Decisions of The Comptroller General of the United States

VOLUME 56 Pages 459 to 566

APRIL 1977

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300110600

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1977

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.40 (single copy) ; subscription price : $17.75 a year ; $4.45 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer

TABLE OF DECISION NUMBERS

	Page
B–127474 Apr. 19	551
B–185199 Apr. 1	459
B–185976 Apr. 27	561
B–186313 Apr. 13	505
B–186504 Apr. 6	482
B–186545, B–187413 Apr. 13	513
B–186761 Apr. 5	481
B–186895 Apr. 15	531
B–187051 Apr. 15	537
B–187104 Apr. 1	470
B–187250, B–187254, B–187256, B–187257, Apr. 25	556
B–187604 Apr. 8	497
B–187617 Apr. 7	487
B–187876 Apr. 14	525
B–187982 Apr. 4	473
B–187997 Apr. 11	499
B–188035 Apr. 7	494
B–188052 Apr. 14	529

Cite Decisions as 5 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-185199]

Timber Sales—Contracts—Modification—Contract Provision—Alternate Logging Methods

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging.

Timber Sales—Contracts—Modification—Consistent With Forest Service Manual

Forest Service action of modifying contract to change logging methods and raise stumpage rates is not inconsistent with Forest Service Manual. In any case, manual is merely expression of Forest Service policy, of which failure to adhere does not render action invalid.

Claims—Evidence To Support—Administrative Records Contrary To Allegations—Acceptance of Administrative Statements

Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost a month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take.

Timber Sales — Contracts — Modification — Consideration—Adequacy

Contractor has alleged that modification agreement to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates lacked consideration since Forest Service could have allowed change without increasing rates. However, contractor received consideration of being relieved of more risky and costly logging method and being allowed to use equipment he apparently was more familiar with and had more control over.

Timber Sales — Contracts — Modification — Not Unconscionable Under Uniform Commercial Code

Contract modification to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates is not unconscionable under Uniform Commercial Code Section 2-302, as contended by contractor, where contractor is experienced logger, record indicates that Forest Service apprised contractor of scope and nature of modification over a month prior to its execution and modification was lawful and not one-sided.

Timber Sales—Contracts—Contractors—Rights—"Election" or Waiver

Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, con-

tractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver or contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract.

Timber Sales — Contracts — Modification — Rates — Structure— Agreement

Modification of rate structure of timber sale contract is in violation of 36 C.F.R. 221.16(a) (1976), which prohibits retroactive rate modifications, because modification pertains to contract unexecuted portions as well as executed portions. However, contractor, who signed modification agreement and performed contract in accordance therewith, cannot now assert violation to excuse himself from agreement.

In the matter of Gene Peters, April 1, 1977:

Mr. Gene Peters claims $133,432.07 for an alleged breach of a logging sale contract by the Forest Service, United States Department of Agriculture. The contract, Skyo Line Timber Sale Contract No. 02425–4, was awarded after competition to the claimant on February 20, 1975, as part of a salvage program to control a bark beetle epidemic in the Randle and Packwood District of the Gifford Pinchot National Forest in Washington State. The contract provided for termination on or before June 30, 1975. To ensure timely performance, the Forest Service required the claimant to post a $250,000 performance bond.

The Skyo Line Timber Sale consisted of 10 separate cutting units. The contract awarded under the sale provided for helicopter logging in units 4 through 10 of the sale area. Helicopter logging was specified to protect against environmental damage, i.e., "to protect soil [and] watershed * * *." The Forest Service chose not to seek to negotiate road easements over private land that would have allowed the use of an existing road system which provided access to portions of units 5, 6, and 10 because of time and possible cost constraints; rather, to expedite matters, helicopter logging was specified for those sale units which otherwise were inaccessible.

On March 31, 1975, the claimant obtained, at his expense, an easement over the private land enabling him to use the road system for access to portions of units 5, 6, and 10. As a result, Mr. Peters could use a "high lead slack line" system of logging on portions of units 5 and 6 and tractor logging on unit 10. These logging methods would accomplish essentially the same environmental protection purposes as helicopter logging.

In early March 1975, the claimant advised the Forest Service of his impending succesful acquisition of the easement. On March 11, 1975, he asked for permission to use the above-specified alternative methods

of logging in units 5, 6 and 10. At that time, the Forest Service advised Mr. Peters that the change in logging methods was permissible, but it would only be authorized if the claimant agreed to execute a formal contract modification with increased stumpage and per acre rates to offset the substantial cost savings resulting from the change. The Forest Service states that it also required the price adjustment to protect the interests of the other bidders and to preserve the integrity of the competitive bid process. Discussions between the claimant and the Forest Service stretched into April as Mr. Peters continued work on other units.

On April 24, 1975, the claimant and the Forest Service executed an Agreement to Modify the Contract, Form 2400–9, effective February 20, 1975, under which the Forest Service agreed to allow the use of the alternate logging methods in units 5, 6 and 10, and the claimant agreed to a stumpage rate increase from $38 per MBF (1000 board feet)—his bid price—to the redetermined rate of $49.18 per MBF and a per acre rate increase from $0.57 per acre to $11.62 per acre. Thereafter, the claimant completed all obligations of performance under the contract.

The claim in question here is based upon Mr. Peter's assertion that the modification was unauthorized, improper and constituted a breach of contract, and that, consequently, any increased price paid by him under the modification should be refunded.

Mr. Peters asserts that the change in logging method could have been accomplished by interpreting and applying the original contract provisions. In this regard, Mr. Peters' counsel states:

> The Forest Service also contends that the contract modification is one both authorized and contemplated by B8.32 of the contract * * *. There has been no change in physical conditions in the sale area or included timber. The only change that occurred was Mr. Peters' obtaining legal permission from private parties to use portions of an existing road system.
> B8.32 is not applicable since no changes occurred * * *

Mr. Peters' counsel also states:

> What the Forest Service did was change the rate provisions of * * * the contract * * * directly contrary to law, regulation and policy.

The pertinent provisions of the contract regarding contract modification include the following:

> B8.3 Contract Modification. The conditions of this sale are completely set forth in this contract. This contract can be modified only by written agreement of the parties, except as provided under B8.31.
> By agreement and with compensating adjustments where appropriate, this contract shall be modified to provide for (a) the exercise of any authority hereafter granted by law or Regulation of the Secretary of Agriculture if such authority is then generally being applied to Forest Service timber sale contracts and (b) any other contractual provision then in general use by Forest Service.
> Contract modifications, redetermination of rates, and termination shall be in writing and may be made on behalf of Forest Service only by the Forest Service officer signing this contract, his successor or superior officer.
> * * * * * * *

B8.32 Changed Conditions. When it is agreed that the completion of certain work or other requirements hereunder would no longer serve the purpose intended because of substantial change in the physical conditions of Sale Area or Included Timber since the date of the contract, said requirements shall be waived in writing. * * *

While Mr. Peters argues that clause B8.32 of the contract is inapposite to the facts present in this case, we need not address the question of its applicability here, notwithstanding its citation by the Forest Service, because the Forest Service acted properly within the scope of clause B8.3 and applicable provisions of 36 C.F.R. Part 221, *et seq.* (1976).

There are only four circumstances, outlined in 36 C.F.R. § 221.7(e) (1976), where the rates of a timber contract may be adjusted without modification of the contract. Both the Forest Service and Mr. Peters agree that none of these four circumstances are present here. Accordingly, the rates under the original contract could not have been properly adjusted (upwards or downwards) without a formal modification of the original contract.

Clause B8.3 provides that modification of the contract is permitted only if both parties agree to the written modification. (The question as to whether Mr. Peters actually agreed to the modification is discussed below.) Further, clause B8.3 allows the contract to be modified, with compensating adjustments where appropriate, to provide for contractual provisions then in general use by the Forest Service. See *Star Valley Lumber Company*, B-168544, March 22, 1974, 74-1 CPD 140; *Arden Tree Farms*, B-184647, September 24, 1975, 75-2 CPD 182. The Forest Service states:

Provisions for slack line or other cable type yarding are in general use by the Forest Service in western Washington. Therefore, a change from helicopter to slack line yarding could be made under B8.3 * * *.

We agree with this Forest Service interpretation of clause B8.3.

Mr. Peters' counsel has asserted that this interpretation of clause B8.3 is not valid because of Forest Service Manual § 2451.83 (Amend 93, Dec. 1975), which states in pertinent part:

This section give[s] authority for contract modification upon rate redetermination, because of changed condition, to recognize applicable new laws and regulations and for catastrophe. * * *

It is contended that this FSM provision shows that a modification can *only* be required under clause B8.3 where there is a scheduled or required rate redetermination. However, we believe the referenced FSM interpretation of clause B8.3—an interpretation which we do not believe was intended to be exclusive—still recognizes the propriety of the interpretation given clause B8.3 here. The Forest Service found the rates had to be redetermined because of a "changed condition" regarding access to an otherwise inaccessible portion of the sale area. This "changed condition" could allow for logging methods other than

the helicopter logging provided for in the contract, which would be in accordance with contractual provisions then in general use by the Forest Service.

16 U.S.C. § 476 (1970) requires that timber be offered for sale at not less than the "appraised" value—which includes consideration of estimated operating costs of the purchaser. See 36 C.F.R. § 221.7 (1976). The record indicates that the "appraised" value reflected that the more expensive helicopter logging method was contemplated, and the sale was advertised on this basis. In this connection, the Forest Service states in an August 11, 1976, letter:

> * * * Whether a compensating adjustment in price is justified or appropriate depends upon the specific conditions and terms of the contract. If the contract states a restriction of some kind, an equivalent action in compliance may be acceptable, if it is clearly not disadvantageous, although compensating price adjustment may be appropriate. On the Packwood District of the Gifford Pinchot National Forest, requirements to log with helicopters strongly tend to reduce the prices advertised and the prices bid for timber. This can easily be seen by comparing prices of Packwood District sales made during 1975, the year in which the Skyo Sale was made. Douglas fir is the major species on the Skyo Sale. For all sales with more than 1 million board feet of that species made on the District in 1975, the average bid for helicopter sales, including the Skyo Line Sale, was $21.28 per M board feet. The average bid for the same species for non-helicopter sales was $178.90 per M, or 741 percent more! The amount bid above the advertised was $66.16 per M, or more than four times the $15.17 average for helicopter sales.
>
> A Forest Service official would be considered derelict in his duties if he ignored this relationship, and the need for compensating adjustments, as specified in B8.3 of the contract.

In addition, the Forest Service has asserted:

> Other bidders who were outbid by the purchaser could argue with justification that had they known we would permit such a modification, they would have been able to bid higher, too. Perhaps they could have bid even higher than the modified rates, since the risks of helicopter logging can be considered to be a deterrent by some potential bidders.

Although other bidders may also have known of the possible easement to portions of units 5, 6 and 10, the sale specifically provided for helicopter logging in these units, unless otherwise agreed to by the Forest Service.

Moreover, although paragraph C.42# of the contract indicates that changes in logging methods may be authorized without modifying the contract, it is clearly discretionary with the Forest Service whether to grant a contractor's request regarding an alternate logging method. That is, under appropriate circumstances, as here, we believe the Forest Service could decline to allow the use of an alternate logging method unless additional consideration is paid to the Government.

Mr. Peters also asserts that the Forest Service acted contrary to various provisions of the FSM by requiring the modification, in that the logging method change should have been allowed without raising the stumpage and acreage rates. However, we believe the Forest Serv-

ice actions in requiring a modification in this case were not inconsistent with any of the FSM provisions cited by Mr. Peters or his counsel. In any case, the Forest Service Manual is merely an expression of Forest Service policy, "which does not rise to the status of a regulation." *Hi-Ridge Lumber Company* v. *United States*, 443 F.2d 452, 455 (9th Cir. 1971). The failure of an agency to adhere to a departmental policy does not render an action by that agency invalid. 43 Comp. Gen. 217, 221 (1963); *PRC Computer Center, Inc.*, 55 *id.* 60, 68 (1975), 75-2 CPD 35.

In the circumstances, the Forest Service contracting officer did, in our view, act lawfully, as discussed above, and within the scope of his authority in requiring a modification of the contract rates commensurate with the changed method of operation.

Mr. Peters' counsel also alleges that the Forest Service extracted the increased stumpage rates through coercion and duress. In this regard, in his letter dated May 21, 1975, to the District Ranger, Packwood Ranger District, the claimant stated:

* * * I advised your Timber Staff that I would sign the modification, however, only due to the fact that I was advised if I did not sign the contract, the Forest Service would suspend my logging operations. As I said, I would sign, but only under protest. Furthermore, that I would pursue the matter to determine if proper procedures had been followed. * * *

In a letter dated October 18, 1976, Mr. Peters' counsel further stated:

The coercion arose out of the Forest Service refusing to let Peters continue to operate until he signed the formal modification agreement. * * *

In summary, as stated in counsel's letter of June 3, 1976, it is claimed that Mr. Peters "did not consent to the modification, since it was extracted as a result of coercion by the Forest Service * * *."

The Forest Service vigorously denies that Mr. Peters was coerced into signing the modification. By letter dated June 20, 1975, the Forest Supervisor at Gifford Pinchot National Forest stated:

The District kept the purchaser informed verbally all the way through the process of redetermining rates for the modification. * * * In fact, the Purchaser was personally handed by District personnel a penciled rough-draft copy of the re-appraisal in early March, well enough in advance to ascertain the costs and requirements involved, and on which to base his decision.

* * * * * * *

The contracts with Forest Service employees and the ensuing discussions were sufficiently timely to provide the Purchaser with full opportunity to digress and prepare his decisions.

By letter dated December 11, 1975, the Director of Timber Management stated:

* * * Mr. Peters requested the yarding system changed. The Agreement to Modify the Contract, Form 2400-9, was prepared and sent to Mr. Peters on April 22, 1975. He signed it and returned it to the Forest Service. * * * The

first evidence of Mr. Peters' protect to the increased stumpage rate in the modification is in his letter of May 21, 1975.

* * * * * * *

Since modification of the contract has been signed and the stumpage rates increased without evidence of protest, we do not believe Mr. Peters was coerced into signing the modification.

Again by letter dated August 11, 1976, Chief of the Forest Service commented:

There is no evidence of "coercion" whatever, to support allegations introduced by the claimant. There was no action by the Forest Service to prevent the purchaser from logging Units 5, 6, and 10 by helicopter, as called for by the Sale Area map and by clauses B6.42 and C6.42# of the contract. The only factor here might have been Forest Service concern to log the timber the way the contract specified; * * *. Local forest officials have denied that there was coercion.

In a series of discussions on March 8–11, 1975, Mr. Peters was given estimates of the amount of compensatory adjustment in stumpage rates which would be involved if he were to request and be given the modification. On March 11, 1975, he requested the modification.

* * * * * * *

Purchaser was not compelled to change the contract; he could have carried it out without changes.

* * * * * * *

Forest Service personnel report that Mr. Peters did not protest, either in writing or verbally, at the time he signed the contract modification. * * * Nothing prevented him from carrying out the contract without the modification * * *.

The claimant has referenced an alleged contrary statement by the Region 6 Director of Timber Management in a letter dated June 26, 1975, wherein an opinion that the contract did not have to be formally modified to allow for Mr. Peters' suggested alternative logging methods is expressed. The letter goes on to say:

It is evident that Mr. Peters was under much pressure to expedite removal of beetle-infested timber from his sale, and felt compelled to sign the modification to help meet that objective.

However, as discussed above, the contracting officer acted lawfully in requiring the contract modification. The "pressure" to expedite removal of the timber appears to be "lawful pressure" of the required contract June 30, 1975, termination date. Urging the meeting of contractual obligations does not amount to unlawful "coercion." Furthermore, this same Forest Service official, in a letter dated December 11, 1975, after the matter was more thoroughly reviewed, expressly stated his belief that Mr. Peters was not coerced into signing the modification.

The record before us presents no further evidence concerning whether Mr. Peters stated, at the time of executing the modification, that he was signing under protest or that he was threatened with suspension unless he signed. The modification agreement itself certainly indicates no evidence of protest by Mr. Peters. The first indication in the record that Mr. Peters did not like the modification agreement

he executed was in his letter dated May 21, 1975—almost a month after the modification's execution. Moreover, we note that Mr. Peters certainly could have elected to perform the work in units 5, 6 and 10 by helicopter logging rather than sign the modification agreement allowing him to use his requested alternate logging methods.

The rule, with respect to claims against the United States, is that the claimant bears the burden of proof to establish his claim. See 31 Comp. Gen. 340 (1952). Accordingly, based on the record before us, where conflicting statements of the claimant and the contracting agency constitute the only evidence, we do not find sufficiently clear evidence to support Mr. Peters' contention that he did not willingly agree to the modification, such that payment of the claim could be supported. See *Afghan Carpet Cleaners*, B-175895, April 30, 1974, 74-1 CPD 220; *Remcor, Inc.*, B-179243, July 22, 1975, 75-2 CPD 57.

Nor can we find that the Government employed improper economic duress to compel the execution of the modification. The elements of economic duress have been found to be as follows: (1) a party compels another to assent to a transaction against his will; (2) such assent is induced by wrongfully threatening action the party has no legal right to take; and (3) the threatened action, if taken, will cause irreparable damage to the other party. *Restatement, Contracts*, § 493; 13 *Williston, Contracts*, §§ 1617-1618 (3rd ed. 1970); *Hartsville Oil Mill* v. *United States*, 271 U.S. 43 (1926); *Paccon, Inc.*, ASBCA No. 7890, 1963 BCA 3659 (1963); *Corbetta Construction Co., Inc.*, ABSCA No. 6290, 1964 BCA 4386 (1964). As indicated above, we do not find in the record evidence that Mr. Peters acted against his will or that the Forest Service obtained Mr. Peters' assent by wrongfully threatening action it had no legal right to take. See *Beatty* v. *United States*, 144 Ct. Cl. 203, 206 (1958). Contrast *Camp Sales Corporation* v. *United States*, 77 Ct. Cl. 659 (1933), where the Government had no legal right to require additional compensation for extending the period of performance caused by Government delays and it was clear that the contractor concurrently protested the modification.

Mr. Peters' counsel also contends that the modification is of no effect because there is no consideration to support it. Counsel also states:

> * * * the switch was advantageous to the Forest Service in that completion of logging within the contract term, while the beetles remained dormant was assured. The risk of lost time due to bad winter weather not permitting helicopter flying was thereby eliminated.

In this connection, it is further stated in counsel's letter dated October 18, 1976:

> It is important to recognize that the performance of the Skyo Line Contract took place between February and June of 1975. A period of time for notoriously

bad weather in the Cascade Mountain Range of Western Washington, where the sale was situated * * * Many days were lost due to bad weather and Mr. Peters was permitted additional time for performance of the Skyo Line Sale whenever helicopters could not fly due to weather or mechanical breakdowns. Revising the Skyo Line logging plan to permit the removal of 50 acres of timber by cable system guaranteed that that timber would be removed within the term of the contract, notwithstanding weather and other problems, since cable yarding systems are not affected by fog or overcast.

While timely performance was certainly in the Government's interest, we observe that Mr. Peters bore the risk of meeting the contract termination date. No extensions of the contract were contemplated and a $250,000 performance bond was required to ensure timely performance. It is therefore clear that Mr. Peters received consideration in that he was relieved of a more risky and costly method of logging on three cutting units. Also, he was allowed to use equipment he apparently was more familiar with and had more control over.

Mr. Peters' counsel argues that the modification agreement is unconscionable and unenforceable as a matter of law under the Uniform Commercial Code (UCC). (In *R. H. Pines Corporation*, 54 Comp. Gen. 527, 528 (1974), 74-2 CPD 385, we indicated that our Office will look to UCC principles as a source of Federal common law. Also see *Everett Plywood and Door Corporation* v. *United States*, 419 F.2d 425 (Ct. Cl. (1969)). He argues:

UCC 1-203 imposes on parties to contracts the obligation of good faith in the performance and enforcement of the contract. Further, where an agreement is found to be unconscionable, it is unenforceable. UCC 2-302.

The circumstances extant at the time of the execution of the modification agreement were such that the Forest Service had the power of economic life or death over Peters. Consent to a change in logging systems would insure timely performance of the contract by Peters. Denial of the requested change would hinder or preclude timely performance and would jeopardize Mr. Peters' performance bond. The Forest Service as a matter of good faith was obliged to cooperate with Mr. Peters. The requested change satisfied the Forest Service needs, and was contemplated by the original contract. The Forest Service demand that Peters agree to an increase in the purchase price of timber as a condition for consenting to the change of logging system was unconscionable when done contrary to existing Forest Service policy and when exacted by duress. This conduct renders the modification agreement unenforceable as a matter of law.

UCC § 2-302 provides in pertinent part:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The basic principle underlying UCC § 2-302 is "the prevention of oppression and unfair surprise and not of disturbance of allocation of risk * * *." See Official Comment to UCC § 2-302.

In determining whether a provision or modification of a contract is unconscionable under UCC § 2-302, the factors the courts have gen-

erally examined are the relative equality of bargaining power, the one-sidedness of the "bargain," and whether the "inferior" party was unfairly surprised by the terms of the agreement. See *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445 (C.A.D.C. 1965); *Jones* v. *Star Credit Corp.*, 298 NYS 2d 264 (Sup. Ct. 1969); *Equitable Lumber Corp.* v. *I.P.A. Land Development Corp.*, 381 NYS 2d 459 (C.A. 1976).

Mr. Peters characterizes himself as a "small independent contract logger, and I have not purchased any Government Timber Sales." However, Mr. Peters is portrayed in a June 20, 1975, letter of the Forest Supervisor as follows:

> It is true that the Purchaser had not previously purchased any National Forest timber; at least none that is on the records of the Forest. However, the Purchaser does have a considerable history of logging different types of timber sales on the Forest. The Purchaser's experience in logging National Forest timber implies that he has first-hand experience and knowledge of the variety of requirements that were incorporated into the sale areas he has operated on.

This characterization has not been questioned or refuted by Mr. Peters. Further, the record clearly indicates that Mr. Peters used his ingenuity to obtain easements so alternate logging systems could be utilized.

Also, in the June 20, 1975, letter of the Forest Supervisor, it is stated:

> The District kept the purchaser informed verbally all the way through the the process of redetermining rates for the modification. * * * In fact, the Purchaser was personally handed by District personnel a penciled rough-draft copy of the re-appraisal in *early March*, well enough in advance to ascertain the costs and requirements involved, and on which to base his decision. His decision to request the change was promptly forthcoming. [Italic supplied.]

Mr. Peters also does not refute or contradict these comments.

While Mr. Peters contends that the Forest Service had no right to demand a contract modification to increase the purchase price of the timber, we are satisfied that the Forest Service acted within the bounds of its lawful authority and did not impose a "one-sided" bargain, and that Mr. Peters was kept sufficiently apprised of the actions and intentions of the Forest Service to conclude that there was no unfair surprise. Consequently, we do not believe Mr. Peters has made his case for unconscionability.

In any case, in the absence of coercion, duress or unconscionability, even assuming that this modification was not permitted under the terms of the contract (which we found above was not the case), we believe Mr. Peters' signing of the modification agreement and continuing performance of the contract in accordance with the agreement, without indication of protest and with apparent knowledge of the modification's scope, constituted an "election" or waiver of his "right" to now assert that the modification was beyond the scope of the con-

tracting officer's authority, and thus constituted a breach of contract. See *Merrill-Stevens Dry Dock & Repair Company* v. *United States*, 119 Ct. Cl. 310, 323 (1951); *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630 (Ct. Cl. 1973); *Airco Inc.* v. *United States*, 504 F.2d 1133 (Ct. Cl. 1974); *Cities Service Helex, Inc.* v. *United States*, 543 F.2d 1306 (Ct. Cl. 1976). Contrast *Peter Kiewit Sons' Company* v. *Summit Construction Company*, 422 F.2d 242, 258–259 (8th Cir. 1969).

Mr. Peters has also raised certain questions regarding the amount of additional consideration he was obligated to pay under the modification. Although no direct questions regarding the additional acreage rate have been raised, Mr. Peters has made considerable objection to the increased stumpage rate. Mr. Peters' basic contention is that no additional stumpage rate should have been charged because this was a "deficit" sale. That is, the sale was appraised by the Forest Service, prior to advertising for bids, at minus $6.40 per MBF as follows:

Selling value of timber	$245.39 per MBF
Logging and manufacturing cost	210.81
Conversion return	$ 34.58
"Normal" profit and risk	40.98
Appraised value	−$ 6.40 per MBF

However, Forest Service regulations required that this particular timber could not be sold for less than $5.39 per MBF. The sale was advertised on this basis. Consequently, Mr. Peters characterizes the sale as a "deficit" sale of minus $11.79 per MBF—the amount the minimum sale rate exceeded the appraised value of the timber.

Taking into account the increased and saved logging costs over the entire sale area as a result of the changed logging methods, a net figure of $11.18 per MBF stumpage rate, representing saved logging costs to Mr. Peters, was computed by the Forest Service. This was the figure by which the stumpage rate under the contract was increased, i.e., from Mr. Peters' bid price of $38.00 to $49.18 per MBF.

Mr. Peters essentially contends that since the "appraised" value of the sale was $11.79 below the advertised base rate and the alleged savings from the modification were $11.18, no additional stumpage rate should have been required, inasmuch as Mr. Peters was essentially being charged the $11.18 twice under the Forest Service's calculations. That is, the reappraised value of the timber should have been calculated as $4.78 per MBF by adding the $11.18 per MBF to the minus $6.40 per MBF appraised value—which is below the $5.39 per MBF minimum sale rate.

From our review, we disagree with Mr. Peters' calculations. He was not charged $11.18 twice; rather, an adjustment to the price he

bid under competition was made to reflect the net savings he achieved by virtue of his requested alternate logging methods. Mr. Peters contracted to pay a $38.00 stumpage rate—not the timber's "appraised" value. Consequently, the contract price—not the appraised value—is the critical figure to be recalculated in making an equitable adjustment because of a contract modification. In any case, Mr. Peters agreed to the higher stumpage rate in signing the modification agreement.

The modification was made retroactive effective to the beginning of the contract period. The record indicates that considerable logging on the other units had been done by April 24, 1975—the date the modification became effective. The modification of the rate structure is in violation of 36 C.F.R. § 221.16(a) (1976), because it pertains to the contract's executed portions as well as the unexecuted portions. This regulation provides in pertinent part:

> Timber sale contracts may be modified only when the modification will apply to unexecuted portions of the contract and will not be injurious to the United States. * * *

Under this regulation, such retroactive modifications to the rates for the already completed portions of the timber sale contract are improper. See 49 Comp. Gen. 530, 531 (1970).

36 C.F.R. § 221.16(a) (1976) was promulgated by the Secretary of Agriculture pursuant to 16 U.S.C. § 476 (1976), and has the force and effect of law. See *Paul* v. *United States*, 371 U.S. 245 (1963); *Hi-Ridge Lumber Company* v. *United States*, *supra*. However, notwithstanding the violation of this regulation, we do not believe Mr. Peters can assert it to excuse himself from the contract modification he agreed to, since, by signing the modification, which was not injurious to the Federal Government, with no coercion, duress or unconscionability shown, and by continuing contract performance in accordance with the modification, this regulation became effectively inoperative insofar as Mr. Peters was concerned. See *United States* v. *New York and Puerto Rico Steamship Company*, 239 U.S. 88, 92 (1915); *Adelhardt Construction Company* v. *United States*, 123 Ct. Cl. 456 (1952); *Hartford Accident & Indemnity Company* v. *United States*, 130 Ct. Cl. 490 (1955); *United States* v. *Russell Electric Company*, 250 F. Supp. 2, 22 (S.D.N.Y. 1965); B-156271, April 20, 1965; 49 Comp. Gen. 761 (1970); B-162922, October 30, 1972.

In view of the foregoing, Mr. Peters' claim is denied.

[B-187104]

Leaves of Absence—Forfeiture—Scheduling Requirement

Annual leave forfeited at end of 1974 leave year allegedly due to exigencies of the public business but not scheduled in advance may not be restored under 5 U.S.C.

6304(d)(1), even if employees did not have actual notice of scheduling requirement and it was known in advance that leave would not be granted if scheduled. Scheduling is a statutory requirement which may not be waived and failure to give actual notice of this requirement is not administrative error since employees are charged with constructive notice of it.

In the matter of Michael Dana, et al.—restoration of forfeited annual leave, April 1, 1977:

By letter dated August 2, 1976, from its Assistant Administrator, General Counsel, Mr. Thomas J. Madden, the Law Enforcement Assistance Administration (LEAA), United States Department of Justice, requests our opinion as to whether annual leave forfeited at the end of the 1974 leave year by five of its employees may be restored under the provisions of 5 U.S.C. 6304(d)(1). The agency's letter, in pertinent part, reads as follows:

The five applicants are Michael Dana, Alison Eliason, Luke G. Galant, Rufus Johnson, and Michael Favicchio. The latter four employees participated in a LEAA sponsored six-week training program starting on or about April 6, 1974. At the conclusion of the training program, each of the four was immediately detailed as a LEAA Field Representative to local units of general government participating in the LEAA sponsored Initiative Oriented Technical Assistance (IOTA) program. The four participated in the IOTA program through January 1975 for the purpose of providing the trainees with practical experience relating to the reality of the State and local criminal justice system structures and an opportunity to apply the previous six-week training to an on-site work experience. Participation by the four employees in the six-week training program and the IOTA program resulted in the four employees being away from their permanent duty stations for the period April 6, 1974, through January 1975. The fifth applicant for restoration, Michael Dana, was the Director of the Field Services Division, Office of National Priority Programs, LEAA, which was administering the IOTA Program out of the Washington, D.C. central office.

In August 1974, the Department of Justice started to use Earning Statement Form MF-44 in place of Earning Statement Form DJ-708. The new form provided advance notice to Department of Justice employees as to the number of "use or lose" hours to avoid forfeiture of annual leave. During September 1974, Field Services Representatives state that they raised questions with Mr. Dana as to the effect working in the field and not being able to take leave would have on the fact that they had leave they would otherwise lose. Mr. Dana has stated that he informed them that should the situation arise, he would submit a justification so that they would not lose their leave. Mr. Dana has also stated that he was not aware at the time of the implications of the requirement to schedule annual leave prior to the start of the third bi-weekly pay period before the end of the leave year. The LEAA Instruction I 1590.3, entitled "Restoration of Forfeited Annual Leave," which provided guidelines and procedures governing the restoration of forfeited annual leave, was issued on October 17, 1974. A copy of LEAA Instruction I 1590.3 is attached.

Mr. Dana has further stated that his reading of the LEAA Instruction I 1590.3 did not clarify that any other necessary administrative action was necessary. As a result, neither Mr. Dana nor the other four applicants scheduled annual leave prior to the start of the third bi-weekly pay period before the end of the leave year. Nothwithstanding the failure to schedule annual leave in advance, Mr. Dana has stated that in view of the exigencies of the IOTA program which, by administrative mandate, called for a completion of the diagnostic phase by January 31, 1975, it simply was not possible for any of the Field Services Representatives to take leave at that time.

In support of Mr. Dana's request for restoration of forfeited annual leave, Mr. Dana's supervisor has stated that because of the workload and timetables of the IOTA program Mr. Dana was not able to use any substantial amount of annual leave.

Based upon the above facts, this office requests your opinion as to two questions. First, where LEAA employees participate in training programs from April to January either at or away from their permanent duty stations and are unable to take annual leave because of the requirements of the program, is it necessary to schedule annual leave in advance pursuant to 5 U.S.C. § 6304(d)(1)(B)?

Secondly, where LEAA employees while participating in the ten month training program away from their permanent duty stations are not informed of the requirement to schedule annual leave in advance to be eligible for restoration, does this constitute "administrative error" as provided in 5 U.S.C. § 6304(d)(1)(A)?

The provision of law in question, 5 U.S.C. 6304(d)(1), was added to title 5 of the United States Code by subsection 3(2) of Public Law 93-181, approved December 14, 1973, 87 Stat. 705. It provides as follows:

Annual leave which is lost by operation of this section because of—

(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

(B) exigencies of the public business when the annual leave was scheduled in advance; or

(C) sickness of the employee when the annual leave was scheduled in advance; shall be restored to the employee.

The Civil Service Commission's implementing regulations and guidelines, issued pursuant to 5 U.S.C. 6304(d)(2) and 6311, are contained in the attachment to Federal Personnel Manual Letter No. 630-22, dated January 11, 1974. These regulations were also published in the Federal Register of January 11, 1974, and have been codified in subpart c, part 630, title 5, Code of Federal Regulations.

As to LEAA's first question—whether the scheduling of annual leave in advance by the employees in question was necessary to qualify for its restoration under 5 U.S.C. 6304(d)(1)(B) in the recited circumstances—we think the answer must be in the affirmative. Advance scheduling is a requirement imposed by the plain language of the law itself. This requirement is reiterated and amplified in the CSC regulation, 5 C.F.R. 630.308, which provides:

Beginning with the 1974 leave year, before annual leave forfeited under section 6304 of title 5, United States Code, may be considered for restoration under that section, use of the annual leave must have been scheduled in writing before the start of the third bi-weekly pay period prior to the end of the leave year.

If, in spite of the foregoing, there should be any lingering doubt as to the mandatory nature of the scheduling requirement, it is dispelled by the legislative history of the law. See for example House of Representatives Report No. 93-456, 93d Congress, dated September 10, 1973, where it is stated in the second full paragraph on page 9:

The committee intends that for purposes of complying with the "scheduled in advance" requirement, some formal documentation will have to be furnished to show that the employee, a reasonable time before the end of the leave year, did, in fact, request a certain amount of annual leave in advance, that such request was approved by the appropriate authority, and that such annual leave was lost due to exigencies of the service or sickness of the employee.

Accordingly, we are of the opinion that statutory scheduling requirement may not be waived or modified even where extenuating circumstances may exist.

As to LEAA's second question—whether in the recited circumstances there was "administrative error" because of failure to inform the employees of the scheduling requirement so as to permit the restoration of the forfeited annual leave under 5 U.S.C. 6304(d)(1)(A)-- we think the answer must be in the negative. Even if they have no actual knowledge, employees are charged with constructive knowledge of statutory requirements pertaining to them and of the implementing regulations authorized to be issued by statute. See B-173927, October 27, 1971, holding that employees are charged with constructive notice of and are bound by properly promulgated statutory regulations reducing per diem rates, even though their employing installations may not be aware of the changes and their travel orders may erroneously provide for the former higher rates.

Furthermore, the scheduling requirement is clearly set forth in paragraph 4.c of LEAA's Instruction I 1590.3, referred to in the agency's letter. This internal document bears an issue date of October 17, 1974, some 5 weeks prior to November 24, 1974, the deadline for scheduling annual leave for the 1974 leave year. It states prominently on the first page that the Instruction is of interest to all current LEAA employees and it indicates that it is to be distributed to all LEAA employees. While it is not clear from LEAA's letter whether all of the five employees in question actually received this instruction, it is stated that one, Mr. Michael Dana, who was administering the program in which the other four were participating, did in fact read it.

In view of the foregoing it is our opinion that the five employees in question do not qualify under the provisions of 5 U.S.C. 6304(d)(1) for the restoration of annual leave forfeited at the end of the 1974 leave year.

[B-187982]

Contracts — Negotiation — Support Services Procurements — Research and Development Governing Statutes Not Applicable

Despite erroneous coding of procurement as one for research and development (R&D), statute governing evaluation of proposals leading to award of R&D contract is not applicable where procurement is actually for support services.

Contracts—Negotiation—Technical Evaluation Panel—Members—Absence

Evaluation of revised proposals by some but not all of those who evaluated original proposals, without discussion among evaluators of their respective judgments, is not contrary to applicable regulations or otherwise improper.

Contracts—Negotiation—Offers or Proposals—Qualifications of Offerors—Experience

Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Deficiency In Proposals

When discussions are held with offerors in competitive range, agency in most cases is required to inform offerors of all deficiencies and weaknesses in their respective proposals. Requirement extends to offeror whose proposal, as initially evaluated, is acceptable despite existence of some deficiencies, since offeror should be given opportunity to improve its proposal.

Contracts — Negotiation — Awards — Not Prejudicial to Other Offerors

Although agency's failure to point out specific deficiency to offeror was improper, award will not be disturbed where it appears that offeror was not materially prejudiced in view of significant technical and cost differences between it and successful offerors.

Contracts—Negotiation—Offers or Proposals—Evaluation—Allegation of Bias Not Sustained

Record does not support allegation that agency treated certain aspects of competing proposals as deficiencies in one of them but not the other.

In the matter of Checchi and Company, April 4, 1977:

Checchi and Company (Checchi) protests the award of contract No. 1-CP-65759 to Enviro Control, Inc. by the National Cancer Institute (NCI), Department of Health, Education, and Welfare (HEW). Checchi alleges numerous improprieties in the procurement which, it suggests, reflect a bias in favor of the successful offeror.

The procurement was initiated by the issuance of request for proposals (RFP) No. N01-55710-68, which called for offers to furnish technical and managerial support to NCI's Diet, Nutrition and Cancer Program (DNCP) on a cost-plus-fixed-fee basis. Of the seven offers received, five, including the protester's, were considered to be in the competitive range. Each of the five offerors in the competitive range was requested to make an oral presentation, subsequent to which offerors were furnished letters pointing out deficiencies in their proposals. Revised proposals were then submitted and evaluated, and Enviro Control was selected on the basis of its high technical rating and lowest proposed costs.

Checchi alleges that the technical evaluation panel was not properly constituted, that its revised proposal was not properly considered by

the panel, that the evaluation criteria of the RFP were not adhered to, that it was not informed of the major deficiencies in its proposal, and that numerous factual errors with respect to its proposal were made by the evaluators.

We have thoroughly reviewed the record in this case, including the detailed documents submitted by Checchi. We find, as HEW has recognized, that there were some procedural deficiencies associated with this procurement. However, we also find that the deficiencies were not prejudicial to Checchi and, for the reasons set forth below, that the record overall does not establish that the award to Enviro Control was improper.

A. Composition and Conduct of the Technical Evaluation Panel

Checchi first alleges that the technical evaluation group was not constituted in accordance with 42 U.S.C. § 2891–4 (Supp. V, 1975), which (in the protester's view) requires that research and development contract proposals be reviewed by a Contract Review Committee not more than 25 percent of whose members are officers or employees of the United States. Protester notes that the "DNCP procurement files contain a computer input form designating the contract awarded to Enviro Control as a Research and Development Contract," but that the evaluation panel was composed entirely of Government personnel.

HEW points out that the effort sought was not research and development, but rather was in the nature of support services, as evidenced by the following description of work contained in the RFP:

> The objectives of this contract are to provide technical and managerial support to the DNCP–NCI. The contractor will function in a purely supportive role, carrying out specific tasks. The contractor will be responsible for assisting in the management and administration of the DNCP and will prepare and monitor budgets, perform program analysis and evaluation, and provide support and logistics services.

HEW further states that the Contract Data Code Sheet was merely erroneously coded "RD" and that such coding cannot turn this procurement into one for research and development.

We agree. It is clear that this was not a research and development procurement, and we therefore see no relevance to the statutory requirements with respect to this procurement.

Checchi next complains that its revised proposal was not evaluated properly because it was not thoroughly reviewed by each member of the technical evaluation group and because the group did not meet to discuss the revised proposals.

The record shows that of the six evaluators who reviewed the initial proposals, four also reviewed and evaluated the revised proposals. A fifth evaluator was unable to prepare a complete written evaluation

of the proposals because of official travel but was able to evaluate the staffing aspects of the revised proposals and to report his scoring of that evaluation area by telephone to the contract specialist at NCI. The sixth evaluator was prevented by illness from reviewing the revised proposals. The evaluators did not meet as a group to discuss the revised offers.

We are not aware of any regulatory requirement which was contravened by HEW's evaluation approach. The Federal Procurement Regulations (FPR) contain no requirement that all initial proposal evaluators review and evaluate revised proposals or that the evaluators get together to discuss their respective judgments. Neither do we find such a requirement in the HEW Procurement Regulations, 41 C.F.R. Subpart 3-3.51 (1976), referred to by Checchi. Further, in *Department of Labor Day Care Parents' Association*, 54 Comp. Gen. 1035 (1975), 75-1 CPD 353, we held that an evaluation was not improper merely because a member of a technical evaluation panel did not participate in the final evaluation even though he evaluated the initial proposals or because the individual evaluators did not discuss their views of the revised proposals with each other. We pointed out that such was not necessary since the manner and extent to which source selection officers will make use of technical evaluation scores and reports is within their "very broad * * * discretion," 54 Comp. Gen. at 1040, so that it could not be readily said that a particular offeror would be prejudiced by the absence of the views of any one evaluator. *See also*, *Grey Advertising, Inc.*, 55 Comp. Gen. 1111, 1118-22 (1976), 76-1 CPD 325.

B. Adherence to Evaluation Criteria and Negotiation Requirements

The RFP set forth Evaluation Criteria, in relevant part, as follows:

(a) Staff

Experience of the proposed Project Director and his key assistants in fields of research management and nutrition science.

* * * * * * *

(b) Science and Business Management Support and Logistics

Previous management experience in operation of a large research program and previous experience in managing the scientific aspects of large research facilities.

* * * * * * *

(c) Understanding of Program and Awareness of Problems Involved

* * * * * * *

Statement and discussion of anticipated major difficulties and problem areas, together with potential or recommended approaches for their resolution.

* * * * * * *

Checchi's contention that HEW did not adhere to these criteria in evaluating proposals is based on the stated weaknesses found to exist

in Checchi's initial proposal. These weaknesses were identified as follows:

a. Key staff—lack of experience in management of biomedical research and nutrition as related to disease.
b. Management/logistics—lack of understanding of management in the biomedical research environment and lack of experience in management and operations of a large biomedical research program.
c. Understanding of program and potential problems—lacked identified potential problems and alternative solutions.

Checchi contends that the RFP did not specify that a proposer should have previously managed biomedical research or that the staff proposed should have managed biomedical research which related nutrition to disease. In Checchi's view, these criteria are new and more limiting than those in the RFP.

We cannot agree. We have taken the position that major evaluation criteria listed in an RFP need not be broken down to reflect each specific factor actually considered in the detailed evaluation of proposals, so long as there is sufficient correlation between the stated criteria and the factors actually used. *See AEL Service Corporation, et al.*, 53 Comp. Gen. 800 (1974), 74–1 CPD 217; 51 Comp. Gen. 397 (1972); 50 *id.* 565 (1972). Here we think there is a specific correlation between general scientific experience and biomedical experience in that the former obviously encompasses the latter. *See BDM Services Company*, B–180245, May 9, 1974, 74–1 CPD 237. Accordingly, we do not find that NCI deviated from the established evaluation criteria.

In connection with the evaluation, Checchi also alleges that the evaluation panel improperly used Enviro Control's proposal as the basis or standard for judging all other proposals, and questions why NCI did not identify any deficiencies or weaknesses in the initial Enviro Control proposal when it provided that firm an opportunity to submit a revised proposal.

The record shows that certain evaluators, when passing upon the revised proposals submitted, did make general comparisons between the proposal under review and the Enviro Control proposal (e.g., "The contractor has improved * * * however, the proposal is not at the same level as Enviro Control"; "Enviro Control * * * still far better"). However, this does not mean that the evaluation standards were predicated on the Enviro Control proposal. From our review, it appears that all proposals were measured against the RFP evaluation criteria and that, when measured against those criteria, the Enviro Control proposal was regarded as significantly superior to the competing proposals.

With regard to NCI's failure to inform Enviro Control of specific weaknesses in its proposal, it is reported that it was not felt necessary to point out deficiencies to Enviro Control in light of that firm's high

technical score and the feeling that the deficiencies noted by individual evaluators were not critical to program success. This position, however, is inconsistent with the purpose and basic principles of competitive negotiated procurement. One of the advantages of negotiation over formal advertising is that the Government may seek to reduce or eliminate undesirable aspects of proposals and negotiate for those which are regarded as more advantageous to the Government. Here, although the Enviro Control proposal was acceptable to NCI, it also contained some deficiencies which NCI did nothing to try to have corrected or improved, even though other offerors in the competitive range were informed of deficiencies in their proposals. Obviously, had one or more of the other offerors been able to significantly improve their proposals to the point where Enviro Control's initial proposal would not have been regarded as more advantageous to the Government than another competitor's revised proposal, the absence of an opportunity for Enviro Control to respond to specific weaknesses in its proposal could have prejudiced its competitive position.

Checchi also asserts that it was prejudiced by NCI's failure to advise it of a perceived significant deficiency in its proposal with regard to a proposed advisory panel. A number of the technical evaluators expressed concern that this panel might duplicate and perhaps even conflict with the DNCP Advisory Committee, an internal NCI organ. Checchi challenges both the legitimacy of the evaluators' concern and NCI's failure to include any mention of that concern when it advised Checchi of the weaknesses in its proposal.

It is not the function of this Office to evaluate proposals or to substitute our judgment for that of qualified agency officials. *Applied Systems Corporation*, B–181696, October 8, 1974, 74–2 CPD 195. Rather, our review is limited to the question of whether proposals have been evaluated in good faith and in accordance with the evaluation criteria and applicable regulations. *Joanell Laboratories, Incorporated*, 56 Comp. Gen. 291 (1977), 77–1 CPD 51; *METIS Corporation*, 54 Comp. Gen. 612, 615 (1975), 75–1 CPD 44. Here, the record shows that the evaluators had serious doubts about the utility and appropriateness of Checchi's proposed advisory panel. Although Checchi disputes the evaluators' judgment, that alone does not establish the invalidity of the evaluators' concerns, *Honeywell, Inc.*, B–181170, August 8, 1974, 74–2 CPD 87, which has not otherwise been shown to be arbitrary or improper. Therefore, we will not further consider this issue.

We agree with Checchi, however, that the listing of weaknesses and deficiencies in its initial proposal should have included mention of the proposed panel. We have held that negotiations must be meaningful

and that in many instances meaningful discussions must include pointing out to offerors the areas in which their proposals have been judged deficient. 47 Comp. Gen. 336 (1951); 51 *id.* 431 (1972); 52 *id.* 466 (1973). NCI suggests that this test was essentially met because the concern over the proposed panel fell within the general area of "lack of understanding" which was pointed out to Checchi as an area of weakness, and because Checchi should have been aware of the evaluators' concern from the questions asked at its oral presentation. HEW, however, acknowledges that Checchi should have been specifically informed that its proposed advisory panel was considered to be a weakness, but states that "the absence of the Advisory Panel, or difference in its use as proposed, would not of itself have improved Checchi's proposal to the level where it would have transcended the merits of the successful offeror's proposal."

We find that HEW's view of the situation is correct. In general, once discussions are opened with an offeror, the agency is required to point out all deficiencies in that offeror's proposal and not merely selected ones. *Teledyne Inet*, B–180252, May 22, 1974, 74–1 CPD 279. Although we have often stated that the extent and content of written and oral discussions is a matter of procuring agency judgment and that in the exercise of that judgment an agency may properly decide, in appropriate circumstances (such as where the possibility of technical transfusion or leveling exists), not to specifically point out certain proposal deficiencies, *see Sperry Rand Corporation (Univac Division), et al.*, 54 Comp. Gen. 408 (1974), 74–2 CPD 276; *Dynalectron Corporation, et al.*, 54 Comp. Gen. 562 (1975), 75–1 CPD 17, the record does not indicate the existence of such circumstances in this case. Furthermore, while requests for clarification or amplification or other statements made during oral discussions may be sufficient to alert an offeror to an area of weaknesses in its proposal, *see Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404; 53 Comp. Gen. 382 (1973), here the record suggests that as a result of discussions the protester was led to believe that the concern with the proposed panel had been cleared up rather than that the panel was a weakness requiring proposal revision.

We do not find, however, that these deficiencies in the procurement process warrant our disturbing the award. It is clear that Enviro Control was not prejudiced by HEW's failure to identify any weaknesses in its proposal. We also think it is reasonably clear, in view of both the overall technical evaluation of competing proposals and the cost differences among those proposals, that Checchi would not have been selected for award even if the evaluators' concern with respect to the advisory panel had been clearly communicated to Checchi. In this connection, we note HEW's finding "that the absence of the Advisory

Panel, or difference in its use as proposed, would not have of itself improved Checchi's proposal to the level where it would have transcended the merits of the successful offeror's proposal." We further note that Enviro Control proposed costs of $340,543 while Checchi proposed costs of $464,893, and that a substantial cost differential would remain even after deducting from Checchi's proposed costs the costs associated with the proposed panel. Thus, we cannot conclude that Checchi was materially prejudiced by the inadequate negotiations conducted in this case.

Finally, Checchi complains that its proposal and the Enviro Control proposal were treated differently in that the evaluators did not recognize deficiencies in the latter proposal, particularly with respect to scientific input and a detailed work plan, even though Checchi was penalized for the same deficiencies. In this connection, Checchi points to provisions of the Enviro Control proposal as indicating Enviro Control's intention to furnish substantive scientific input and to the absence of any work plan from that firm's proposal.

From our review of the record, it appears that the evaluators were concerned with unwarranted offers of scientific input relating to the formulation of program strategies, overall policy and direction. It further appears that this was not what Enviro Control proposed to do. Section III.2a of that firm's proposal stated:

> The groundwork and general structure of the overall program will be established by the Director with the guidance of the Advisory Committee; ECI does not expect to be deeply involved here, but there will be ad hoc tasks for ECI such as seeking and compiling consultant opinions on a specific project and providing an independent summary and evaluation of literature reviews on nutrition and cancer.

We think this suggests that Enviro Control understood its role as subordinate and supportive to the Director and Advisory Committee of DNCP. The provisions which Checchi cites as examples of Enviro Control's proposing substantial scientific input appear to be more in the nature of provisions for scientific input to a program, the design and structure of which would already be conceived by the Director and Advisory Panel of DNCP, rather than input regarding how the program should be structured.

With regard to the work plan, Checchi points out that the evaluators found fault with its work plan, but that Enviro Control did not offer a work plan at all. The RFP, however, did not require the submission of a work plan. It only recommended that a listing of chronological milestones be provided. The weight to be accorded the absence of a milestone chart was a matter for the judgment of the evaluators. We find no basis for disagreeing with the evaluators' judgment regarding the acceptability of the Enviro Control proposal, notwithstanding the absence of a milestone chart from the proposal.

The protest is denied.

[B-186761]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Vacating Residence Requirement

Transferred employees arranged in advance to rent former residence after date of closing on sale because temporary quarters, although available, were expensive and not convenient. Claim for temporary quarters subsistence expenses for period of continued occupancy of former residence may not be certified for payment since the residence at the old duty station was not vacated within the meaning of Federal Travel Regulations para. 2-5.2c.

In the matter of Gerald L. Modjeska—what constitutes "temporary quarters," April 5, 1977:

An authorized certifying officer of the Department of Labor has requested our determination of the propriety of payment of the claim of Mr. Gerald L. Modjeska for reimbursement for temporary quarters subsistence expenses incident to a transfer.

In January 1976, Mr. Modjeska was transferred by the Department of Labor from Round Lake, Illinois, to Deerfield, Wisconsin. Incident thereto, Mr. Modjeska placed his residence in Round Lake for sale and attempted to secure temporary living quarters at the new duty station. However, because of the large size of his family, nine members, Mr. Modjeska was unsuccessful in locating suitable temporary quarters in Deerfield, and he elected therefore to rent his former residence from the purchaser until permanent quarters could be obtained at his new duty station. The contract for sale of Mr. Modjeska's former residence provides for continued occupancy by Mr. Modjeska and his family for up to 45 days from the date of settlement at at stipulated rental of $23 per day. Mr. Modjeska's family remained in their former residence for 15 days after settlement, for which period Mr. Modjeska is seeking reimbursement in the amount of $425 for rent ($345) and subsistence ($80). The record shows that the closest available suitable temporary lodgings were in Madison, Wisconsin, the nearest city to Deerfield, where two motel rooms were available at a cost of $24 per day. The certifying officers recommends that payment of Mr. Modjeska's claim be authorized.

The reimbursement to employees of the expense of occupying temporary quarters incident to a transfer of duty station is governed by the provisions of part 2-5 of the Federal Travel Regulations (FTR), FPMR 101-7 (May 1973). The question here is whether Mr. Modjeska and his family may be considered to have "vacated the residence quarters in which they were residing at the time the transfer was authorized" as required by FTR para. 2-5.2c as a condition of entitlement to reimbursement for temporary quarters.

There is no precise definition of the term "vacate" in the travel regulations and each case must be considered on its own merits. 47

Comp. Gen. 84 (1967); B–181032, August 19, 1974. We generally consider a residence to be vacated when an employee and/or his family cease to occupy it for the purposes intended. B–185696, May 28, 1976. In evaluating such cases, we have consistently given great weight to the intent of the employee with respect to the location of permanent residence and the occupancy of temporary quarters. In those cases where there is evidence of action taken by the employee prior to and/or after departure from the former residence which support an inference that the employee intended to cease occupancy of that residence, we generally have authorized reimbursement. See, e.g., B–185696, *supra*, and cases cited therein. Conversely, we have not approved reimbursement for temporary quarters where such evidence is absent. B–162680, November 3, 1967; B–173217, July 13, 1971.

We are of the opinion that the record here will not support a conclusion that Mr. Modjeska intended to vacate his former residence at the date of sale. This is not a case where an employee has been forced by circumstances beyond his control, such as a breakdown of a moving van (B–181032, *supra*) or the unavailability of temporary quarters at either the old or new duty station (B–177965, March 27, 1973), to continue occupancy of his former residence. We note particularly that arrangements were made in advance for continued occupancy of Mr. Modjeska's former residence despite the availability of temporary quarters, although such quarters may have been less convenient. We view this evidence as supporting a conclusion contrary to that required to established entitlement to reimbursement.

In these circumstances, we cannot authorize the reimbursement to Mr. Modjeska of the temporary quarters expenses claimed.

The voucher may not be certified for payment.

[B–186504]

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—Refund Entitlement—Computation

Where widow's Survivor Benefit Plan (SBP) annuity is reduced pursuant to 10 U.S.C. 1450(c), by the award of Dependency and Indemnity Compensation (DIC), the computation of cost of the reduced annuity in order to determine amount of any refund due the widow pursuant to 10 U.S.C. 1450(e) is to be done on a monthly basis and shall include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death.

Pay—Retired—Survivor Benefit Plan—Spouse—Termination or Reduction—Refunds

Where a surviving spouse receives the full amount of selected SBP annuity for any period because an award of DIC could not be made retroactive to the date of death, since recalculation of SBP annuity pursuant to 10 U.S.C. 1450(c) and

(e) is permitted only when annuity is reduced by)IC award effective "upon the death" of the retiree, no refund is due.

In the matter of the Department of Defense : lilitary Pay and Allowance Committee Action No. 524, April 6, 197 ?:

This action is in response to a letter from :he Assistant Secretary of Defense (Comptroller) requesting a decis on on several questions concerning the correct method of recalculatin ; the cost of a Survivor Benefit Plan (SBP) annuity in the circums ances described in Department of Defense Military Pay and Allov ance Committee Action No. 524, enclosed with the letter.

The first question is:

When a Survivor Benefit Plan (SBP) annuity s reduced by an award of Dependency and Indemnity Compensation (DIC) an a partial cost refund is due the widow or widower, what is the correct method of recalculating the cost of the reduced annuity so as to determine the amount f the refund payable to the widow or widower under 10 U.S.C. 1450(e)?

The discussion in the Committee Action : oints out that in situations where the DIC award exceeds the elect l SBP annuity, no SBP annuity is paid and the entire amount d lucted from retired or retainer pay is refunded. The problem ari es only when the DIC awarded is less than the SBP annuity and a partial cost refund is required. It is indicated that in those cases t e services have not been uniform in their interpretation of the recal ulation provisions of 10 U.S.C. 1450(e) and as a consequence, have us l three different methods of recomputing the cost of the reduced annu ty in order to determine the amount of the refund.

In all three methods, the services apparen y agree that the amount of the reduced annuity due for the month i which the member died is determined by subtracting the amount of he DIC award from the full SBP annuity otherwise payable. This establishes both the adjusted base amount required to produce th reduced SBP payment and, by applying the charge formula contai ed in 10 U.S.C. 1452(a), the actual cost of such coverage for that ionth. According to the description used in the Committee Action, the variance among the services relates to the method of recalcula ng the costs of reduced coverage for the period prior to the month i . which the member died.

In the first method, only the prior cost-of- ving (COL) percentages which would be used to establish the full SI P annuity are applied to the before-mentioned reduced base amount luring the period the retiree participated in the plan in order to d termine what the cost of coverage would be for any one month und r that COL level. These various representative monthly costs are th a multiplied by the num-

ber of months that those COL percentage increases were in effect, and the resulting amounts are then added to produce the total recalculated cost of reduced coverage.

In the second method, both the prior COL percentages and changes in DIC rates are applied to the reduced base amount during the period the retiree participated in the plan. As a result, for each change in the COL percentages and DIC rates, a new recalculated monthly cost is determined. As before, these different recalculated monthly costs are then multiplied by the number of months they were in effect and, when added, produce the total recalculated cost of coverage.

In the third method, neither the prior COL percentages nor changes in DIC rates are considered. Only the recalculated monthly cost for the reduced base amount as of the date of the retiree's death is used for this purpose. Under this method, that recalculated cost is simply multiplied by the number of months the retiree participated in the plan to produce the total recalculated cost.

The basic provisions governing SBP cost assessments are contained in section 1452 of title 10, United States Code, subsection (a) of which provides in part:

(a) * * * the retired or retainer pay of a person to whom section 1448 of this title applies * * * shall be reduced each month by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. * * *

The provisions authorizing recalculation of cost assessments when an annuity reduced by a DIC award is payable, is contained in section 1450 of the same title and provides in pertinent part:

(c) (If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

* * * * * * *

(e) * * * If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of the title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

In House Report No. 92-481, Committee on Armed Services, House of Representatives, to accompany H.R. 10670, at page 13, analyzing coverage for service-connected retiree deaths, it is stated:

* * * If the DIC exceeds the amount of annuity under the plan and, therefore, no annuity is payable, the full amount that has been deducted from the person's retired pay because of participation in the bill's program would be refunded to the widow or widower. When part of the annuity is payable, the per-

son's retired or retainer pay deductions will be recalculated to determine the amount that would have been necessary to provide that level of benefit from the survivor-annuity program; and the amount by which the retired pay deductions had exceeded this recalculated amount would be refunded to the widow or widower.

In this connection, on page 26 of the same report, the early evolution of congressional thinking regarding the provisions which eventually became 10 U.S.C. 1450 (c) and (e) was stated:

> * * * The original language of the bill had provided that when the retiree died of service-connected causes and the surviving spouse or dependent child is thus entitled to DIC, the survivor could elect to receive either the DIC or the annuity under the bill; and if DIC was elected, a refund would be made of the retired pay deductions under the bill's program. The bill had provided that an annuity under the plan could not be paid if DIC was chosen. The Defense Department suggested a modification which provides for automatically paying the DIC to the survivor and, in cases where the annuity under the bill's plan would exceed DIC, to provide a supplemental payment from the Department of Defense to make up the difference. *The survivor will receive a refund of any portion of the retired pay deduction which exceeds the percentage of total annuity that is based on military retired pay.* The survivor would be spared the necessity of making a choice and thus situations would be avoided where a survivor might unknowingly choose the less beneficial plan. * * * [Italic supplied.]

Clearly under the provisions of 10 U.S.C. 1452(a), *supra*, the basic reduction in retired pay to be charged a member to provide him with his elected SBP coverage is required to be calculated and charged to reflect all COL increases in the member's retired pay during his retirement period. See 55 Comp. Gen. 1432 (1976). It would seem that any recalculation of such changes "under section 1452" as required by section 1450(e) should also be on a monthly basis taking into account the COL changes which were applicable. It may also be recognized that DIC payments have been increased periodically changing the potential SBP benefits which would be payable to survivors who are entitled to DIC. These changes should also be used in recalculating the cost of SBP protection to survivors entitled to DIC.

We have reviewed the three alternatives proposed in the light of the quoted law and its legislative history and find that the most accurate, equitable and reasonable way in which refunds may be made is to relate the refunds to the amounts actually deducted from the retired member's monthly pay (including COL adjustments) and to the potential DIC at the time such deductions were made. If either of those factors is not recognized in the computation, the refund will not have an appropriate relationship to the deductions made or the potential SBP benefit at the time such deductions were made. Since neither the law nor the legislative history thereof provides a clear indication of which method should be used to calculate reimbursement we find that, to the extent possible, both COL increases and DIC increases which occurred between the member's retirement and his death should be taken into account in calculating the refund.

Question 1, therefore, is answered by saying that the proper method of determining the widow's or widower's 10 U.S.C. 1450(e) refund is by using computation method 2.

The second question asked is:

If DIC is awarded more than one year after the death of a retiree and the award is not made retroactive to the date of death, what is the correct method of computing the amount of the SBP refund payable to the widow or widower?

Chapter 51 of title 38, United States Code, contains the general administrative provisions governing the filing of applications with the Veterans Administration for benefits, effective dates of such benefits and payments to be made. The effective dates for awards of DIC are contained in 38 U.S.C. 3010, subsection (d) of which provides that where an application is received within 1 year from the date of death, the effective date of DIC award shall be the first day of the month in which the death occurred. Veterans Administration regulations regarding effective date of DIC awards is more specific in that it provides that if an application is not received within the 1 year allowed, the effective date of DIC will be the date of receipt of a claim. See 38 CFR 3.400(c)(2).

In other words, a DIC award ordinarily is effective from the first day of the month in which the retiree died. However, if the application is not filed within 1 year following his death, the award will not coincide with the month of death. In such a situation, the earliest date that a DIC award could become effective would be the date of application or claim and would result in the widow or widower receiving, if otherwise eligible, the full amount of the selected SBP annuity for at least 12 months following the retiree's death.

Neither the language of the SBP provisions nor the legislative history thereof specifically treats a situation where, while DIC is ultimately awarded, such payments cannot be made retroactive to the date of death due to the statutory limitations imposed on awards by the Veterans Administration. However, 10 U.S.C. 1450, states in subsection (c) that "if, upon the death * * * the widow * * * is also entitled to" DIC, the annuity paid will be reduced by the amount of the DIC.

Since the basic right to receive an SBP annuity is automatic if the member elected coverage, the determination which is to be administratively made involves only the establishment of the amount of the annuity, subject to adjustment to reflect the amount of the DIC entitlement due "upon the death" of the retiree. If, because of other laws, no DIC is or can be payable at that time, the full amount of the annuity chosen must be paid.

It appears that recalculation of the SBP annuity pursuant to 10 U.S.C. 1450(e) for the purpose of determining the amount of refund to be paid the widow or widower occurs only when the SBP annuity

payable is reduced by a DIC award effective upon the member's death. It is, therefore, our view that unless this statutorily recognized condition exists, there is no basis for recalculating to determine the amount of refund and no refund would be due. Question 2 is answered accordingly.

[B-187617]

Bids—Competitive System—Adequacy of Competition—Sustained By Record

Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions.

Contracts—Specifications—Aggregate *v.* Separable Items—Options to Contractor

Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition.

In the matter of Union Carbide Corporation, April 7, 1977:

This case involves a complaint by a would-be supplier against the award of a contract by the recipient of a Federal grant. The complainant states that the award contravened the requirements of the grant agreement that award be made to the low responsive, responsible bidder after competitive bidding. The basis for the complaint is the assertion that the bid accepted by the grantee was nonresponsive in that it was based on a system that deviated substantially from the specifications included in the solicitation. For the reasons stated herein, we find the complaint to be without merit.

The complaint was filed by Union Carbide Corporation (UC) against the award made to John T. Brady and Company (Brady) by Westchester County, New York. The procurement, which involves the addition of secondary treatment capability to the existing primary sewage treatment plant located in the City of New Rochelle, New York, is funded in substantial part (75 percent) by a grant from the Environmental Protection Agency (EPA) pursuant to Title II of the Federal Water Pollution Act Amendments of 1972, Public Law 92-500, 86 Stat. 833, 33 U.S.C. § 1281 *et seq.* (Supp. V, 1975).

Pursuant to the grant, Westchester County issued an invitation for bids (IFB) for the project which contemplated the award of four separate contracts. Contract 1912G, for general construction, is the subject of UC's complaint. Line item 2 of that contract solicited bids

for furnishing and installing an "Oxygen Equipment System." Section 350 of the IFB's specifications set forth certain design features and performance parameters for the system and provided that the system's oxygen supply equipment consist in part of a "pressure swing absorber (PSA) or equivalent" oxygen generator.

However, Article 8 of the IFB, entitled "MAJOR EQUIPMENT BID ITEMS AND PREQUALIFICATION," informed bidders that "one system had been used in preparing the * * * specifications," but that the specifications "do not name any supplier," and that bidders, in addition to inserting in the space provided on the bid form (lines [a 1] and [a 2]) the name of its supplier and total price for furnishing and installing the oxygen equipment system, could propose (on lines [b 1] and [b 2]) "another supplier and total price for furnishing and installing the system." Article 8 further advised that if the alternate system required "any modification on the arrangements or details indicated or specified" in the IFB, the contractor, upon the system's acceptance by Westchester County, would be responsible for preparing detailed drawings showing all the necessary modifications and for payment of any increased costs to the other prime contractors resulting from the modifications. It was further provided that within 5 days after receipt of bids, "each bidder shall submit material for prequalification of suppliers for all parts of the * * * modified items * * *."

Eighteen bids were received by the date set for bid opening, March 3, 1976. The bid submitted by Brady, as well as the bids of the other 17 potential prime contractors for the general construction contract, proposed for line item 2 a PSA system to be supplied by UC and, alternatively, a system to be supplied by Air Products and Chemicals, Inc. (APC). Brady's total bid of $16,779,525 with the UC equipment and its alternate bid of $16,421,525 utilizing the APC equipment were both lower than the bids submitted by the other competing firms. Upon examination of the bids and the material submitted subsequent to bid opening, Westchester County determined that the APC system was acceptable and on April 15, 1976, awarded the contract in question to Brady, based on Brady's bid to furnish and install the APC oxygenation system.

Following notification of the award to Brady, UC filed a protest (April 21, 1976) with Westchester County, which was subsequently denied by a written determination dated May 5, 1976. UC thereafter filed a protest with the EPA Regional Administrator, Region II. On September 7, 1976, the Regional Administrator issued a written determination denying UC's protest. On October 1, 1976, EPA denied UC's request for reconsideration of that decision. UC, on October 12, 1976, then filed a complaint with this Office and on October 22, 1976,

filed suit in the United States District Court for the District of Columbia. (*Union Carbide Corporation* v. *Russell E. Train, et al.*, Civil Action No. 76–1973), seeking in part to enjoin EPA from permitting, directing, or approving the expenditure of Federal grant funds for that part of Contract 1912G relating to the "Oxygen Equipment System" pending our decision in this matter. On November 22, 1976, the United States District Court dismissed UC's action for failure to join Westchester County and Brady as parties. On November 26, 1976, UC filed a comparable action in the United States District Court for the Southern District of New York (*Union Carbide Corporation* v. *Russell E. Train, et al.*, Civil Action No. 76–5272). On February 8, 1977, the court issued an order denying UC's motion for a preliminary injunction, but deferred action on defendants' cross-motions for summary judgment until this Office could rule on whether the award of the contract complied with applicable regulations.

It is the practice of this Office not to render a decision on a matter where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. *See*, e.g., *Nartron Corporation*, 53 Comp. Gen. 730 (1974), 74–1 CPD 154. However, we will consider matters where the court desires and expects our decision. *Lametti & Sons, Inc.*, 55 Comp. Gen. 413 (1975), 75–2 CPD 265. Therefore, in view of the court's order, we consider it appropriate to consider the merits of UC's complaint.

UC asserts that the award was contrary to the terms of the IFB and violated applicable EPA regulations because the APC oxygen supply system is not equivalent to the system described in detail by Section 350 of the specifications and because Brady was permitted to establish the acceptability of the APC system after bid opening. EPA and Westchester County do not take issue with UC's position that APC's cryogenic system is not equivalent to the complainant's PSA oxygen generator. They assert, however, that the IFB, particularly in view of Article 8, permitted acceptance of bids based on systems other than that described by Section 350 and that the bid accepted was fully responsive. In this connection, it is stated that the specifications were developed around UC's PSA generator system because that was the only acceptable system known to the County at the time but that, in an effort to avoid a sole source situation, the County intentionally did not identify UC as the equipment supplier and included Article 8 in the IFB so as to permit competition on the basis of any other system which, although unknown to the County, would be acceptable. UC, on the other hand, argues that Article 8 does not permit bidders to propose an oxygen equipment system not incorporating a PSA genera-

tor or equivalent, but only allows bidders to propose an alternate supplier for the system, which still has to meet the specified requirements for the PSA generator.

At the outset, we point out that this case does not concern a Federal procurement and the Federal Government is not a party to the awarded contract. In such a case, we are not called upon to determine the legality of the contract award. Rather, our rule is to determine whether there has been compliance with applicable statutory requirements, agency regulations and grant terms, and to advise the Federal grantor agency, which has the responsibility for administering the grant, accordingly. *O.C. Holmes Corporation*, 55 Comp. Gen. 262 (1975), 75-2 CPD 1974; *Thomas Construction Company, Inc.*, 55 Comp. Gen. 139 (1975), 75-2 CPD 101; 52 Comp. Gen. 874 (1973).

In so doing, we do not strictly and mechanistically apply the rules governing Federal procurements, merely because there is a Federal grant requirement that contracts be awarded on the basis of competitive bidding. For example, in *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74-2 CPD 1, we stated the following:

> We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen. * * * [326 (1968)]. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B-168434, April 1, 1970; B-168215, September 15, 1970; B-173126, October 21, 1971; B-178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen. *supra*. * * *

In *Copeland Systems, Inc.*, 55 Comp. Gen. 390 (1975), 75-2 CPD 237, we further explained:

> Obviously, it is difficult to detail all that is "fundamental" to the Federal system of competitive bidding. However, basic Federal principles of competitive bidding are intended to produce rational decisions and fair treatment. To the extent, therefore, that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental Federal norm. The decision will, in all likelihood, also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding.

Thus, in the absence of a requirement that the precise Federal rules be followed, the grantee's effecting a procurement through the use of local procedures which are "not entirely consistent with Federal competitive bidding principles" will not be regarded as contrary to competitive bidding requirements of a Federal grant, *see General Electric Company*, 54 Comp. Gen. 791 (1975), 75-1 CPD 176, unless it can be

said that there has been a violation of some basic, fundamental principle inherent in the concept of competitive bidding. The EPA regulations applicable to this case, 40 C.F.R. § 35.938 (1975), requiring the grantee to use competitive bidding and to award a contract to the low responsive, responsible bidder, must be read in this light.

In formally advertised Federal procurements, the specifications are required to describe adequately the Government's minimum needs so that all bidders can compete on an equal basis. In other words, the use of an invitation which solicits bids on the basis of specifications other than those set forth in the invitation would be improper, and the acceptance of a bid which deviated from the stated specifications generally would not be permitted. 39 Comp. Gen. 570 (1960); 40 *id.* 679 (1961); 42 *id.* 383 (1963); 43 *id.* 209 (1963). Moreover, under Federal procedures a bidder cannot make his bid acceptable by submitting information or documentation after bid opening, since to allow such a practice would give the bidder an unfair opportunity to decide, after his competitors' prices have been exposed, whether it would be advantageous to qualify for the award. 38 Comp. Gen. 532 (1959); *Veterans Administration re Welch Construction, Inc.*, B–183173, March 11, 1975, 75–1 CPD 146; *see* P. Shnitzer, Government Contract Bidding, 239 (1976).

The basis for the strict rules governing bid responsiveness is grounded in the need to protect the integrity of the competitive bidding system by assuring that all bidders compete on an equal footing. *See* 17 Comp. Gen. 554 (1938); P. Shnitzer, *supra*, at 237. In most cases, of course, the integrity of the system can be preserved only by strict application of the responsiveness rules. However, in cases where it appeared that acceptance of a deviating bid would result in a contract which would satisfy the Government's actual needs and would not prejudice any other bidder, we permitted acceptance of the bid notwithstanding that the bid was technically nonresponsive, *GAF Corporation et al.*, 53 Comp. Gen. 586 (1974), 74–1 CPD 68; *Thomas Construction Company, Inc.*, B–184810, October 21, 1975, 75–2 CPD 248; 38 Comp. Gen. 532 (1957); *see also Keco Industries, Inc.*, 54 Comp. Gen. 967 (1975), 75–1 CPD 301, since the integrity of the competitive system was not adversely affected thereby.

Here, it is clear that the bid accepted by the County resulted in a contract which the County and EPA believe will satisfy the County's requirements. It is also clear that no other bidder was prejudiced by acceptance of that bid. All 18 bidders based their bids on supplying, alternatively, either UC's system or APC's system. Thus, it appears that all 18 bidders interpreted that provision as the grantee intended, so that it cannot be said that any bidder was misled. Furthermore,

Brady bid low on both alternatives, and so would be in line for award in any event. Even UC concedes that, with respect to the 18 bidders, they competed equally among each other.

Notwithstanding this, however, UC asserts that the award contravened grant requirements because it and other potential suppliers to the successful bidder were misled by the specific IFB requirement for a system incorporating a PSA generator. UC states that the requirement kept other suppliers from competing and kept it from either offering a less expensive system or offering its PSA system at a lower price. Thus, concludes UC, there was not "free and open competition" as "encourage[d]" by 40 C.F.R. § 35.938-2.

We have held that where a solicatation restricts competition to one offeror, a contracting agency may accept a proposal from another offeror provided that the former is put on notice, prior to the submission of final offers, that the procurement has been transformed from a noncompetitive to a competitive one, so that the apparent sole source offeror will have an opportunity to compete on an equal basis by amending its offer to reflect whatever changes it might deem appropriate in light of the now-competitive nature of the procurement. 48 Comp. Gen. 605 (1969); 47 *id.* 778 (1968); *Instrumentation Marketing Corporation*, B-182347, January 28, 1975, 75-1 CPD 60; B-176861, January 24, 1973. UC, however, was not a direct competitor (bidder) on this procurement; there was no privity or direct relationship recognized in law between UC and the contracting authority. UC's only relationships in this case were with Brady and the other bidders to which UC sought to provide an oxygen equipment system, and it is through those relationships only that UC can assert its claim that it should have been put on notice that its system might not have been the only one acceptable to the County. The fact that Brady and the other bidders may not have so informed UC does not mean that the competitive bidding requirements of the grant were not met.

In other words, assuming that UC and other potential suppliers were misled as alleged by UC, we could not agree that this would have destroyed the competitive nature of the procurement. The EPA grant regulations require a grantee to award its Federally assisted contracts after providing an opportunity for maximum competition and free and open competition among those bidders participating in the procurement. We cannot conclude that there was anything less than maximum competition since there is no evidence of record, nor does UC allege, that any potential contractor for Contract 1912G was precluded from competing. Furthermore, as indicated above, there was fair and equal competition among the 18 participating bidders. Federal competitive bidding principles require no more.

Moreover, even if we viewed those principles as affording protection to would-be suppliers of prime contractors, UC's position could not be sustained in this case. The record here in no way establishes that any other potential supplier of oxygen equipment systems was interested in this procurement or felt precluded from submitting a proposal to any of the bidders. Neither is there any convincing evidence of record that UC could or would have offered its own alternative system or that it would have been acceptable to the grantee. While UC may have offered a lower price for its PSA generator system had it appreciated the prospects of competition for the oxygen supply system, that possibility we think is too speculative to provide a basis for concluding that the requisite competition was not attained in this case.

In short, what the record does show is that (1) the grantee sought to avoid a sole source situation and to promote competition by permitting bids on systems other than the one with which it was familiar; (2) the IFB provisions it utilized in so doing were intended to permit bids on alternate systems but also could be read as permitting alternative bids based on furnishing a system meeting the specification features but supplied by a firm other than UC, and (3) all of the bidders understood what was intended and submitted alternative bids, each based on the same alternative system. Thus, what we have here is a case where all bidders understood the specifications and responded to them in the same way, so that it cannot be said that any of the bidders was prejudiced.

(Parenthetically, we point out that if prejudice to any bidder had resulted from the situation involved here, the only appropriate remedy would have been readvertisement. Award to Brady on the basis of its furnishing UC's system would not be appropriate remedial action since it is clear that the specifications, as interpreted by UC, overstate the actual needs of the County and would not provide a proper basis for award.)

Finally, with regard to the qualification after bid opening aspects of Article 8, we think that any provision which allows bidders "two bites at the apple," that is, control after bid opening over the decision whether their bids will be responsive, is inconsistent with the Federal competitive bidding principles and should not be used. However, we concur with the EPA Regional Administration that the use of the provisions in this case did not fatally taint the procurement. As pointed out by the Administration, the unacceptable feature of Article 8 was not a serious concern here, because the procurement was for "general construction services with the disputed sub-bid item being only a portion of the total bid," and the bidders, obviously interested

in the total job, submitted bids on two bases, including one with which the County was familiar. While bidders may have been able to get "two bites at the apple" with respect to their alternative bids, we think bidders were bound by their basic bids. In this regard, we read Article 8 as requiring that the system to be furnished in accordance with the bid entered in the "spaces marked (a), or (a 1) and (a 2)" be a system meeting the specifications set forth in Section 350. Therefore, even though bidders were required to submit data on that system as well as on any alternative system offered, the County could have accepted a bid without the submission of such data, and the bidder would have been obligated to furnish an oxygen supply system meeting the design and performance requirements of Section 350. Thus, in this case Brady was bound by the basic portion of its bid and, since it was low bidder on both the basic and alternate systems, it did not, in our view, have the option to decide after bid opening whether to remain in the competition.

For the foregoing reasons, we find the award to Brady does not contravene the competitive bidding requirements of the EPA grant agreement and regulations applicable thereto.

[B-188035]

Contracts—Negotiation—Offers or Proposals—Qualifications of Offerors—License Requirement

Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license.

In the matter of Pacific Architects & Engineers, Inc., April 7, 1977:

Pacific Architects and Engineers, Inc. (PAE) protests the United States Air Force's (Air Force) award of a contract to any offeror other than PAE for the interior painting and repair of 120 family housing units at the Sagamihara Dependent Housing Area, Sagamihara-shi, Kanagawa-ken, Japan, under Request for Proposals (RFP) F62562-76-R-0695. PAE is both the low offeror and the only non-Japanese firm among the 14 offerors proposing under the solicitation. The RFP incorporated by reference the generally worded license requirements of Armed Services Procurement Regulation (ASPR) 7-602.13, entitled "Permits and Responsibilities (1964 JUN)." During the course of negotiations the Air Force was advised by the U.S. Navy Officer-in-Charge of Construction, Far East, that PAE did not have a Japanese license to perform maintenance and construction in Japan. The record indicates that the same issue had previously arisen with

regard to several Navy contracts and that award was made by the Navy to PAE notwithstanding the lack of the required license because PAE had made its offer as a joint-venturer in conjunction with a Japanese firm which was in possession of the required license.

Upon learning of PAE's lack of licensing, the Air Force requested all offerors within the competitive range to furnish evidence of such licensing. PAE did not furnish the required evidence. Air Force inquiries at the Japanese Ministry of Construction indicated that the reason PAE could not furnish the evidence was that PAE had never applied for a license. It is the Air Force's position that the requirements for licensing under Japanese laws are not restrictive or prejudicial to PAE and are required of American contractors pursuant to the Status of Forces Agreement (SOFA) between the United States and Japan. PAE admits that a non-Japanese firm may be licensed, but points out that a condition precedent to such licensing is that a principal of the firm be a Japanese citizen. PAE also notes that the time involved in obtaining a license is approximately one year. PAE questions the Air Force's authority to request that all offerors in the competitive range furnish evidence of licensing. PAE contends that ASPR 3–805.3 only authorizes discussions with offerors in order to advise them of deficiencies in their proposals. PAE takes the position that "[l]ack of information in the proposal as to licenses, when none was required by the solicitation, is not a 'deficiency.'" However, this is merely a corollary to the main issue presented which is whether the Air Force, in a negotiated procurement, can declare a low offeror to be nonresponsible for failure to hold a specific Japanese license where the requirement for such specific license is not found in the solicitation, but rather emerges during the course of negotiations.

Since the solicitation contained only a generally worded license requirement, the request for evidence of specific licenses constituted a change in the Government's requirements as defined by ASPR 3–805.4 (1976). This section, which authorizes the agency to change its requirements after the issuance of a solicitation, states that when such changes are made a written modification to the solicitation should normally be issued. In certain instances the regulation provides that offerors may be orally informed of the change if this oral notification is promptly confirmed by a written amendment. Although it is clear that the regualtions authorized the Air Force to change its requirements, the agency failed to properly follow-up its oral change with a written amendment. However, since all offerors were informed of the change and no offeror complains that it was prejudiced by the lack of a written amendment, this omission does not affect the validity of the agency's requirement change.

238-162 O - 77 - 6

Turning to the main issue, PAE argues that the Air Force contracting officer does not have the legal authority to deny an award to PAE on the ground that PAE is nonresponsible because of its lack of a license from the Japanese Government. In support of its position PAE cites several of our decisions. *Mid American Movers, Inc.*, B-187612, February 4, 1977, 77-1 CPD 92, is cited for the proposition that where an Invitation for Bids (IFB) contains a license requirement which is couched in broad, general language, which does not specifically require the obtaining of specific licenses, the matter of whether or not such licenses are obtained is a matter solely between the contractor and the licensing authority and that the presence or absence of a license has no bearing on the award of a contract or the responsibility of a bidder.

Reference is also made to B-125577, October 11, 1955, which was excerpted in later published decisions 51 Comp. Gen. 377 (1971) and 53 Comp. Gen. 51 (1973), which stated in part that:

> * * * No Government Contracting Officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor.

Finally, PAE quotes, with emphasis, the following passage from our decision in *Martin Widerker, Eng.*, 55 Comp. Gen. 1295 (1976), 76-2 CPD 61:

> As we have stated in 51 Comp. Gen. 377 (1971), the validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts. *We believe the same situation exists in the case of offshore procurement.* [Italic supplied.]

It is PAE's view that the foregoing citiations should be dispositive of the issue presented.

We do not believe that this case is governed by the decisions cited by PAE. Those decisions all concern situations in which the contracting officer, by use of *general* language in the solicitation, attempted to insure compliance with licensing requirements that may or may not have been applicable to or enforced against the prospective contractor. In the instant case the contracting officer by his oral request clearly amended the solicitation to include a specific license requirement.

We have held in this connection that the procuring agency may, in exercising its broad discretion in determining a prospective contractor's qualifications to perform a contract, properly include in a solicitation a requirement that offerors have a *desginated* local license regardless of the applicability of that license requirement to the specific procurement involved. See 53 Comp. Gen. 51 (1973).

Accordingly, we believe that it was not improper for the Air Force to amend the solicitation to include a specific license requirement;

nor do we believe that the agency erred in rejecting PAE's proposal because that firm failed to comply with the specific license requirement.

Accordingly, the protest is denied.

[B-187604]

Contracts — Specifications — Defective — Corrective Action Recommended

Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated.

In the matter of ABS Duplicators, Inc., et al., April 8, 1977:

Three protests have been submitted to this Office regarding an award to TS Info Systems (TS Info) under invitation for bids (IFB) No. 76-25 by the United States Department of Labor (Labor). The solicitation called for bids to furnish all equipment, material and labor for the operation of photocopy services for one year with an option to extend for an additional year. The specifications, in part, required:

A. Complete photocopy station will consist of the following:
(1) Four stations with bond paper multiple reduction photocopiers with sorting capabilities and one operator.
(2) Three photocopy stations with bond paper same size photocopiers with sorting capabilities and one operator.

The bids were opened on September 16, 1976, and on September 23, 1976, a contract was awarded to TS Info, which had been determined to be the lowest responsive and responsible bidder.

ABS Duplicators, Inc. (ABS), which was the second lowest bidder and had provided the services for the previous year, asserts that the contracting officer knowingly ignored substantial evidence establishing a lack of integrity by TS Info.

A second protest was submitted by Kaufman DeDell Printing, Inc. (Kaufman), after initially protesting directly to Labor about the mishandling of an amendment to its bid. Labor has acknowledged that Kaufman sent its bid amendment by certified mail five days prior to the bid opening, that the bid amendment was received at the office designated in the solicitation prior to award, but that it was not brought to the attention of the contracting officer until after the contract award. The amendment was returned unopened to Kaufman, which contends that the amendment proposed prices below those of the contractor and was fully responsive.

Finally, the Silver Spring Blueprinting Company (SSB) submitted an untimely protest to this Office. However, we believe the matter

should be considered under the exception provided in our Bid Protest Procedures for considering untimely protests which raise issues significant to procurement practices and procedures. 4 C.F.R. 20.2(c) (1976).

The essence of SSB's protest is that the specifications of the IFB do not accurately represent the actual needs of the agency, inasmuch as TS Info has not been required to perform in accordance with the specifications. Specifically, SSB states that Labor has not enforced the requirement that four stations be equipped with bond paper multiple reduction photocopiers, because the contractor has been permitted to furnish less costly and less efficient equipment which performs the same function in a two-step rather than a one-step operation. The firm contends that such forbearance is unfair to those bidders who established prices on the assumption that adherence to the specified equipment would be strictly enforced.

Labor readily admits permitting use of the nonconforming equipment and states that, previous to this protest, it was not aware that there was a conflict between its intent and the exact language of the IFB. In fact, Labor states that ABS, the previous contractor, was also permitted to perform the reduction and copy operation with the less efficient equipment. The agency further states that because the end product provided by TS Info complies with its needs, it does not consider further action necessary.

The information available to us indicates that the costs to be incurred by adherence to the specifications would be significantly greater than the costs of providing the nonconforming equipment now being used. The precise cost difference depends largely upon the volume of the copy reduction requirements, with the difference being greater for low volumes than for high volumes.

It is clear, therefore, that the specifications overstated the Government's needs. The solicitation was therefore defective. *Vista Scientific Corporation*, B–185170, March 31, 1976, 76–1 CPD 212. What is not clear, however, is whether the defective specifications resulted in actual prejudice to either Kaufman, ABS or SSB. In this connection, Kaufman contends that its mishandled and unopened bid amendment proposed prices below those of TS Info, ABS and SSB, even though it proposed to use the more expensive equipment specified in the IFB.

At this time, there is no acceptable way to determine with certainty whether the bidders would have submitted lower prices if the specifications had correctly reflected Labor's actual needs. Among the seven bidders, there was a maximum difference in the evaluated monthly station prices of $760, and two of the bids were within $350 of the contract prices. Therefore, we cannot say that lower prices would have

been unlikely even if the actual needs had been clearly stated or that free and open competition was achieved. Moreover, we believe that an undue competitive advantage may have been given to those bidders possessing information not found within the confines of the solicitation. It is a fundamental requirement that advertised invitations must contain sufficient information for the intelligent preparation of bids so that the maximum competition possible is obtained. 49 Comp. Gen. 347 (1969).

The decision as to whether corrective action should be recommended depends on what, under all of the circumstances, would be in the best interest of the Government. In this regard, we note that Article V of the contract schedule reserves to the Government the right to cancel the contract at any time upon thirty days' written notice. We therefore recommend that the requirement be resolicited on the basis of revised specifications clearly reflecting Labor's actual needs. If, after resolicitation, it is determined that it would be advantageous to the Government to accept one of the proposals received, then the contract with TS Info should be terminated for the convenience of the Government.

As this decision contains a recommendation for corrective action to be taken, 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 (1976), which requires the submission of written statements by the agency to the House and Senate Committees on Governmental Affairs concerning the action taken with respect to our recommendation.

[B–187997]

Claims—Assignments—Contracts—Assignee's Rights No Greater Than Assignor's

Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign.

Claims—Priority—Wage Claims, etc. *v.* Taxes

Claims by workers underpaid under Contract Work Hours and Safety Standards Act and Service Contract Act would prevail over Internal Revenue Service (IRS) tax liens which matured subsequent to underpayments.

Contracts—Payments—Bankrupt Contractor—Rights of Unpaid Workers *v.* Trustee in Bankruptcy

Courts, as well as this Office, recognize that unpaid laborers have equitable right to be paid from contract retainages and unpaid workers would have higher pri-

ority to funds withheld from amounts owing contractor than would trustee in bankruptcy.

Set-Off—Contract Payments—Assignments—Tax Debts

While IRS is entitled to setoff against assignee-bank any of its claims against assignor-contractor which matured prior to assignment, agency may not set off claims which matured subsequent to assignment.

Claims—Assignments—Contracts—Notice of Assignment—Payment Status

Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer.

Claims—Assignments—Contracts—Conflicting Claims—Assignee *v.* IRS

Federal tax lien, unrecorded as of time of bankruptcy, is invalid against trustee in bankruptcy which would have priority to funds withheld from amount owed bankrupt contractor under contract.

Corporations—Officers—Debts—Corporation Not Liable

Where president of corporation leaves corporation and enters into several contracts with Government, as individual, claims against individual arising out of contracts may not be set off against funds withheld from amount owing corporation under contract which was signed by individual in his capacity as president of corporation.

In the matter of Cascade Reforestation, Inc., April 11, 1977:

The Director, Administrative Services, Forest Service, United States Department of Agriculture, has requested an advance decision concerning the proper disposition of $14,706 withheld from Cascade Reforestation, Inc. (Cascade), which is currently in bankruptcy.

The $14,706 was earned by Cascade for performance of Forest Service contract 13-1540, awarded on September 14, 1972, for tree planting in the Kaniksu National Forest. This amount was withheld pending the outcome of a Department of Labor (DOL) investigation of wage underpayments which, according to a letter dated October 25, 1972, from the DOL Regional Administrator, amounted to $11,500.

There are several claimants and potential claimants to the funds, and this Office has been requested to determine the priority of these claims. We have also been requested to answer the question of whether claims against Mr. Jerry M. Sullivan, who was president of Cascade until September 1, 1972, may be settled with funds owed Cascade.

The following have submitted claims for the money:

1. The Bank of Willamette Valley, Dallas, Oregon, on September 29, 1972, was assigned all monies due under contract 13-1540.

2. The trustee in bankruptcy for Cascade, by letter of December 29, 1972, requested that, after the wage claims were satisfied, the balance should be remitted to him.

3. By letter of June 21,1976, DOL requested that the Forest Service transfer $7,366.76 to them for disbursal. This amount represents $6,427.73 finally determined due on contract 13–1540, plus $939.03 due on region 3 contract 11–512 resulting from Service Contract Act (SCA) wage underpayments. Also, in connection with contract 13–1540, a total of $230 was assessed for 23 violations of the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, *et seq.*, and a total of $108.07 is owned in CWHSSA overtime back wages. Included in the $6,427.73 due under contract 13–1540 is an amount claimed by Klamath Reforestation, Inc. (Klamath), which did some of the tree planting as a subcontractor for Cascade. However, the contracting officer was not advised of the subcontract arrangement and, therefore, Klamath was not an approved subcontractor. Klamath's four underpaid employees were considered employees of Cascade.

4. Also, the DOL, San Francisco, in its letter of July 30, 1976, requested the transfer of $2,075.36 due on contracts made by Mr. Jerry M. Sullivan as an individual. According to DOL, this amount covers $702.13 wage underpayments under region 3 contract 14–1772 and $1,373.23 wage underpayments under region 4 contract 15–1137. In connection with the latter contract, the Forest Service is claiming $1,253.15 resulting from a default action against Mr. Sullivan. Also, the Forest Service claims an amount of $4,489.89 for reprocurement costs resulting from a default by Mr. Sullivan as an undividual on contract 02904.

5. The Internal Revenue Service (IRS) is claiming an amount of $10,914.24 plus accrued interest and penalty covering Cascade's tax indebtedness.

6. The Peerless Insurance Company, the surety on the performance bond under contract 13–1540, has requested that the monies on hand be withheld until the period for filing claims has elapsed. However, since this was a performance bond, once work was completed the surety's obligation would cease. No payment bond was required on this contract.

Regarding the question of whether claims against Mr. Sullivan arising out of contracts between Mr. Sullivan as an individual and the Government may be settled with funds owed Cascade, we recognize that the Government has the same right as any other creditor to apply the unappropriated monies of its debtor, in its hands, to the extinguishment of debts due. *United States* v. *Munsey Trust Company*, 332 U.S. 234 (1947). However, this common law right of setoff

would not be applicable in the present case, since the evidence of record indicates that the contracts between the Government and Mr. Sullivan were entered into by Mr. Sullivan as an individual, many months subsequent to both the Cascade contract and Mr. Sullivan's departure from Cascade. It has been held that a duly organized business corporation enjoys an identify separate and apart from its stockholders, directors and officers. *Gottlieb* v. *Sandia American Corporation*, 452 F.2d 510 (1971). As a separate legal entity, a corporation cannot be required to pay legal obligations which are not its own. See *Missouri Pacific Railroad Company* v. *Slayton*, 407 F.2d 1078 (1969). We are of the view that the above rule can be extended to Mr. Sullivan in connection with the liabilities he incurred individually, since there is no evidence that, after September 1, 1972, Cascade acquiesced or agreed to assume Mr. Sullivan's future liabilities or that Mr. Sullivan was in any way connected with Cascade. This being the case, the claims against Mr. Sullivan arising out of his contracts with the Government may not be settled with funds owed Cascade under contract 13-1540.

It is recognized that unpaid laborers have an equitable right to be paid from contract retainages. B-178198, August 30, 1973. Also, see *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962), where the court gave priority in withheld funds to a surety (who had paid laborers and materialmen) over the trustee in bankruptcy. In a similar case, *Hadden* v. *United States*, 132 Ct. Cl. 529 (1955), the court, in giving priority to the claims of unpaid laborers over the claim of the trustee in bankruptcy, stated:

> * * * In cases referred to above, the plaintiff was a surety company, asserting rights derived from its payment of laborers and materialmen. If this right is enforcible, the laborers and materialmen, in whose shoes the surety in those cases stood, must have had rights. * * *

Thus, we conclude that the request by DOL for $7,366.76 covering wage underpayments would have priority over any claim by the trustee in bankruptcy. The trustee in bankruptcy apparently recognizes this priority since, as previously mentioned, only the balance of the funds has been requested after the wage claims have been satisfied.

Regarding the priority of claims as between unpaid workers and the assignee, the court in *The National City Bank of Evansville* v. *United States*, 143 Ct. Cl. 154, 163 F. Supp. 846 (1958), stated, in pertinent part:

> It is well established that * * * by assignment the assignee could acquire no greater rights than its assignor. * * *

Contract 13-1540 contained a provision allowing the Government to withhold funds pursuant to the CWHSSA and the SCA to satisfy unpaid wage claims and CWHSSA liquidated damages.

The DOL, pursuant to SCA, determined that the assignor had underpaid its employees in violation of this act, and an amount sufficient to satisfy these unpaid wage claims was withheld from monies owing under the contract. Thus, the assignor had no right in the withheld fund, at least to the extent of the wage claims, to transfer to the assignee. Accordingly, it is our view that the claims for unpaid wages would have priority over the claim by Cascade's assignee. See B–178198, August 30, 1973. According to the record, the assignee had no objections to the wage claims being given priority over its claim.

Concerning the priority between the unpaid wage claims and IRS's tax lien, this Office has held that available funds should be applied first to the wage underpayments. B–170784, February 17, 1971, B–161460, May 25, 1967. Under the circumstances of the present case, we are of the view that priority should be given to the payment of unpaid wage claims in the amount requested for disbursal by DOL.

In regard to the priority between the IRS and the assignee, both the courts and this Office have held that in the absence of a no-set-off provision in the contract, the Government, i.e., the IRS, is entitled to set off against the assignee-bank any of its claims against the assignor-contractor which had matured prior to the assignment. *South Side Bank & Trust Co.* v. *United States*, 221 F.2d 813 (1957), B–170454, August 12, 1970. Also, see *Acme Electrical Supply, Inc.*, B–185962, April 7, 1976, 76–1 CPD 234. However, under the common law applicable to assignments, debts of the assignor which mature after an assignment is made may not be set off against payments otherwise due the assignee.

In this regard, in 37 Comp. Gen. 318 (1957), we stated:

> * * * If the assignment of the contract proceeds was made before the tax became due, there would be no property or right to property owned by the taxpayer to which the lien could attach, at least to the extent of the assignee's entitlement to such proceeds.

In the present case the contract does not contain a "no set off" provision. However, we are advised that IRS sent out a tax assessment letter for $6,894 on December 18, 1972, and another assessment letter for $637.52 on June 18, 1973. It is on these two dates that IRS's claims matured. See 26 U.S.C. § 6321. Thus, since the assignment was effective as of September 29, 1972, the assignee would have a higher priority to the funds than would the IRS.

As to the priority between the assignee and the trustee in bankruptcy, generally, where, as in the present case, the assignee has filed its assignment with the Government agency involved in the contract to be performed by the bankrupt, in accordance with the Assignment of Claims Act, 31 U.S.C. § 203, 41 U.S.C. § 15 (1970), it will have per-

fected the assignment to the extent that the assignment cannot be attached by the trustee in bankruptcy. See *Scarborough* v. *Berkshire Fine Spinning Associates*, 128 F. Supp. 948 (1955). Thus, the assignee would have a higher priority to the funds than would the trustee in bankruptcy.

However, under section 60(a) of the Bankruptcy Act, 11 U.S.C. § 96(a), the assignment may be set aside or voided if the trustee in bankruptcy can prove that there was a preferential transfer. In order for there to be a preferential transfer, the following elements must be present: (1) a transfer of any of the property of a debtor; (2) for the benefit of a creditor; (3) for or on account of an antecedent debt; (4) made or suffered by such debtor while insolvent; (5) within 4 months before the filing of the petition initiating a proceeding under the Act, and (6) the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. *Diamond Door Co.* v. *Lane-Stanton Lumber Company*, 505 F.2d 1199 (1974). In the present case we note that the notice of assignment was dated September 26, 1972, and acknowledged on September 29, 1972, while the letter from the trustee in bankruptcy requesting setoff against the withheld funds is dated December 29, 1972. This would indicate to us that element number (5) above, i.e., the assignment was made within 4 months of the date the bankruptcy petition was filed, is present. However, the evidence of record is insufficient to establish the presence of the other required elements. Of course, should it be established that all six elements did, in fact, exist in connection with the assignment, the trustee in bankruptcy would have a higher priority to the withheld funds than would the assignee. However, it should be kept in mind that the mere fact that the assignment was made within 4 months of bankruptcy does not mean that the assignment was preferential. See *Cumberland Portland Cement Company* v. *Reconstruction Finance Corporation*, 140 F. Supp. 739 (1953). Should the above-mentioned elements exist in the present case, we must consider whether the IRS or the trustee in bankruptcy would have a higher priority to the funds.

In *United States* v. *Speers, Trustee in Bankruptcy*, 382 U.S. 266 (1965), the court held that a Federal tax lien, unrecorded as of time of bankruptcy, was invalid against a trustee in bankruptcy. Thus, in the present case the trustee would have a higher priority to the funds than would the IRS, since evidence of record indicates that the bankruptcy petition was filed prior to December 5, 1972, which predates both IRS tax liens.

Accordingly, the full amount of the wage claims under contracts Nos. 13–1540 and 11–512 should be satisfied from the withheld funds.

Next, any CWHSSA wage underpayments under contract 13–1540 and liquidated damages should also be paid from the withheld funds. However, the sum of $337.07, representing the $108.07 CWHSSA underpayments under contract 13–1540 and $230 CWHSSA liquidated damages, should be retained by the Forest Service pending receipt of findings and recommendations which will presumably be contained in the DOL report promised by the Assistant Regional Administrator for Wages and Hours in a June 31, 1976, letter, after which these amounts may be disbursed in accordance with normal procedures. The balance of the funds should be remitted to the assignee, the Bank of Willamette Valley, provided that it is determined that the assignment was not a voidable preference. If it is determined that the assignment was a voidable preference, the balance should be remitted to the trustee in bankruptcy.

[B–186313]

Contracts—Protests—Timeliness—Basis of Protest—Date Made Known to Protester

Since protester's contention that it only became aware of protest when it learned facts concerning contents of successful proposal is reasonable and not refuted, limitation on filing begins to run from that time and protest is timely.

Contracts—Negotiation—Competition—Preservation of Systems Integrity

Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by General Accounting Office (GAO), mission of protecting health and safety of miners will be delayed for up to a year if recompetition results in termination of proposed award. Even assuming accuracy of claimed costs and delays—which have not been explained or analyzed in detail—confidence in competitive procurement system mandates recompetition, where improperly awarded Automatic Data Processing (ADP) contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not.

Contracts—Negotiation—Offers or Proposals—Best and Final—Discussions—Disclosure

To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester.

Contracts—Negotiation—Disclosure of Price, etc.—Auction Technique Prohibition

When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects

of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible.

General Accounting Office—Recommendations—Contracts—Recompetition of Procurement—Administrative Difficulties No Deterrent

Possible administrative difficulties attending recompetition of improper award in determining performance period, residual value of offered equipment, and treatment of services already performed by incumbent contractor do not constitute reasons to change prior recommendation for recompetition.

In the matter of Honeywell Information Systems, Inc., April 13, 1977:

The Department of the Interior, by letter dated December 20, 1976, and Honeywell Information Systems, Inc. (Honeywell), by letter dated December 21, 1976, have requested that we reconsider our decision in *Burroughs Corporation*, 56 Comp. Gen. 142 (1976), 76-2 CPD 472. Our decision sustained the protest of Burroughs Corporation (Burroughs) against the award of a contract to Honeywell for the acquisition of an automatic data processing (ADP) system by the Mine Enforcement and Safety Administration (MESA) of the Department.

We sustained the protest after finding several irregularities in the protested procurement, which are summarized as follows: (1) the award to Honeywell (for services over a possible 65-month period) was based on an unacceptably late best and final offer, which was intended to correct a timely received but unacceptable "best and final" communication; (2) no fixed or finitely determinable price was proposed in the timely communication as required by the request for proposals; (3) Honeywell's final technical submission was technically unacceptable because it contained a significantly different equipment configuration from that which passed the benchmark tests; (4) Honeywell was improperly permitted to correct its proposal deficiencies after the closing date for receipt of proposals; (5) payment of "separate charges" set forth in Honeywell's contract in the event the Honeywell system was terminated prior to the end of the intended "systems life" would violate statutory funding limitations.

Because of our findings, we concluded:

* * * Burroughs and Honeywell [should] be afforded an opportunity to submit new price proposals in a manner consistent with this decision. After negotiating with these sources, the Honeywell contract should be terminated for the convenience of the Government, if Burroughs is the successful offeror. In this event, Honeywell should not be paid separate charges; rather, settlement with Honeywell is required to be made in a manner consistent with the T for C clause. If Honeywell is successful at a price lower than that contained in its

existing contract, the contract should be modified in accordance with Honeywell's final proposal. Also, a clause in the RFP to be used for resoliciting price proposals should expressly provide that Honeywell, as a condition of participating in the resolicitation, agrees to the modification scheme. * * *

The Department requests reconsideration of our prior decision on two basic grounds: (1) a recompetition would not serve the Government's best interests in view of the substantial costs and the severe impact on MESA's programs which would result if the Honeywell contract were terminated; and (2) the recompetition between Burroughs and Honeywell would not be on an equal basis, particularly because Burroughs was provided with a complete copy of the initial delivery order under the Honeywell contract which contained a detailed description of the ADP system configuration and the unit prices.

Two of Honeywell's bases for reconsideration are essentially the same as the Department's two bases. In addition, Honeywell asserts that Burroughs' protest was improperly found to be timely under our Bid Protest Procedures because we improperly allocated the burden of proving Burroughs' protest was not timely on Honeywell and the Department rather than requiring Burroughs to show by conclusive evidence that its protest was timely.

There is no requirement in our Bid Protest Procedures requiring proof of timeliness by conclusive evidence, notwithstanding the cases and authorities concerning rules of evidence generally applicable in the courts cited by Honeywell. Burroughs met the burden of showing the protest was timely in this case by stating when it became aware of the bases for protest concerning the contents of the Honeywell proposal—which was not publicly disclosed. There is no evidence indicating that Burroughs' statement—which is reasonable under the circumstances—is incorrect. (Contrast *Reliable Maintenance Service, Inc.*, B–185103, May 24, 1976, 76–1 CPD 337, where the agency contradicted with objective evidence the protester's contentions regarding when it became aware of the bases for protest.) Thus, to use Honeywell's terms, Burroughs has established—in the absence of conflicting evidence—"when" (rather than "how") it came into knowledge of the facts giving rise to the protest. Since Honeywell concedes that the "when [rather than the how] is vital," we do not agree that Burroughs also had to establish "how" it became aware of facts which it was not otherwise entitled to possess. Moreover, since neither Honeywell nor the Department has questioned our determination that the award to Honeywell was improperly based on a late price proposal containing separate charges violative of the funding statutes and a technically unacceptable final technical submission, it would be incongruous for our Office to now ignore the clearly improper Honeywell award because of this procedural contention.

Both the Department and Honeywell have asserted that if Burroughs should win the recompetition, it would be very costly to the Government and MESA's mission would be severely affected. In brief, these costs and effects are said to be:

(1) Termination costs of at least $500,000;
(2) Possible "separate charges" liability;
(3) Duplicate operation costs;
(4) Conversion costs of $358,173;
(5) Previously expended conversion costs of $1,128,000;
(6) Equipment investment loss of $47,900;
(7) Support services of $113,779;
(8) Delay in implementing a possible Burroughs' system, thereby hindering MESA's mine enforcement responsibilities.

Honeywell has claimed that termination for convenience costs will be at least $500,000. This figure has not been documented, analyzed, or verified by the Department. Honeywell has also implied that it may be entitled to the separate charges quoted in its proposal. As discussed in our prior decision, payment of these charges would not be authorized.

MESA states that the Government will have to pay duplicate operation costs if the system is changed. For example, the Burroughs and Honeywell systems will have to be run in parallel, MESA insists, for 1 month if Burroughs wins on recompetition. Honeywell asserts that the systems will have to be run in parallel for 4 months—at a price of $34,500 per month.

The Department also estimates that it will cost at least $358,173 in additional software conversion costs to change from the Honeywell system to the Burroughs system. This estimate consists entirely of payroll costs of MESA employees. The Department has also obtained a conversion cost estimate of $434,325 from a GSA term contractor. Burroughs—which supplied MESA's ADP requirements prior to the installation of the Honeywell system—has stated that it understands that at least a portion of the programs converted from its old system—a lesser system than presently required—to the Honeywell system was first converted into Burroughs' COBOL 68 programs. These intermediate programs are apparently consistent with the more powerful ADP system proposed by Burroughs in this case and, if still in existence, would appear to lessen conversion difficulties and costs.

In addition, MESA claims: (1) a prospective loss of $1,128,000 (mostly MESA payroll costs) to convert programs to the Honeywell system—a process which is approxiamtely 70 percent complete (These are primarily lost investment costs rather than "out-of-pocket" costs payable as a result of a change in systems. This investment should not

completely be lost by such change, e.g., the documentation revisions and augmentations for the software in the Honeywell system are useful for either system.); (2) a prospective loss of $47,900 in equipment (RCP707 remote job entry terminal device and eight disc packs) purchased from Honeywell under the contract (This equipment would have to be reprocured to conform to a Burroughs configuration. This cost also represents a lost investment rather than an "out-of-pocket" cost.); (3) a prospective loss of $113,779 in supporting services supplied by Honeywell. (These services would have to be reprocured from Burroughs if it is successful on the recompetition; however, Burroughs denies that the cost of these supporting services will be as much as $113,000.)

Honeywell has also asserted that MESA will lose substantial investment costs (not less than $1,000,000)—most of which are outlined by the Department above—if Burroughs wins the recompetition. The investment costs mentioned by Honeywell include hiring and training of personnel, computer usage, communications, construction and/or plant modification and software conversion. A substantial portion of these costs may be duplicated by converting to the Burroughs system. Also, the Government will lose the benefit of purchase credits that it has earned on the Honeywell system. (The amount of the earned credits are claimed to be proprietary by Honeywell.)

Honeywell and the Department assert that in view of these costs and since the value of the Honeywell contract if all 65 months in options are exercised is only $2,511,856, it would not serve the Government's best interests to terminate the contract. The bulk of the Department's and Honeywell's claimed costs has not been documented.

The Department also claims that reprocurement from Burroughs and the resulting inherent delay of converting from the Honeywell system to a Burroughs system would seriously impede and delay MESA's mine enforcement and safety program responsibilities. The Department states that this impact is even more serious than the above-outlined significant costs that may have to be incurred.

For example, MESA's Civil Penalty and Assessment program has been redesigned for the Honeywell system during the past year, partially in response to congressional criticism regarding delays in implementing the program. The Department states that this program is heavily dependent on Honeywell's particular data base management system, query language and telecommunications software—which are unique to Honeywell hardware. The Department claims that 10 man-years of effort over a calendar year would be needed to convert this program to a Burroughs system. Also, assessment program personnel would have to be diverted for such a task, which would cause further

case backlogs in enforcement activities (The Program is apparently not on the Honeywell system yet, however. Further, the Department says that "minor modifications to the system are required before the product is formally released to the user.").

The Department also contends that the Metal/Non-Metal Inspection program—an especially critical program created to spot hazardous trends in mines and to analyze the effectiveness of mine inspections—and the Mine Health and Safety Academy program will be delayed for at least 6 months if a change to the Burroughs system is made. These programs are also apparently not on system yet.

Finally, MESA says that it is revising regulations governing the monitoring of respirable coal dust—the cause of pneumoconiosis (black lung disease)—which allegedly cannot be implemented without an ADP system. The Department asserts that a change in contractors would delay for 3 months the implementation of the regulations.

In summary, the Department asserts that, in addition to the substantial costs which may be involved in recompeting the procurement, MESA's basic mission of protecting the health and safety of the Nation's miners may be adversely affected by the recompetition and that ADP support may well be delayed for a year if Burroughs wins the recompetition.

In determining whether it is in the Government's best interest to undertake action which may result in the termination of an improper award, certain factors must be considered, such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact of the user agency's mission. 51 Comp. Gen. 423 (1972); *Dyneteria, Inc.*, B-178701(1), February 22, 1974, 74-1 CPD 90; *DPF Incorporated*, B-180292, September 12, 1974, 74-2 CPD 159; *PRC Computer Center, Inc.*, 55 Comp. Gen. 60 (1975), 75-2 CPD 35; *C3, Inc.*, B-185592 August 5, 1976, 76-2 CPD 128; *ABC Cleaning Service, Inc.*, B-187659, February 4, 1977, 77-1 CPD 91.

Before issuing our decision, we were aware that the Government would incur termination costs and substantial conversion costs in the event Burroughs won the recompetition. Also, we presumed that MESA's ADP requirements would be disturbed if the contractor had to be changed.

Notwithstanding our awareness of these costs and effects, we recommended action leading to a possible termination because, in part, of the knowledge that the improperly awarded contract might otherwise extend for 65 months—assuming all options are exercised as is still

presently planned by MESA. It remains our view that the competitive procurement system is hardly served by permitting the prejudicial effects of an improperly awarded contract to stand for 5 years.

Moreover, in the contracting officer's report on the protest to our Office, it was specifically represented with regard to the technical evaluation of the final technical submissions of Burroughs and Honeywell:

> * * * As a result of that evaluation, both proposals were found to be technically responsive to the RFP and therefore acceptable. * * *

As discussed in our prior decision, Honeywell proposed an equipment configuration in the final technical submission which was clearly inconsistent with its benchmarked configuration. Since even a cursory comparison of this submission with the benchmarked Honeywell configuration reveals this deficiency, we are unable to ascertain from the record how MESA could possibly have determined that Honeywell's final technical submission was "technically responsive to the RFP and therefore acceptable."

Consequently, confidence in the integrity of the competitive procurement system would best be preserved, and thereby the Government's best interests served, by recompeting this requirement as recommended in our prior decision, notwithstanding the Department's and Honeywell's assertions—even assuming their accuracy—regarding the high cost and the adverse impact on MESA's mission that may result. (Although for the purpose of discussion we assume the accuracy of the claimed costs and delays, we observe that the varying estimates of the projected delays (3-, 6-, and 12-month periods) attending recompetition and the prospective termination charges have not been explained in any detail. Further, the projected delays seem to be inconsistent with the 21-week period on which MESA's cost estimate for converting to the Burroughs system is based.) Also, the alleged adverse impact on MESA's mission in the event Burroughs wins the recompetition can be reduced. For example, any switch-over of contractors need not be done hastily. Moreover, critical ADP requirements could possibly be met on an interim basis by sharing time on other Honeywell equipment.

The Department and Honeywell assert that the recompetition would not be on an equal basis because Burroughs was provided by MESA with a complete copy of the initial delivery order to Honeywell. This order detailed the initial system configuration of Honeywell with unit prices. Honeywell was not provided any data regarding Burroughs' price and technical proposals other than Burroughs' total evaluated price.

The previous record did not indicate that Burroughs had this special knowledge. We agree with the Department and Honeywell that such knowledge gives Burroughs an unfair competitive advantage on the recompetition. Consequently, as a condition to competing on the re-

solicitation, Burroughs must consent to the Department's disclosure to Honeywell of information from Burroughs' best and final cost proposal regarding the details of the proposed initial equipment configuration and unit prices. This information should be substantially comparable to that disclosed in Honeywell's initial order. See *TM Systems, Inc.*, 55 Comp. Gen. 1066 (1976), 76-1 CPD 299, where a similar remedy was recommended. Burroughs has said that this procedure would not be objectionable.

The Department and Honeywell state that such a disclosure would create an improper auction situation. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. 48 Comp. Gen. 536 (1969); 53 *id.* 253 (1973); *TM Systems, Inc., supra.* Indeed, the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. *Cf. Minjares Building Maintenance Corp.*, 55 Comp. Gen. 864 (1976), 76-1 CPD 168.

Honeywell seeks to distinguish *TM Systems, Inc., supra*, because it involved a preaward situation rather than a postaward situation where significant performance has been accomplished. We are not persuaded by this distinction where the award, as here, is improper. Honeywell also cites two prior decisions—50 Comp. Gen. 222 (1970) and *RCA Corporation*, 53 *id.* 780 (1974), 74-1 CPD 197—for the proposition that when proposals are improperly disclosed, the procuring agency should make an award, *if possible*, without further discussions so as to avoid an auction. However, these cases involved *otherwise proper awards*—apart from the impropriety of the price disclosure. Moreover, unlike the cited cases, it is not possible to avoid an auction-like situation here to allow for a nonprejudicial recompetition insofar as possible, if the prejudicial effects of the improper award are to be overcome. To this extent, the mandate for fair and equal competition which flows from the procurement statutes must be considered to override any regulatory restrictions (see, e.g., Federal Procurement Regulations § 1-3.805-1(b) (Amend. 153, Sept. 1975)) on auction techniques. *Cf. Minjares, supra.*

Honeywell also asserts that since its low evaluated price and configuration was the one on which award was based, it is the only proposal of significance, so that the disclosure of comparable information from Burroughs' proposal will not place the competition on an equal basis. While we recognize that it may not be possible to achieve total equality on the recompetition, the disclosure of substantially comparable information from the Burroughs price proposal will elimi-

nate, insofar as possible, Burroughs' unfair competitive advantage resulting from the knowledge of the initial order. See *TM Systems, Inc., supra*, at 1071.

The Department has referenced certain other problems which it states will not allow equal competition under a new call for best and final offers. For example: should the resolicitation be based on a 53-month or 65-month basis, since Honeywell will have provided 12 months of service prior to any new award? Also, the Department states that Honeywell would not have to propose the $113,000 in support services that it has already provided, while Burroughs will have to provide these services. Also, since Honeywell will be proposing the already installed equipment while Burroughs may well propose new equipment, the evaluation of the equipment's residual value would affect each offeror differently.

We recognize that total competitive equality in the recompetition may not be possible to achieve in view of Honeywell's ongoing performance under the contract. Such is the case to some degree in all reprocurements of improperly awarded contracts. Nevertheless, we believe the Government's best interests will be served by a recompetition in this case. Unfair competitive advantages should be eliminated to the extent legal and feasible. For example, we would not object to a recompetition based on either a 53-month or 65-month basis, so long as both offerors are proposing on the same basis and the Government's actual requirements are being solicited.

The recommendation in *Burroughs Corporation, supra*, that new best and final offers be solicited from Burroughs and Honeywell is modified in accordance with this decision. Otherwise, our prior decision is affirmed.

[B-186545, B-187413]

Contracts—Specifications—Restrictive—Particular Make—Special Design Features

Specification provision which excluded particular design is without a reasonable basis where rationale for exclusion appears founded on erroneous concept of design.

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics—Unduly Restrictive

Protester's contention that listed salient characteristic of brand-name item is unduly restrictive is sustained where even offeror of brand-name item took exception to requirement.

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics—Absence of Empirical Evidence for Need

In absence of empirical evidence that brand-name item has salient characteristic supposedly representing Air Force's minimum need, and in view of brand-name

offeror's specific exception to that characteristic, General Accounting Office (GAO) advises Air Force that no further deliveries of brand-name item should be accepted until item's compliance with salient characteristic is established through actual demonstration.

Contracts—Negotiation—Requests For Proposals—"All Or None" Proposals

Request for proposals (RFP) contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in the future, oral amendments to solicitations be confirmed in writing.

In the matter of the Raymond Corporation and Schreck Industries, April 13, 1977:

Raymond Corporation (Raymond) and Schreck Industries (Schreck) protest the award of a contract to Clarklift-West (Clark) for twelve forklift trucks under request for proposals (RFP) F04699-76-09129 issued by the Sacramento Air Logistics Center (Sacramento), McClellan Air Force Base, California.

Raymond contends that some of the specifications used by Sacramento were defective, in that they unnecessarily restricted competition and were impossible of performance. We conclude below that one specification requirement has been shown not to have a reasonable basis. In addition, the brand-name offeror took exception to braking performance requirement which was said to be a salient characteristic of his product. In view thereof, we are advising the Secretary of the Air Force that as-yet undelivered trucks should not be delivered until it has been shown through actual demonstration that the brand-name item can meet the braking performance requirements of the solicitation.

At the conclusion of the negotiations, Sacramento orally amended the solicitation from one for a firm quantity of 12 trucks to one for a basic quantity of 4 with an option for an additional 8. Schreck, who was the low offeror for the basic quantity but not the entire quantity, objected to the evaluation of offers on the basis of the entire quantity. We have concluded that the Air Force adequately expressed its intent and that the evaluation was consistent with the unamended, written provisions of the RFP. However, we are recommending that in the future, oral amendments to solicitations be confirmed in writing.

Background

In 1975, Sacramento was using an aging fleet of electric forklift trucks which had been purchased to a military specification in the

early 1960's. Because of a lack of spare parts, the trucks were being condemned as they broke down, severely impairing Sacramento's ability to perform its mission.

We understand that the usual method by which Sacramento could satisfy its needs was to have the trucks purchased for it by the Defense Logistics Agency's Defense Construction Supply Center (DCSC) at Columbus, Ohio. In the case of forklift trucks destined for the Air Force, DCSC uses the Warner Robins ALC Purchase Description WRNE 3930–328 (hereafter referred to as WRNE–PD).

The WRNE–PD resulted from a project initiated by the Air Force in September, 1969, for the purpose of evaluating narrow aisle forklift trucks and to collect data for the preparation of a specification for such a truck. After visits to several manufacturers and users for aid in determining which forklift would be most suitable for evaluation, the Air Force selected a Raymond Model 821. One of these trucks was obtained through a bailment agreement with the manufacturer, its operation was studied, and as noted in a subsequent Air Force report, use of the resulting WRNE–PD would "allow competitive procurement of narrow aisle forklifts having performance characteristics equal to the Raymond Model 821 truck which was tested at [Warner Robins]."

However, in the instant case Sacramento did not satisfy its needs through DCSC, which would have used the WRNE–PD. The record shows that prior to submitting its purchase request, the using activity reviewed the WRNE–PD and rejected it because:

1. it did not describe a truck intended for use outside on sloped ramps in inclement weather and for round trip distances in excess of 500 feet;

2. it required compliance with certain military specifications and standards excessive to Sacramento's needs, which could be satisfied by commercial standards;

3. it contained requirements for preproduction testing and for certain design features in excess of those required to fulfill Sacramento's minimum needs;

4. it contained other design requirements which were less than those dictated by Sacramento's minimum needs; and

5. it was silent as to certain features which Sacramento thought necessary for operator safety and to reduce maintenance down time.

The record also shows that as a result of its past experience, Sacramento was concerned about the future availability of spare parts for equipment built to a military specification in contrast to commercial, off-the-shelf machines.

Sacramento therefore requested and received permission to procure the forklift trucks on a "Brand Name or Equal" basis. Sacramento's position is that this method of procurement, which uses the Clark Model NP500–45 as the brand name item, will provide a commercial, off-the-shelf item meeting Sacramento's needs at lower cost and with faster delivery than trucks specially manufactured to the WRNE–PD. In view of the urgent need for these items, the procurement was negotiated under the "public exigency" authority of 10 U.S.C. § 2304(a)(2).

The Raymond Protest

Early in the negotiation process, Raymond began to point out to Sacramento those areas in which the "Brand Name or Equal" purchase description differed from the WRNE–PD. Raymond took the position that a number of salient characteristics of the Clark brand name item called out in the RFP were design features exclusive to Clark and were unnecessarily restrictive of competition. However, Raymond agreed to furnish these items except for the salient characteristic "Brakes on idler wheel assembly." As to this requirement, Raymond advised Sacramento:

> Your requested brakes on the idler wheel assembly are exclusive to Clark Equipment, and if you insist upon same, please consider this as a formal protest to this procurement. You are attempting to dictate the design of a truck! Establish a performance and test requirement as they have done in [the WRNE–PD], but let the manufacturer determine the design in order to meet a valid requirement. The [WRNE–PD] *does not specify brakes on the idler wheel.* * * * [Italic in original.]

An amendment to the RFP then effected some changes to the specifications and the delivery schedule. (More than one offeror objected to the original delivery schedule as being unreasonably short.) Permissible dimensions of the roller mast and wheels were changed and other design requirements were deleted from the specifications. However, Raymond declined to acknowledge amendment M001 and filed a protest with our Office.

Although two offers received in response to amendment M001 met the specifications, only one source could meet the delivery requirements. A second amendment, M002, was then issued which made significant changes to the wheel and braking requirements. Because of their criticality to this protest, some background information on these items is required.

The trucks at Sacramento must operate indoors and out, including upon exterior concrete ramps of a slope of 10 percent, which at times are wet. (Early references by Sacramento to 10-*degree* ramps, which are steeper than 10-*percent* ramps, found in some of the material quoted below, were in error.) One concern of Sacramento's, which in-

fluenced the specifications for wheels and brakes, was to obtain the most effective system for safely stopping the vehicles on these ramps.

The electric narrow aisle reach trucks being procured are supplied in four- or six-wheel configurations. Two of the wheels are located beneath the rear of the main body of the truck, which contains the batteries, motors, control mechanisms and the operator's compartment. One of the wheels, through which the motive power is applied, is the "drive" wheel; the other wheel is the "idler" wheel. In front of the operator is a collapsible mast which can be raised and lowered hydraulically. Attached to the mast are two forks upon which the load is placed. By means of a pantograph, the forks may be made to extend and retract. Extending from the front of the main body of the truck and lying outside the forks are two horizontal members called "outriggers." At the end of each outrigger may be a single "load" wheel or an assembly of two smaller load wheels.

In these trucks, braking is accomplished through one or both of the rear wheels—the drive and idler wheels—not through the forward load wheels. The design of the Clark brand name product incorporates brakes in both rear wheels; i.e., "dual wheel braking." Raymond's design incorporates a brake drum on the drive motor shaft. Therefore, braking on the Raymond product is accomplished solely through the drive wheel.

The RFP requirement for "brakes in the idler wheel assembly" was consistent with Clark's dual wheel braking system, but was not a feature of the Raymond design. Amendment M002 deleted this requirement and provided that the idler wheel need not have a rubber tread if a one-wheel braking system was employed. Only if a dual-wheel system was used were both rear wheels to have a rubber tread, which provides more traction than the urethane tread commonly offered.

These changes to the RFP were favorable to the consideration of Raymond's product. However, Amendment M002 added the following "salient characteristics" with regard to braking:

> (2) Paragraph F.1., *Brand Name Evaluation*, delete that part of Item 0001, *Brakes*, which reads "Brakes on idler wheel assembly" and substitute in lieu thereof the following characteristics:
>
> a. Regardless of the brake system design, the vehicle will be required to comply with the vehicle stopping criterion established in paragraph 410, ANSI Standard B56.1–1975.
>
> b. The vehicle braking system shall be capable of bringing the vehicle to a smooth, controlled, non-slueing stop within a distance of fifteen (15) feet on the 10° descending ramp from a full rated speed with zero load and with a maximum rated load on both dry and wet surfaces.
>
> c. In addition, because of the environment in which the vehicle must operate, the vehicle braking system must be capable of bringing the vehicle to a smooth controlled stop under all combinations of the following situations:
>
> (1) Both forward and reverse direction of travel.

(2) Speeds up to maximum rated.
(3) Level surfaces.
(4) 10° ramps (downward direction).
(5) Dry or wet surface.
(6) Zero load and maixmum rated load.
(7) Slueing shall not exceed 2° under all above test conditions.

d. Performance under simulated emergency stop conditions will equal or exceed the above specifications for ramp and level operations.

e. The vehicle braking system must continue to provide braking in the event of power train failure.

There appears to be no question about the ability of Clark or Raymond equipment to comply with (2) a above. However, paragraphs (2) b, c and d imposed additional braking requirements. Paragraph (2) e could not be satisfied by Raymond's standard design which brakes on the power train.

Raymond acknowledged receipt of this amendment but advised Sacramento that "we will not withdraw our protest until you utilize [the WRNE–PD] * * *. Your purchase description remains deficient and inadequate for this procurement." None of the other three offerors in acknowledging the amendment made any comment about the new braking requirements, a circumstance which the contracting officer admits caused her "concern."

At this time, Sacramento was directed by its superior command to use the WRNE–PD and a realistic delivery date of 60 days after award for the first four of the twelve units. However, Sacramento requested and received authorization to proceed with the procurement using its own brand–name–or–equal purchase description in view of the urgent need for the items and Sacramento's representation that the trucks had to negotiate 10-degree concrete slopes, which at times would be wet. In granting Sacramento permission to use its own purchase description, the superior command noted:

[The WRNE–PD] has been established for use in the procurement of narrow aisle fork lift trucks. It requires negotiation of ten percent grades on dry concrete. [Sacramento], however, sets forth a requirement for the negotiation of slopes having a *10 degree angle with the horizontal. Ten degrees represents a 17.63 percent grade.* In addition, [Sacramento] specifies wet concrete. *These two significantly more severe conditions* establish the following: Equipment which meets the performance requirements of [the WRNE–PD] will not necessarily meet those of [Sacramento]. For this reason, use of the "brand name or equal" specification with a description of environmental conditions peculiar to [Sacramento] is the preferred approach and satisfactory for the purpose. [Italic supplied.]

It has since been conceded that Sacramento erred in stating it had 10-degree ramps, thus negating one of the two specific bases upon which Sacramento was permitted to use its own specification.

Sacramento then issued amendment M003 to the RFP. The amendment added the requirement that the manufacturer certify that its product met the specifications, extended the time for delivery and

restated the braking requirements as follows (changes from the prior amendment are underscored):

Brakes:

x. Foot actuated parking brake
y. Regardless of the brake system design, the vehicle will be required to comply with the vehicle stopping criterion established in paragraph 410, ANSI Standard B56. 1–1975.
z. The vehicle braking system shall be capable of bringing the vehicle to a smooth controlled stop on 8%, +2%, —0%, descending ramps from a full rated speed with zero load and with maximum rated load on both wet and dry surfaces.
aa. In addition, because of the environment in which the vehicle must operate, the vehicle braking system must be capable of bringing the vehicle to a smooth controlled stop under all combinations of the following situations:
(1) Both forward and reverse direction of travel.
(2) Speeds up to maximum rated.
(3) Level surfaces.
(4) 8%, +2%, —0%, ramps (downward direction).
(5) Dry or wet surface.
(6) Zero load and maximum rated load.
bb. Performance under simulated emergency stop conditions will equal or exceed the above specifications for ramp and level operations.
cc. The vehicle braking system must continue to provide braking in the event of power train failure.

Omitted from Amendment M003 were the prior requirements that the truck come to a "non-slueing" stop "within a distance of fifteen (15) feet" and that "slueing shall not exceed 2°" under all test conditions.

Raymond responded to Amendment M003 by reiterating its position that it would not withdraw its protest until Sacramento used the WRNE–PD specification. None of the other three offerors could meet the delivery schedule. One of those offerors (Yale) was determined to be outside the competitive range because of technical deficiencies in its proposal and its failure to meet the delivery schedule. Raymond was also determined to be outside the competitive range in view of its refusal to acknowledge Amendment M001 and its insistence in response to Amendments M002 and M003 that Sacramento adopt the WRNE–PD specification.

Amendments M004 and M005 were sent only to Clark and Schreck, who were deemed technically acceptable. These amendments extended the delivery schedule, made the offeror's compliance with the Government's required delivery schedule a prerequisite to consideration of the offeror's price, and made it clear that the braking requirement applied to "cement" ramps. Clark was awarded contracts for all twelve trucks despite the pendency of Raymond's protest and that of Schreck, which is discussed separately below.

Raymond has consistently taken the position that Sacramento should have used the WRNE–PD specification. In its report to this Office, the Air Force argues that Raymond has attempted to dictate

to Sacramento specifications which do not meet that activity's needs. Yet, as we have related, in the midst of the procurement Sacramento was directed to use the WRNE–PD, and was relieved of that obligation on the basis of its representation that its trucks had to operate on 10-degree (over 17 percent), wet ramps. Less than two weeks thereafter, Sacramento issued Amendment M003 to the solicitation which described the ramps as "8%, +2%, −0%." (This would indicate that the ramps vary in steepness from 8 percent to 10 percent, but they have been generally characterized as "10 percent" ramps.)

There is no indication in the record that Sacramento advised its superior command that half of the factual basis upon which Sacramento was permitted to use its own specification was in error. This necessarily creates some question as to the validity of the decision to permit Sacramento to use its own specification, although the fact that the ramps were wet at times in itself might have led to the same conclusion.

The Sacramento specification contains an extensive list of salient characteristics of the Clark Model NP500–45 truck. Blanks were provided for bidders offering an "equal" item to identify the item and to describe its salient characteristics. Raymond has objected to a number of these characteristics on the basis that they have the effect of restricting competition to Clark equipment without representing an essential need of the agency. At the same time, Raymond offered to provide a number of these items at additional cost, or the agency has indicated that Raymond's comparable feature was acceptable to it. For this reason, we see no need to discuss Raymond's objections to several salient characteristics listed in the RFP.

The unresolved disputes in this case concern the salient characteristics related to braking. One of these is that the "vehicle braking system must continue to provide braking in the event of power train failure." The truck offered by Raymond does not meet this requirement. Sacramento presents this as a safety feature which was particularly important for a vehicle operating on ramps. The agency's views appear to have been reinforced by a visit made by two Sacramento employees to a nearby commercial organization where they observed Eaton, Raymond and Clark trucks in operation. Their report states in part:

> Mr. N —— [the forklift maintenance supervisor at the installation] stated that the Raymond lift used a pin to connect the drive motor to the drive axle. In the event of pin failure the Raymond lift has no braking capability which is a very unsafe feature. Mr. N —— stated that failure of the pin has been experienced, and that operation of the lift on ramps under loaded conditions would increase the probability of failure.

Raymond objects to the demonstration on the basis that the observers were shown 24-volt Raymond trucks delivered from 1961 through

1969, not Raymond's current 36-volt model, yet were shown relatively new Clark trucks. Raymond feels that it was placed at an unfair disadvantage because the disparity in the trucks observed was not made clear to the Sacramento employees. In addition, Raymond has shown that its drive motor is connected to the axle not by "a pin" but by two Woodruff keys. Raymond further states that "to the best of our knowledge, we have never had a power train failure in the over twenty years we have used this design."

We have long recognized the broad discretion offered procuring activities in drafting specifications reflective of their minimum needs, and will not disturb a procuring activity's determination of minimum needs unless it is clearly shown to be without a reasonable basis. See *Tele-Dynamics Division of Ambac Industries, Inc.*, B–187126, December 17, 1976, 76–2 CPD 503. The only potential cause for a "drive train failure" identified by the Air Force is the possibility that "a pin" may break. Since Raymond has shown this to be an erroneous depiction of its unit's construction, we do not believe a reasonable basis has been shown for this restrictive requirement.

The RFP also set forth certain minimum braking performance standards. At their most severe, they require the truck to come to a "smooth controlled stop" when the brakes are applied to a vehicle traveling at its full rated speed, carrying its maximum rated load on a 10-percent, wet, concrete ramp. The Air Force has stated that in requiring the vehicle to come to a "smooth controlled stop" its "concern here is not primarily the stopping distance, but that the vehicle does not slew in such a manner that the load will be dumped [and] the vehicle overturned, thus causing injury to the operator or other personnel in an emergency stopping situation."

Raymond argues that the braking performance characteristics are unrealistic and cannot be met by the type of truck being procured by the Air Force:

> * * * we know of no narrow aisle electric truck, regardless of the braking system employed, that could possibly comply with the brake requirements * * * If the brakes were applied on a Clark Model NP500–45, or any other truck of this type, when the truck was traveling at maximum speed (5.7 M.P.H.) with rated load (4,000 lbs.) down a 10% wet cement ramp, it would *never* come to a smooth, controlled stop. When the brakes were applied, the truck would go into an uncontrolled slide and eventually come to a stop. We doubt the initial application of the brakes would even slow the truck down. * * * [Italic in original.]

After a conference on this protest, at which the braking requirements were extensively discussed, we asked the following questions of the Air Force and received the answers shown:

> Question: What engineering evidence does the Air Force have in its possession indicating that any commercial forklift truck of the kind in question can be brought to a smooth controlled forward stop on an 8%, +2%, −0%, descending ramp from its full rated speed with a maximum rated load on a wet surface?

Answer: Our primary engineering evidence has been the certificate of conformance (COC) provided by Clarklift-West, Inc. and Schreck's indication in negotiations that it was willing to provide a COC that its forklift would meet our requirement. These braking standards were originally imposed to permit Raymond to offer a proposal, and Raymond chose not to do so. Also see answer [to following question].

Question: What engineering evidence does the Air Force have in its possession indicating that the Clark Model NP500 45 has as one of its salient characteristics the ability to stop in the above described manner?

Answer: In our requirement, we were indicating our most severe possible combination of conditions to be encountered should the operator inadvertently exceed the established normal operating limits. The requirement does not describe normal operating limits established for the equipment, but the requirement was so defined to provide a maximum degree of safety. The Clark Model NP500-45 has been observed in daily use, and it has demonstrated excellent controllability during braking on ramps with no evidence of slewing. We have no indications that these forklifts would not continue to provide the same degree of control and braking necessary for operator safety if the forklifts were operated at our maximum stated conditions. One of the reasons that we believe that the Clark NP500-45 is able to stop in a controlled manner is its two brake system, although a one wheel braking system that performs as well would have been acceptable. Also, by applying the Clark NP500-45 braking capability of 15 percent drawbar drag to the ANSI Standard B 56.1 table for ramp calculations, it is indicated that it would come to a stop within 20 feet on a 10 percent dry descending ramp. As a result of getting such satisfactory response on a dry ramp, it is the engineers' judgment that it would come to a smooth controlled stop on a wet ramp, although the exact stopping distance cannot be computed. It should be noted here that the exact stopping requirement does not state a distance in which the forklift is required to stop but only that the forklift will come to a smooth controlled stop on such grade and under such conditions. Clarklift-West has furnished a COC with each NP500-45 forklift delivered on our requirement.

The essence of the Air Force position, therefore, is that it is primarily relying on the manufacturer's certification and on a prediction based upon performance on a dry ramp. It does not appear that the trucks have ever been actually tested at the most severe conditions required by the sepcifications. In none of the Clark technical literature with which we have been provided does the manufacturer claim it can achieve these braking requirements.

Perhaps the most compelling evidence that the braking requirements were unreasonable is that *in its offer, Clark took exception to them.* One of the "salient characteristics" listed in the RFP for the Clark Model NP500–45 was that it come to a "smooth controlled stop" on "8%, +2%, −0% descending ramps." On the line adjacent to this characteristic, intended for the use of those offering products "equal" to the Clark brand name item, Clarklift-West inserted "8%." Again, at the end of the listing of all the conditions under which this braking was to be achieved, Clarklift-West inserted "Maximum 8%."

We think these entries reasonably can be read in only one way: that Clarklift-West limited its guarantee of braking performance to ramps no steeper than 8 percent. This appears to have been the contemporaneous understanding of Sacramento, whose technical evaluators wrote "8% max" in the Clark column adjacent to the requirement for "8%, +2%, −0% wet/dry ramp." There is no indication that the

8-percent limitation was ever discussed with Clark and the limitation was eventually incorporated into Clark's contract.

As shown above, the "primary engineering evidence" upon which the Air Force has relied in concluding that these trucks can meet the braking requirements has been Clark's execution of a Certificate of Conformance, plus Schreck's indicated willingness to provide such a certificate. The certificate states, in pertinent part, that "All technical requirements of the contract are satisfied. Quality and performance are in accordance with the contract, the specifications, and any references and associated contractual drawings and documents." In view of the presence of "8%" and "Maximum 8%" in Clarklift-West's contract, Section F ("Description/Specifications"), there is a substantial doubt as to whether that firm has certified to anything more than that the truck meets the braking requirements on ramps of 8 percent or less.

It therefore appears that not only is there a lack of empirical data to show that the Clark item meets the braking performance requirements, but that the offeror took specific exception to those requirements. As discussed below in connection with Schreck's protest, the contract awarded to Clarklift-West was for a basic quantity of four trucks with an option for eight trucks. We understand that the basic quantity and three of the option quantity have been delivered to the Air Force. Delivery of the remaining five trucks is expected to be made no later than Apirl 30, 1977. By separate letter of today, we are advising the Secretary of the Air Force that the remaining five trucks should not be accepted until it has been shown through actual demonstration that the Clark NP500-45 truck can come to a "smooth, controlled stop" under the most severe combination of conditions set forth in the solicitation.

The Schreck Protest

Schreck's protest concerns the way in which the bids were evaluated. From the outset, this procurement has been for 12 trucks. As issued, the RFP required delivery of 6 trucks within 30 days and the remaining 6 within 60 days. As the result of offerors' complaints about the brevity of the delivery schedule and direction from higher headquarters, the delivery schedule was lengthened. The last formal amendment to the RFP required that 12 trucks be delivered in three groups of four at 60, 90 and 150 days after receipt of notice of award. Section D of the RFP, entitled "Evaluation Factors for Award," advised that "award will be made to the low aggregate offeror for all items [on an 'All or None' basis]."

Sacramento had not been permitted to proceed with an award pending disposition of Raymond's protest. At the same time, the need

for the trucks became more urgent. A compromise was struck on August 31, 1976, when Sacramento was orally authorized to divide the requirement for 12 trucks into an award for 4 trucks with an option for 8.

Telephonic negotiations were then held with Clarklift-West and Schreck: the new terms of award were given orally, and no formal amendments to the RFP were issued. The record of negotiations kept by the contracting officer states in part that:

> As he [Mr. Campbell, Schreck's representative] was reasoning his delivery on the option quantity of 8, at the outset of negotiations, he expressed a delivery on the 8 to be: 4 ea in 112 days & 4 ea in 150 days.
>
> As discussions progressed Mr. Campbell asked the [contracting officer] about the probability of the exercise of the option and he was told that it would be. [The contracting officer's superior], who was also on the phone, interrupted the discussion to state to Mr. Campbell that "It is an option, however." He [Mr. Campbell] then changed the delivery on the 8 to be all within 112 days after award of the contract. * * *

In her report to our Office, the contracting officer further stated that in the negotiations "A firm *quantity of 12 forklifts* (immediate award of 4 units, option quantity of 8 units), *delivery* and the *option*, with the *intent to award*, were emphasized." [Italic in original.]

Offers were then received from Schreck and Clarklift-West. The low offeror varied with the quantity. Schreck was low by $16.87 on the basic quantity of 4; Clarklift-West was low by $3,891.61 for the entire quantity of 12. Bids were evaluated on the latter basis, and the contract was awarded to Clarklift-West.

Schreck contends that it was never adequately advised that offers would be evaluated on the basis of price for the basic and option quantities; it states it thought the award would be made on the basis of price for the basic quantity alone. In this connection, Schreck notes that the Air Force failed to amend the RFP to add the "Evaluation of Options" clause set out in Armed Services Procurement Regulation (ASPR) § 7-2003.11(b). Schreck maintains that it might have been able to offer a more advantageous price had it realized the entire quantity of 12 would have been awarded.

The contracting officer acknowledges that the ASPR § 7-2003.11(b) clause should have been incorporated into the RFP. Nevertheless, it is her opinion that Schreck should have realized that the entire quantity of 12 trucks was to be procured. We agree.

We do not believe that the oral negotiations with Schreck and Clarklift-West can be considered in a vacuum apart from all that preceded them. The procurement began as one for 12 trucks and the increasingly urgent need for them was repeatedly stressed by the Air Force in its reports on the Raymond protest, upon which Schreck had commented. In response to Schreck's question as to the probability

of the exercise of the option, Schreck was told that it "would be." We believe that the record as a whole supports the position that Schreck was adequately advised that all 12 trucks would be procured. In addition, we note that the award was consistent with the written, unamended Section D of the RFP providing for award on "all items" on an "All or None" basis. Although for these reasons Schreck's protest is denied, we are suggesting to the Air Force that in the future, oral amendments of solicitations should be confirmed in writing.

[B-187876]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, etc.—Dependents—Move Concurrent With Member's Restricted Duty

A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibited) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it.

In the matter of Lieutenant Colonel Charles D. Robinson, USMC, April 14, 1977:

This action is in response to a letter dated July 28, 1976, and enclosures, from Major M. G. Sorensen, USMC, Disbursing Officer, Marine Corps Air Station, Kaneohe Bay, Hawaii, requesting an advance decision as to whether Lieutenant Colonel Charles D. Robinson, USMC, 524-40-5561, may be paid station allowances on behalf of his dependents as a result of their move to Hawaii incident to the transfer of Colonel Robinson to a restricted tour of duty in Okinawa. The request has been assigned PDTATAC Control No. 76-24, and forwarded to this Office by Per Diem, Travel and Transportation Allowance Committee endorsement dated November 19, 1976.

Pursuant to orders dated May 4, 1976, as subsequently endorsed, Colonel Robinson was detached from duty at the Army War College, Carlisle Barracks, Pennsylvania, and transferred on a permanent change of station (PCS) to the 3rd Marine Amphibious Force, Fleet Marine Force, Okinawa, a restricted overseas duty station, to which the movement of his dependents was prohibited. Colonel Robinson's orders authorized transportation of his dependents, privately owned vehicle and household goods to Hawaii as a designated location in accordance with paragraph M7005-2, Volume 1, Joint Travel Regula-

tions (1 JTR). The orders also stated that it was the intention of the Commandant of the Marine Corps to assign Colonel Robinson to duty at Headquarters, Fleet Marine Force, Pacific (which we understand is in Hawaii), following his tour of duty in Okinawa. Incident to those orders Colonel Robinson moved his dependents and household goods to Hawaii and then traveled on to his new duty station in Okinawa.

Although no voucher accompanied the Disbursing Officer's submission, apparently Colonel Robinson is claiming overseas station allowances as a member with dependents who is assigned to duty in a restricted area. Such station allowances, prescribed under 37 U.S.C. 405 (1970), include (1) housing and cost-of-living allowances, (2) interim housing allowances, and (3) temporary lodging allowances. See 1 JTR, paragraph M4300–4.

As indicated in the submission, under 1 JTR, paragraphs M7005-2, item 3 (change 268, June 1, 1975), and M8253–2b (change 279, May 1, 1976, and change 246, August 1, 1973), when a member is transferred by PCS orders from a duty station in the United States to a restricted station, transportation of dependents and household goods may be authorized by the Secretary concerned to Puerto Rico, Alaska, Hawaii, or any territory or possession of the United States. However, 1 JTR, paragraph M4305 specifically provides that a member who is reassigned from a permanent duty station in the United States to a permanent duty station in a restricted area outside the United States is not entitled to station allowances on behalf of his dependents when the dependents move to a designated place outside the United States. Paragraph M4305 indicates that such prohibition is based on 49 Comp. Gen. 548 (1970).

The Disbursing Officer indicates that had Colonel Robinson designated a place within CONUS for transportation of his dependents and household goods, the Government would have incurred the expense of transporting them to that place and then later to Hawaii upon Colonel Robinson's assignment there. He further indicates that the designation by the member of Hawaii for transportation of his household goods was not, therefore, purely for his own convenience, but also for the convenience and lesser expense of the Government. He states that insofar as it is the policy of the Marine Corps to advise members assigned to restricted overseas tours of their subsequent assignments whenever possible and then to authorize transportation of dependents to the vicinity of that subsequent assignment, it seems reasonable that other associated allowances such as station allowances should be payable.

By endorsement to the submission, dated October 18, 1976, by direction of the Commandant of the Marine Corps, the following comments are made on the case:

The literal terms of the applicable statutory regulations, subparagraph M4305-2 of the Joint Travel Regulations, would preclude payment of station allowances in the case described in the basic correspondence.

The prohibitory provision is based on 49 Comp. Gen. 548. The conclusion drawn in that decision was necessitated by the absence of any connection between the overseas location of dependents and the place of duty of their sponsor when the member was transferred from CONUS to a restricted overseas station. The decision recognized as valid the regulations under which station allowances may be authorized a member whose transfer is from an unrestricted to a restricted overseas station and whose dependents either remain in the vicinity of his old station or move to another area overseas. In this situation, a connection is deemed to exist between the dependents' presence overseas, even though in a different locale from the old station, and the member's duty at the old station. The member's having been on duty at that station is rendered the equivalent of being on duty there for the purpose of 37 U.S.C. 405, which authorizes payment of station allowances to "a member who is on duty outside of the United States or in Hawaii or Alaska." The relationship of dependents' location to their sponsor's place of duty refers to duty required of the member in the past.

In the case at hand, the presence of dependents overseas is related to duty to be required of the member in the future. It is believed that it may be permissible under 37 U.S.C. 405 to consider the presence of dependents overseas to be connected with a scheduled duty assignment of their sponsor on the same basis as a connection is now made with a completed assignment. Assuming this to be valid, then the present case introduces a factor that was not involved in the situation on which the prohibitory provision of the statutory regulations is based.

That endorsement also presents the following questions:

Since 37 U.S.C. 405 has been construed so that the phrase "a member who is on duty outside of the United States or in Hawaii or Alaska" may in effect encompass a member who *was* on such duty before transfer to a restricted tour, would the law permit similarly considering that the phrase may also include a member who *will be* on such duty when a connection exists between this future duty and the place to which his dependents move incident to his assignment to a restricted tour, as in the case of the subject named claimant?

If the answer to the preceding question is in the affirmative, would the literal terms of item 1 of subparagraph M4300-1 and subparagraph M4305-1 of the Joint Travel Regulations be binding in the present case until changed, notwithstanding that the considerations underlying these provisions apparently did not include the existence of a connection between the place of a future duty assignment and the location of dependents, which characterizes the present case?

In 49 Comp. Gen. 548, *supra*, we were asked whether the JTR's could legally be amended to authorize the payment of station allowances in the case of a member whose dependents made an authorized move from a place in the United States, as defined in the regulations, to a designated place in Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States upon his PCS from a duty station in the United States to a restricted area. We stated the view that no authority exists for payment of station allowances under 37 U.S.C. 405 on account of dependents if the dependents' residence outside the United States has no connection with the member's duty assignment and cited 38 Comp. Gen. 531 (1959).

Basing our decision in 49 Comp. Gen. 548, *supra*, on an examination of the purpose for the dependents' move from the United States to an

overseas residence as called for by 38 Comp. Gen. 531, 532, *supra*, we stated at page 550:

> * * * In cases where dependents, who are not authorized to accompany a member to an overseas duty station, move from the United States to an overseas residence as a designated place, *their overseas residence is purely a matter of personal choice and, as such, is separate and apart from the member's overseas duty.* [Italic supplied.]

In 38 Comp. Gen. 531, at page 532, we noted that the regulations, then as now, provide that station allowances are authorized for the purpose of defraying the average excess cost of living experienced by members on permanent duty at places outside the United States. We concluded:

> * * * Thus, the controlling regulations not only provide that the dependents must reside in the vicinity of the member's station; they specifically set forth the only purpose for which the allowance may be paid.

Therefore, in that case we held that a member transferred to France, whose wife was a French National and whose dependents were already living in France at the time of the member's assignment there, was not entitled to station allowances since his dependents were residing in the vicinity of his duty assignment solely through coincidence and not due to the member's duty assignment.

In the case presented here, the move to the overseas residence by Colonel Robinson's dependents apparently was a matter of both their personal choice and their anticipation, based on the intent manifested by the Commandant of the Marine Corps in the member's orders, that he would be permanently assigned to Hawaii upon completion of his restricted tour of duty. In this regard, their residence in Hawaii may not be "purely a matter of personal choice"; rather, their Hawaii residence may be, to an extent, related to the member's anticipated overseas permanent duty assignment, although not directly related to his current assignment.

The statute authorizing station allowances, 37 U.S.C. 405, is a broadly written statute which provides for increased cost-of-living allowances, as authorized by the Secretaries concerned, incident to a permanent duty assignment outside the United States. The language of that provision does not preclude payment of station allowances under circumstances presented here. The test, discussed above, to examine the purpose of the move of a member's dependents to an overseas residence, which we have employed beginning with our decision in 38 Comp. Gen. 531, *supra*, provides protection against unwarranted abuse of entitlements payable to members under 37 U.S.C. 405. *Cf.* 43 Comp. Gen. 525 (1964). In accordance with their authority and in line with 49 Comp. Gen. 548, the Secretaries have specifically prohibited payment of station allowances in cases in which the dependents' move to a designated place outside CONUS incident to a member's

PCS from a station inside CONUS to a restricted station. Therefore, under current regulations, Colonel Robinson is not entitled to the station allowances claimed.

Concerning whether the regulations may be changed to authorize payment of station allowances in situations such as this, the statute is sufficiently broad to support a carefully drawn regulation which would provide such allowances in cases in which a member's dependents move from the United States to outside the United States or to Alaska, Hawaii, or a United States territory or possession, incident to that member's assignment to a restricted tour if the purpose of their move is primarily based on their reliance upon a properly issued official determination that the member will be reassigned, immediately following completion of the restricted tour, to the locale to which the dependents moved. Any such change in the regulations should be made so as to preserve the principles set out in 49 Comp. Gen. 548. We believe, however, that as currently written, paragraph M4305 clearly prohibits payment and, although that prohibition is based on 49 Comp. Gen. 548, we do not believe that its clear prohibition can be avoided in Colonel Robinson's case. Therefore, payment to him is not authorized.

The questions are answered accordingly.

[B-188052]

Transportation—Rates—Tariffs—Construction—Against Carrier

A tariff should be construed strictly against the carrier who drafted it, but a tariff must be given a fair reading and any unreasonable ambiguities cannot be imparted.

Transportation — Rates — Tariffs — Ambiguous — Ambiguity Unfounded

No ambiguity is found in tariff when one tariff item clearly makes rates in tariff inapplicable on shipments having certain physical characteristics, and directs tariff user to another tariff for applicable rates on those shipments.

In the matter of the E. L. Murphy Trucking Company, April 14, 1977:

E. L. Murphy Trucking Company (Murphy), in a letter dated December 14, 1976, requests review by the Comptroller General of the United States of settlement actions taken by the former Transportation and Claims Division (TCD) of the General Accounting Office, now a part of the General Services Administration (GSA). See the General Accounting Office Act of 1974, 88 Stat. 1959, approved January 2, 1975. The review is being made pursuant to the provisions of Section 201(3) of that Act, 49 U.S.C. 66(b) (Supp. V, 1975), and of 4 C.F.R. 53.1(b)(1) and 53.2 (1976).

The settlement actions concern two shipments. One was a shipment of gun mount parts, NOI, transported under Government bill of lading (GBL) No. H–1522808, dated January 22, 1973, from Fridley, Minnesota, to Newport, Rhode Island. The dimensions of the shipment were 16′ long x 13′4″ wide x 9′ high.

The other shipment was machinery, NOI, transported under GBL No. H–1523087, dated March 2, 1973, from Fridley, Minnesota, to Philadelphia, Pennsylvania. The dimensions of this shipment were 21′ long x 13′5″ wide x 11′2½″ high.

Murphy states that rates on the shipments are derived from Item 5050 of National Association of Specialized Carriers Tender No. 200.

TCD contends that Item 335 of E. L. Murphy Trucking Co. Freight Tariff 1–B, MF–I.C.C. 22 (Tariff 1–B), applies to the shipments. Item 335 states in part:

> Shipments tendered for transportation in excess of eight (8) feet in width will be accepted subject to the following provisions:
> * * * Width over 12 feet, but not over 14 feet * * * 130 percent of applicable rate * * *

The application of item 335 resulted in the issuance of a Notice of Overcharge (Form 1003) on each shipment; they totaled $799.57.

The overcharges were protested by Murphy based on Item 286 of Tariff 1–B, which, under the heading "NON–APPLICATION OF RATES," reads:

> Rates named in this tariff will not apply on shipments containing articles, which:
> (1) exceed 13 feet in width, * * *
>
> * * * * * * *
>
> "For rates and provisions to apply, see Agent W. A. Hallman's Heavy and Cumbersome Articles Tariff 1, MF–I.C.C. 5.

However, TCD's action was upheld by TCD's Review Branch; and upon Murphy's failure to refund the overcharges, they were deducted from other sums owed to Murphy. This resulted in Murphy's claims for $799.57, which were disallowed by GSA in the settlements here under review.

Murphy contends that Item 286 of Tariff 1–B provides for the non-application of the rates in Tariff 1–B on shipments exceeding 13 feet in width, and that therefore Item 335 of Tariff 1–B does not apply to the shipments. The Associated Motor Carriers Tariff Bureau, Inc., agrees; in a letter to Murphy, it states that: ". . . the exceptions to the application of rates in Item 286 distinctly provide that the tariff would not apply on articles exceeding 13 feet in width, notwithstanding any other rules and provisions of the tariff."

GSA contends that notwithstanding the existence of Item 286 of Tariff 1–B, Item 335 applies as it provides for a rate of "130% of the

applicable rate" on shipments over 12 feet but not over 14 feet wide. GSA concludes that there is an ambiguity in the language of items 286 and 335 of Tariff 1–B, an ambiguity that must be construed against Murphy as the publisher of the tariff.

Several well-established principles of tariff construction control the disposition of this case. A tariff must be given a fair reading and any unreasonable ambiguities cannot be imparted. *Great Northern Ry. Co.* v. *United States*, 178 Ct. Cl. 226, 244 (1967). In the interest of both the carrier and the shipper, a tariff should be free of any ambiguity or doubt. When the interpretation of a tariff is the issue, any ambiguity in the tariff provisions which in reasonableness permits misunderstanding and doubt by shippers must be resolved against the carrier, the party preparing the document. *A. E. West Petroleum Co.* v. *Atchison, T. & S.F. Ry. Co.*, 212 F.2d 812 (8th Cir. 1954); 55 Comp. Gen. 958 (1976); and 42 *id.* 203 (1962). However, it is important that the ambiguity or doubt be a reasonable one, totally avoiding a straining of the tariff's language. *Penn Central Company* v. *General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971). Once this is determined to be the case, the lower rate must be applied to the shipment. *United States* v. *Strickland Transp. Co., Inc.*, 200 F.2d 234 (5th Cir. 1952); *Emery Air Freight Corporation* v. *United States*, 499 F.2d 1255 (Ct. Cl. 1974); and *Western Grain Co.* v. *St. Louis–San Francisco Ry.*, 56 F.2d 160 (5th Cir. 1932).

Adhering to these principles, it seems clear that there is no ambiguity here. Item 286 of Tariff 1–B excludes the application of Tariff 1–B rates when shipments contain articles that possess certain physical characteristics. Once the shipment meets Item 286's specifications, Tariff 1–B rates do not apply and in clear language Item 286 directs the user of the tariff to Agent W. A. Hallman's Heavy and Cumbersome Articles Tariff 1, MF–I.C.C. 5, for the applicable rates and provisions. There would be no need to refer to Item 335 of Tariff 1–B.

Item 335 is not made a nullity by Item 286. Rather, only those shipments with the characteristics described in Item 286 are eliminated from Item 335. In fact, if the two shipments here involved were less than 12 feet wide, rather than over 13 feet wide, the rates in Tariff 1–B would have applied absent other lower applicable rates.

Action should be taken by GSA consistent with this opinion.

[B–186895]

Contracts—Specifications—Deviations—Descriptive Literature—Brand Name or Equal Item

Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in

fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause.

Contracts—Negotiation—Offers or Proposals—Deviations—Substitution—Beyond Contemplation of Solicitation Requirements

Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited.

Contracts—Negotiation—Awards—Validity

Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, subpart B, section 201.11, which is virtually identical to "Buy American Act," 41 U.S.C. 10(a)-(e), is incorrect. While true that American Medical Instrument Corporation (AMICO) substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offer will result in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award.

Contracts — Negotiation — Awards — Erroneous — Adjustment in Price

Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct, but General Services Administration has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation.

In the matter of McKenna Surgical Supply, Inc., April 15, 1977:

McKenna Surgical Supply, Inc. (McKenna), protests against the award of a contract to American Medical Instrument Corporation (AMICO) under solicitation no. FPZ-Z-TC-184-N-6-14-76, issued by the Federal Supply Service, General Services Administration (GSA), on behalf of the Agency for International Development (AID).

The solicitation, issued on May 20, 1976, was for medical kits and surgical instruments necessary for AID's voluntary contraception program. The solicitation provided a "brand name or equal" purchase description for 56 separate items to be combined into six different medical kits designed for the AID program. The date for receipt of initial proposals was June 14, 1976.

As an AID-financed transaction, this procurement was subject to the source origin requirements in AID Regulation No. 1, subpart B,

section 201.11, which implements section 604 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2354 (1970). This AID regulation was incorporated into the solicitation by article 14 of GSA standard form 1246. That portion of the regulation pertinent to the procurement specifies that the source of any commodity supplied under the contract must be a country authorized in the solicitation. In regard to commodities comprised of components, the regulation provides that the cost of components originating in a country other than the designated source country must not exceed 50 percent of the cost of all components. The source origin requirements, including the component provision are virtually identical to the requirements of the "Buy American Act," 41 U.S.C. § 10(a)–(e) (1970), and therefore will be applied here as though the "Buy American Act" does apply.

On June 25, 1976, the contract was awarded to AMICO, the lowest acceptable offeror. McKenna was advised of the award on June 28, 1976, and on July 7, 1976, filed its protest in our Office. McKenna contends that AMICO's offer materially differed with the solicitation's requirements. Specifically, McKenna argues that AMICO's offer deviated from the solicitation's requirements with respect to item No. 22 (reusable surgeon's gloves) by offering to supply disposable surgeon's gloves, item No. 48 (carbon steel surgical blades) by offering to supply stainless steel surgical blades, and items Nos. 27, 28 and 47 (surgical needles) by incorrectly listing these as domestic source items and, therefore, AMICO's offer did not comply with the 50 percent source origin requirement. On page 12 of the solicitation, it was stated that:

BIDDERS OFFERING OTHER THAN BRAND NAME ITEMS IDENTIFIED HEREIN SHOULD FURNISH WITH THEIR OFFERS ADEQUATE INFORMATION TO ASSURE THAT DETERMINATION CAN BE MADE AS TO EQUALITY OF THE PRODUCT(S) OFFERED (SEE CLAUSE 24 OF GSA FORM 1246).

The items being questioned by McKenna were all offered as equal items; however, no descriptive literature was submitted to assure that these items were, in fact, equal.

Item No. 22 of the solicitation required a unit price for:

22. Gloves, surgeon's *reusable* latex, Bard-Parker Catalog No. 2041, 2043. or equal. (Pairs of one dozen).

McKenna maintains that AMICO's offer materially deviated from the above purchase description based on a letter from AMICO's supplier stating that it planned to furnish AMICO a disposable rather than a reusable glove.

Prior to the closing date, AMICO indicated to the contracting officer that the glove supplied by Bard-Parker was no longer available and requested the name of a substitute supplier. The contracting of-

ficer informed AMICO that gloves manufactured by the Perry Rubber Company (Perry) were being supplied under a then existing contract pursuant to an identical purchase description. In addition, the contracting officer furnished AMICO the catalogue number (1040) of the Perry glove which the prior contractor, McKenna, had used to identify the glove. AMICO subsequently offered the Perry glove for item No. 22 designated by catalogue No. 1040.

Prior to the award of the contract, the contracting officer sought a formal assurance from AMICO that any item offered as a substitute for a brand name item would be an equal item. By mailgram dated June 24, 1975, AMICO stated:

> We certify that the cost of foreign items quoted does not exceed 50 percent of the cost of the total items per kit. We further certify that those items offered other than the brand specified are in fact equal to the brands specified.

Based upon this certification and the information furnished regarding item No. 22, which corresponded to that furnished in the prior contract, the contracting officer determined that AMICO's offer for item No. 22 complied with the purchase description in the solicitation.

After the contract was awarded, it was discovered that the number "1040" does not indicate whether a glove is disposable or reusable but refers to the type of packaging. It was also discovered that due to a misunderstanding between AMICO and Perry, Perry intended to supply disposable gloves. When AMICO requested a price from Perry, it cited the surgical procedures for which the glove would be used. Perry mistakenly assumed these procedures required a disposable glove. Perry does manufacture a reusable glove but refused to sell these gloves directly to AMICO. By mailgram dated June 30, 1976, AMICO changed its supplier of reusable gloves to the Pioneer Rubber Company.

It is our view that the contracting officer acted improperly by accepting item No. 22 in light of AMICO's certification of June 24 that the item was equal to the brand name specified in the solicitation. We do not believe that a mere promise to conform, such as AMICO's certification, satisfies the descriptive literature requirement of the brand name or equal clause. See 50 Comp. Gen. 193, 201 (1970). It is well settled that an offer of blanket compliance with the salient characteristics listed in a solicitation is not an acceptable substitute for required descriptive data on an equal product. See *Ocean Applied Research Corporation*, B–186476, November 9, 1976, 76-2 CPD 393.

McKenna contends that AMICO's offer deviated from the specifications for item No. 48, which stated:

> 48. Blades, surgical, carbon steel, size #15, sterile regular pack (6 blades to a package). V. Mueller Catalog No. SU–1415CS, or equal.

In this connection, McKenna asserts that AMICO actually offered stainless steel blades rather than blades made of carbon steel.

Prior to submitting its offer, AMICO inquired whether stainless steel blades could be furnished in lieu of carbon steel blades. It was advised that AID had prescribed a carbon steel blade for the medical kits. The contracting officer advised AMICO that if a blade of other than carbon steel was to be offered, the offer must clearly state so in a labeled exception; otherwise, the offer would be considered as an offer to supply the designated type of blade. AMICO submitted an offer which contained no exception or condition to the carbon steel blade requirement.

AMICO listed in its offer the firm of Medical Sterile Products to supply a carbon steel blade for item No. 48. We have been informed that most of the medical instrument industry presently supplies a stainless steel surgical blade rather than a carbon steel blade and Medical Sterile Products, although at one time a supplier of carbon steel blades, apparently is able to deliver only a stainless steel blade. GSA argues that in the absence of a labeled exception AMICO is bound to deliver carbon steel blades. In a letter dated August 4, 1976, AMICO recognized this and indicated it would supply a Bard-Parker carbon steel blade.

Notwithstanding the fact that AMICO took no exceptions and is bound to deliver carbon steel blades, the contracting officer improperly allowed AMICO to change its supplier after award. The contracting officer disregarded the underscored language on page 12. Clearly, she was on notice about a possible problem with this item since AMICO had raised a question about it during negotiations. Had the descriptive literature been supplied as required by the solicitation the contracting officer would have known that Medical Sterile Products does not manufacture carbon steel blades and could have requested AMICO to submit another supplier before an award was made. While Bard-Parker ostensibly would have been acceptable had it been offered before award, it is nevertheless a different offer than the one submitted by AMICO at the time of award. It is our view that such a substitution is beyond the contemplation of the solicitation requirements and is contrary to the procedures of negotiated procurements. *Cf.* 54 Comp. Gen. 593 (1973).

Finally, McKenna alleges that AMICO did not meet the domestic origin requirements of AID Regulation No. 1, subpart B, section 201.11, for items Nos. 27, 28 and 47. These items were described as follows:

27. Needle, Keith abdominal, triangular point, straight, 2½''. V. Mueller Catalog No. SN–30 or equal. (6 needles to a package; 12 needles equal 1 dozen.)
28. Needles, Mayo ½ circle, taper point, regular eye, Size 6. Miltex Catalog No. MS–112, or equal. (6 per package.)

* * * * * * *

47. Regular surgeon's needles. Cutting edge ½ circle, Size 2, stainless steel. (6 needles per packet, 12 needles=1 dozen.) V. Mueller Catalog No. SN-15, or equal.

AMICO's offer for these needle types listed Berbecker as the supplier. AMICO indicated that Berbecker was a domestic manufacturer; however, the Berbecker plant was located in England.

Although Berbecker was mistakenly listed as a domestic source, GSA is of the view that AMICO fully intended to furnish a domestic source medical kit. During negotiations, the contracting officer contacted AMICO to advise that the cost of foreign components listed in its offer appeared to exceed the maximum permitted by the AID regulation. AMICO responded by offering to substitute domestic components to bring its offer into conformance with the source origin requirements. These revisions were confirmed by AMICO in a letter dated June 17, 1976, and they pertained to items Nos. 14, 23, 28, 35, 40, and 45. Furthermore, AMICO stated on June 24, 1976, that the cost of foreign items does not exceed 50 percent of the cost of the total items per kit and therefore was in conformance with the source origin requirements of the applicable AID regulations. By letter dated July 2, 1976, AMICO changed suppliers of the needles to Hospital Marketing Services, a domestic supplier.

Even if AMICO had not been permitted to substitute a domestic supplier for Berbecker, the cost of the components of the kits using items Nos. 27, 28 and 47 still did not exceed 50 percent of the cost of the components of the designated source country.

Our Office has consistently held that where a bidder or offeror excludes no end products from the Buy American certificate in its bid or offer and does not indicate that it is offering anything other than domestic end products, the acceptance of the offer, if otherwise acceptable, will result in an obligation on the part of the bidder or offeror to furnish domestic end products, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award. 50 Comp. Gen. 697 (1971); B-174281, December 17, 1971; B-174184, May 24, 1972; B-174850, April 6, 1972; *Unicare Vehicle Wash, Inc.*, B-181852, December 3, 1974, 74-2 CPD 304. Accordingly, it is our view that the contention raised by McKenna concerning AMICO's compliance with the source origin requirement does not affect the validity of the award to AMICO.

On February 24, 1977, we were advised by McKenna that it was its belief that items Nos. 52 and 53 supplied by AMICO were foreign items rather than domestic as offered. We informed GSA of this advice and both GSA and our Office made an onsite investigation. On the basis of the information obtained, we have concluded that McKenna was correct in its belief.

GSA requested an explanation as to why these items did not meet the source origin as indicated by AMICO in its offer. In a letter dated March 8, 1977, AMICO takes the position that it inadvertently commingled foreign source components from medical kits under a similar concurrent contract with the World Health Organization with the domestic components from the GSA contract. AMICO states that to the best of its knowledge only 260 of these items have been affected and it is willing to make restitution to GSA in the amount of $1,424.52, which represents the difference between the foreign component which was supplied and the domestic item in AMICO's offer. GSA has accepted AMICO's offer of restitution.

In view of the noted deficiencies and irregularities the protest is sustained and we are recommending that the contract with AMICO be terminated for the convenience of the Government and that any outstanding kits, either undelivered or unordered, be resolicited.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committee named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and Committees on Appropriations concerning the action taken with respect to our recommendation.

[B-187051]

Contracts—Data, Rights, etc.—Disclosure—Trade Secrets

Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps.

Contracts—Negotiation—Offers or Proposals—Unsolicited Proposals—Status

Acceptance of protester's unsolicited proposal is not dispositive that TF-30 blade shroud repair process set out in proposal was proprietary data and that Government violated protester's rights by disclosing process in subsequently issued RFP, where acceptance was caused by administrative error and proposal's restrictive legend recognizes that nonproprietary common shop practices or process independently developed by Government or another firm are not protected against disclosure by Government.

Contracts—Data, Rights, etc.—Status of Information Furnished—Unsolicited Proposals

Although it is disputed whether protester's informal disclosure of alleged trade secret (repair process of TF-30 engine) to Air Force prior to submission of unso-

licited proposal containing proper restrictive legend was in confidence, legitimate proprietary rights of protester on alleged trade secret contained in proposal have not been defeated by prior Air Force-protester discussions of secret under repair contract or Air Force's limited disclosure of secret to TF-30 engine manufacturer for evaluation and testing purposes, since secret was not generally disclosed by Air Force prior to unsolicited proposal's submission.

Contracts—Data, Rights, etc.—Trade Secrets—Protection

Although trade secret can exist in combination of characteristics or components, each of which by itself is in public domain, there should be no trade secret protection, where combination of three steps—each of which is apparently common shop practice—seems to be determined by normal shop practice and alleged "owner" of trade secret expended no great effort to develop process, notwithstanding that knowledge of combined process benefited Air Force and "owner's" competitors under RFP disclosing process because it informed them that this particular process worked.

Contracts—Data, Rights, etc.—Use By Government—Basis

Where Air Force exercises prerogative in determining that TF-30 blade shroud weld repair process contained in protester's unsolicited proposal is incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding, process in unsolicited proposal is not entitled to trade secret protection, since there is mix of private and Government funds in developing process.

In the matter of the Chromalloy Division—Oklahoma of Chromalloy American Corporation, April 15, 1977:

BACKGROUND

Chromalloy Division-Oklahoma of the Chromalloy American Corporation (CDO) protests request for proposals (RFP F34601-76-R-2394, issued on May 12, 1976, by the Oklahoma City Air Logistics Center, Department of the Air Force (Air Force), Tinker Air Force Base, Oklahoma, for the repair of TF-30 jet engine turbine blades. CDO's protest is that the RFP should be canceled because amendment 0001 to the RFP dated May 17, 1976, incorporated documents containing data proprietary to CDO. Although proposals have been received, no award has been made pending this decision.

The allegedly proprietary data included in amendment 0001 described a weld repair method for the shrouds on TF-30 jet engine blades. This data was essentially the same as that contained in CDO unsolicited proposal UP-PPDM-477. This proposal was submitted on December 16, 1974, and was approved by the Air Force on May 4, 1976.

The TF-30 blade shroud repair process is to repair pitting in the blade caused by sulfidation. Sulfidation is essentially a chemical deterioration of the blade resulting when the blade is subjected to extremely high temperature during operation. Pitting reduces the integrity of the blade's structure and can reduce engine efficiency.

CDO has been the Air Force contractor for the repair of TF–30 engine turbine blades since July 30, 1974. When CDO received the award, TF–30 blades were not repaired if the shroud was pitted deeper than 0.010 inch. One reason for this policy was that sulfidation in excess of 0.010 inch on the TF–30 engine blade shrouds had only recently become a significant problem when CDO received the contract. In this regard, the Air Force asserts that enhanced repair procedures on TF–30 blades could only be implemented after adequate repairable blades had been accumulated to justify obtaining the necessary additional tooling, changing technical orders, and verifying the process.

The complete process for repair of TF–30 blade shrouds called for in amendment 0001 of the RFP reads as follows:

> First and second turbine blade shroud weld repair TF30–P3.
>
> a. Blades that exceed inspection limits for either cross shroud measurement or shroud edge pit limits will be weld repaired using the following procedure provided no defect exceeds *0.040" deep* into edge of shroud:
>
> 1. Remove scale in area to be welded by localized burnishing.
> 2. Preheat blade to 1000° F. (Argon atmosphere preferred).
> 3. Build up edge of shroud surfaces observing limits of attached sketch by TIG welding. Weld per Spec PWA 16–33 using *AMS 5837 (Inco 625) weld wire.* Buildup must be sufficient to permit finishing to original blueprint width.
> 4. Stress relieve at 1600±25° F. for two Hours.
> 5. Finish machine to dimension on drawing of item being repaired, except that weld material may be 0.000 to *0.005" thicker* per sides than parent metal of shroud. (The emphasis is on the disputed data; CDO asserts no proprietary data claim on the other listed steps.)
>
> Item 1 of the UP–PPDM–477 reads in pertinent part as follows:
>
> It is the recommendation of Chromalloy that all turbine blades * * * which exhibit erosion in excess of 0.005" measured shroud to shroud up to *a maximum of 0.040"* be suitably cleaned and weld prepared, followed by the build-up of these shrouds by GasTungsten Arc Welding.
>
> Weld material to be used should be *Inco 625 (AMS 5837)* or Inco 62 (AMS 5679). These shrouds should then be re-ground to blueprint dimension by utilization of the electro-chemical grinding process.
>
> * * * After re-grinding of the added material the inner sides of the shroud contact surface should be blended to *within 0.005" of base material.* * * * [Disputed data italicized.]

UP–PPDM–477 had the following proprietary legend attached:

> This data shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in all sheets herein.

CDO alleges that it disclosed the process incorporated in UP–PPDM–477 in confidence to the Air Force during the course of the 1974 blade repair contract. The supply of this information was not required nor contemplated by the contract. The overhaul instructions

for the TF–30 were revised to incorporate this process on October 16, 1975, and CDO contracts for blade repair were amended to cover the enhanced process on January 7, 1976.

The Air Force states that the acceptance on May 4, 1976, of UP-PPDM–477 was the result of an administrative error. After CDO protested to the Air Force against amendment 0001, the approval of UP–PPDM–477 was rescinded. The Air Force advanced the following reasons for the rescission: (1) the data in question was developed at substantial Government investment as a part of the Component Investment Program (CIP) and the Product Support Program (PSP), and (2) the repair process was merely the application of common shop repair practices known generally throughout the industry. In order to develop repair and maintenance procedures for the TF–30 engine, the CIP and PSP have been conducted on a continuing basis since 1969 by the Air Force, Navy and the Pratt & Whitney Aircraft Division of United Aircraft Corporation (P/N)—the TF–30 engine manufacturer.

Our Office, in its bid protest function, has recommended in appropriate circumstances the cancellation of a solicitation which wrongfully disclosed a protester's proprietary data or trade secrets so long as no award has been made. 41 Comp. Gen. 148 (1961); 42 *id.* 346 (1963); 43 *id.* 193 (1963); 49 *id.* 28 (1969); 52 *id.* 312 (1972); *Data General Corporation*, 55 *id.* 1040 (1976), 76–1 CPD 287. In order for this recommendation to be made, the protester must present clear and convincing evidence that the procurement will violate the protester's proprietary rights. 52 Comp. Gen. 773 (1973); *T. K. International, Incorporated*, B–177436, March 12, 1974, 74–1 CPD 126 (affirming 53 Comp. Gen. 161 (1973)).

ACCEPTANCE OF UNSOLICITED PROPOSAL

CDO argues that since the Air Force accepted CDO's unsolicited proposal, the Government is liable for its unauthorized disclosure. The May 4, 1976 acceptance, insofar as pertinent, provided:

> Your UP-PPDM–477 is approved for all parts * * *. A specification change will be initiated on your Air Force Contracts * * * within the next 60 days * * *

This acceptance in and of itself does not establish that CDO's data was in fact proprietary and that the Government violated CDO's rights by disclosing the data in the RFP.

The Air Force states that the acceptance of UP–PPDM–477 was caused by an administrative error. In this regard, an involved Air Force employee states that he "was under the erroneous impression that approval of the unsolicited proposal was required if the service

described was desired, but it was not being obtained under present contracts."

Moreover, even the terms of the restrictive legend CDO attached to UP-PPDM-477 (quoted above) recognized that "the Government's right to use information contained in the data if it is obtained from another source without restriction" is not limited. That is, if the alleged proprietary data is found to be actually nonproprietary, common shop practice, or to have been independently developed by another firm or the Government, the Government's disclosure is not wrongful. Contrast B-143711, December 22, 1960, affirmed May 15 and June 21, 1961, where the Government's acceptance of an unsolicited proposal was not an administrative error and the wrongfully disclosed data was found to have been proprietary at the time it was accepted.

WAS DISCLOSURE IN CONFIDENCE?

The Air Force concedes that it disclosed the data contained in UP-PPDM-477 in the RFP. However, in order to establish a breach of confidence by the Air Force justifying canceling this solicitation, it must be shown that (1) the data represents a protectable trade secret proprietary to CDO and (2) the secret was disclosed in confidence to the Air Force. See *Restatement, Torts* § 757 (1939); *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F.2d 912, 921 (7th Cir. 1953); *Smith* v. *Dravo Corp.*, 203 F.2d 369, 373 (7th Cir. 1953); 41 Comp. Gen. 148; 52 *id.* 312; 53 *id.* 161, 163.

If a trade secret holder does not disclose the secret in confidence, the secret is not entitled to protection. *Ferroline*, *supra*, at 922; *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 475 (1973). The legend would be sufficient to protect from unauthorized disclosure by the Government proprietary data in UP-PPDM-477. See Armed Services Procurement Regulation (ASPR) § 3-507.1(a) and § 4-107(b) (1976 ed.).

In the present case, both CDO and the Air Force concede that various oral discussions concerning this blade shroud repair process had been conducted from July 1974—when CDO received the TF-30 blade contract—to December 1974—when U-PPDM-477 was submitted to the Government. CDO asserts that it "frequently reiterated" to the Air Force officials with whom it discussed the process from "as early as July of 1974" that "CDO intended to submit an unsolicited proposal which covered [the] repair procedure * * * [which] adequately communicated the confidential nature of [the] repair procedure." A CDO affiant asserts that "until the disclosure of that data by the Air Force, I believe that [Air Force officials] also considered the information concerning the blade shroud repair procedure to be proprietary data."

In addition, Air Force officials discussed the process at the CDO facility where they signed the visitor's register, which clearly states:

> It is recognized that I may observe or [CDO] may disclose to me private and proprietary information during my visit to [CDO]. Disclosure of any such information might result in substantial detriment to [CDO].
>
> I therefore acknowledge my responsibility to maintain in confidence all information I acquire at [CDO] which is not generally available to others or which is specifically identified to me as private information. I agree not to disclose any such information to others without the express permission of an authorized representative of [CDO].

Air Force affiants assert that the CDO statements on the question of whether the allegedly proprietary process was discussed with the Air Force in confidence are not true. One Air Force affiant states that "at no time can I recall that anyone representing CDO ever indicated with regard to any discussion that the matters being discussed were considered confidential." This affiant further states that "I know that they [CDO] never told me that they considered the repair process regarding the TF-30 engine blades was confidential." Other Air Force affiants substantiate this version.

From the record, it appears that the process in question was disclosed to P/W by the Air Force for evaluation and testing purposes before UP-PPDM-477 was received in December 1974. A trade secret is no longer protectable when it becomes public knowledge or general knowledge in the trade or business. *Ferroline*, *supra*, at 922, *Kewanee*, *supra*, at 475. In the present case, however, both the Government and CDO concede that a disclosure to P/W of any process concerning the TF-30 engine for testing or evaluation purposes is necessary since P/W is the manufacturer of the TF-30. In view of the apparent confidential relationship between the Government and P/W regarding TF-30 repairs, we do not believe this limited disclosure by the Government would either violate any existing CDO proprietary rights or destroy the secret nature of any data which had been disclosed in confidence to the Air Force by CDO. There is no indication that the data in question was disclosed to any other firm until amendment 0001 of the RFP was issued.

A disclosure may be confidential even if it is not expressly restricted. The confidentiality of a disclosure of proprietary data can be implied from the relationship of the parties and the circumstances of the particular case. *Smith* v. *Dravo Corp.*, *supra*, at 376; *Kewanee*, *supra*, at 475; 43 Comp. Gen. 193 (1963); B-154079, October 14, 1964. Inasmuch as the data discussed under the TF-30 blade repair contract was not generally disclosed by the Air Force prior to the submission of the CDO unsolicited proposal containing the restrictive legend, we do not believe any legitimate proprietary rights of CDO have been defeated by the prior Air Force-CDO discussions or the limited disclosure to

P/W, even assuming the correctness of the Air Force version of these discussions.

WAS DISCLOSED DATA A TRADE SECRET?

The major argument advanced by the Air Force against CDO's protest is that the alleged proprietary data is not, in fact, a trade secret. In this regard, the Air Force asserts that (1) the repair process was developed primarily at Government expense as a joint effort by P/W, CDO and the Air Force; (2) the repair process represents merely the application of common shop practices; and (3) the proposed process was incomplete and unacceptable without the preheating and stress relief steps added by P/W and the Air Force. These assertions, CDO's responses and our analyses are detailed below.

WAS PROCESS DEVELOPED BY PROTESTER OR GOVERNMENT?

The Air Force asserts that UP-PPDM-477 was simply the summary of effort by the Government, P/W and CDO from March 1974—before CDO became involved in TF-30 blade repair. Numerous discussions with CDO were held under the 1974 blade repair contract during which the Air Force states it conveyed information to CDO regarding P/W's and the Air Force's efforts in developing pit limits and blade shroud repair procedures, including the possible use of INCO 625 for welding TF-30 vanes, which are composed of PWA 663 metal, as well as other TF-30 parts made of this metal (e.g., blade shrouds). The Air Force explicitly denies that CDO unilaterally proposed the blade shroud repair procedures, but rather asserts that the INCO 625 process was the result of joint Air Force, P/W and CDO efforts and discussions.

CDO denies that the Air Force disclosed these repair procedures to CDO. Rather, CDO states it introduced the procedures, including the possibility of INCO 625 for use on PWA 663 metal parts of the TF-30 engine, to the Air Force. CDO claims it planned to use INCO 625 for enhanced repairs on the TF-30 blades and vanes even before submitting its proposal on the 1974 procurements. Moreover, CDO claims that the Air Force encouraged it to develop this process during the course of the 1974 contract. (Air Force affiants vigorously deny encouraging CDO.)

The INCO 625 solution for welding TF-30 vanes and other PWA 663 TF-30 components (including blade shrouds) is documented by the Air Force in a P/W handwritten memorandum of November 20, 1974. The Air Force asserts that this shows P/W rather than CDO deter-

mined that INCO 625 could be used for this application. This memorandum included "preheating" and "stress relief" steps which were not mentioned in UP-PPDM-477 (discussed below).

On the other hand, the Air Force admits that several months earlier, in July 1974, CDO submitted TF-30 blade shroud repairs using INCO 625 for testing.

The possibility of using INCO 625 for blade shroud repair is mentioned in a November 1974 telegram incorporated into the November 18, 1974, CIP/PSP minutes. This telegram referenced "a meeting with the contractor who is repairing and recoating TF-30 turbine blades and vanes," i.e., CDO, which "revealed" a requested use of INCO 625 for blade shroud repair. CDO claims that on October 30, 1974, just prior to this telegram, it revealed to the Air Force, in confidence, the details of its draft unsolicited proposals on the repair of blade shrouds and vanes.

To support the argument that the Government developed this process, particular reference is made to a TF-30 blade shroud repair process developed by P/W apparently during the Summer/Fall of 1974, where blades with pitting in the shrouds not exceeding 0.060 inch were to be welded with PWA 694 hardface weld. However, this process was never endurance tested and was discontinued after CDO's unsolicited proposal was received. The Air Force states that further development of this process was discontinued because a "hardface" weld was not needed for blade shroud welding.

Inasmuch as the Government decided to incorporate the basic method contained in UP-PPDM-477 rather than this P/W method, and in view of the differences between the processes, we are not persuaded by the Air Force contention that the P/W approach somehow preempted CDO's trade secret claim on the UP-PPDM-477 process.

The details of the P/W PWA 694 blade shroud repair process were first mentioned in the CIP/PSP minutes of November 18, 1974, as a possible solution to the sulfidation problem. Except for the November 1974 telegram mentioning the INCO 625 process, no other blade shroud repair process was mentioned in the CIP/PSP minutes. The March 10, 1975, CIP/PSP minutes indicate that sulfidation limits and repair procedures had been initiated for blade shroud repairs, but completion of this process had been delayed. At that meeting, the P/W approach discussed above was dropped. Up until that meeting, the CIP/PSP minutes indicate that repair limits and procedures for sulfidation were inadequate but P/W was "in process" of developing limits and procedures.

In notes made by a CDO officer on a telephone conversation with an Air Force official on March 13, 1975, the Air Force allegedly asked

CDO to provide the "process history on * * * sample blades" presented at the March 1975 CIP/PSP conference. The INCO 625 repair process for blade shrouds was adopted by October 1975 and later was incorporated into CDO's TF-30 blade contracts.

In view of the foregoing, we believe it was more probable that CDO introduced the INCO 625 process for welding TF-30 blade shrouds, although the record is certainly not clear in this matter.

WAS PROCESS COMMON SHOP PRACTICE?

The Air Force has also alleged that each of the three claimed proprietary steps of the UP-PPDM-477 process was merely the application of "common shop practices" used in the repair of jet engines. We will discuss each of the three steps and the combination thereof to see if the process represents a trade secret.

Was 0.040 Inch Repair Limit a Trade Secret?

The 0.040 inch repair limit is explained by a CDO affiant as follows:

> * * * The .040" tolerance was calculated on the basis of our analysis of blades we had retained [under the 1974 contract limiting repair to .010" tolerance]. As a general matter, a shroud repair technique should not remove any more of the basic metal than is absolutely necessary. The more you grind into a metal, the more weld you have to apply to build the metal back up. We wanted to minimize the amount of metal which might be removed in the repair process. Our analysis of blades we had retained showed us that almost every blade would be repaired if we adopted the .040" tolerance.

The Air Force says the 0.040 inch repair limit was nothing new in view of the 0.060 inch limit of the P/W PWA 694 shroud repair process. As indicated above, we find this argument totally unpersuasive since the P/W process has never been reduced to practice and it involved a different welding material. Further, if 0.060 inch is a "feasible" repair limit, why was not this limit rather than the 0.040 inch limit included in the protested RFP?

On the other hand, the CDO analysis appears to be merely the result of an empirical study of the blades on which the shrouds were pitted deeper than 0.010 inch. These blades were stored at CDO's facility pursuant to the terms of the 1974 blade repair contract. This study simply involved measuring the pit depth in the blade shrouds. This "study" of the blade shrouds apparently showed that almost all of the blades were not pitted deeper than 0.040 inch, so that the engineering risk and trouble to repair deeper pitted blade shrouds were not justified. The Government could have as easily performed this analysis itself, but for the fact that the blades were required to be stored at CDO's facility. It appears that CDO essentially volunteered

the study to support its unsolicited proposal and to allow it to repair more blades under its contracts. Consequently, we do not believe the 0.040 inch tolerance in and of itself is a protectable trade secret.

Was Use of INCO 625 Weld a Trade Secret?

CDO states its choice of INCO 625 (also known as AMS 5837) weld material—a commercial nickel based alloy—for blade shroud repair was based on its analysis of weld compatibility with the nickel based PWA 663 of which the blade shrouds are composed.

In addition to claiming that CDO was told about INCO 625 for repairing blade shrouds, the Air Force asserts that the INCO 625 selection was merely the application of common machine shop practice. An Air Force affiant explains:

> * * * The technique for restoring metal to deteriorated portions of jet engine blades and regrinding the blades back to blueprint specifications has not changed in [10 to 15] years. The use of weld material is determined by the composition of the base metal to be welded. In the case of the TF 30 engine blades composed of high nickel alloy, the selection of INCO 625 welding wire was nothing more than the application of common engineering practice which requires use of compatible metal to effect an acceptable weld joint/build up. * * *

From our review, the choice of a high nickel alloy for use as weld filler on a high nickel metal which is subject to high temperature use appears to be only logical. In this regard, the INCO 625 weld wire is not only used for blade shroud repair in the TF–30 engine, but also for repairs to the rest of the turbine blade and the vanes. Moreover, an Air Force affiant states:

> INCO 625 weld wire is also used in our shops when welding is required on metals composed of a high nickel alloy.

Also, the Air Force refers to NAVAIR 02–1–517/T.O.2–1–111/DM—a general process technical order which has been in existence for many years—which recognizes that INCO 625 weld wire is a suitable material for welding corrosion and heat resistant parts, e.g., jet engine turbine blades. Further, TRW, Inc.—an interested party in the protest—has submitted material to our Office which shows INCO 625 has been used since late 1972 for repairing commercial jet engine turbine blades (not composed of PWA 663). Furthermore, a CDO affiant seemingly recognizes that only a few types of weld material are suitable for the blade shroud repair application, as follows:

> * * * Prior to July of 1974 the welding material generally applied to PWA 663, the metal used for blade shrouds, was either the Inco 62 or the Hastelloy W or X. The Inco 62 is a chemically simple weld, which has a low alloy content. The Hastelloy W or X is more complex, and also more expensive. * * * I thought the Inco 625 was the best selection when price and all technical factors were considered.

It may be questioned, if INCO 625 was such an "obvious" choice, why did not P/W select it rather than PWA 694 for blade shroud repair. However, it is certainly possible that PWA 694 could also have successfully been used for this application. As noted above, an Air Force affiant says that the use of PWA 694 was not continued because the "hardface" material is not *required* on the shroud and not because its use was unsatisfactory. Also, in the TRW material supplied our Office, it is shown that PWA 694 weld material has been successfully used for weld work in jet turbine engines.

In view of the foregoing, we are not persuaded that the selection of INCO 625 weld wire for the blade shroud repair application can be categorized in and of itself as a protectable trade secret.

Was 0.005 Inch Tolerance a Trade Secret?

The specification that the material be reground to within 0.005 inch of the base material has been explained by a CDO affiant as follows:

> The decision by CDO to grind welded material back to .005 inch of the base material is a departure from an accepted practice of grinding weldings to engine parts flush with the base metal. The practice of grinding so that the weld is flush with the base metal frequently leads to over-grinding. CDO's procedure removes this obstacle to effective blade repair.

On the other hand, the Air Force asserts that restoration to within 0.005 inch of blueprint dimensions was a common shop tolerance considering the type and criticality of the part involved. An Air Force affiant explains:

> The ideal situation would be to blend the added weld material perfectly with the original base material. As a practical matter this can hardly be achieved and the trade off is a consideration of the chance of grinding out base metal or allowing a little bit of the weld material to hang on to the base metal. 0.005" is regarded as standard for most areas of the turbine blade or vane and is a tolerance which can be as a practical matter achieved without any special requirements. * * * We use this tolerance frequently in our own repair facility. * * *

From our review, we are persuaded by the Air Force's contention that the 0.005 inch tolerance, in and of itself, does not represent a trade secret.

Was Combined Process a Trade Secret?

A trade secret can exist in a combination of characteristics or components, each of which by itself is in the public domain, if the combination represents a valuable contribution arising from the independent efforts of the person or firm claiming the trade secret. See *A. O. Smith Corporation* v. *Petroleum Iron Works Co. of Ohio*, 73 F.2d 531, 538–539 (6th Cir. 1934); *Ferroline, supra; Imperial Chemical Industries Limited* v. *National Distillers and Chemical Corporation*, 342 F.2d 737, 742 (2d Cir. 1965); *Nickelson* v. *General Motors*

Corporation, 361 F.2d 196, 199 (7th Cir. 1966); *Grismac Corporation* v. *United States*, 22 CCF para. 80252 (Ct. Cl. No. 4-72 (1976) (trial judge opinion)); 53 Comp. Gen. 161; *T. K. International*, *supra*.

It is apparent that knowledge of the three allegedly proprietary elements of the blade shroud repair process certainly benefits the Air Force as well as competitors under the protested RFP; otherwise, they would not have been included in the RFP. This process apparently works so the competitors do not have to use their own technical knowledge to derive a blade shroud repair process that will work. There would be uncertainty that other possible processes would work until they are appropriately tested.

However, since the combination of the three steps discussed above seems to be determined by normal shop practice (e.g., dimensions are best brought to tolerance after welding), it would appear that the process should not be regarded as a protectable trade secret. See 53 Comp. Gen. 161, affirmed *T. K. International*, *supra*, which also involved a weld repair process on jet engine components, where the combination of steps known to the Air Force was also found to be determined by normal shop practice.

In addition, one factor courts have looked to in ascertaining whether a process represents a protectable trade secret is the degree of effort expended in developing the process by the alleged "owner." See *Ferroline*, *supra; Nickelson*, *supra*. It would appear that CDO expended no great effort to develop this process, e.g., the 0.040 inch repair limit was derived from simply measuring the depth of the pitting in the stored blade shrouds, and INCO 625 was apparently selected by CDO as appropriate for weld repair of TF-30 blades and vanes even before CDO was awarded the blade repair contract.

Based on the foregoing, although the matter is not free of doubt, the steps in the UP-PPDM-477 process, as well as the combination thereof, appear to represent the application of "common shop practices" and not a protectable trade secret.

DOES ADDITION OF PREHEATING AND STRESS RELIEF STEPS PRECLUDE TRADE SECRET PROTECTION?

The Air Force also asserts that the UP-PPDM-477 process was incomplete and unacceptable. Step 2 (preheating) and step 4 (stress relief) of the complete blade shroud repair process disclosed in amendment 0001 were not in UP-PPDM-477. These steps were added at the insistence of P/W and the Air Force after the P/W tests on the sample blades submitted by CDO in July 1974, on which the shrouds were repaired with INCO 625. The Air Force states that the tests which were conducted prior to UP-PPDM-477's submission revealed

significant microcracking or "heat tears" in the repaired shrouds. (CDO says that it was not aware of the microcracking problem until 1975.) P/W and the Air Force insist that the microcracking can only be reduced to an acceptable level so as not to adversely affect the material's structural soundness by preheating blades to 1000° F. before welding and stress relieving at 1600° ± 25° F. after welding. The Air Force states that after CDO was informed of the necessary heat cures, it submitted new blades for testing using the pre- and post-weld heating steps, and these repaired blades were found acceptable in 1975. The Air Force, therefore, alleges that even assuming that CDO developed the UP–PPDM–477 portion of the blade shroud repair process, the Government funded a significant part of the total implemented process because of the addition of these steps. Consequently, the Air Force contends that this mixture of private and Government funds in developing the complete process precludes CDO's trade secret claims on the blade shroud repair process. See 49 Comp. Gen. 124, 127 (1969) and 52 Comp. Gen. 312, 315–316.

CDO asserts that some microcracking always appears in metals that have been weld repaired—a fact which is admitted by an Air Force affiant. However, we cannot disagree with the Air Force's determination that such microcracking that will adversely affect the structural soundness of jet engine turbine blades is an unacceptable risk and that this problem can be cured by preheating and stress relief. See *Maremont Corporation*, 55 Comp. Gen. 1362 (1976), 76–2 CPD 181.

CDO also asserts that it still believes that the additional procedures are unnecessary. In this regard, a CDO affiant states that it is his recollection that the blades submitted in July 1974 had been built up with INCO 625 weld. However, he states that the welded material had not been ground back because CDO did not then have the tooling to grind or measure welded material to achieve the tolerances specified in UP–PPDM–477. The Air Force has not responded to this CDO position.

In addition, the CDO affiant says that these blades had not been coated with PWA 73 aluminide coating, which is specified for TF–30 blades at the end of the repair process. He asserts that this coating makes post-weld stress relief unnecessary because during application of the coating, the blades are put through more extensive heat cycles than the specified stress relief. Also, the commercial literature supplied this Office by the Air Force on INCO 625 states that "[INCO 625] require[s] no post-weld heat treatments to maintain [its] high strength and ductility."

Ironically, CDO also asserts that the pre-heat and post-heat steps are "standard shop practices" well known to CDO. CDO claims that it did not propose these steps because it did not believe they were necessary, and that Air Force personnel encouraged CDO not to pre-heat

or post-heat the blades for testing purposes to see if INCO 625 was an acceptable weld material for blade shrouds and to see if P/W would accept the blades without these expensive treatments. The Air Force has not specifically responded to these contentions, although Air Force affiants have specifically denied encouraging CDO to develop the shroud repair process.

Notwithstanding the foregoing, it is certainly the Air Force's prerogative to determine that the specified pre- and post-heating treatments are necessary to assure safe repairs of critical items. See *D. Moody & Co., Inc.*, 55 Comp. Gen. 1 (1975), 75-2 CPD 1. Also, although the pre- and post-heating processes seem to be "common shop practices" in the aircraft engine welding field, the fact remains that these steps are not contained in the UP-PPDM-477 blade shroud repair process.

In 49 Comp. Gen. 124, 127, and 52 Comp. Gen. 312, 315-316, we found that significant Government funding of computer sofeware in one case and rocket motor materials in the other precluded a proprietary data claim on these items by contractors who developed processes under contracts containing the ASPR "Rights in Technical Data Clause." (Clause is now codified at ASPR § 7-104.9(a) (1976 ed.).) In these cases, we adopted the Department of Defense policy interpreting this clause which is set out in Hinrichs, *Proprietary Data and Trade Secrets under Department of Defense Contracts*, 36 Mil. L. R. 61 at 76 (1967), as follows:

> Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis. The government will get 100 percent unlimited rights, except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion, or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item.

We believe the foregoing statement of policy is applicable whether or not the standard "Rights in Technical Data Clause" is included in the contract. See ASPR § 9-202.2(c) (1974 ed.).

Since the UP-PPDM-477 process was determined unacceptable without the additional Government-funded heating steps, we cannot conclude that CDO has proprietary rights in the TF-30 blade repair process incorporated in amendment 0001 of the RFP.

CONCLUSION

In view of the foregoing, CDO did not sustain its burden of proving by "clear and convincing evidence" that the Government wrongfully

disclosed its proprietary data as to justify a recommendation that the RFP be canceled. See *T. K. International*, *supra*.

Protest denied.

[B-127474]

Leaves of Absence—Annual—Holidays—Premium Pay—Regularly Scheduled Tour of Duty

In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision.

Leaves of Absence—Annual—Holidays—Charging Precluded—Within Regularly Scheduled Tour of Duty—Employees Receiving Premium Pay

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified.

In the matter of Veterans Administration employees receiving premium pay—absences on holidays, April 19, 1977:

This decision concerns the question whether employees receiving premium pay under 5 U.S.C. § 5545(c)(1) (1970) may be absent on holidays without charge to leave. This subject has been addressed in 35 Comp. Gen. 710 (1956) and, more recently, in 54 Comp. Gen. 662 (1975). Our review of the matter has been made in response to requests by the Assistant Secretary of the Navy (Manpower and Reserve Affairs) and the Administrator of Veterans Affairs. The requests indicate there are various problems in implementing our holding in 54 Comp. Gen. 662, *supra*, and that the decision was based on an inaccurate agency statement.

In 35 Comp. Gen. 710, *supra*, we held that employees receiving premium pay under section 401(1) of the Federal Employees Pay Act of 1945, as amended, now 5 U.S.C. § 5545(c)(1), in part because their positions require holiday work, should be charged leave on holidays not worked which fall within their regularly scheduled tours of duty. The rule of this decision, as restated in Federal Personnel Manual Supplement 990-2, Book 550, subchapter 1-8b(2) (July 21, 1971), requires that employees receiving premium pay under

5 U.S.C. § 5545(c)(1) be charged leave for absences on holidays falling within their regularly scheduled tours of duty.

In 1974, four X-ray technicians employed at the Veterans Administration Hospital, Dallas, Texas, raised a question concerning the application of the Civil Service Commission's regulation to employees whose rates of premium pay reportedly were not based upon considerations of holiday work. The employees involved were assigned to regular 40-hour workweeks, during which they performed actual work, and to additional regular periods of standby duty outside their regular 40-hour workweeks, for which they received premium compensation under the following provision of 5 U.S.C. § 5545(c)(1):

> (c) The head of an agency, with the approval of the Civil Service Commission, may provide that—
> (1) An employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 * * * by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors * * *.

With respect to those particular employees, the Hospital Director advised us that holiday pay was not considered in arriving at their rates of premium pay.

In reliance upon the Hospital Director's statement as to the basis upon which the employees' rates of premium compensation were determined, we held in our 1975 decision (54 Comp. Gen. 662, at 664):

> * * * Since section 5545(c)(1) provides for premium pay for that standby duty required of an employee, it would follow that where an employee was not scheduled to perform standby duty on a holiday and, thus, the computation of his premium pay did not take into account the extent to which performing work on that holiday would have been made more onerous to him, section 5545(c)(1) would not require that the employee work on the holiday or be charged leave for his absence. * * * In the instant case, since standby duty was not required of the employees on the holidays in question and was, therefore, not considered in the setting of their premium pay, no charge to leave was required to be made. Decision 35 Comp. Gen. 710, *supra*, is amplified to the extent stated herein.

In reviewing this holding we find that it may be construed to hold that premium pay is payable partly in consideration of the extent to which standby duty outside the employee's regularly scheduled workweek is made more onerous by the fact that it occurs on a holiday. In fact, premium pay authorized by 5 U.S.C. § 5545(c)(1) is in lieu of other specific forms of additional compensation including holiday premium pay and the reference in that subsection to the extent to which the duties of the employee's position are made more onerous by holiday

work is intended to indicate that the amount of holiday premium pay the employee would otherwise receive is to be taken into account in determining his rate of premium pay. Since holiday premium pay provided for by 5 U.S.C. § 5545 is not payable for work on a holiday that is in excess of 8 hours or overtime work, it is improper to take work on a holiday into account in establishing the rate of premium pay except insofar as it falls within his regular 8-hour workday. Also, standby time which extends a tour of duty beyond 40 hours a week is included in determining the premium pay rate. Accordingly, our decision in 54 Comp. Gen. 662, *supra*, is overruled and our holding in 35 Comp. Gen. 710, *supra*, is modified as hereinafter indicated.

Regarding 54 Comp. Gen. 662, *supra*, the Veterans Administration informed us that the Hospital Director's statement that holiday pay was not a factor in arriving at the employees' rates of premium compensation is inaccurate. Presumably, that statement reflected the Hospital Director's determination that the services of the employees involved were not required on every holiday. In fact, we are advised that the rates of premium pay paid such employees are those prescribed by the Civil Service Commission and set forth at 5 C.F.R. § 550.144. With respect to positions in which the employees have basic workweeks involving actual work and standby duty for additional periods, that section provides in pertinent part:

§ 550.144 Rates of premium pay payable under § 550.141.

(a) An agency may pay the premium pay on an annual basis referred to in § 550.141, to an employee who meets the requirements of that section, at one of the following percentages of that part of the employee's rate of basic pay which does not exceed the minimum rate of basic pay for GS-10:

* * * * * * *

(3) A position in which the employee has a basic workweek requiring full-time performance of actual work, and is required, in addition, to remain on standby duty; 14 to 18 hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek—15 percent; 19 to 27 hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek—20 percent; 28 or more hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek—25 percent; 7 to 9 hours on one or more of his regular weekly nonworkdays—15 percent; 10 to 13 hours on one or more of his regular weekly nonworkdays—20 percent; 14 or more hours on one or more of his regular weekly nonworkdays—25 percent.

(4) When an agency pays an employee one of the rates authorized by subparagraph (1), (2), or (3) of this paragraph, the agency shall increase this rate by adding (i) 2½ percent to the rate when the employee is required to perform Sunday work on an average of 20 to 40 Sundays over a year's period or (ii) 5 percent to the rate when the employee is required to perform Sunday work on an average of 41 or more Sundays over a year's period but the rate thus increased may not exceed 25 percent.

(b) If an employee is eligible for premium pay on an annual basis under § 550.141, but none of the percentages in paragraph (a) of this section is applicable, or unusual conditions are present which seem to make the applicable rate unsuitable, the agency may propose a rate of premium pay on an annual basis for the Commission's approval. The proposal shall include full information bear-

ing on the employee's tour of duty; the number of hours of actual work required; and how it is distributed over the tour of duty; the number of hours in a standby status required and the extent to which the employee's whereabouts and activities are restricted during standby periods; the extent to which the assignment is made more onerous by night, holiday, or Sunday duty or by hours of duty beyond 8 in a day or 40 in a week; and any other pertinent conditions.

The Civil Service Commission verifies that it has not received a request from the Veterans Administration pursuant to 5 C.F.R. § 550.144(b) to estabish special rates of premium pay for its employees and confirms that the rates of premium pay established by 5 C.F.R. § 550.144(a) are based on the assumption that employees will perform duty on holidays falling within their regularly scheduled tours of duty. Thus, the rates of premium pay received by the X-ray technicians involved in 54 Comp. Gen. 662, *supra*, were in fact based on considerations of holiday duty.

Nonetheless, the situation described in 54 Comp. Gen. 662, *supra*, does raise an administrative problem. As in the case of the Veterans Administration Hospital, Dallas, Tex, we understand that there are installations at which full staffing on holidays by employees receiving premium compensation under 5 U.S.C. § 5545(c)(1) is unnecessary. The primary concern of Congress in enacting that subsection was ease of administration. We do not think it was the intention of Congress to require employees to perform unnecessary work or standby duty. Yet it appears that that could well be the result of our decision in 35 Comp. Gen. 710, *supra*, when strictly construed in light of the Civil Service Commission's regulations at 5 C.F.R. §§ 550.141 through 550.144. This result could be avoided by careful advance planning to determine the specific number of holidays a particular employee's services will be needed and application to the Civil Service Commission to establish a special rate applicable to such employee. However, this would tend to deprive agencies of the flexibility necessary to adjust work assignments to accommodate illnesses and other unanticipated absences. Therefore, we believe this problem may be resolved without obtaining special rates through the use of administrative discretion as set forth below.

The premium pay rates set forth at 5 C.F.R. §§ 550.144(a)(1) through 550.144(a)(3) are not established on the basis of precise numbers of hours in duty status but apply to ranges of hours varying between a specified minimum and maximum. Subsection 550.144(a)(4) similarly authorizes payment of an additional 2½ percent per annum for work on an average of 20 to 40 Sundays. Although the regulations do not ascribe a specific rate to holiday work or standby duty as such, it does not appear that the rates of premium pay payable would necessarily be decreased by the elimination of the consideration of work on some or all holidays. Therefore, since the rate of premium

compensation that an employee receives presumably would be the same or negligibly different regardless of the amount of holiday work considered in establishing that rate, upon further consideration, we believe that an employee receiving premium pay under 5 U.S.C. § 5545 (c) (1) may be excused from work on holidays within his regular tour of duty without charge to leave when the employing activity determines that his services are not required.

We find support for the above conclusion in 42 Comp. Gen. 426 (1963) where we recognized that employees receiving premium compensation may be excused from standby duty without deducting the hourly equivalent of their premium compensation where their services are not required on a particular day. That case involved instances when it was known in advance that conditions of weather or other factors would occasionally render standby duty unnecessary. We there authorized determination of the appropriate percentage rate of premium compensation based on the yearly calculation of standby tours to derive a weekly average and noted that since the percentage rates are geared to ranges of standby duty hours, we did not consider the regulations to require rigid adherence to a fixed weekly standby schedule.

In view of the above, we hold that an agency may excuse employees receiving premium pay under 5 U.S.C. § 5545(c) (1) from regular or standby duty without charge to leave on holidays when the employees' rates of premium pay are established under 5 C.F.R. § 550.144(a) (1) and (2) as well as to those receiving premium pay at rates established under 5 C.F.R. § 550.144(a) (3). However, this decision applies only when there has been an administrative determination that the employees' services are not required on a particular holiday. Thus, when an employee's services are administratively required and he absents himself on a holiday within his regularly scheduled tour of duty for personal reasons, he is to be charged annual or sick leave as appropriate. In so holding we recognize that the need for holiday work on the part of certain categories of employees, such as firefighters, will render their excusal on holidays unlikely.

Since this decision represents a changed construction of law, it is limited to prospective application. We understand that, on the basis of 54 Comp. Gen. 662, *supra*, some employees have had their leave accounts retroactively recredited with annual leave and have received lump-sum leave payments or have taken leave to which they would otherwise not have been entitled. Since such payments or use of leave were made pursuant to 54 Comp. Gen. 662, no action is necessary and the employees may be considered properly to have been paid or to have taken leave. Also, inasmuch as there has been considerable con-

fusion in this area, those employees who were not charged leave for absences on holidays prior to the date of this decision may be regarded as having properly been excused from duty on such days.

[B-187250, B-187254, B-187256, B-187257]

Contracts—Awards—Small Business Concerns—Set-Asides—Restrictive of Competition

Series of General Accounting Office decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders—small business concerns—since restriction of competition under current law is not compatible with formal advertising.

Advertising—Advertising *v.* Negotiation—Formal Advertising "Wherever Possible"

Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible."

Advertising—Advertising *v.* Negotiation—Negotiation Propriety—Waiver of Formal Advertising Procedures

Since Administrator, General Services Administration, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision.

In the matter of Nationwide Building Maintenance, Inc., April 25, 1977:

Nationwide Building Maintenance, Inc., has protested the decision of the General Services Administration (GSA) to use conventional negotiation techniques (including the use of incentive-type contracting) to procure janitorial services under four separate small business set-aside solicitations, Nos. 4PBO-83; 03C6 1367 01; 4PBO-60; and 03C6 1387 01). Nationwide insists that the use of conventional negotiation techniques under these procurements is contrary to our decision in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976), 76-1 CPD 71. Although Nationwide questions the use of these techniques, it does not otherwise object to the set-asides involved.

Our *Nationwide* decision held that GSA's use of "exception 10" negotiating authority—that is, 41 U.S.C. § 252(c)(10) (1970)—to negotiate procurements of janitorial services was not rationally justified under existing law and regulation. The cited statutory authority

permits negotiation "for property or services for which it is impracticable to secure competition." GSA believes that the authority could properly be invoked to negotiate procurements of janitorial services in order to secure a "desired level of quality" in janitorial contracting. We pointed out, however, that the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which the contracts were being awarded, revealed that Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of supplies or services. Consequently, we rejected GSA's rationale for using the cited statutory authority.

The four solicitations involved in the current controversy were not negotiated under 41 U.S.C. § 252(c)(10), however. They were negotiated under "exception one" negotiating authority—that is, 41 U.S.C. § 252(c)(1)—which permits negotiation of contracts if "determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress." (At present, a state of national emergency exists by reason of a 1950 Presidential Proclamation.)

The Determinations and Findings (D&F) supporting the negotiation of the janitorial services requirement under solicitation No. 4PBO–83 is representative of the D&F's supporting negotiation under the other solicitations involved. The cited D&F provides:

> In accordance with the requirements of Section 302(c)(1), 304(b) and 307 of the Federal Property and Administrative Services Act of 1949 (the Property Act), the 63 Stat. 377, as amended, I make the following findings:
>
> FPR 1–3.201 provides that Section 302(c)(1) of the Property Act is to be used as the authority to negotiate unilateral set-aside contracts with small business concerns when it is determined to be in the interest of assuring that a fair proportion of the purchases and contracts for property and service for the Government are placed with small business concerns.
>
> The General Services Administration has consistently awarded the majority of its custodial services contracts to small business firms by making the procurements total small business set-asides. It is now proposed to make all such procurements by negotiating unilateral set-aside contracts with small business concerns.
>
> While it is recognized that contracts involving total small business set-asides should be procured by small business restricted advertising whenever possible (FPR 1–1.706–5(b)), it must also be recognized that contracts involving such set-asides may properly be entered into by conventional negotiation.
>
> A major factor in determining whether to use conventional negotiation or small business restricted advertising is which method will better promote the interests of small business concerns * * *.
>
> GSA has found that procurement of custodial services through the statutorily preferred method of formal advertising of small business restricted advertising (hereinafter collectively called "formal advertising") procedures for large and complex buildings has not been successful in obtaining the performance results for which contracted. The contractor's level of performance indicated a constant and persistent decline without apparent regard as to whether the firm was classified as small business or large business. The sanitary and esthetic condition of buildings serviced by contracts steadily and cumulatively deteriorated to what most agencies termed unsatisfactory status because of the several factors discussed below.
>
> Procurement of services by contract expanded rapidly in recent years in conformance to the policies of Budget Circular A–76 and the ever increasing de-

pendence on the private sector for contract custodial services because of manning and budgetary constraints. Many new firms were established to participate in this expanded market in the hopes of obtaining Government contracts. Many of these firms were lacking in experience, poorly organized and short of resources such as management expertise, experienced supervisors, and capital assets, yet able to qualify as responsible firms with the assistance of the small business program under the Small Business Act (15 U.S.C. 631).

Lack of management expertise and the extreme competition among these new firms caused poor estimating practices and irrational bidding. Bid prices on some contracts have been below the minimum reasonable cost expectations to perform. The Comptroller General ruled (B–171419, March 12, 1971) that because a bid is below reasonable cost expectations, is not a sufficient reason for rejection of the bid. It is factual that a contractor of the type normally bidding on custodial service contracts will not maintain an acceptable level of performance with a "below-cost" contract, yet it is very difficult for the Contracting Officer to refuse an award based primarily on the lowest bid price, considering the constraints of the statutes.

Because of the large quantity of service contracts; the time factor for operational support, and personnel ceiling restrictions, GSA published general custodial service specifications which were meant to be standard for all buildings under Government control. Because of the individual requirements of specific buildings, the standard specifications resulted in some overstatement and some understatement of tasks and frequencies, yet there was no way to allow contractor flexibility in meeting contract requirements as to tasks, frequencies of performance, and the quality of work under a fixed-price low-bid contract.

Contract enforcement under these conditions requires 100-percent inspection of contract work, which GSA is unable to provide because of budget and manning constraints. To mollify this weakness, a penalty deduction system was resorted to for control purposes. Minimum man-hours were specified and monetary deductions were taken for failure to meet minimum man-hour requirements, or for omissions of service and inadequate performance. This system burdened GSA with management of the contract operations by exception. Contractors initiated a constant stream of protests and subsequent appeals, which resulted in very heavy extra and unproductive administrative cost at all echelons of GSA, and a hindrance to the program support of agencies. The penalty deduction system was not successful as a contract enforcement tool to improve performance. It actually caused an adversary relationship between the contractors and GSA.

Formal advertising procedures are intended to broaden the competition to the maximum extent. Under the circumstances cited herein, the competition was actually narrowed to the point where marginally qualified and inexperienced contractors formed the major portion of the bidders. Reputable, experienced and qualified contractors deserted the competition for GSA contracts in favor of commercial business since this type firm was not willing to lower its performance and production standards and prices below the point of fair and equitable return for satisfactory services given.

The concept of custodial service contracting is unique by virtue of the fact that management and supervision is the paramount ingredient for success. All contractors use essentially the same labor source, since none can afford to maintain a work force without a contract. The work force is hired when an award is won. Reputable contractors depend on a fair profit return to maintain a nucleus of experienced and qualified supervisors as a cost of doing business. An under-financed contract eliminates any prospect of providing a supervisory training program; thus, incompetent and inadequate supervision becomes the rule rather than the exception. Often an under-financed contractor must assign one supervisor to several contract locations in an attempt to keep costs within his low bid price. The result is unsatisfactory span of control and poor contract management evidenced by poor planning and scheduling, ineffective inspection and quality control, inefficient use of manpower, recurring performance deficiencies, poor supply and equipment control, and total poor performance.

The problems and factors discussed * * * above, support a determination to use procurement by competitive negotiation as an exception to the use of formal advertising which is found to be neither feasible nor practicable under the conditions and circumstances cited, e.g. irrational bid prices; inexperienced and marginally qualified bidders; lack of management quality and expertise; en-

forceable, manageable specifications cannot be drawn nor administered; the narrowing of the bidders market; the very heavy extra and unproductive contract enforcement administrative costs suffered which are never reflected in the bid price; and the hindrance to the program support of agencies.

Competitive negotiated procurement of custodial services for Government buildings of large size and complexity, under the conditions and circumstances cited above, is more advantageous to the Government in terms of economy, efficiency and effectiveness than is procurement by formal advertising and, is the better method for promoting the policies of 15 U.S.C. 631 and the small business set-aside program.

Competitive negotiated procurement is also considered likely to be consummated at less real cost to the Government, all costs considered, and value received for money spent, than could be obtained through the use of low-bid, fixed-price contracting methods.

The use of the cost reimbursement type contract with an award fee or an incentive-type contract is also more advantageous since the use of audit service can identify real costs as allocable and allowable. The profit factor is also known and can be controlled. The contractor can be competitively selected and the contract award can be made to the best advantage of the Government, price and other factors considered. Thus, the Government is assured of getting exactly what it pays for and the competition is expanded to all offerors on an equal basis.

A further advantage of a cost-type contract is the fact that a prospective contractor has no problem with contract financing since any commercial credit institution will not hesitate to provide a line of credit on an assigned Government cost reimbursement contract. This further expands the competition and facilitates operations and continues viability of service contractors to a much greater extent than a full risk low-bid contract at a suspect price.

The use of the ITC not only aids the Government in overcoming * * * [these] deficiencies * * *, but it also is helpful to building service contractors and the building cleaning industry in general. It enables the contractors, for example, to invest in sophisticated equipment and systems, etc., which would not be possible under formally advertised contracts. A cost-type incentive contract fosters a stronger, more viable small business service contracting industry by removing financial risk, improving management expertise and removing the undesirable adversary relationship through profit incentives geared to performance.

* * * [these] findings * * * have been found applicable to the requirement for custodial services at the Social Security Building, Birmingham, Alabama.

Determination

Based on the foregoing findings, I hereby determine, within the meaning of Section 302(c)(1) of the Property Act that:

The services described are to be procured by a total small business set-aside;

Conventional negotiation is necessary, in order to carry out the policy of the Small Business Act and to further the purposes of the small business set-aside program; and,

Such negotiation is in the best interest of the Government.

Based on the foregoing findings, I also determine, pursuant to Section 304(b) of the Property Act, that it is impractical to secure the services of the kind or quality required without the use of a cost-plus-award-fee (incentive type) contract.

Upon the basis of these findings, I hereby authorize the negotiation of an incentive-type contract for the procurement of the services described in these findings pursuant to Section 302(c)(1) of the Property Act.

We read the D&F as advancing essentially the same line of reasoning previously argued by GSA in the prior *Nationwide* protest for justifying "exception ten" negotiating authority of janitorial services. Then, as now, GSA: (1) criticizes the advertised procurement method for not permitting the achievement of the "level of performance" felt necessary in janitorial contracts; (2) cites our Office for not permitting the rejection of a "below cost" janitorial services bid; (3) de-

scribes the enormous burden of adequately supervising advertised janitorial services contracts; (4) argues that adequate janitorial services specifications cannot be "drawn or administered"; and (5) extolls the merits of negotiation in general and incentive-type contracting in particular.

What is new in the current D&F (other than the citation of "exception one" authority) is the argument that conventional negotiation better promotes the interests of small business concerns. GSA believes that negotiation promotes the interests of "reputable, experienced and qualified" small business contractors as opposed to those small business concerns considered by GSA to be "marginally qualified and inexperienced"—even though these marginal concerns might possess "certificates of competency" from the Small Business Administration for janitorial services procurements in which the "marginal" concerns are competing.

In our prior decision we held that the numbered arguments were not legally sufficient to justify "exception ten" negotiating authority. The question now presented, of course, is whether these arguments carry any greater weight to justify use of conventional negotiation techniques when advanced under "exception one" authority.

In a series of decisions in the 1950's, our Office authorized the use of "exception one" negotiation authority to permit small business set-aside awards. We reviewed these decisions in 41 Comp. Gen. 306, 314–315 (1961) when we said:

> In 31 Comp. Gen. 347 [1952] we held that contracts may be awarded to small business firms by negotiations, under section 2(c)(1) of the Armed Services Procurement Act of 1947 upon a proper determination by the agency head that the award is necessary in the public interest [during the period of a national emergency] * * *
>
> The decision reasoned that:
>
> "* * * if the contracts here contemplated properly may be negotiated with small business firms at a higher cost to the Government than is otherwise obtainable, the fact that bids are first solicited would not preclude the contracting agency from negotiating the contract with a small-business concern at a higher price. In that connection, it would appear that important considerations indeed would be necessary to determine that the public interest requires the award of contracts to small business concerns when it is known at the time that the procurement could be made from other sources at less cost to the Government. In apparent recognition of such fact, section 714(f)(2) of the Defense Production Act of 1950, as amended, 65 Stat. 143, provides that—
>
> "The Congress has as its policy that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns. To effectuate such policy, small-business concerns within the meaning of this section shall receive any award or contract or any part thereof as to which it is determined by the Administration [Small Defense Plants Administration] and the contracting procurement agencies (A) to be in the interest of mobilizing the Nation's full productive capacity, or (B) to be in the interest of the national defense program, to make such award or let such contract to a small-business concern."
>
> In 31 Comp. Gen. 431 [1952] we held that although it would not be legally proper for a procuring agency to enter into a contract with a small business concern at a higher price than otherwise might have been obtained in instances

where advertising is required and formal bids are solicited, where joint determinations (such as under section 714(f)(2) of the Defense Production Act of 1950), are made in advance, the procurement may be negotiated with small business concerns at higher prices than otherwise obtainable. Finally see 36 Comp. Gen. 187 [1956].

Acting in agreement with our decisions, the Administrator of GSA formally determined in the 1950's that contracts could be negotiated by executive agencies with small business concerns under "exception one" negotiating authority. See Federal Procurement Regulations (FPR) § 1–3.201(b) (1964 ed. amend. 32).

Our decisions sanctioning the use of "exception one" negotiating authority were premised on the need to justify the restriction of competition (which we otherwise found to be proper) to one category of bidders—small business concerns. Restriction of competition to one class of bidders, however, is not compatible with formal advertising procedures under current law. Since we found the restriction of competition to be otherwise proper, the small business set-aside procedure had to be justified within the context of negotiation.

Nevertheless, both FPR and the Armed Services Procurement Regulation (ASPR) soon recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, the procurement should otherwise be conducted under the rules of formal advertising "whenever possible." See, for example, ASPR § 1–706.5(b) (1976 ed.) and FPR § 1–1.706–5(b) (1964 ed. amend 101).

It is our view that the above-numbered (previously considered and rejected) reasons do not justify negotiation under any of the statutory exceptions to formal advertising. This conclusion is not dispositive of the legality of the procedure, however. The Administrator of GSA, the official designated under the Federal Property and Administrative Services Act of 1949, as amended, to prescribe the FPR, has signed a waiver of the FPR mandate requiring use of formal advertising procedures whenever possible under small business set-aside procurements. In view of the waiver, and in the absence of any limit on the negotiation procedures that can be used in "exception one" procurements, we must conclude that GSA's use of conventional negotiation procedures under the questioned procurements is lawful and not in violation of our prior *Nationwide* decision.

Protests denied.

[B–185976]

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—House Purchase And/Or Sale

Necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by reason of the purchase or sale of a residence incident to

a permanent change of station constitute "similar expenses" within the meaning of Federal Travel Regulations para. 2-6.2c (May 1973). Such costs may be reimbursed, provided they are within the customary range of charges for such services in the locality of the residence transaction. B-161891, August 21, 1967; 48 Comp. Gen. 469 (1969); and similar cases no longer to be followed regarding attorney fees.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—Single Fee—Customary Charges In Locality of Residence Transaction

Since the cost of legal services normally rendered in the locality of the transaction may be reimbursed, a single overall fee charged may be paid without itemization if it is within the customary range of charges in that locality. B-163203, March 24. 1969; B-165280, December 31, 1969; and similar cases modified.

General Accounting Office—Decisions—Overruled or Modified—Prospective Application

This decision relating to reimbursement of legal fees incurred for real estate transactions is prospective only; it may not be applied where the settlement of the transaction occurred prior to date of decision.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—Preparing Conveyances, Other Instruments, And Contracts—Purchase And/Or Sale of House Not Consummated

Because legal fees and costs associated with unsuccessful efforts to sell are analogous to statutorily unreimbursable losses due to market conditions, rule denying payment of such fees and costs is not changed. Accordingly, claim of transferred employee for attorney's fee for preparation of affidavit of title relative to unsuccessful sales effort may not be paid.

In the matter of George W. Lay—real estate expenses—attorney fees, April 27, 1977:

This action is in response to a request dated February 25, 1976, from Colonel William E. Dyson, Executive of the Per Diem, Travel, and Transportation Allowance Committee, concerning the voucher of Mr. George W. Lay, a former civilian employee of the Department of the Army, for reimbursement of certain attorney's fees incurred in selling his residence incident to a permanent change of station.

The record indicates that effective June 24, 1974, Mr. Lay was transferred from Dover, New Jersey to New Cumberland, Pennsylvania. As a result of the transfer, Mr. Lay sold his residence at the old duty station and has requested reimbursement of certain legal fees incurred in connection therewith. The claimant's employing agency did not reimburse him for the following fees charged by his attorney:

Review of contract of sale	$ 50
Representation and attendance at closing	100

These items were disallowed based upon our decisions which hold that legal fees for counseling and advisory services rendered to the em-

ployee are not authorized expenses for which reimbursement is proper. In addition, $25 was disallowed for the preparation by the attorney of an affidavit of title relative to a prior, unconsummated contract to sell the residence. This fee was not reimbursed on the grounds that the regulations do not authorize reimbursement of unusual expenses incurred by an employee because of difficulties involved in selling his residence. Whether any of the above items may properly be paid is the subject of this action.

Statutory authority for reimbursement of the expenses of residence transactions of transferred employees is found at 5 U.S.C. 5724a (1970). Regulations implementing that provision are found in para. 2–6.2c of the Federal Travel Regulations (FPMR 101–7) (May 1973) and provide as follows:

> c. *Legal and related expenses.* To the extent such costs have not been included in brokers' or similar services for which reimbursement is claimed under other categories, the following expenses are reimbursable with respect to the sale and purchase of residences if they are customarily paid by the seller of a residence at the old official station or if customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily charged in the locality of the residence: costs of (1) searching title, preparing abstract, and legal fees for a title opinion or (2) where customarily furnished by the seller, the cost of a title insurance policy; costs of preparing conveyances, other instruments, and contracts and related notary fees and recording fees; costs of making surveys, preparing drawings or plats when required for legal or financing purposes; and similar expenses. Costs of litigation are not reimbursable.

This paragraph carried forward, with minor changes of wording, the original provisions of section 4.2c of Bureau of the Budget Circular No. A–56 (October 12, 1966), which first provided for the reimbursement of legal fees incurred incident to transfers of station.

It should be noted at the outset that the only limitations placed by the above regulation upon the reimbursement of legal fees is that they not be included in another category, do not exceed the amount customarily charged in the locality of the residence, and are not for litigation. There is no broad prohibition against the payment of legal fees generally. However, in the first decision of this Office interpreting section 4.2c of Circular A–56, we were required to consider the appropriateness of reimbursing an employee for the services of an attorney in ascertaining the propriety of the terms of the contract of sales and other instruments, and examining the title papers and preparing a title opinion letter. We found those services to be advisory in nature and distinguished them from the searching of title and the preparation of the purchase contract, holding:

> Such services while stemming from prudence on the part of the employee are, in our opinion, not to be considered as normal or usual expenses incident to the purchase or sale of moderately priced residential housing and, therefore, not reimbursable expenses within the guidelines of section 4.2c, referred to above. B–161891, August 21, 1967.

Based on this rationale, we have consistently held that an attorney fee paid by an employee for legal representation and advice in connection with the sale or purchase of a residence is not reimbursable. 48 Comp. Gen. 469 (1969).

Since the time of our earlier decisions, the law, regulations, and practices governing real estate transactions have grown more complex. Major Federal legislation enacted during this period affecting real estate transactions includes the Truth in Lending Act, Public Law 90–321, May 28, 1968, and the Real Estate Settlement Procedures Act of 1974, Public Law 93–533, December 22, 1974. When the latter Act was amended by Public Law 94–205 on January 2, 1976, House Report 94–667 (1975) acknowledged the complexity of real estate transactions at pages 1–2:

> Real estate settlement practices are different in each of the 50 states and each state differs extensively within the numerous governmental subdivisions. The attempt of last year to legislate nationally with the Real Estate Settlement Procedures Act on the problems that had arisen with regard to real estate practices in a number of jurisdictions has proved in many areas of the country to be unworkable, overly rigid in a number of other areas, and too inflexible to be administered adequately in those jurisdictions where real estate settlement practices needed the attention of Federal regulations.

It has thus been recognized by the Congress that the nature of real estate transfer services customarily performed by the attorney, the realtor, the title insurance carrier, and the financing institution varies greatly from location to location. In addition, the definition of "practice of law" governing the functions of attorneys and other persons and entities regarding real estate transactions differs among the various jurisdictions. In view of these differences and complexities. It is not uncommon for buyers and sellers of real property to obtain the services of an attorney to provide the legal services involved in a real estate transaction. Consequently, we are of the view that obtaining necessary and reasonable legal services incident to the purchase or sale of residential housing is not merely prudent, but is customary.

In addition, we have observed, from the matters referred to us for decision, that while the nature of the legal services rendered incident to a real estate transaction varies from location to location, attorneys frequently assess a single overall fee for the rendition of a combination of such services. Such a fee structure recognizes the fact that frequently some of the services provided by the attorney are a necessary continuation of other services, and that information developed by his consultations and investigations is used in its entirety to provide such services. It thus appears that in the usual case, an attorney may, incident to providing the agreed services, be required to render advice and otherwise represent the employee.

We have, therefore, reconsidered the position taken in B-161891, *supra*, and 48 Comp. Gen. 469, *supra*, and similar cases, and have deter-

mined that those cases will no longer be followed. As noted above, FTR para. 2–6.2c (May 1973) provides for reimbursement of several stated categories of legal expenses and of "similar expenses." In view of the circumstances described above, we hold that necessary and reasonable legal fees and costs customarily charged incident to the purchase or sale of a residence in the locality of the transaction, except fees and costs of litigation constitute "similar expenses" within the meaning of the regulations.

In this connection, we noted above that while the nature of the legal services rendered varies from location to location, attorneys frequently assess a single overall fee for the rendition of a combination of such services incident to a real estate transaction. We have previously required itemization of legal fees on the grounds that a listing of the services provided and the charges therefor was necessary to ensure that reimbursement be authorized only for certain enumerated services. B–163203, March 24, 1969; B–165280, December 31, 1969. Because our decision of today authorizes reimbursement of the cost of legal services customarily rendered in the locality of the residence transaction, a single fee charged therefor may properly be paid without itemization if it is within the customary range of charges for such services in that locality. Accordingly, B–163203 and B–165280, *supra*, are modified to the extent set forth above.

With respect to determining the amount customarily charged in a given locality, local mandatory minimum fee schedules formerly constituted the normal standard for that amount. Such schedules were held by the Supreme Court to violate the Sherman Anti-trust laws in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). However, pursuant to FTR para. 2–6.3c (May 1973), technical assistance in determining the reasonableness of an expense may be obtained from the local or area office of the Department of Housing and Urban Development serving the area in which the expense occurred. We have been informally advised that such assistance includes the reasonableness of legal fees and costs charged in connection with the purchase and sale of residences. Of course, if the claimed charges appear excessive, then pursuant to FTR para. 2–6.3b, any portion of such costs which is excessive shall not be reimbursed.

In determining whether a decision should be made effective retrospectively or prospectively, courts have weighed the several policies and interests involved. Thus, in *Darrow* v. *Hanover Township*, 58 N.J. 410, 278 A.2d 200 (1971), the Supreme Court of New Jersey, in determining that its decision abrogating the doctrine of interspousal immunity should be applied prospectively, considered the extent to which its prior decisions had been justifiedly relied upon, and the extent to

which retrospectivity would be disruptive of settled claims. However, the court applied the rule retrospectively as to the parties involved in the landmark decision since a purely prospective ruling would not provide an incentive to challenge outmoded common law doctrines.

In the present matter, decisions of this Office have recently been rendered in accordance with our previous views concerning reimbursement of attorney fees. These decisions have followed an unbroken line of precedent for 10 years, and have been justifiably relied upon by transferred employees, by employing agencies in rendering advice to transferees, and by certifying and disbursing officers in the disposition of claims presented to them for reimbursement. Further, prospective application of our decision of today will foster stability since it will avoid the necessity of opening claims which might have gone stale because of a failure to promptly investigate. Accordingly, since this decision represents a substantial departure from our previous interpretation of the Federal Travel Regulations, and involves the overruling of many precedents on which reliance had justifiably been placed, the rules set forth above are prospective only and may not be applied where the settlement date for the transaction for which reimbursement is claimed is prior to the date of this decision. 54 Comp. Gen. 890 (1975); *id.* 1042 (1975).

In the case of Mr. Lay, however, our decision of today will be applied retrospectively to his claim only. This application is in recognition of the validity of his arguments and of the fact that his claim constitutes the vehicle by which our interpretation of the Federal Travel Regulations has been altered. Accordingly, to the extent that they are necessary and reasonable in the locality of the transaction, Mr. Lay's claim for the fees charged by his attorney for review of the contract of sale and for representation at closing may be reimbursed. 54 Comp. Gen. 1042, 1049, *supra.*

Regarding the legal fees charged in connection with the unsuccesful previous efforts to sell the property, our rule remains unchanged. Mr. Lay's employing agency disallowed $25 for the preparation of an affidavit of title regarding that effort. This item may not be paid because it is duplicative of costs incurred by reason of the successful sale. B–184869, September 21, 1976. Because the costs associated with uncompleted contracts are analogous to losses due to market conditions, and since reimbursement of such losses is prohibited by 5 U.S.C. 5724a(a)(4) (1970), the rule denying reimbursement of these costs is not changed. Accordingly, the claim for reimbursement of legal costs associated with unsuccessful efforts to sell a residence may not be paid. B–184869, *supra.*

Accordingly, the voucher may be certified for payment in accordance with the foregoing.

U. S. GOVERNMENT PRINTING OFFICE : 1977 O - 230-102