or a Regular each time he applied for augmentation. Thus, Lieutenant Hughes evidenced the "positive and unconditional desire" to continue to serve on active duty that the Court of Claims in *Mansell* v. *United States*, 199 Ct. Cl. 796, 802 (1972), indicated made a release, when such intent was present, involuntary for purposes of 10 U.S.C. § 687.

We have held that an officer retained on active duty beyond the 5 years at his own request to avail himself of maternity benefits, under applicable regulations, was not released involuntarily after 5 years of service for readjustment pay purposes. B–183492, May 15, 1975. However, in this case whether or not the pregnancy extension had been granted to Lieutenant Hughes, it appears that he would have been retained on active duty past the 5-year mark because of his physical condition. As a matter of fact since the service's determination was made in April to retain him on active duty due to his physical condition, before he began serving on the pregnancy extension, his service after his normal expiration of service date in May was due to his being held for medical reasons and not because of his request for the pregnancy extension. In the circumstances the fact that he requested a limited extension before he knew he would be extended for physical reasons does not defeat his entitlement to readjustment pay.

In summation, Lieutenant Hughes served continuously on active duty for more than 5 years and was released involuntarily. He is, accordingly, entitled to readjustment pay under 10 U.S.C. § 687.

[B–190791]

Contracts—Specifications—Restrictive—Geographical Location

Opinion of this Office remains unchanged from decision last year regarding geographic restriction on competition adopted by Small Business Administration (SBA). If SBA's minimum needs can be satisfied by restriction based on regional and district boundaries, they can also be satisfied by a restriction based on number of miles from a central point which is less restrictive of competition.

Contracts—Specifications—Restrictive—Minimum Needs Requirement—Administrative Determination—Reasonableness

Although an agency can determine after consideration of all relevant factors involved that geographic restriction on competition is required, record does not show that manner by which SBA imposes restriction necessarily effectuates agency's minimum needs.

Contracts—Negotiation—Competition—Restrictions — "Administrative Convenience" Insufficient Basis

Agency's contention that geographic restriction based on areas of responsibility of local agency field offices is necessary for purposes of administrative control is not persuasive where record fails to show that close personal contact between local SBA offices and contractor is essential.

Contracts—Specifications—Minimum Needs Requirement—Specification Adequacy

Contracting agency should extend limits of geographic restriction to broadest scope consistent with agency's needs. However, while SBA restriction should

not be continued for future procurements, contracts awarded under protested procurement should not be terminated because record reveals that adequate level of competition was obtained despite restriction, and because SBA will need considerable time for study and analysis in order to draw new geographic areas.

In the matter of the Burton Myers Company, May 10, 1978:

Burton Myers Company (Burton) protests the geographic restriction on competition contained in request for proposals (RFP) SBA–7(i)–MA–78–1, issued by the Small Business Administration (SBA) on November 14, 1977. The RFP solicited offers for providing management and technical assistance services to individuals or enterprises located in each of 45 specified geographic areas who are eligible for assistance under sections 7(i) and 7(j) of the Small Business Act, 15 U.S. Code 636 (i) and (j) (Supp. IV, 1974). The procurement was a total small business set-aside. Awards have been made in 39 geographic areas. The requirement for management and technical services in five areas was canceled and certificate of competency proceedings are being conducted on the potential awardee in one area.

Burton takes exception to the provision on page 6 of the solicitation which states:

> Prior Experience Requirement. Offerors must have been engaged as an established business providing management and technical assistance services to the general public on a continuous basis within each geographical area for which it submits a proposal for a period of at least one year prior to the date of issuance of this solicitation. Ability to meet this experience requirement will be considered in determining the responsibility of the offeror.

Burton contends that the above-described restriction eliminates competition merely for the administrative convenience of the SBA. Citing our decision in *Department of Agriculture's use of Master Agreement*, 54 Comp. Gen. 606 (1975), 75–1 CPD 40, Burton argues that a restriction on competition may not be utilized for the purpose of minimizing the procuring agency's administrative burden. Burton states that a geographic restriction is proper only where the agency has determined that it is required to meet minimum procurement needs.

The SBA informs us that in this solicitation for management and technical services, it is attempting to solicit bids from "local" firms to perform services to "local" SBA offices. Each SBA field office has a specifically defined geographic area of responsibility, based primarily on its ability to assist the small business population in that area. According to the SBA, having a geographic restriction corresponding to each SBA field office's area of responsibility permits an almost immediate response by the solicitation awardee to the needs of the local small business. In addition, the SBA feels that based on past experience, an ancillary benefit of the geographic restriction has

been the significant savings in travel and per diem costs incurred by awardees.

In *Burton K. Myers and Company*, B-187960, September 14, 1977, 77-2 CPD 187, we indicated in regard to the protest on the SBA's fiscal year 1977 procurement for management and technical services that we did not dispute SBA's assertion that its minimum needs could be satisfied only by having a contractor located in the vicinity of the contract performance. What we did question, however, was the *manner* in which the SBA designed its geographic restriction to determine which offerors could be eligible for award. We were of the opinion that if the SBA's minimum needs could be satisfied by a restriction based on regional and district boundaries, they could also be satisfied by a restriction based on number of miles from a central point, which under the circumstances appeared to be less restrictive of competition. We recommended, then, that prior to issuing future soliciations, the SBA reexamine the method of basing geographic restrictions on SBA regional and district boundaries.

The SBA states that it has reexamined its geographic restriction and has determined that it does not unduly restrict competition. Four hundred and fifty-five total proposals were received on the solicitation. Out of these 455 proposals, the SBA obtained at least three or more proposals from each of the 45 geographic areas with the exception of Little Rock, Arkansas (2), Fargo, North Dakota (1), and Helena, Montana (2).

We agree that the only justification for the geographic restriction adopted by the SBA is administrative convenience. Essentially, our view on the matter remains unchanged from our decision last year. We recognize that a procuring agency can determine after consideration of all relevant factors involved that a geographic restriction on competition is required. *Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry*, 54 Comp. Gen. 29 (1974), 74-2 CPD 27. Nevertheless, despite the fact that the SBA has reexamined its geographic restriction, we still do not believe that this particular restriction necessarily effectuates the SBA's minimum needs.

The following services are listed on page 5 of the RFP as those which the successful offeror will provide to eligible small businesses:

(1) bookkeeping systems installation and accounting services and instruction to the degree warranted by the size and nature of the business being served;

(2) production, engineering and technical advice as warranted;

(3) feasibility studies, market analyses and advertising expertise as warranted;

(4) guidance in the matter of seeking and executing Federal Government contracts; and

(5) specialized management training, advice, and guidance particularly germane to the specific type of business being assisted.

In light of the foregoing, it can be seen that the successful offeror within a geographic area has to maintain a close liaison with each and every eligible small business that requires its services. Furthermore, in order to have these services effectively fulfilled, the successful offeror would have to be located in the vicinity of the eligible small businesses and be fairly familiar with the nature of their businesses. We believe, then, that the purpose of a properly drawn geographic restriction would be to insure that the successful offeror has been in the area long enough to have gained experience with the business problems toward which its services will be directed and to have established a working relationship with the particular small business community which it is to assist.

On pages 26–91 of the RFP the exact coverage of each of the 45 geographic areas is set out in sequential order. Also, a breakdown is given for each area regarding the types of services to be rendered; the estimated number of task days for each service; the total cost for each type of service; the estimated cost of travel and per diem; and the total estimated contract amount.

The determination of the proper scope of a particular geographic restriction is for the most part a matter of judgment and discretion for the procuring agency, involving consideration of the services being procured, past experience, market conditions and other factors. *Descomp, Inc.*, 53 Comp. Gen. 522 (1974), 74–1 CPD 44. Nevertheless, we find it difficult to conclude that the 45 geographic areas are so drawn as to insure that the management and technical services contemplated in the RFP will be adequately performed. In other words, we do not think that the SBA's geographic areas serve a useful or necessary purpose other than to facilitate the administration by local field offices with the contractors. The record shows that the SBA is more concerned with the relationship between the offeror and its field offices than it is with the relationship the offeror has with the particular small business community which the offeror is to assist.

There is no uniformity in these geographic areas with regard to distance from major metropolitan centers where many of the eligible small businesses would likely be located. For example, geographic area #2 covers the States of Massachusetts, Rhode Island, and Connecticut. This area encompasses three large cities—Boston, Providence, and Hartford. Hartford, Connecticut, is approximately 100

miles from Boston while Providence, Rhode Island, is approximately 50 miles from Boston. On the other hand, Baltimore, Maryland, which is approximately 40 miles from the District of Columbia, is in a different geographic area. It seems incongruous to us that an offeror in Northern Virginia (such as the protester) could be incapable of providing management and technical assistance to small businesses located in Baltimore while an offeror in Hartford, Connecticut, is qualified to provide such assistance to small businesses approximately 100 miles away in Boston.

Apparently, the SBA seeks to justify the way these geographic areas have been established by emphasizing the role of the local field office. Once a contract has been entered into, task orders for assistance are to be issued as needed by the local SBA offices. More specifically, all orders for services are to be placed on behalf of the Government by the SBA Project Manager designated to manage the particular contract. Page 14 of the RFP provides that the task orders are to be issued in writing by the Project Manager and are to contain:

(1) a description of the services to be performed, in detail, including the number of man-days of services authorized by category;

(2) the name and address of the client to receive services specified and the period of performance authorized; and

(3) an estimated sum for the completion of the task order.

We have found that an agency's geographic limitation has a reasonable basis where there is a demonstrated need for "close liaison" between agency personnel and the contractor. See *CompuServe*, B-188990, September 9, 1977, 77-2 CPD 182. On the record before us, however, we are unable to conclude that there is a demonstrated need here for such close liaison. Moreover, in our decision last year, we stated that we failed to understand the SBA's concern with the coverage of its local offices because selection of contractors without strict regard to whether their offices are located within a given SBA region or district would not appear to affect either the administrative responsibility of individual SBA offices or the coverage provided by the contracts awarded.

Accordingly, we recommend that the Administrator of the SBA adopt in future solicitations for management and technical assistance to eligible small businesses a more realistic restriction to make certain that potential awardees have gained enough experience with "local" small businesses to provide effective service. Consideration should be given to extending geographic limits for many metropolitan areas in the United States to the broadest scope that is consistent with the above-described needs of the SBA. See *Paul R. Jackson Construction*

Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, A Joint Venture, 55 Comp. Gen. 366 (1975), 75–2 CPD 220.

We do not, however, recommend termination of any contracts awarded under the protested RFP or other corrective action as to the procurement before award. In our opinion, the SBA will need considerable time for study and analysis needed to draw up geographic areas consistent with our decision. See *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976), 76–1 CPD 71. In addition, the record does show that the SBA received 455 total proposals. Therefore, although we conclude that the geographic areas as presently drawn would likely be restrictive of competition in all future procurements of the type being protested, competition was obtained, notwithstanding the fact that these areas do not fulfill the SBA's need to have awardees familiar with the problems of the local small business community which they are to assist. *Cf. Metal Trades, Inc.*, B–186098, August 3, 1976, 76–2 CPD 119.

[B–190847]

Grants—Educational Institutions—Amendment, etc.—Appropriation Availability

A research grant was made to South Carolina State College, an 1890 institution (as defined in 7 U.S.C. 323), under the authority of 7 U.S.C. 450i using fiscal year 1975 appropriated funds. In fiscal year 1976, although it retained some aspects of the original proposal, the research objective of the grant was changed. The substitute proposal changed the scope of the original grant and thereby created a new obligation chargeable to the appropriation of the year (fiscal year 1976) in which the substitution was made.

In the matter of substitute grant projects—South Carolina State College, May 12, 1978:

The Acting Deputy Assistant Secretary of Agriculture requested our decision about the authority of the Department of Agriculture, under Public Law 89–106, section 2, 79 Stat. 431, 7 U.S.C. § 450i (1976) to substitute one research grant project for another although awarded to the same grantee, after the expiration of the original appropriation.

The Department has provided us with the following facts:

Grant No. 516–15–163 was made by the Cooperative State Research Service (CSRS) to South Carolina State College (SCSC) on June 27, 1975, to fund a research project proposal entitled "A Method of Determining Trace Metal Concentrations Utilizing Luminescence Spectroscopy."

The grant was part of the program administered by CSRS to make research grants to the colleges eligible to receive funds under the Act of August 30, 1890 (25 Stat. 417–419, amended; 7 U.S.C. 321–326 and 328), including Tuskegee Institute. The grant was funded in the amount of $146,583 out of the annual appropriation made to CSRS in FY 1975 for scientific research pursuant to section 2

of Public Law 89-106 (7 U.S.C. 450i). This Act, prior to its recent amendment by section 1414 of the Food and Agriculture Act of 1977, Public Law 95-113, authorized the Secretary of Agriculture to make grants for periods not to exceed five years' duration for research to further the programs of this Department.

The program of funding research projects at the Land-Grant Colleges of 1890 and Tuskegee Institute began in 1967, when a determination was made that $283,000 of the funds appropriated for research grants under section 2 of Public Law 89-106 would be awarded only to those institutions. A formula was devised by which the sum would be awarded. Each school was permitted to submit research proposals for funding in amounts equal to its share of the total as derived from the formula. * * *

In FY 1972, the Congress appropriated a substantially increased amount for this purpose. The principal justification for doing so appears to have been a recognition on the part of Congress that these institutions had received little in the way of research funds in the past since they did not share in the distribution of Hatch Act funds and McIntire-Stennis Cooperative Forestry Act funds. * * *

Accordingly, while section 2 of Public Law 89-106 authorized research grants to further programs of this Department, funds were appropriated by the Congress pursuant to that section with the underlying purpose of providing the 1890 institutions with funding for agricultural research so that these institutions could develop their research capabilities and assume a partnership role in the conduct of agricultural research with the land-grant colleges established under the provisions of the Morrill Act of July 2, 1962, and the acts supplementary thereto.

It should be noted that beginning in FY 1979, the program of funding agricultural research at these institutions will be administered under the provisions of section 1445 of Public Law 95-113.

In its letter approving Grant No. 516-15-163, CSRS expressed concern that the need for the proposed research project had not been clearly established. For that reason, a limitation was placed on the expenditure of funds under the grant, permitting grant funds to be expended through December 15, 1975, only for the purpose of conducting a more thorough problem analysis and a reappraisal of the need for the research.

By letter dated January 16, 1976, CSRS extended the period authorized for expenditures for a more thorough problem analysis through April 9, 1976.

By letter dated April 13, 1976, the grant agreement was amended. A project proposal entitled "Incorporation of Waste Materials into Soil to Reduce Soil Compaction" was substituted for the original project. The original obligation of FY 1975 funds in the amount of $146,583 was not deobligated, but was carried forward to fund the substitute project.

This Department's auditors have concluded that upon the termination of the reappraisal period and the decision to drop the original project the grant should have been terminated, and the unexpended funds deobligated and returned to the Treasury. It is understood that this position is based on the rationale that the substitute project was not within the scope of the original grant and should have been funded as a new grant chargeable to FY 1976 appropriations. * * * [O]ur Office of the General Counsel has concurred in the conclusion that the amendment substituting a new project created a new obligation, chargeable to FY 1976 * * *.

It is well established that agencies have no authority to amend grants so as to change their scope after the appropriations under which they have been made have ceased to be available for obligation. See, for example, 39 Comp. Gen. 296 (1959). The substitution of one grant for another extinguishes the old obligation and creates a new one. The new obligation is chargeable to the appropriation available at the time the new obligation is created. See 41 Comp. Gen. 134 (1961); 39 *id.* 296 (1959); 37 *id.* 861 (1958); and B-164031(5), June 25, 1976.

In this case the Acting Deputy Assistant Secretary provides two arguments suggested by the CSRS to show that the fiscal year 1976 grant amendment in question did not change the scope of the original grant. First, it is urged that the research proposal approved in fiscal year 1976 retained enough similarities with the research proposal approved in fiscal year 1975 to remain within its scope. Second, in the nature of an alternative argument, CSRS suggests that since an underlying congressional purpose in appropriating funds for the 7 U.S.C. § 450i program was to provide for the development of research capabilities at the Colleges of 1890 and Tuskegee Institute, the scope of the grants to these schools should be expanded to accommodate this purpose. CSRS feels that substitutions of specific research projects should not be considered to change the scope of the grants, since they have such a broad purpose.

With regard to the first argument, CSRS contends that the substitute project did not amount to a change in the scope of the original grant since "some aspects of the work are common to both." An Office of General Counsel, Department of Agriculture, memorandum that accompanied the submission quotes the following statement from the original proposal:

> In particular, we will develop a new procedure for quantitatively analyzing drinking water for the presence of trace metals.

The memorandum also quotes the following statement from the substitute proposal:

> This work is designed to gain fundamental information concerning application of waste to agricultural land, but more importantly is designed to determine if additions can be made in such a way as to reduce the problem of soil compaction.

The Office of General Counsel memorandum concludes that "it is obvious that the two projects involved entirely different objectives." A similar statement was made by the Assistant Regional Director in an October 3, 1977, memorandum, also included in the submission. He said:

> The substitute proposal had no real relationship to the original project as approved. It was coincidental that each of the two projects involved tests for metal content * * *.

We agree with these administrative findings. We do not believe that the fact that certain aspects of the two grants are related can form a basis for concluding that the scope of the original grant has not been changed in this case.

CSRS contends that the grant purpose must be read in the context of a larger program purpose to develop the research capability of 1890 institutions, including Tuskegee Institute. This objective was mentioned in S. Rept. No. 93–1014 at page 13: "A portion of these

funds are earmarked for the 1890 land grant colleges." However, this purpose originated as and has remained an administratively designed program.

Section 450i provides in pertinent part as follows:

> The Secretary of Agriculture is authorized to make grants, for periods not to exceed five years' duration, to State agricultural experiment stations, colleges, universities, and other research institutions and organizations and to Federal and private organizations and individuals for research to further the programs of the Department of Agriculture.

The legislative history on 7 U.S.C. § 450i describes the grant-making authority as "broader authority" for "applied as well as basic research" to a wide variety of grantees. *E.g.*, H. Rept. No. 206 (89th Cong., 1st Sess.) page 4; S. Rept. No. 506 (89th Cong., 1st Sess.) at page 5. In his testimony before the House Committee on Agriculture (Hearings on H.R. 5508, March 10, 1965, 89th Cong., 1st Sess., p. 5) the Deputy Administrator, Management, Agriculture Research Service, distinguished the authority of formula grants under the Hatch Act (7 U.S.C. § 361a *et seq.* (1976)) from the then proposed 7 U.S.C. § 450i. In reference to section 450i he said "This refers, rather, to grants for *specific* pieces of research which are needed to accomplish the Department's purposes." [Italic supplied.]

In testimony before the House and Senate Committees concerning the need for separate authority for funding research at the 1890 institutions, both the administration and a spokesman for the 1890 institutions recognized the difficulties of administering such a program under the authority of 7 U.S.C. § 450i. In Hearings before the House Subcommittee on Department Investigations, Oversight, and Research on H.R. 4394, 95th Cong., 1st Sess., March 21–22, 1977, Richard David Morrison, President of Alabama Agricultural and Mechanical University, said in a prepared statement at page 158:

> These funding arrangements, Mr. Chairman, are less than desirable in terms of providing continuous resources for viable definitive programs of research and Cooperative Extension. Therefore, it is not only desirable, but essential that research and extension efforts at our institutions be funded on a more solid basis than is now the case—funded in the same manner as the 1862 land-grant institutions.

In the same hearings at page 197, the Secretary of Agriculture, Bob Bergland, also in his prepared statement said:

> In this respect, we believe that legislation is needed to provide continuous funding in agricultural research and extension for the 1890 Land Grant Colleges and Tuskegee Institute. Currently, these institutions are eligible for support only under the special grants authority of the Department. It is important that their eligibility be made comparable to the continuing support available to State Agricultural Experiment Stations and Cooperative Extension in order that they can participate in long-range planning at the State level and utilize the funds for tenured personnel. These institutions play a unique and important role in research and extension in this country, and they should take their place as full partners in the agricultural research and extension system.

While a formula allocation system was adopted for part of the 7 U.S.C. § 450i appropriation, this appears to have merely reserved the money for specifically approved research grants for these institutions. According to Department of Agriculture testimony before the House Committee on Appropriations, Subcommittee on Agriculture, Environmental and Consumer Protection Appropriations (92d Cong., 1st Sess.) at page 577, in response to a question on how funding determinations are made under 7 U.S.C. § 450i, it was stated:

> On a competitive basis. We announce shortly after the Appropriation Act is approved that this $2 million is available. We identify the earmarking such as the $1 million for cotton and the $400,000 for soy beans. We provide the information in a letter to the State agricultural experiment station directors, forestry schools and to the colleges of 1890. They submit their research proposals in March. We ask each institution, although we do not rigidly enforce this, to submit no more than two proposals in order to minimize the paperwork which would be generated and which we would have to evaluate. Once the proposals are assembled, we separate them by fields of research, that is, cotton, soybean, et cetera. The proposals from the 1890 colleges are handled in the same way. They are essentially automatic. All of them are reviewed by a panel of experts in each field, and rated as to their merit.

We conclude from this setting that both the CSRS and the 1890 institutions were well aware that the grants under section 450i authority are narrowly limited in scope to the purposes and objectives described in the grant documents. We find no basis for going beyond the specific purpose or objective in defining the scope of the obligation of each grant. Accordingly, we must agree with the Department of Agriculture's Office of General Counsel that the grant amendment accepting the substitute proposal created a new obligation chargeable to the appropriation for the year (fiscal year 1976) in which it was made and terminated the old grant which was made with fiscal year 1975 funds. 41 Comp. Gen. 134 (1961); 39 *id.* 296 (1959); 37 *id.* 861 (1958); B–164031(5) (June 25, 1976).

We are also asked to decide whether the funds involved must be recovered from the grantee. Under our decision in this case, the original grant project terminated with an unexpended balance from fiscal year 1975. Any unexpended funds in the hands of the grantee or unallowable costs attributable to the original project should normally be returned by the grantee. However, the substitute grant created a new obligation in fiscal year 1976 that should have been charged against fiscal year 1976 appropriations. The grantee has used at least some of those funds on its new (fiscal year 1976) grant. In these circumstances, it would appear that no funds should be recovered from the grantee as a result of the replacement of the original grant with the substitute or new grant. Rather, the Department of Agriculture should appropriately adjust its 1975 and 1976 appropriations accounts. If the Department's unobligated fiscal year 1976 appropriations

are not sufficient to make the adjustment then a reportable Anti-Deficiency Act violation occurred.

Finally, the Acting Deputy Assistant Secretary notes the existence of similar grant substitutions as presented in this case. We trust that this decision provides adequate guidance for an appropriate resolution in these cases.

[B-186364]

Compensation—Removals, Suspensions, etc.—Back Pay—Entitlement

District of Columbia Government employee was erroneously separated and later reinstated. He is entitled to backpay under 5 U.S.C. 5596, less amounts received as severance pay and unemployment compensation. Employee is also entitled to credit for annual leave earned during erroneous separation. Maximum amount of leave is to be restored and balance is to be credited to a separate leave account. Deductions are also to be made from backpay for lump-sum payment of terminal leave.

In the matter of Ernest E. Sargent—reinstated employee of District of Columbia—backpay, May 16, 1978:

This action is in response to a letter from Charles E. Davis, an authorized accounting officer of the District of Columbia. Under 31 U.S.C. 82d (1970), he requests our decision as to which of four vouchers made on behalf of Ernest E. Sargent, an employee of the District of Columbia, should be certified for payment of backpay under 5 U.S.C. 5596 (1976).

The Federal Employee Appeals Authority of the Civil Service Commission (CSC), in a decision dated December 19, 1975, held that Mr. Sargent had been improperly separated from the District of Columbia Public School System (DCPS) in that his separation by reduction-in-force (RIF) action was procedurally defective. The CSC recommended that the employee's separation be cancelled and that he be assigned to the position of Accounting Officer GS–510–12, or to any other permanent position of like grade, salary, and tenure, retroactively effective to the day following the effective date of the employee's separation, August 17, 1974. At the time of the employee's separation he was holding the position of Accounting Officer, GS–510–14, Department of Finance Division of Management Services, DCPS. The employee was reinstated by the DCPS effective March 1, 1976, in accordance with the CSC recommendations.

With regard to reinstatement, this Office has been asked to determine: (1) the appropriate action to be taken concerning annual leave; (2) if severance pay must be refunded; (3) if unemployment compensation received during the period of his separation must be deducted

from backpay; and (4) the total amount of backpay due in the circumstances described.

The facts concerning Mr. Sargent's separation and the reasons for his reinstatement are set out in the CSC's decision of December 19, 1975. According to a memorandum dated March 4, 1976, from the Acting Superintendent, DCPS, the employee returned to duty on March 1, 1976, and was placed retroactively in the position of Operating Accountant, GS-510-12. His salary was adjusted based on the highest previous rate of pay to reflect the 10th step of the GS-12 level.

Annual Leave

At the time of separation he was paid a lump-sum payment for 354 hours of annual leave. This apparently represented a combination of carryover or accrued annual leave for calendar year 1973, leave earned but not used in 1974 and sixteen (16) hours for two paid holidays that occurred on Labor Day and Columbus Day, 1974, totaling 354 hours.

If he had not been separated he would have earned 64 additional hours of leave in 1974 for a total of 418 hours at the end of the 1974 leave year (January 4, 1975). In addition he would have earned 208 hours of annual leave during leave year 1975 and 32 hours annual leave from January 3, 1976, through February 27, 1976. This amounts to a grand total of 658 hours of annual leave for which an accounting must be made.

Section 5596 of title 5, United States Code, provides the authority for adjusting the backpay due to employees who are found to have undergone an unjustified or unwarranted personnel action. It applies to the District of Columbia Government. Subsection (b) of that section must be followed in accounting for annual leave in this case.

The purpose of Public Law 94-172 in amending 5 U.S.C. 5596(b) (2) to provide for restoration of annual leave in excess of the maximum leave accumulation permitted by law is explained at Senate Report No. 94–536, 94th Cong., 1st Sess., page 3, as follows:

> Subsection (a) of the first section of the bill amends section 5596(b) (2) of title 5, United States Code. Under the existing provisions of section 5596, an employee who is restored to duty following a period of separation resulting from an unjustified or unwarranted personnel action is deemed for all purposes to have performed service for the agency during the period of separation except that he may not be credited with annual leave in excess of the maximum amount of leave that is authorized for the employee by law or regulation (generally, 240 hours).
>
> Subsection (a) amends section 5596(b) (2) so as to permit restoration of all of the annual leave that an employee would have earned during the period of separation. However, any annual leave which is in excess of the employee's annual leave ceiling shall be credited to a separate leave account. The restored leave then will be available for use by the employee within reasonable time limits to be prescribed by regulations of the Civil Service Commission. * * *

The employee upon reinstatement should have been credited with the maximum leave accumulation permitted by law, 240 hours. The balance of 418 hours should be credited to a separate leave account and available to the employee for use by the employee pursuant to 5 U.S.C. 5596(b)(2)(A) and implementing regulations contained in Federal Personnel Manual System letter 550-69 dated May 24, 1976, which gives the employee 2 years from the date on which the annual leave is credited to the separate account in which to schedule and use such leave. If the employee had not been separated, the annual leave accumulation for which he was paid would not have been so liquidated. Therefore, such payment is a proper setoff against the backpay. B–189198, August 25, 1977, and B–171716, October 26, 1976.

Severance Pay

Severance pay is authorized by 5 U.S.C. 5595 (1976) for employees of the District of Columbia who are involuntarily separated from the service and not removed for cause. However, 5 U.S.C. 5596(b) (1976) entitles an employee to backpay when he undergoes an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or a part of his pay. If, as a result of the applicability of section 5596, an employee is entitled to backpay, he is "* * * *for all purposes* * * * deemed to have performed service for the agency * * *" during the period of wrongful separation. 5 U.S.C. 5596(b)(2) (1976). [Italic supplied.]

In the present case, the CSC determined that the employee was wrongfully separated on August 17, 1974. He was, therefore, retroactively reinstated to the date of his separation and under 5 U.S.C. 5596 entitled to receive backpay for the same period. Thus, the employee is entitled to receive the amount he normally would have received if the unwarranted personnel action had not occurred. As such, the separation is regarded as if it never occurred and the employee is deemed, for all purposes, to have rendered service during the period covered by the corrective personnel action. B–178551, January 2, 1976; B–167875, October 31, 1969.

An employee's entitlement to severance pay, however, is conditioned upon actual separation from the service. Since the employee is regarded, *for all purposes*, as having performed services during the period of wrongful separation, he may not simultaneously claim the status of a "separated" employee during the same period. See *Ainsworth* v. *United States*, 399 F. 2d 176, 185 (1968). Accordingly, the severance pay paid to the employee is a proper item for deduction from the backpay. B–185192, March 2, 1976. Compare B–166683, May 21, 1969.

Unemployment Compensation

During his separation, the employee received $6,858 from the District of Columbia in unemployment compensation. It is considered that this sum should be treated the same as the severance pay. That is, since the employee was deemed to have been employed at all times during his wrongful separation, he was not entitled to unemployment compensation and such sums paid to the employee may properly be recouped. This determination is based upon 46 District of Columbia Code 301(d) and (e) which provide as follows:

> (d) "Earnings" means all remuneration payable for personal services, including wages, commissions, and bonuses, and the cash value of all remuneration payable in any medium other than cash whether received from employment, self-employment or any other work. After August 29, 1946, back pay awarded under any statute of the District or of the United States shall be treated as earnings * * *
>
> (e) An individual shall be deemed "unemployed" with respect to any week during which he performs no services and with respect to which no earnings are payable to him, or with respect to any week of less than full-time work if the earnings payable to him with respect to such week are less than his weekly benefit amount.

Because of the retroactive reinstatement of the employee, it is apparent that he did have earnings during this period. A person with full-time earnings, including backpay awarded by the District is not entitled to unemployment compensation. This case is distinguishable from 35 Comp. Gen. 241 (1955) and B–189198, August 25, 1977. In 35 Comp. Gen. 241, *supra*, the unemployment compensation was received from the State of Oklahoma by a postal service employee and since the employee might have been required to refund the unemployment compensation to the State Commission of Oklahoma, it was determined that no deduction from the backpay for Federal employment should be made. In B–189198, *supra*, it was determined that the unemployment compensation received from the District of Columbia should not be deducted from a backpay award to an employee of the Community Services Administration, a Federal agency, citing Federal Personnel Manual Supplement 990–2, Book 550, subchapter S8–5f and S8–5i (now subchapter S8–6e(4)). There, even though the unemployment compensation had been paid by the District of Columbia, the backpay was for employment in a Federal agency, not the District of Columbia. In this case the employee was employed by the District of Columbia from which he received the backpay and also received unemployment compensation from the District of Columbia for the same period of time. Accordingly, the amount of unemployment compensation paid by the District of Columbia is a proper item for deduction from the backpay.

The file discloses that the employee considers that his backpay should be calculated on the basis of a GS–14, the grade held by him at

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the time of separation. However, the Federal Employee Appeals Authority specifically ruled that the employee should have been offered a position at the GS–12 level. Also, since questions regarding classification of positions are solely within the jurisdiction of the employing agency and the CSC (5 U.S.C. 5107, *et seq.* (1976)), this Office lacks authority to consider propriety of classification actions or to entertain claims for backpay based on contentions that position classification was improper. See B–187234, December 8, 1976.

In conclusion, payment for backpay should be made on the basis of the deductions and amounts shown on voucher "D" of the District of Columbia Accounting Officer, which reduces the backpay due by the amounts of terminal leave pay, severance pay, and unemployment compensation received by Mr. Sargent. In addition a special leave account should be established in accordance with 5 U.S.C. 5596(b)(2) in the amount of 418 hours and the maximum of 240 hours restored to his regular leave account.

[B–189789]

Contracts—Disputes—Contract Appeals Board Decision—Jurisdictional Question

In deciding issue of mistake in bid, the General Accounting Office (GAO) is not bound by prior Armed Services Board of Contract Appeals (ASBCA) decision on same case finding mistake, as result of which no contract came into being, where ASBCA has declared in *National Line Company, Inc.* ASBCA No. 18739, 75–2 BCA 11,400 (1975), that it lacks jurisdiction to decide mistake in bid questions. Existence of contract and mistake upon which relief may be granted is question of law upon which ASBCA's decision is not final under 41 U.S.C. 322 (1970) and implementing procurement regulation and will be decided *de novo* by GAO.

Contracts—Offer and Acceptance—Acceptance—What Constitutes Acceptance

Where solicitation provides that written acceptance of offer otherwise furnished to bidder within bid acceptance period shall result in binding contract and bidder took no exception to provision in its bid, contract was effective on timely issuance of telegraphic notice of award and bidder's assertion of mistake to procuring activity after issuance of notice was therefore allegation made *after* award.

Contracts—Awards—Multiple—Propriety

Procuring activity is not precluded from making multiple awards where solicitation expressly reserves Government's right to do so and bidder does not qualify its bid for consideration only on "all-or-none" basis. Agency's requests for extensions of bid acceptance period were not inconsistent with provision to make multiple awards, and extensions granted, without limiting language to the contrary, preserve Government's right to so award intact.

Contracts—Mistakes—Unilaterial—Specification Misinterpretation

Bidder's assumption that award would be made in the aggregate, notwithstanding solicitation's provision for multiple awards, was error in judgment; bidder's misinterpretation, of which Agency was not aware before issuance of notice of award, is therefore unilateral, rather than mutual, mistake.

Contracts—Mistakes—Contracting Officer's Error Detection Duty—Notice of Error—Lacking

Contracting officer did not have actual notice of mistake in bid prior to award where bidder's statement to preaward survey team concerning unacceptability of partial award was neither included in survey report nor otherwise communicated to him before notice of award was issued and bidder did not assert mistake until after issuance of notice of award.

Contracts—Mistakes—Contracting Officer's Error Detection Duty—Aggregate *v.* Separable Items, Prices, etc.

Bidder's statement to preaward survey team, that partial award would be unacceptable, did not serve as constructive notice of mistake to contracting officer; survey was conducted on basis of total quantity, survey report recommended total award, and bidder's statement was not included in report or otherwise communicated to contracting officer prior to issuance of notice of award.

Contracts—Mistakes—Allegation After Award—No Basis for Relief

Contracting officer cannot be charged with constructive notice of mistake in bid where nothing in record indicates that in light of all facts and circumstances he should have known of the possibility of error in the bids prior to the issuance of notices of award. Therefore, request for relief for mistake in bids made after award is denied.

In the matter of the Wolverine Diesel Power Company, May 17, 1978:

Wolverine Diesel Power Company (Wolverine) has requested relief in the amount of $13,501 for alleged mistakes in its bids in response to invitations for bids (IFB) Nos. DSA–400–74–B–4924 (IFB–4924) and DSA–400–74–B–5193 (IFB–5193) for mounting assemblies, on the basis of which Wolverine was awarded contracts Nos. DSA–400–74–C–8790 (Contract 8790) and DSA–400–74–C–8827 (Contract 8827) by the Defense Logistics Agency (DLA), Defense General Supply Center, Richmond, Virginia.

DLA subsequently terminated both contracts for default, and Wolverine appealed to the Armed Services Board of Contract Appeals (the Board). The Board upheld the default actions, but dismissed the appeal to the extent that it concerned a mistake in bid. *Wolverine Diesel Power Company*, ASBCA No. 19967, 75–2 BCA ¶ 11,453 (August 19, 1975), *aff'd.* ASBCA No. 19967, October 7, 1975. DLA repurchased its requirements from another supplier and demanded excess reprocurement costs of $64,403.41 from Wolverine, which the firm appealed to the Board. The Board found that DLA's delay in effecting the reprocurement precluded assessment of reprocurement costs on the basis of the price of the reprocurement contracts, and sustained the appeal to the extent that the Government was not entitled to any amount in excess of $13,501. *Wolverine Diesel Power Company*, ASBCA No. 20609, 77–2 BCA ¶ 12,551 (May 18, 1977). In so doing, however, the Board stated:

In deciding an original appeal from the terminations for default, we dismissed the case to the extent it concerned a mistake in bid citing * * * *National Line Company, Inc.*, ASBCA No. 18739, 75–2 BCA ¶ 11,400. The Board has before it only the Rule 4 file and the pleadings of the parties. We were barred from pursuing the mistake in bid as a result of the *National Line Company* decision * * *. *We now have before us clear and convincing proof of a mistake in bid as found above. Appellant bid on a certain quantity while the Government's acceptance was predicated on a far lesser quantity. There was no meeting of the minds, no striking of a bargain; consequently, from a factual point of view, no contract came into being.* In view of the *National Line Company* decision, however, we are obligated to reiterate that appellant has no remedy for a mistake in bid in this forum. Such relief can properly be sought from the Comptroller General of the United States or the United States Court of Claims. [Italic supplied.]

PROCEDURAL ASPECTS

The initial issue for resolution is whether and to what extent our Office is bound by the Board's findings concerning mistake in bid in its May 18, 1977, decision. Counsel for Wolverine asserts that the facts set forth in the decision, quoted above with emphasis, are binding on the parties under the doctrine of *res judicata*. Counsel further contends that the Board's determination of mistake must stand unless that finding was fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, citing *inter alia*, 41 U.S.C. § 321 (1970); Armed Services Procurement Regulation (ASPR) § 7–103.12 (1973 ed.); *United States* v. *Bianchi & Co.*, 373 U.S. 709 (1963); *Woodcrest Constr. Co.* v. *United States*, 408 F. 2d 406 (Ct. Cl. 1969); 46 Comp. Gen. 441 (1966); 49 *id.* 782 (1970).

DLA, however, takes the position that the Board's findings concerning mistake in bid and the validity of Wolverine's contracts are not binding and that in light of the *National Line* decision, the issue of mistake in bid should be decided *de novo* by our Office.

We think it significant that the Board cited *National Line* as controlling in its discussion of Wolverine's alleged mistake in bid in both the 1975 and 1977 decisions, for we find the language of that case dispositive as the Board's own statement of its authority with respect to the issue of mistake in bid. The case involved an appeal from a default termination and resultant assessment of excess reprocurement costs for which the appellant-contractor contended the firm was not liable due to an alleged mistake in bid of which the contracting officer should have known. The Board dismissed the appeal for lack of jurisdiction to decide questions concerning mistake in bid stating that:

One of the Board's leading cases * * * on the subject of the Board's broad jurisdiction over appeals involving claims by the Government is *Harrington & Richardson, Inc.*, ASBCA No. 9839, 72–2 BCA ¶ 9507, and in that decision * * * the Board stated that bid mistake relief was a recognized exception to the Board's jurisdiction. We are unaware of any case in which this Board or its

predecessors have asserted jurisdiction under the Disputes article to decide the merits of mistake in bid questions. *To the rare extent such questions have been decided as threshold jurisdictional issues under the authority of our Charter, such decisions are hereby overruled. National Line Company, Inc.*, ASBCA No. 18739, 75-2 BCA ¶ 11,400 (July 16, 1975). [Italic supplied.]

Consequently, we view the Board's conclusions with regard to the issue of mistake in bid as *dicta*, not binding on our Office. Moreover, the questions of the existence of the contracts and of mistakes in bid upon which relief may properly be granted are matters of law and, as such, the decision of the Board in this regard is not and cannot be considered final. 41 U.S.C. § 322 (1970); ASPR § 7-103.12(a), (b) (1973 ed.); 49 Comp. Gen. 782, 783 (1970); 53 *id.* 167, 169 (1973).

HISTORY OF PROCUREMENTS

A review of the history of the procurements is initially requisite to an understanding of the issue now before our Office. DLA issued IFB-4924 for a total of 220 mounting assembly power units, Federal Stock Number (FSN) 6115-783-6335, on January 8, 1974. Bids were solicited freight on board (f.o.b.) origin or, in the alternative, f.o.b. various destinations. Bid opening, originally scheduled for February 7, 1974, was extended by amendment to February 19, 1974. Four responsive bids were received; unit bid prices before discount were as follows:

BIDDER	F.O.B. Origin (Items 1-6)	F.O.B. Destination (Items 1-6)
Wolverine	$643.40	No Bid
John R. Hollingsworth Co	740.00	No Bid
	[1] 733.00	
Essex Electro Engineers	1,145.00	No Bid
A.C. Ball Co	3,245.00	$3,437.00

[1] (Bid with waiver of first article testing)

IFB-5193 for a total of 225 mounting assembly power units, FSN 6115-873-3915, was issued on January 23, 1974. The two eligible bids received at the bid opening on February 22, 1974, were priced as follows:

BIDDER	F.O.B. ORIGIN (Items 1-7)
Wolverine	$1,355.00
John R. Hollingsworth Company	1,484.00
	[1] 1,480.00

[1] (Bid with waiver of first article testing.)

On March 28, 1974, DLA requested a partial preaward survey of Wolverine's premises. See ASPR § 1-905.4(b) (1973 ed.). The survey was conducted on the basis of the total quantities of DLA's requirements on April 4 and April 5, 1974; the survey report, dated April 10, 1974, recommended complete award to the firm on each of the solicitations. The record shows that during the course of the survey DLA's industrial specialist asked Wolverine personnel whether a lesser quantity would be acceptable to the firm, to which Wolverine responded in the negative. That information is not, however, recorded in the survey report.

DLA's contracting officer subsequently determined that Wolverine was the low bidder on items 1 and 2 of IFB-4924 for a total of 60 units at $38,604 and that John R. Hollingsworth Company (JRHC) was the low bidder on items 3 through 6 for a total of 160 units (on the waiver basis) at $117,280. During the interim, DLA requested and received extensions of Wolverine's and JRHC's bids to May 1 and May 10, 1974. DLA telegraphically notified Wolverine of the award of Contract 8790 for 60 units on May 9, 1974.

Similarly, Wolverine's bid was deemed low on items 5 and 6 of IFB-3915 for a total of 65 units at $88,075; JRHC was the low bidder on the remaining items for a total of 160 units (on the waiver basis) at $236,800. Meanwhile, the bidders had complied with DLA's request that their bids be extended for acceptance to May 10, 1974, and a telegraphic notice of the award of Contract 8827 for 65 units was sent to Wolverine on that date. Contracts 8790 and 8827 were mailed to Wolverine on May 23 and June 18, 1974, respectively.

However, by telegram of May 13, 1974, Wolverine advised DLA that it could not perform the contracts in the reduced quantities awarded because the firm's bids were based on the total quantities solicited and asked to be relieved of the contracts. In a letter to DLA on the following day, confirming the telegram, Wolverine related the preaward survey inquiry concerning the acceptability of a reduced-quantity award and the firm's response that such an award would be unacceptable because pricing on purchased parts would be increased on reduced quantities. Wolverine returned the contracts to DLA on May 28, 1974.

DLA telegraphically acknowledged receipt of Wolverine's telegram and letter on May 31, 1974; DLA further advised that in order to consider the request for relief from the contracts Wolverine must furnish clear and convincing evidence of the alleged mistake, enumerated acceptable types of evidence, and required that the evidence be submitted by June 7, 1974. Wolverine timely furnished DLA an affidavit of the industrial specialist who conducted the preaward survey, together with a letter stating that the firm interpreted Clause

No. D4 of the solicitations as indicating that awards would be made for total quantities and that no indication to the contrary was given in DLA's numerous requests for extensions of the acceptance dates of the firm's bids.

By telegram dated June 11, 1974, however, DLA informed Wolverine that the evidence supplied appeared insufficient to substantiate the alleged mistake, referred to the examples of evidence listed in the Agency's May 31 telegram, allowed Wolverine to provide additional evidence by June 18, 1974, and admonished that failure to do so would raise the assumption that no further evidence existed and such failure would be considered in determining the request for relief.

Wolverine responded on June 17, 1974, with cost comparisons of tooling, production start up, and fire extinguisher and bracket costs for producing the total and partial quantities. Four days later DLA's contracting officer telephonically informed Wolverine that the information furnished in the June 17 letter did not appear to substantiate the alleged mistakes and asked whether the firm had worksheets or other information which would show that Wolverine intended to indicate that the bids should be on an "all-or-none" basis or that an award for less than the total quantity would not be accepted. According to the record, Wolverine replied that it had furnished to DLA the only information the firm had and that nothing in the worksheets indicated that the bids should be "all or none." Wolverine reiterated its request for relief in a letter to DLA of August 19, 1974, asserting that the statements made during the preaward survey, together with the affidavits furnished concerning costing, constituted sufficient legal evidence of mistake in bid within the meaning of ASPR § 2-406 (1973 ed.).

DLA notified Wolverine by letter dated October 17, 1974, that its request for relief from the contracts had been denied because the evidence which the firm submitted was not clear and convincing, to which Wolverine responded on October 22, 1974, again requesting that DLA recognize its reasons for not accepting the contracts and relieve the company of performance responsibility.

DISCUSSION

Formation of Contract

Initially, paragraph 10(d) of standard form (SF) 33A of the IFB's in question provided that award of the contracts would be made in the following manner:

> 10. Award of Contract.
>
> * * * * * * *
>
> (d) *A written* award (or *Acceptance of Offer* mailed (or *otherwise furnished*) to the successful offeror *within the time for acceptance specified in the offer shall*

be deemed to result in a binding contract without further action by either party. [Italic supplied.]

As mentioned above, DLA sent telegraphic notices of the award of Contracts 8790 and 8827 to Wolverine on May 9 and May 10, 1974, respectively. We believe that those telegrams constitute written acceptance of Wolverine's bids which were timely "otherwise furnished" to the firm within the meaning of the above-quoted provision of the solicitations. We have long held that where such language is included in the solicitation and the bidder takes no exception to it, a binding contract comes into existence at the time the notice of award is mailed or otherwise furnished, regardless of when or whether it is received by the bidder. 45 Comp. Gen. 700, 708 (1966). Because Wolverine did not take exception to the terms of the IFB concerning consummation of the contract upon notice of the award, the contracts were effective on May 9 and 10, 1974, and Wolverine's May 13, 1974, telegram to DLA was an allegation of mistake in bid made *after* award.

Mistake in Bid

We have consistently held that the responsibility for preparing a bid rests with the bidder. The general rule applicable to a mistake in bid alleged after award is that the bidder must bear the consequences unless the mistake was mutual or the contracting officer had either actual or constructive notice of the mistake prior to award. *See, e.g.*, 17 Comp. Gen. 373, 374–75 (1937); 48 *id.* 672, 675 (1969); *Porta-Kamp Manufacturing Company, Inc.*, 54 Comp. Gen. 545, 547 (1974), 74–2 CPD 393; *Peterman, Windham & Yaughn, Inc.*, 56 Comp. Gen. 239 (1977), 77–1 CPD 20.

Wolverine takes the somewhat anomalous position that (1) neither the terms of the solicitations nor DLA's requests for extensions of the acceptance dates of the firm's bids indicated the possibility that multiple awards might be made under the solicitations, and (2) the firm intended to bid on an "all-or-none" basis and its failure to do so constituted mistakes in the bids for which relief from performance of the contracts should have been granted.

Paragraph 10(c) of SF 33A of the solicitations provided, in pertinent part, for the making of multiple awards under the following circumstance:

> (c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. * * *

We have held that in the absence of qualifying language to the contrary in the bids under consideration, this provision allows the procuring activity to split the items for award. *Engineering Research, Inc.*, B–188731, June 15, 1977, 77–1 CPD 431; *Federal Contracting Corporation*, B–189855, November 8, 1977, 77-2 CPD 353. While we feel that

the above-quoted provision constitutes sufficient advice of the possibility of multiple awards, we note that the Master Solicitation, section "D," Evaluation And Award Factors, paragraph D3, of the IFB's expressly provided that:

> [B]ids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). [I]ndividul awards will be for the items and combination of items which result in the lowest aggregate price to the Government, * * *. See ASPR § 2-201(a)(D)(iii) (1973 ed.).

Consequently, we find nothing which precluded DLA from splitting the awards for items included in the solicitations. *Federal Contracting Corporation, supra.*

With regard to Wolverine's exception to DLA's requests for extension of the firm's bids, we find nothing in the procuring activity's actions inconsistent with the Agency's prior reservation of the right to make multiple awards under the solicitations. Wolverine's bids as initially offered and extended contained the above-quoted provisions, did not include any qualifying language to the contrary, and were therefore extended with the Government's right to so award intact.

As to Wolverine's allegation that the firm intended its bids to be considered only in the aggregate and that its failure to qualify the bids to that effect constituted a mistake, we cannot agree that such an error should be characterized as a mutual mistake requisite to the relief sought. It is our opinion that the only mistake which may have been involved was in Wolverine's judgment concerning the meaning of the IFB award provision, due solely to the firm's own misinterpretation of the solicitations and, thus, a unilateral error. See *Federal Contracting Corporation, supra;* 49 Comp. Gen. 782, 787 (1970); 47 *id.* 378, 382–83 (1968); 45 *id.* 700, 709 (1966); 17 *id.* 373, 374 (1937). Furthermore, a mistake by one party coupled with the ignorance of that mistake by the other party does not constitute a mistake as to which a legal basis exists for reformation or relief of a contract. B–143438, September 9, 1960; 47 Comp. Gen. 365, 369 (1968).

Because notice of award was issued to Wolverine prior to the firm's allegation of mistake, and DLA was not aware of Wolverine's interpretation of the solicitation's award provisions prior to issuing the notices, we are unable to conclude that DLA's contracting officer had actual notice of the alleged errors before the awards were made. 45 Comp. Gen. 700, 708 (1966); *Federal Contracting Corporation, supra.*

Similarly, we cannot agree with Wolverine's contention that the preaward survey inquiry concerning the acceptability of a partial award constituted notice of mistake to the contracting officer. According to the record, that interchange was neither included in the survey report, nor was the information otherwise communicated to the con-

tracting officer prior to the time the notices of award were issued. See *Cross Aero Corporation*, ASBCA No. 15092, 71–2 BCA ¶ 9076 (September 14, 1971); *Cross Aero Corporation*, ASBCA No. 14801, 71-2 BCA ¶ 9075 (September 4, 1971); 38 Comp. Gen. 218 (1958).

There remains for consideration the question of whether the contracting officer had constructive notice of the alleged mistake. Such notice is said to exist when the contracting officer, considering all the facts and circumstances, should have known of the possibility of an error in the bid. 44 Comp. Gen. 383, 386 (1965); *Smith Decalcomania Co., Inc.*, B–182414, January 27, 1975, 75-1 CPD 54. However, we find nothing in the record from which to conclude that DLA contributed to, was responsible for, or had specific or constructive knowledge of Wolverine's misinterpretation of the solicitations' award provisions. 47 Comp. Gen. 378, 386 (1968).

Accordingly, Wolverine's request for relief is denied.

[B–190790]

Fines—Government Liability—Carrier Violation of Weight Regulation—Improper Loading

Forest Service employee paid fine to Virginia State Court because Government truck that he was driving exceeded maximum weight limitation. He may be reimbursed by Government since the fine was imposed upon him as agent of Government and was not the result of any personal wrongdoing on his part.

In the matter of Jeffrey L. Wartluft—reimbursement of fine, May 18, 1978:

This is in response to a letter from David L. Olexer, an authorized certifying officer of the U.S. Department of Agriculture, Forest Service, requesting a decision whether he may certify for payment a voucher for reimbursement of a $104.40 fine paid to the General District Court at Bland, Virginia, by Jeffrey L. Wartluft, a Forest Service employee.

Mr. Wartluft drove a Forest Service truck from Virginia to West Virginia when the truck was found to be overweight on the rear axle at the weigh scales at Bland, Virginia. The truck had been loaded with logs by Mr. Wartluft and several other Forest Service employees who had no way of checking the weight at the time the truck was loaded. Although the truck was underweight in total, it was overweight on the rear axle by 2000 pounds. The overweight citation was thus the result of improper loading rather than overloading the entire truck. The fine was paid from personal funds by Mr. Wartluft and his work unit, and Mr. Wartluft now seeks reimbursement of the amount paid.

It has been the general position of our Office that a fine imposed by a court upon a Federal employee for an offense committed while driving a Government vehicle in the performance of his official duties is the responsibility of the employee and there exists no authority for its payment from appropriated funds, as such fine is imposed upon the employee personally. 31 Comp. Gen. 246 (1952). See also B–186680, October 4, 1976, and B–173660, November 18, 1971.

These cases, however, dealt with fines for failure to pay parking meter fees or for exceeding a speed limit. A factor common to them is that the violation was caused by the negligent or intentional acts of the employee concerned. Thus, the imposition of the fine was on the employe personally. Even in B–173660, *supra*, where an employee claimed that an inaccurate speedometer on his Government vehicle caused his arrest and fine for speeding, we denied the use of appropriated funds to reimburse him for payment of the fine. Since the fine might have been the result of intentional or negligent acts on the part of the Government employee, we stated the employee could present his claim to his agency under the Federal Tort Claims Act, 28 U.S.C. 2674.

We believe that the present case may be distinguished from the line of cases discussed above. Although Mr. Wartluft assisted in loading the truck, the weight of the truck could not be checked as it had been loaded in the woods where there was no scale. Thus, the excess weight on the rear axle was not the fault of Mr. Wartluft. Furthermore, although the citation was issued in Mr. Wartluft's name, as the driver of the vehicle, it was not for any personal wrongdoing by him in operating the vehicle, as occurred in the cases cited above. Moreover, Mr. Wartluft was acting as an agent of the Government within the scope of his duties. In this connection the record indicates that the judge handling the case offered to change the citation from one against Mr. Wartluft to one against the United States. The Government representatives handling the case declined the offer. They did not wish to try the case in Federal Court because of the precedent set in *Virginia* v. *Stiff*, 144 F. Supp. 169 (W.D. Va., 1956). In that case the Federal District Court held that federally owned and operated motor vehicles are not immune from the operation of laws limiting the weight of vehicles on Virginia public highways, and that the driver of a Government truck which exceeded the maximum weight limitation was subject to a fine for violating the weight limitation statute. See 46 Comp. Gen. 624, 627 (1967).

On the basis of the foregoing, it is our opinion that, although the citation was issued in Mr. Wartluft's name, it was actually a citation against the United States, his principal. Pursuant to *Virginia* v. *Stiff*, *supra*, the United States is not immune from payment of a fine of this

nature. Accordingly, appropriated funds may be used to reimburse the employee for paying the fine.

The certifying officer is therefore advised that the voucher may be properly certified for payment.

[B-190336]

Contracts—Specifications—Conformability of Equipment, etc., Offered—Commercial Model Requirement

Award of contract was improper where actions of contracting agency were tantamount to waiver of clause requiring bidders to offer a "standard commercial product." However, in view of extent to which contract has been performed, General Accounting Office concludes that it would not be in Government's best interest to terminate contract for convenience.

In the matter of Coast Iron & Machine Works, Inc., May 24, 1978:

Coast Iron and Machine Works, Inc. (Coast Iron) protests the award of two contracts to Clarke and Lewis, Inc. (C&L) under invitation for bids No. N00600-77-B-1694 (-1694) and oral solicitation No. N00600-77-C-2123 (-2123) issued by the Naval Regional Procurement Office, Washington, D.C. (Navy).

Each solicitation sought offers on a 6-inch pipe bending machine. These machines are offered in two styles: hinged clamp ("shipboard") and swing arm ("standard"). Although both styles perform the same function, the shipboard bender is of a more compact design.

Coast Iron's original protest to this Office was founded upon the assumptions that both solicitations sought a shipboard bender and that both solicitations contained a standard commercial product clause which read as follows:

The equipment to be furnished hereunder must be a manufacturer's standard commercial product. For purposes of this contract, a standard commercial product is one which, within a period commencing two years prior to the opening date of this solicitation, has been sold by the manufacturer or his distributor in reasonable quantities to the general public or government in the course of conducting normal business operations. Nominal quantities, such as models, samples, prototypes, or experimental units will not be considered as meeting this requirement.

Coast Iron felt that if its two assumptions were correct C&L was incapable of qualifying for award under either solicitation. It is Coast Iron's position that C&L does not manufacture a shipboard bender that can qualify as a standard commercial product as that term is defined in the above quoted clause.

It subsequently developed that solicitation -2123 did not include the standard commercial product clause set out above. Coast Iron has recognized that the absence of the clause renders its protest of -2123 moot. (We have been advised by the Department of the Navy that C&L

failed to deliver the machine by December 13, 1977, as required by contract –2123, and now anticipates delivering the entire machine including ancillary equipment by July 31, 1978.)

Turning to IFB–1694, the Navy reports that although the solicitation contained the standard commercial product clause, the specifications permit the manufacturer to provide either a standard or a shipboard bender. The issue then becomes one of whether C&L has the ability to furnish either a standard or a shipboard bender which is a standard commercial product within the meaning of the clause.

Bidders were not required to submit with their bids evidence of compliance with the standard commercial product clause. However, the preaward survey team reported that C&L "has furnished similar items in the past and is the original designer of many numerically controlled bending machines and has assigned patent rights to other machine tool manufacturers." With regard to C&L's technical capability, the team noted that "At the present time bidder has produced over 100 similar tube bending machines for commercial use and over 20 machines for use by the Navy." The team concluded that C&L's performance record was satisfactory because, among other reasons, "the bending machine required for this procurement is similar to previously produced machines." Included within the preaward survey report was a photograph of a C&L machine with the legend "This machine is similar to the proposed procurement only requiring few minor changes."

Based upon this information, the contracting officer proceeded with award to C&L. However, in response to a post-award inquiry by the contracting officer which was prompted by Coast Iron's protest, C&L could identify only one standard 6-inch pipe bender and two shipboard 6-inch pipe benders which it had sold during the 2 years preceding issuance of the IFB. Only one shipboard bender had been delivered to the customer at the time of award: the other was still being fabricated.

In view of this information, we think that C&L had sold only "nominal quantities" of these items during the 2 years before the IFB was issued, and, therefore, C&L did not qualify for award.

We have held that where a solicitation requires a commercial product an award under such a solicitation must be preceded by a determination that the potential awardee will offer a commercial product and that it is improper to make an award if the intended awardee is incapable of furnishing a commercial product. *Kepner Plastics Fabricators, Inc., Harding Pollution Controls Corporation*, B–184451, June 1, 1976, 76–1 CPD 351. The rationale behind this position is our belief that the Government should not represent that it has minimum requirements of such a nature that it must restrict competition to

only those who are capable of providing a standard commercial product when in fact the Government's minimum needs can be fulfilled with the provision of something less than a standard commercial product. A solicitation which states requirements in excess of what is actually required is unduly restrictive of competition and the waiver of such excess requirement could well prove prejudicial to other bidders or potential bidders who did or did not bid in reliance upon its application. *Haughton Elevator Division, Reliance Electric Company*, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

We believe that, in the instant case, the actions of the contracting agency were tantamount to a waiver of the standard commercial product clause. First, the preaward survey team was not asked to examine whether C&L was offering a standard commercial product as defined by the clause. In this connection we note that the preaward survey team spoke in terms of "similar" machines previously produced by C&L, whereas the standard commercial product clause requires that "*the equipment to be furnished hereunder* must be a manufacturer's standard commercial product." [Italic supplied.] It also does not appear from the record that the contracting officer specifically determined prior to making award to C&L that the firm was offering a standard commercial product. Since the standard commercial product clause was, in effect, waived, the award to C&L was improper.

Delivery of the pipe bending machine was to have been made by April 15, 1978. However, we have been advised by the Department of the Navy that the contractor has completed approximately 50 percent of the work and that delivery is now scheduled for August 15, 1978.

In view of the extent to which the contract has been performed, we do not believe it would be in the best interests of the Government to terminate C&L's contract for convenience. By separate letter of today, however, we have brought this procurement to the attention of the Secretary of the Navy in order to preclude future similar deficiencies.

[B-190784]

Contracts—Specifications—Amendments—Failure to Acknowledge—Bid/Offer Nonresponsive

Protest against possible award to lowest bidder, which allegedly submitted unrealistically low bid under which performance in compliance with solicitation's manning requirements and applicable Department of Labor wage determination is not possible without sustaining huge losses, will not be addressed because procuring activity found low bid nonresponsive and ineligible for award because bidder failed to submit amendments to solicitation with its bid.

Personal Services—Detective Employment Prohibition—Violation—*Equifax* Case Effect

Protest against proposed award to second low bidder on ground that award would violate Anti-Pinkerton Act, 5 U.S.C. 3108 (1970), and implementing procurement regulation is denied. GAO will hereafter interpret act in accord with judicial interpretation in *United States ex rel. Weinberger* v. *Equifax*. Inc., 557 F. 2d 456, 463 (5th Cir. 1977), providing that "an organization is not 'similar' to the * * * Pinkerton Detective Agency unless it offers quasi-military armed forces for hire." Where record does not show that bidder offers such a force, it is not a "similar organization" within the meaning of the act, and award may properly be made to bidder. 55 Comp. Gen. 1472, 56 *id.* 225, and other cases, overruled or modified.

Contracts—Specifications—Failure to Furnish Something Required—Affiliates Affidavit—Waiver—As Minor Informality

Protest alleging that second low bid or award to that bidder contravines terms of Affiliated Bidder's clause, Armed Services Procurement Regulation 7-2003.12 (1976 ed.), is without merit where bidder submitted required information with bid. In addition, failure to comply with clause is minor informality which may be waived or cured after bid opening.

In the matter of Professional Security Officers Company, May 25, 1978:

Professional Security Officers Co. (PSO) protests against the proposed award by the Department of the Army (Army) of a contract to provide security guard services at the Army Support Facility, Pedricktown, New Jersey, under invitation for bids (IFB) No. DABT35-78-B-0006.

The IFB, issued on October 14, 1977, contemplated the award of a service contract for the period December 1, 1977, to December 31, 1978, with an option to renew the contract; the entire duration of the contract, including the exercise of any options, is not to exceed 2 years.

Amendment No. 0001 to the IFB, issued on October 18, 1977, reduced item 0001 from 13 to 12 months and added item 0002, "Option to renew in accordance with Section J.4," for 1 month.

Nine bids were received at the bid opening, which was held, pursuant to amendment No. 0002, on November 18, 1977. The three lowest bids, submitted at a monthly rate for each of the items, were: Eastern Brokers, Inc. (Eastern), at $3,195.92 per month; Lance Security Patrol Agency, Inc. (Lance Security), at $11,575.20; and PSO at $12,392.50.

By letter to the Army dated November 23, 1977, PSO protested against the award of a contract to any other bidder. The protest was filed with our Office on November 28, 1977. The Army has withheld award of the contract pending resolution of the protest.

PSO initially contends that Eastern's bid is unrealistically low and that the firm cannot perform in accordance with the manning speci-

fications of the IFB and the applicable Department of Labor Wage Determination No. 69–260 (Revision 9) without sustaining huge losses. We find it unnecessary, however, to address these issues because the Army states that it has found Eastern's bid nonresponsive and, therefore, ineligible for award of the contract, because the bidder failed to submit amendments Nos. 0002 and 0003 with its bid, as required by the IFB. See, e.g., *Quality Services, Inc.*, B–184887, February 18, 1976, 76–1 CPD 112; *Hinck Electrical Contractors, Inc.*, B–184625, October 20, 1975, 75–2 CPD 244.

PSO further contends that an award to Lance Security, the apparent low, responsive bidder, would violate the so–called Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), and Armed Services Procurement Regulation (ASPR) § 22–108 (1976 ed.). The statutory authority cited by the protester provides that:

> *An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States* or the government of the District of Columbia. [Italic supplied.]

PSO has shown in support of its contention: (1) that Lance Security, with Ralph V. Johnson listed as its president, is licensed by the New York Department of State as a watch guard agency under license No. 978; (2) that Lance Investigation Service, Inc. (Lance Investigation), with Ralph V. Johnson listed as president, is licensed by the State of New York as a private investigating firm under license No. 15135; and (3) that Lance Investigation of New York and New Jersey has been issued New Jersey Private Detective license No. 2179 and that the sole licensed principal of the corporation is Ralph V. Johnson. PSO additionally asserts that this information constitutes proof of "common officers, directors and stockholders" within the meaning of ASPR § 7–3002.12(b)(iii) (1976 ed.).

In interpreting the above-quoted statute over the years, we have established certain principles, enumerated in our decision in *Progressive Security Agency, Inc.*, 55 Comp. Gen. 1472, 1474 (1976), *modified* by 56 Comp. Gen. 225 (1977), 77–1 CPD 8. Among those principles, we stated that "[a]lthough we have never defined 'detective agency' for the purposes of the * * * Act, we have drawn a distinction between detective * * * and protective agencies, and have expressed the view that the Act does not forbid contracts with the latter." 55 Comp. Gen. 1472, 1474 (1976) (citations omitted).

Subsequent to our decisions in *Progressive Security*, however, the Court of Appeals for the Fifth Circuit issued a decision in *United States ex rel. Weinberger* v. *Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 46 U.S. L.W. 3446 (U.S. Jan. 16, 1978), *rehearing denied*, 46 U.S.L.W. 3556 (U.S. Mar. 6, 1978), interpreting the act in

a manner different from our prior line of decisions in this area. *Id.* at 463, n. 6. The *Equifax* decision represents the first judicial interpretation of the Anti-Pinkerton Act contained in a published decision and an interpretation with which we are in essential agreement. Consequently, the interpretation given the act by the court in *Equifax* will hereafter also be the position taken by our Office.

On appeal from the dismissal of an action for declaratory judgment, the plaintiff-appellant in the *Equifax* case claimed that because the defendant, a consumer reporting agency employed by the Government to provide information about prospective Government employees, used "detective-like investigative techniques," it was a "similar organization" within the meaning of the act and, therefore, precluded from Government employment. *Id.* at 459.

In affirming the dismissal, however, the court found that the district court had erred in its restrictive interpretation of the act, reviewed the legislative history and purpose of the act, and concluded as follows:

> * * * In light of the purpose of the Act and its legislative history, we conclude that *an organization is not "similar" to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire.* Because Weinberger fails to allege that Equifax provides so much as an armed guard, much less an armed quasi-military unit, Equifax's employment is not illegal under the Anti-Pinkerton Act. * * * *Id.* at 463 (footnote omitted). [Italic supplied.]

Applying the above-quoted standard promulgated by the court, we are unable to conclude on the basis of the record that Lance Security offers "quasi-military armed forces for hire" and, therefore, cannot agree with the protester's assertion that an award to Lance Security would be in violation of the act and the implementing procurement regulation.

We find PSO's additional contention that either Lance Security's bid or the Army's proposed award would contravene ASPR § 7–2003.12 (1976 ed.) to be without merit. The regulation sets forth the Affiliated Bidders clause which is to be included in supply and services contract solicitations when the contracting officer considers it necessary in order to prevent practices prejudicial to fair and open competition. ASPR § 2–201(a) Sec. B(ii) (1976 ed.). The clause was, in fact, included in the solicitation as paragraph B.19. and the Army states that Lance Security complied with that provision of the IFB. PSO's assertion in this regard is raised primarily in support of its unsuccessful attempt to show a potential violation of the Anti-Pinkerton Act. We note, however, that even the failure to furnish the affiliates affidavit is a minor informality which may be waived or cured after bid opening. ASPR §§ 2–201(a) Sec. B(ii) and 2–405(v) (1976 ed.); *Bryan L. and F. B. Standley*, B–186573, July 20, 1976,

76–2 CPD 60; *Kleen-Rite Janitorial Service, Inc.*, B–179652, January 18, 1974, 74–1 CPD 15.

In light of the above, we find no legal basis upon which to object to the award proposed by the Army. Accordingly, the protest is denied.

[B–191099]

Bids—Evaluation—Estimates—Requirements Contracts

Estimated peak monthly requirements (EPMR) for items were not halved when items were divided into set-aside and non-set-aside portions, but rather total EPMR was listed as EPMR of each subitem. Invitation for bids (IFB) required that offeror's listed monthly supply potential must be able to cover total EPMR's for which offeror was low. Therefore, it was improper and not consistent with IFB to total EPMR's for subitems in bid evaluation.

In the matter of the American Abrasive Metals Company, May 25, 1978:

American Abrasive Metals Company (AAM) has protested the award of two requirements contracts to Palmer Products Incorporated (Palmer) for nonslip flight deck compound under invitation for bids (IFB) No. 8FPQ-S1-30083 issued by the General Services Administration (GSA). Basically, AAM contends that GSA evaluated the bids in a manner inconsistent with that set forth in the IFB and this incorrect bid evaluation resulted in AAM being found nonresponsive for several items for which it was low bidder.

Construction of IFB

AAM is protesting the award of items 9A, 9B and 9F. Item 9, partially set aside for small business, was presented in the IFB as follows:

ITEM 9 –PARTIAL SET ASIDE.
ITEMS 9A THRU 9E NOT SET ASIDE FOR SMALL BUSINESS.

	EPMR*	ECQ**	UNIT	UNIT PRICE
9. 5610–00–857–2453				
(A) Duluth, GA (A–4)	750(2)	1500	KT	$
(B) Stockton, CA (S–1)	750(2)	1500	KT	$
(C) Auburn, WA (T–1)	325(2)	650	KT	$
(D) Norfolk, VA (W–3)	1200(2)	2400	KT	$
(E) Honolulu, HI (S–7)	150(2)	300	KT	$
(F) Duluth, GA (A–4)	750(2)	1500	KT	$
(G) Stockton, CA (S–1)	750(2)	1500	KT	$
(H) Auburn, WA (T–1)	325(2)	650	KT	$
(I) Norfolk, VA (W–3)	1200(2)	2400	KT	$
(J) Honolulu, HI (S–7)	150(2)	300	KT	$

*EPMR DENOTES ESTIMATED PEAK MONTHLY REQUIREMENTS. NUMBERS IN PARENTHESIS AFTER EPMR INDICATE ESTIMATED NUMBER OF ORDERS EXPECTED TO BE PLACED DURING CONTRACT TERM.

**ECQ DENOTES ESTIMATED CONTRACT QUANTITY.

The GSA Inventory Management Branch, Region 8, provided the Procurement Office a requirements forecast specifying ECQ and EPMR for each destination, Duluth, Stockton, Auburn, Norfolk and Honolulu.

GSA states that:

When the decision was made to partially set aside, for small business, quantities of certain stock items, it was necessary to divide the stock items' estimated contract quantities into two bid items for each destination, one set-aside and the other not set-aside. The estimated frequency of order placement was divided.

Example: Original forecast—ECQ = 3000 units,
EPMR = 750 units, number of orders = 4.
Revised forecast—ECQ=1500 units,
EPMR = 750 units, number of orders = 2.

The estimated peak monthly requirement could not be divided for the reason if different bidders were low on each bid item, it must be established that each bidder is willing and has the capacity to produce material in sufficient quantities to meet the estimated peak monthly requirement, if so ordered.

In applying this analysis to items 9A and 9F, we find that before the requirements for Duluth were divided, the ECQ was 3,000 units, the number of orders expected was 4 and the EPMR was 750 units. That is, if 9A and 9F were one item, a successful contractor could expect to have to supply 3,000 units over 4 months at a rate of 750 units per month. Once the Duluth requirements were subdivided into two items the ECQ was 1,500 units per item, the number of orders was 2 and the EPMR remained at 750 because that amount could still be needed from any one contractor for Duluth in any single month.

The following clause was included in the IFB:

MONTHLY SUPPLY POTENTIAL:

(a) The estimated requirements of the Government for the contract period and the estimated peak monthly requirements are shown in the schedule of items. Bidders are requested to indicate, in the spaces provided, the total quantity per month which they are willing to furnish. This monthly supply potential will not* be used in order to preclude the placement of orders in excess of a contractor's production capacity. Bidders are urged to group as many items or groups of items as possible in setting their monthly supply potential since the items or groups for which they may be eligible for award cannot be predetermined. Such grouping will make it possible to make the fullest use of the production capacity of each successful bidder. For example, if a bidder's production facilities can produce all of the items, or groups, solicited, the bidder may insert a single overall limitation on the quantity that he can supply. Bidders are cautioned that in order to qualify for an award, their monthly supply potential must cover the Government's estimated peak monthly requirement for each item or group to be awarded. Groups or individual items will not be subdivided for award purposes.

If a bidder does not specify a monthly potential, he will be deemed to offer to furnish 125 percent of the Government's estimated peak monthly requirement for the item or group of items. The quantity shall then be considered as the bidders monthly supply potential.

BIDDER'S MONTHLY SUPPLY POTENTIAL

ITEMS OR GROUP OF ITEMS	BIDDER'S MONTHLY SUPPLY POTENTIAL

(*Note: The "not" was included in the IFB as a typographical error and has been treated as if it were omitted.)

Finally, the Method of Award clause included in the IFB provided:

Award will be made item-by-item destination-by-destination on the basis of the Government's estimated peak monthly requirements to the low responsive offerors up to their stated monthly supply potentials. Within the limits prescribed by the offeror, the Government will apply offeror's monthly supply potential to any items offered, as the Government's interest requires. *In order to qualify for an award, the offeror's monthly supply potential must cover the Government's estimated peak monthly requirement for each individual item to be awarded to the offeror.* Individual item quantities will not be subdivided for award purposes. Further evaluation will be made on the partial set-aside items 6D thru F, 9F thru J, 13C, D, and 14A in accordance with GSA Form 1773. [Italic supplied]

Basis of Protest

AAM was low bidder on items 9A, 9B, 9D, 9E, 9F, 9G, 9I, and 9J, as well as items 4 and 8. AAM specified 20,000 gallons (4,000 kits) as its monthly supply potential. In evaluating the bids for award, the contracting officer (C.O.) totaled the EPMR's for *all items* on which AAM was low, apparently assuming that this was required by the Method of Award clause.

The evaluation of item 9 was done in the following manner. AAM was low on both the set-aside and non-set-aside subitems for Duluth (9A and 9F), Stockton (9B and 9G), Norfolk (9D and 9I) and Honolulu (9E and 9J). Even though the EPMR's for each destination had not been halved when the estimated requirements were divided into set-aside and non-set-aside subitems, the C.O. added the EPMR's together for each destination in evaluating the bids. For example, before dividing the requirements for Duluth, the ECQ was 3,000, the estimated number of orders 4, and the EPMR 750. In evaluating the bids in the above manner, however, the requirements for Duluth were treated as ECQ=3,000, orders=4 and EPMR=1,500. Thus, the bid evaluation method employed had the effect of doubling the original EPMR for evaluation purposes for each destination if the same firm was low on both the set-aside and non-set-aside subitems for the destination.

Using this method, since AAM was low on both the set-aside an non-set-aside portions for four of the five destinations listed in item 9, the total EPMR's exceeded AAM's listed monthly supply potential, and it was, therefore, found nonresponsive for items 9A, 9B and 9F.

AAM contends that the C.O. misinterpreted the solicitation in evaluating bids in this manner. The protester argues that in totaling the EPMR's for evaluation purposes, since the *total* EPMR was listed for both the set-aside and non-set-aside portions of each destination's requirements, when the same bidder is low on both portions the EPMR listed in each place should be counted only once. AAM argues that to do otherwise doubles the actual EPMR for each destination. AAM contends, therefore, that the solicitation clearly requires evaluation of bids as it argues.

AAM also contends that to evaluate bids in the manner done by GSA is in conflict with other parts of the solicitation, including the maximum order limitation clause, and makes the EPMR's out of harmony with the ECQ's and number of orders. AAM also argues, in the alternative, that if the C.O.'s bid evaluation method is correct, then the solicitation must be improperly constructed.

GSA's Response

GSA characterizes AAM's protest as being based on two grounds:

> (1) that the solicitation was "improperly constructed," i.e. that the Government's estimated peak monthly requirement (EPMR) is incorrect and should have been lower * * *; and
> (2) that the contracting officer for the purpose of making awards should have "interpreted" the solicitation's quantitative requirements in such a manner as to allow awards on the basis of the prior experience with the bidder rather than on the basis of tendered capacity appearing in the protester's bid document.

Regarding the first ground, GSA argues that the protest is untimely under § 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which requires that protests based on alleged patent defects in a solicitation be filed before bid opening.

Concerning the merits of the first ground, GSA states that in constructing the solicitation the C.O. determined that for ease of contract administration for items partially set aside, "* * * a bidder for either the set-aside or non-set-aside *portion of an item* must have the capability of meeting the Government's estimated total monthly supply potential *for that item.*" [Italic supplied.] GSA then states that using the total EPMR figure for both the set-aside and non-set-aside portions of an item was reasonable and within the exercise of the C.O.'s discretion and that all bidders were put on notice of these figures.

Concerning the second ground, GSA states that AAM appears to be arguing that GSA should have evaluated its bid on the basis of past experience rather than on its listed monthly supply potential. GSA concludes that evaluating AAM's bid on that basis would be "* * * improper, and a gross disregard of the basic procurement statutes and regulations.

Timeliness

As discussed above, GSA partially characterizes AAM's protest as being against the construction of the solicitation which should have been filed before bid opening. While AAM does argue in the alternative that, *if* the C.O.'s method of bid evaluation is proper, the solicitation is defective, AAM's primary argument is that the C.O. evaluated the bids in a manner plainly inconsistent with that set out in the IFB. Thus, the protest is not one against the construction of the solicitation, but rather against the evaluation of bids by the C.O.

That is, AAM's primary argument is that the solicitation is correct, but the C.O. evaluated bids in a manner inconsistent with the solicitation.

AAM could not have known of this ground of protest until January 3, 1978 (the date of award), at the *earliest*. Since its protest was received on January 17, 1978, within 10 working days of January 3, it is timely.

Merits

GSA appears to have misconstrued AAM's protest and responded to its own misinterpretation. The protester does not attack the EPMR's set forth in the IFB nor does it argue that listing the total destination EPMR for both the set-aside and non-set-aside portions of an item is improper. Neither does the protester argue that its listed monthly supply potential be disregarded in making award. What AAM does argue is that, since the *total* destination EPMR's were retained for *both* the set-aside and non-set-aside portions of each subdivided item, the EPMR should be counted only *once* for *both* the set-aside and non-set-aside portions in evaluating bids; otherwise, the actual EPMR for each destination is doubled in the evaluation. If bids were evaluated in the manner argued for by AAM, the total EPMR's for items on which it is low would be within its monthly supply potential as listed and it would have been awarded items 9A, 9B and 9F.

In support of the method of bid evaluation used, GSA makes only the following two statements:

> (1) * * * Our regional office has also shown that in making awards it complied in all respects with the award procedure which was set forth in the Method of Award clause of the solicitation. In this regard, it is to be noted that the solicitation's Method of Award clause includes the following admonition:
> "In order to qualify for an award, the offeror's monthly supply potential must cover the Government's estimated peak monthly requirement for each individual item to be awarded to the offeror. Individual item quantities will not be subdivided for award purposes."
> (2) * * * In accordance with the terms of the solicitation it was required that estimated peak monthly requirements for each bid for which an offeror appeared to be in line for award be totaled in order to determine their bid's responsiveness. * * * (From the statement of the Regional Office).

We see nothing in the Method of Award clause, or elsewhere in the solicitation, that would compel or permit the method of bid evaluation used by the C.O. GSA has admitted in several instances that the EPMR listed for *each* subitem for any destination under item 9 is the same as the *total* EPMR for that destination. GSA has not, however, shown why the EPMR's for each subitem should then be added together in evaluating bids, thus resulting in a figure admittedly double the actual EPMR.

The Method of Award clause does not require that the EPMR's for every subitem be mechanically totaled, even though they obviously represent the same total EPMR. The clause requires only that the offeror's monthly supply potential *cover* the EPMR for each individual item to be awarded. Therefore, for example, if a bidder were low on 9A and 9F, the set-aside and non-set-aside requirements for Duluth, and listed 1,000 kits, as its monthly supply potential, it could still *cover* the total EPMR for both subitems since, according to GSA, the 750 EPMR listed for each subitem is the same as the total for both subitems.

Accordingly, the protest is sustained.

In the circumstances, henceforth no orders for items 9A, 9B and 9F should be placed with Palmer and the requirements (no guaranteed minimum quantity) contract award for those items should be terminated and awarded instead to AAM for the balance of the contract period.

As this decision contains a recommendation for corrective action, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

[B–191218]

Contracts—Architect, Engineering, etc., Services—Procurement Practices—Brooks Bill Applicability—Equality of Competition Requirement

Discussions required to be conducted by agency with three of most qualified firms in course of procurement of professional A–E services are part of statutory and regulatory procedures prescribing competitive selection process. It is fundamental to competitive A–E selection process that firms be afforded opportunity to compete on equal basis.

Contracts—Architect, Engineering, etc., Services—Competitive Advantage—Unfair Government Action

Where one of three competing A–E firms had possession and knowledge of Master Plan containing basic design concepts for development of cemetery to which agency intended selected A–E firm's design to conform, failure of agency to inform other two firms of existence of Master Plan prior to discussions resulted in unfair competitive advantage to firm possessing Master Plan.

In the matter of Sam L. Huddleston & Associates, Inc., May 25, 1978:

Sam L. Huddleston & Associates, Inc. (Huddleston), protests the proposed award by the Office of Construction, Veterans Administration (VA), of an architectural and engineering (A–3) contract to the joint venture of Gerald F. Kessler & Associates, Inc. and Arthur H

Bush & Associates, Architects (Kessler), for project No. 789–888007 and project No. 789–888008, Fort Logan National Cemetery, Fort Logan, Colorado.

The procedure for the Government's procurement of A–E services is prescribed by the Brooks Bill, 40 U.S.C. § 541 *et seq.* (Supp. V, 1975). Section 542 of that act states as follows:

> The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

Section 543 provides, in part:

> * * * The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

In accordance with this statutory framework, Federal Procurement Regulations (FPR) § 1–4.1004–1 (2d ed. June 1975) requires each agency to establish one or more permanent or ad hoc architect-engineer evaluation boards to be composed of members having experience in architecture, engineering, construction and related procurement matters. Further, FPR §§ 1–4.1004–2 (b) and (c) provide, in part, as follows:

> (b) When procurement of architect–engineer services is proposed, the board shall review the current data files on eligible firms, including files established * * * in response to the public notice of a particular contract. * * * After making this review and technical evaluation, the board shall hold discussions with not less than three of the most highly qualified firms regarding anticipated concepts and relative utility of alternative methods of approach for furnishing the required services.
>
> (c) [The board shall] [p]repare a report for submission to the agency head or his authorized representative recommending, in the order of preference, no less than three firms that are considered most highly qualified to perform the required services. This report shall include in sufficient detail the extent of the evaluation and review and the considerations upon which the recommendations were based.

After action by the agency head or his authorized representative on the board's recommendations, negotiations are held with the A–E firm ranked first. Only if the agency is unable to agree with that firm as to a fair and reasonable price are negotiations terminated and the second ranked firm considered.

In the instant case, notice of intention to contract for A–E services was published in the Commerce Business Daily (CBD) on July 28, 1977. The present cemetery at Fort Logan consists of approximately 41 acres with 96 acres remaining for future expansion needs. The se-

lected A–E firm, under project No. 789–888007, is to be responsible for the development and preparation of final design plans, contract or "working" drawings, and specifications for the construction of a national cemetery administration building, entrance drive and gate. Project No. 789–888008 also requires the preparation of final design plans, contract drawings, and specifications as well as construction period services for the development of 35 acres of the cemetery.

Various firms responded to the CBD synopsis by submitting, if not already on file at the VA, updated statements of their qualifications, Standard Form (SF) 254, "Architect-Engineer and Related Services Questionnaire." The firms were also required to supplement SF 254 by submitting Standard Form (SF) 255, "Architect-Engineer and Related Services for Specific Project," see FPR §§ 1–4.1004–2 and 1–16.803. Following evaluation of these forms, the VA A–E Evaluation Board (Board) selected Huddleston, Kessler and the joint venture of Nelson, Haley, Patterson and Quirk, Inc., and Harley Ellington Pierce Yee Associates, and Donald H. Godi and Associates, Inc. (Nelson) for further consideration since they were felt to be the best qualified for the projects.

Kessler had previously prepared for the VA an approved Master Development Plan (Master Plan) for the entire Fort Logan National Cemetery. The Master Plan had been prepared in two phases, including a detailed conceptual design for the development of the cemetery, two volumes of specifications and approximately 40 drawings. Kessler had also previously designed in the Master Plan a national cemetery administration building and entrance drive and gate for the cemetery. The VA apparently intended the selected A–E firm's final design approach for the instant projects, including the design plans, construction drawings and specifications, to be consistent with the design approach contained in the Master Plan. Huddleston states that it was not aware of the existence of the Master Plan when it responded to the CBD synopsis.

Each firm was subsequently interviewed by the Board on October 25 and 26, 1977. During these interviews, each firm was given weighted numerical scores by the Board in ten categories, six of which were as follows:

I—TEAM PROPOSED FOR THIS PROJECT
- A. Background of the personnel
  - 1. Project Manager
  - 2. Other key personnel
  - 3. Consultant(s)

II—PROPOSED MANAGEMENT PLAN
- A. Team Organization
  - 1. Design phase
  - 2. Construction phase

III—PREVIOUS EXPERIENCE OF TEAM PROPOSED FOR THIS PROJECT
A. Describe projects

* * * * * * *

V—PROJECT CONTROL
A. Schedule
1. What techniques are planned to assure that schedule will be met?
2. Who will be responsible to assure that schedule will be met?
B. Cost
1. What control techniques are planned?
2. Review recent projects to demonstrate ability to meet project cost target.
3. Who will be responsible for cost control?

VI—PRESENT PROPOSED DESIGN APPROACH FOR THIS PROJECT
A. Describe proposed design philosophy
B. What problems do you anticipate and how do you propose to solve them?
C. Describe possible energy applications.
D. Describe innovative approaches in production and design.

VII—PRESENT EXAMPLES OF RECENTLY ACCOMPLISHED SIMILAR PROJECTS
A. Describe the projects to demonstrate:
1. Schedule control
2. Cost control
3. Construction problems and means taken to solve them.
4. Any additional construction costs caused by design deficiencies; not program changes.

The Evaluation Criteria and Scoring Sheet (VA Form 08–3375) used by the Board during the interviews also provided for the award of 5 bonus points to a firm for its "preparation for interview."

During the actual interview with Huddleston, the VA, for the first time, orally apprised Huddleston of the existence of the Master Plan. The Chief, Technical Support Division, a member of the Board, asked Huddleston during the interview as follows:

> Regarding the question that I asked of the two (2) firms other than Kessler during the interviews, i.e., if selected could they generally live with the approved design concept of the approved Master Plan, *I thought the question was of substantial importance.* This was because the general concepts of the Master Plan had been approved and substantial deviation from the Master Plan would result in a great loss of time, funds, advance planning, and possibly adverse publicity because the Master Plan brochures have been furnished to numerous individuals, organizations, federal and probably state agencies, and to various offices and individuals in the House and Senate. [Italic supplied.]

After conclusion of the interviews, the November 8, 1977 memorandum concerning final rankings of the A–E firms, prepared by the Chairman of the Board, recommended as follows:

> The Board after a thorough review of all available information recommends the joint venture firm of Gerald F. Kessler and Associates, Inc., and Arthur A. Bush and Associates of Denver, Colorado, as being the best qualified to provide the services on these two projects. *This joint venture previously furnished the Master Plan for overall development of Fort Logan National Cemetery and presented a straightforward approach to the final design phase through the continued effort of this design team.* The Veterans Administration Exterior Elevation Committee has previously approved the architectural concept for the Administration Building by Arthur A. Bush Associates.
>
> Sam L. Huddleston and Associates, Inc., was ranked second by the Board. Although well founded in each respective aspect of architecture for the building

design as well as the landscape design for the 35 acre development, *this firm failed to highlight as effective an overall approach to these projects as the recommended firm.* [Italic supplied.]

The Chief, Technical Support Division, in a memorandum dated December 13, 1977, also wrote as follows:

My decision to vote for the selection of Kessler was based strictly on the three (3) interviews. I felt that while Huddleston, if selected, could have done a good job, Kessler could do a superior job and to vote other than for Kessler would have deprived the cemetery and ultimately the Veterans Administration of the highest quality design and design philosophy, and construction. The interviews, and questions, I and the other members asked during the interviews, clearly convinced me that Kessler's joint venture firm should be selected. This decision was based on team organization, experience, design philosophy, solar energy and environmental concerns, and *the prudent use and conservation of a limited water supply.* [Italic supplied.]

The basis of Huddleston's protest is that it was placed in an unfair competitive disadvantage during the interviews constituting the selection process by the VA's failure to inform and furnish it with a copy of the Master Plan prior to its interview. Counsel for Huddleston argues as follows:

[C]ontained in the [VA's November 8, 1977 memorandum] is the statement that the Huddleston firm "failed to highlight as effective an overall approach to these projects as the recommended firm." Without benefit of the Master Plan how on earth could a firm without benefit of a working knowledge of the Master Plan be expected to even approach the concept as developed by the firm with total working knowledge of the Master Plan?

* * * * * * *

If in fact the Master Plan was so important and obviously it was, than all firms presenting their plans should have had the opportunity to work from the Master Plan when preparing their presentation to the evaluation board. * * * The Master Plan was briefly explained to the Huddleston firm once the interview began. This was the first time that the Huddleston firm even was aware of the plan and of course could do nothing at that late date to respond to the Plan. Furthermore, the time spent by the board to review the Master Plan took time away from the presentation made by the Huddleston firm. It is argued that because the Kessler firm had the Master Plan that it could devote additional time to its presentation, not having to spend time on a review of a plan already in its possession. * * * It is submitted that the Master Plan was most critical and to deprive a firm vying for the job was tantamount to denying that firm with information that it needed to properly prepare its plans and presentation. * * * The Kessler firm obviously was aware of the limited water supply as it had prepared the Master Plan and was knowledgeable with this aspect of the project. With such information it of course could, and did prepare its presentation to favorably take this matter into consideration. On the other hand, the Huddleston firm had no such knowledge and could not properly prepare itself for this aspect of the plan. At no time did the interview team even mention the limited water supply to the Huddleston firm.

We agree with the protester. The discussions required to be conducted by the Board with three of the most qualified firms are part of the statutory and regulatory procedures contemplating a competitive selection process of A–E services, not unlike the procedures for competitive negotiations. It is a fundamental rule of competitive negotiations that offerors be afforded the opportunity to compete on an equal basis. We believe that this rule is equally applicable to the competitive selection process governing the procurement of A–E serv-

ices by the Government. While we have recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances, such competitive advantage may not be enjoyed by a particular firm if it is the "result of preference or unfair action by the Government." *ENSEC Service Corp.*, 55 Comp. Gen. 656 (1976), 76-1 CPD 34; B-175834, December 19, 1972. The VA's failure to furnish Huddleston with the Master Plan prior to the interviews placed the protester in a competitive disadvantage since it appears that only Kessler possessed and knew of the existence and contents of the Master Plan design concepts, drawings, and documents to which the VA intended the selected A-E firm to conform. Such action by the VA was clearly unfair to Huddleston and contrary to the required equality of treatment by the Government of competing firms during the selection process.

The VA, however, argues as follows:

> The factors considered in the interview dealt with the firm's method and potential, not an actual and complete understanding of the proposed project. Therefore, each firm was placed on an equal footing with regard to the board's consideration of the Master Plan. * * * The only one of the ten factors to be evaluated on which knowledge of the Master Plan might bear was Factor VI—Present Proposed Design Approach for this Project. Out of a possible 10 points, the protesting firm was rated as good, 9 points. Therefore, it is not apparent that the protesting firm, Huddleston, was at any disadvantage in light of this high score. Despite the Protester's allegations, the decision to select Kessler was based on team organization, experience, design philosophy, solar energy and environmental concerns, and the prudent use and conservation of a limited water supply. Pre-interview possession of the Master Plan could have no bearing on the above-mentioned bases for selection and therefore the allegations of advantage and/or disadvantage are without merit.

In reply, counsel for Huddleston argues as follows:

> The VA has submitted that it was unimportant to provide the Huddleston firm with a copy of the Master Plan, and that only one of ten factors to be evaluated would relate to the Master Plan. It is submitted that this attitude on the part of the VA is * * * without merit. *The Kessler firm, possessing the Master Plan, had an opportunity to key their presentation to the criteria graded* * * *. It should be carefully noted that in the Point Adjustment section of the scoring sheet, paragraph C provides 5 bonus points for "Preparation for Interview." The Kessler firm received the 5 bonus points for its interview preparation while the Huddleston firm did not receive any points for its preparation. Certainly Kessler's ability to know the scheme of the Master Plan allowed it to better prepare for the interview. Furthermore, the interviewing party being familiar with the Master Plan, and seeing and hearing the Kessler presentation could not help but be more impressed with a presentation which obviously related more to the ideas contained in the Master Plan, than did the Huddleston presentation. * * * Without a doubt having the use and benefit of the Master Plan permitted Kessler to address itself to the design philosophy, environmental concerns, and the prudent use and conservation of the existing limited water supply present in the subject project. As we have already noted the philosophy of the Master Plan had already been approved prior to the interviews, with knowledge of the environmental concerns, and the limited water supply the Kessler firm also had an advantage to address itself to these aspects of the project. The Huddleston firm did not have this information. Certainly fairness in the competitive market place requires the bidding firms to have all information relative to a project. Knowing that the Kessler firm prepared the Master Plan, it was incumbent upon the VA to provide all bidding firms with the Plan. [Italic supplied.]

Without knowledge of the Master Plan, Huddleston and Nelson were admittedly placed in a competitive disadvantage as to Factor VI, "Present Proposed Design Approach for this Project," especially in view of the fact that the VA intended the selected A-E firm to design in conformance with the Master Plan. Factor VI is also of importance from the point of view of an A-E firm trying to impress its interviewers and relate to them its particular qualifications and competence for the specific project.

We do not agree with the VA, however, that this was the only evaluation factor affected by the failure of the VA to furnish the other firms a copy of the Master Plan. Kessler, possessing the Master Plan, had an opportunity to prepare and deliver its entire presentation with detailed knowledge of the requirements of the specific projects. Undoubtedly, a firm's presentation during the interview, where it has the only competitive opportunity to impress the Board with its qualifications and credentials, can be substantially enhanced by a detailed knowledge of the basic and fundamental design concepts, two volumes of specifications and 40 drawings contained in the Master Plan. For example, the December 13, 1977 memorandum of the Chief, Technical Support Division, expressly states that his decision to vote for the selection of Kessler was based, among other things, on Kessler's presentation regarding environmental concerns and the prudent use of a limited water supply at the cemetery. As stated by the protester, it had no such information during the interview for a presentation concerning these matters.

The VA argues, however, that Huddleston had, as a member of its team, a consulting engineering firm that had previously worked on the Master Plan with Kessler, and thus knew or should have known of the environmental concerns and the limited water supply at the cemetery. For the reasons that follow, we believe this argument to be without merit since we find that the duty to furnish this information rested with the agency. Section 543 of the Brooks Bill requires each agency to publish (furnish to each competing A-E firm with which discussions are conducted) the criteria upon which selection shall be based. We believe, by necessary implication, that the agency must also furnish the competing A-E firms the basic information underlying the selection criteria necessary for the firms to compete on an equal basis, where, as here, only one firm has possession and knowledge of such information. Into this category of basic information underlying the selection criteria and known to only one firm fall the environmental concerns and the limited water supply at the cemetery. It is wholly insufficient for the agency to argue *post facto* that the A-E firm not furnished the information by the agency may have acquired the underlying information from some other source. It is solely the agency's

duty and responsibility to furnish a competing firm the basic information underlying the selection criteria and necessary for the firm to compete on an equal basis with the other firms. We conclude that Huddleston was placed in a competitive disadvantage, permeating the interview selection process, due to the failure of the VA to furnish it with the Master Plan.

Accordingly, we recommend that the Master Plan be furnished to all three A-E firms, that the discussions be reopened, and that all three firms be reevaluated so that the firms can be afforded the opportunity of competing on an equal basis.

The protest is sustained.

[B–170264]

Compensation—Overtime—Standby, etc., Time—Work Requirement

Federal Aviation Administration employee assigned to 3-day workweek at remote radar site and required to remain at facility overnight for nonduty hours spanning workweek is not entitled to overtime compensation for standby duty for nonduty hours. Radar site was manned 24 hours per day by on-duty personnel and there is no showing that employees were required to hold themselves in readiness to perform work outside of duty hours or that they were required to remain at the facility for reasons other than practical considerations of the facility's geographic isolation and inaccessibility in terms of daily commuting.

In the matter of Paul E. Laughlin—standby duty at remote radar site, May 31, 1978:

This decision was initiated by Mr. Paul E. Laughlin's appeal from Settlement Certificate Z–2602719, December 14, 1977, denying his claim for overtime compensation. Subsequent to September 21, 1970, Mr. Laughlin, an employee of the Federal Aviation Administration (FAA), was assigned to duty at the Silver City Long Range Radar Facility, a remote radar site. He claims overtime compensation for standby duty performed at that radar facility from September 21, 1970, to July 6, 1975, after which date he was reassigned to a 4-day workweek, including 28 hours of regularly scheduled standby duty, for which he received 25 percent premium pay under 5 U.S.C. § 5545(c)(1).

During the period for which he claims overtime compensation, Mr. Laughlin was assigned a 40-hour workweek consisting of 3 consecutive days of 14, 12, and 14 hours each. He claims that as a condition of his employment he was required to remain at the facility overnight for the hours spanning his assigned workweek. The FAA has explained that because of the Silver City's Facility's remote location, the agency provides furnished living quarters for its employees who remain on site during their off-duty hours. The agency has advised that prior to July 6, 1975, employees were not in fact required to re-

main at the facility after duty hours because of work requirements, but that they were free to leave the station during nonduty hours, inasmuch as the radar site was manned by on-duty personnel for 24 hours per day.

In support of his claim, Mr. Laughlin cites our holding in B–170264, December 21, 1973, and the allowance referred to therein of Mr. Olin Cross' claim for overtime compensation for time spent in a standby status at the FAA's Pleasants Peak Facility. In disallowing Mr. Laughlin's claim, our Claims Division distinguished the situation in the *Cross* case by reason of the fact that the radar site at Pleasants Peak had on-duty coverage for only 16 hours per day and that for the remaining 8 hours per day, needed coverage was provided by those employees who occupied on-site quarters overnight. The record otherwise established that, due to the lengthy commuting time to the worksite, needed coverage could not be provided by employees subject to call-back overtime from home and that Mr. Cross was required to remain on site in a standby status for the Government's benefit. In contrast, since 24-hour on-duty coverage was maintained at the Silver City Facility, there was no indication that employees were required to remain at the radar site for the Government's benefit, but that any requirement to remain on site was a result of the facility's isolated location.

Mr. Laughlin points out that the Settlement Certificate incorrectly states that his claim is for annual premium pay, whereas he in fact claims overtime compensation under 5 U.S.C. § 5542. He takes specific exception to the finding that employees stationed at the Silver City Facility were not required to remain on site throughout their assigned workweeks. In this regard he refers to statements in correspondence and other documents indicating that employees were "required" to remain at the radar site during nonduty hours. In further support of his assertion that employees were required to remain at the facility, he states that employees were not furnished Government transportation to and from the worksite other than at the beginning and end of the workweek or for approved absences and he points to the FAA's admission that employees who remained at the site during nonduty hours were sometimes called upon to perform overtime work on a call-back basis. In addition, he states that from June 1970 until May 1971 there was on-duty coverage at the facility for only 14 to 18 hours per day, with the balance of the day covered by standby duty.

We have reviewed the written record which, as Mr. Laughlin suggests, indicates that prior to July 6, 1975, employees were required to remain throughout their assigned workweeks at the Silver City Facility. With respect to a vacancy at that facility, a 1970 vacancy announcement specifically states:

* * * site is approximately 80 miles west-northwest of sector headquarters and requires that watchstanders remain at the site three nights while on duty. * * *

The record strongly suggests, however, that such requirement was the practical result of the relative remoteness and inaccessibility of the facility's location. The very language of the vacancy announcement quoted above suggests such a relationship between the requirement to remain on site and the facility's location, and this view is further supported by the FAA's statement that living accommodations were provided by FAA because of the facility's remoteness and that employees were free to leave the site by privately owned vehicle outside of duty hours.

Mr. Laughlin is of the view that under our holding in B–170264, December 21, 1973, an employee who remains throughout his workweek at a radar site is entitled to overtime compensation for hours outside his regular duty hours not spent eating or sleeping. The cited decision involved claims by three FAA employees for overtime compensation for time spent in a standby status at the FAA's Boise Cascade Facility under circumstances similar to those at the Silver City Facility, but distinguishable in that Boise Cascade Facility did not have on-duty coverage for 24 hours per day. For those off-duty hours, radar coverage at the site was provided by employees required to remain on site. As in Mr. Cross' case, the record established that Boise Cascade employees were required to remain at the site for the Government's benefit to provide needed radar coverage, although geographic and other factors may also have influenced that requirement. While conceding that this was the case, the FAA declined to compensate the employees. It sought to distinguish the two situations by its determination that the Boise Cascade employees' time at the facility outside of duty hours was spent predominantly for their own and not the FAA's benefit. In holding that the employees were entitled to overtime compensation for standby duty, we explained that the test of whether an employee's time is spent predominantly for his own or the Government's benefit relates to standby duty performed at the employee's home. It does not apply to defeat entitlement where the employee is required to remain in quarters provided by the agency which are other than the employee's regular living quarters and which are specifically provided for use of personnel required to stand by in readiness to perform actual work.

Because of the particular fact circumstances involved, the decision in B–170264, *supra*, begins with the premise that the employees were required to hold themselves in readiness to perform work outside their regular tours of duty, based on administrative reports indicating that there was on-duty coverage at the Boise Cascade Facility for less than 24 hours per day with needed coverage provided by employees required

to remain on site during nonduty hours. That decision includes the following statement on which Mr. Laughlin relies as a basis for his claim:

> * * * While an employee who is "on call" at home may in fact be found to have spent his time predominantly for his own benefit, Congress has made the determination, reflected by enactment of 5 U.S.C. 5542 and 5545, that where, as in the instant cases, a Federal employee is required to remain at his duty station and away from his home his time is necessarily spent for the benefit of his employer.

That language is not intended to authorize overtime pay under 5 U.S.C. § 5542 or premium compensation under 5 U.S.C. § 5545(c)(1) except in circumstances where the employee is required to hold himself in a state of readiness to perform work. It does not stand for the proposition that the mere restriction of an employee to his worksite outside of duty hours entitles him to overtime compensation therefor.

It should be recognized that an employee may be required to remain at a worksite during nonduty hours without compensation where his presence is not a result of work or a standby requirement but is due to geographic factors. In *Mossbauer* v. *United States*, 541 F.2d 823 (1976), the U.S. Court of Appeals considered the claim of a Navy employee for overtime compensation for travel between his Government-furnished quarters at one end of a Navy controlled island facility and his job site at the other end of the island. Once a week the employee was flown at Government expense to the island where he was required to remain until he was provided return transportation at the end of his workweek. In the interim he slept in quarters furnished by the Navy. In discussing the employee's entitlement to overtime compensation generally, the Court stated:

> Mossbauer is required to live on the island during the workweek in order to facilitate his presence at the jobsite. However, that fact does not itself render his required off hours presence and daily journeys compensable.

The *Mossbauer* case was one in which the requirement that the employee remain on site during nonduty hours was a result of the facility's geographic isolation and commuting impracticalities. The Court's statement that the mere requirement that the employee remain on site does not entitle him to overtime compensation is consistent with the language of the Civil Service Commission's regulation at 5 C.F.R. § 550.143(a)(1). That subparagraph provides that annual premium compensation for regularly scheduled standby duty is not payable where the employee's remaining at his station is:

> * * * merely voluntary, desirable or a result of geographic isolation, or solely because the employees lives on the grounds.

While the language of that regulation is specifically addressed to annual premium pay entitlement under 5 U.S.C. § 5545(c)(1), as noted in B–170264, *supra*, the definition of standby duty under that provi-

sion is equally applicable in determining entitlement to overtime compensation for standby duty under 5 U.S.C. § 5545(a).

One situation in which an employee is required to remain at his duty site, as a practical matter of geographic isolation, is while assigned to duty aboard a vessel underway. In 52 Comp. Gen. 794 (1973) we held, notwithstanding the necessity that he remain on board the vessel outside of duty hours while on a trial trip, that the claimant was not entitled to overtime compensation for any time aboard ship during which he did not perform actual work inasmuch as his assignment did not require that he hold himself in readiness to perform work.

With respect to that portion of Mr. Laughlin's claim subsequent to May 1971, the record establishes no more than that FAA employees, including the claimant, assigned to the Silver City Facility were required to remain at the radar site during nonduty hours as a result of the facility's remote location and practical problems related to daily commuting. The radar facility was manned 24 hours a day by on-duty personnel and, unlike in the cases discussed above involving the FAA's facilities at Pleasants Peak and Boise Cascade, there has been no showing that employees were required to hold themselves in a state of readiness or alertness to perform work during nonduty hours. The fact that, on occasion, employees may have been required to perform compensated overtime work on a call-back basis does not of itself demonstrate that they were required to remain in a standby status.

Accordingly, we find no basis to overturn the Settlement Certificate determination disallowing Mr. Laughlin's claim for overtime compensation for the period subsequent to May 1971.

While the FAA has advised that 24-hour on-duty coverage has been maintained at the Silver City Facility for the past 8 to 10 years, Mr. Laughlin claims that from June 1970 until May 1971 there was on-duty coverage for only 14 to 18 hours per day. A review of the records submitted by the employee and the FAA does not resolve this dispute of fact. However, the FAA has indicated that where an employee can provide substantiating documentation, his claim for overtime compensation will be considered by the agency. In view of the FAA's willingness to further consider the matter, we do not here disallow Mr. Laughlin's claim for the period from June 1970 through May 1971 for his failure to establish his entitlement, but recommend that he submit evidence to the FAA to establish that less than 24 hours on-duty coverage was provided for that period. His claim should be reviewed by the FAA in light of our holding in B-170264, December 21, 1973, as clarified herein. In particular, we direct the FAA's attention to the discussion in B-170264, *supra*, of the Court of Claims' holding in *Baylor, et al.* v. *United States*, 198 Ct. Cl. 331 (1975), as to the standards to be applied in determining whether overtime work, including standby duty, has been authorized or approved.

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