DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60002

FILE: B-183851 DATE: October 1, 1975

MATTER OF: LTV Aerospace Corporation 97862

DIGEST:

1. Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since GAO has continuing audit interest in NACF program.

2. Navy is not required as matter of law to expend funds provided in lump-sum appropriation act for a specific purpose when statute does not so require, notwithstanding language contained in Conference Report. Absence of statutory restriction raises clear inference that the Report language paralleled and complemented, but remained distinct from, actual appropriation made. Therefore, Navy selection of particular aircraft design for its Air Combat Fighter and resultant award of sustaining engineering contracts cannot be regarded as contrary to law.

3. While protester argues contract award by Navy should be regarded as void since it is not in accordance with public policy as expressed in congressional Conference Report, award is not contrary to statute, contract does not require any actions contrary to law, and does not represent a violation of moral or ethical standards. Therefore no basis exists to conclude that award is contrary to public policy.

4. Although protester argues that Navy did not comply with DOD reprogramming directives, those directives are based on nonstatutory agreements and do not provide a proper basis for determining the legality of expenditures.

5. Provision in appropriation act which prohibits use of funds for presenting certain reprogramming requests cannot operate to invalidate contract awards even if awards resulted from reprogramming action since a violation of such provision cannot serve to invalidate an otherwise legal contract award.

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6. Protester's assertion that Navy properly could select only derivative of model selected by the Air Force is incorrect, since reasonable interpretation of RFQ, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter.

7. Protester's claim that Navy did not treat offerors on equal basis is not supported by record, which indicates that overall evaluation was conducted in accordance with established criteria and that both offerors were treated fairly.

8. Assertion that engine selected by Navy was not authorized for use with lightweight fighter is without merit, since record indicates selected engine is modified version of baseline engine listed in solicitation. Also, record indicates Navy did not improperly estimate offerors' engine modification costs.

9. Navy's cost evaluation of competing proposals was conducted in accordance with proper procedures and established criteria since the Navy's development of its own estimates in determining cost credibility was consistent with sound procurement practices and award of contract to higher priced offeror was not improper.

10. Restriction of competition in Navy procurement for Air Combat Fighter (ACF) to offerors furnishing designs derived from Air Force ACF program was proper even though Navy selected derivative of design different from that chosen by Air Force, since solicitation was intended to maximize commonality of both technology and hardware between Air Force and Navy designs and Navy selection was in accordance with solicitation criteria regarding commonality.

INTRODUCTION

LTV Aerospace Corporation (LTV) has protested the selection by the Department of the Navy of the McDonnell Douglas Corporation (MDC) to develop the Navy Air Combat Fighter (NACF), which is intended to be a low cost complement to the operational F-14 fighter and a replacement for the F-4 and A-7 aircraft. The NACF

has resulted from the DOD effort to turn away from the increasingly complex top-of-the-line fighter aircraft, as exemplified by the Navy F-14 and the Air Force F-15, and to seek less expensive complements to these weapon systems.

The selection of MDC followed a lengthy competition between MDC and LTV, in which both firms sought to modify aircraft originally designed for the Air Force under the Air Combat Fighter (ACF) program so that they would be suitable for aircraft carrier operation. While the Navy was evaluating the designs proposed by both offerors, the Air Force selected the F-16 for its ACF. Although LTV's designs were in varying degrees based on the F-16 design, the Navy ultimately determined that only the MDC entry, which was based on the F-17 design not selected by the Air Force, was suitable for the Navy. As a result of that determination, the Navy selected the MDC entry, designated it the F-18, and on May 2, 1975, awarded sustaining engineering contracts to MDC and also to General Electric Company (GE) (which is to develop the engines for the aircraft).

Upon announcement of the Navy's selection, LTV filed a protest with this Office, claiming that the Navy's selection was illegal, contrary to public policy, and not in accordance with the established selection criteria.

Specifically, LTV argues that the Navy selection of the F-18 violated the 1975 fiscal year DOD Appropriation Act since the F-18 is not a "derivative" of the F-16 and not common with it, requirements which LTV believes were contemplated by the act. Also, LTV contends that at the very least the selection of the F-18 must be deemed void as against public policy since the selection was contrary to the language of the Conference Report which led to the passage of the act.

With respect to the competition itself, LTV contends that MDC and LTV were not properly evaluated in the areas of commonality, engines, and cost, and that the competition itself was unduly restrictive. The relief sought by LTV is initiation of a new competition by the Navy.

The Navy denies all of LTV's allegations. It is the Navy's position that selection of the F-18 complied with both the letter and spirit of the 1975 DOD Appropriation Act, that both LTV and MDC were evaluated fairly and on the same basis, and that the F-18 is the best design for the Navy's requirements.

In considering this protest, we have carefully examined the submissions from the Navy, LTV, and MDC. Also, in view of the technical and cost arguments made in this case, we conducted an audit investigation, the results of which are reflected herein. In addition, we have considered the views expressed in two reports issued by the Library of Congress which deal with some of the points raised by the protester. It is our considered opinion that the Navy's actions were not contrary to statute or public policy and that the selection was fair and impartial and in accordance with the established selection criteria. Accordingly, for the reasons more fully discussed below, the protest is denied.

It should be noted, however, that this does not mean that the Navy is free to proceed with full-scale development of the F-18. In reaching our conclusion we have not considered the wisdom or cost effectiveness of the Navy's decision, nor have we examined the various alternatives available to the Navy. Our decision, therefore, does not encompass any broad policy questions that might be raised concerning the Navy selection. Rather, it concerns only the award of the short-term sustaining engineering contracts. Award of full-scale development contracts will depend upon congressional authorization of funds for that purpose.

PROCUREMENT HISTORY

LTV's protest can best be understood in the context of the procurement history of the NACF. The present NACF program is the result of several years of exchanges between Congress and the Department of Defense (DOD) regarding the type of aircraft considered most appropriate for future Navy use, and has evolved from earlier Navy efforts to procure needed levels of combat aircraft. Up until 1971, DOD had intended to procure an all F-14 force for the Navy. However, this plan was altered to a limited procurement of 313 F-14A aircraft (as then indicated in the 5-year defense plan) with possible future procurement. Hearings on the Lightweight Fighter Aircraft Program Before the Defense Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess. 35 (1975) [hereinafter cited as 1975 Senate Appropriations Hearings].

During this same time period, the Air Force was evaluating the concept of advanced prototyping of aircraft as a means to reduce defense costs and risks by demonstrating the feasibility of utilizing advanced technology before effecting large scale production. The Air Force intended to demonstrate and evaluate the technology for a small, high performance aircraft. Hearings on Advanced Prototype Before the Senate Committee on Armed Services, 92d Cong., 1st Sess. 23-27 (1971) [hereinafter cited as 1971 Senate Armed Services Hearings]. Accordingly, on January 6, 1972, the Air Force issued a request for proposals to conduct a prototype development of the lightweight fighter (LWF) aircraft. (The LWF program was the predecessor to the Air Force's present ACF program, and was intended to implement the concept of a low cost and high performance aircraft, the same concept on which the NACF is based.) In February 1972 five companies responded. Northrop Corporation responded with two proposals and the following four companies responded with one each: Boeing, General Dynamics (GD), Lockheed, and LTV. Evaluation of the six proposals was completed in March 1972, with Northrop and GD announced as the winning competitors. Lightweight fighter development contracts in the amounts of $38 million and $39.1 million for the GD YF-16 and the Northrop YF-17, respectively, were released on April 14, 1972.

While the Air Force was proceeding with the LWF program, the Navy in 1973 was evaluating various options regarding the procurement of a new aircraft. Initially, it was proposed that a prototype flyoff program between a lower cost version of the F-14 and a Naval version of the F-15 be held. This program, however, was regarded as too expensive. 1975 Senate Appropriations Hearings at 36. Ultimately, it was decided to investigate a lighter weight, lower cost, multi-mission aircraft which could serve as a fighter to replace certain F-4 aircraft and also eventually replace the A-7 aircraft in the attack mission. Id. This multi-mission airplane was designated the VFAX. In June 1974, the Naval Air Systems Command (NAVAIR) released a presolicitation notice to the aerospace industry soliciting expressions of interest in and comments on the proposed VFAX development program. Industry responses were received in July 1974.

At this time, the VFAX program was meeting with some opposition in the Congress, in part because the VFAX was not tied to the Air Force prototype program. This led the House Armed Services Committee to recommend deletion from the 1975 DOD Appropriation Authorization Act of the entire $34 million requested by the Navy to

initiate the development of the VFAX. However, the Senate Armed Services Committee recommended inclusion of the entire $34 million requested for the VFAX. S. Rep. No. 93-884, 93d Cong., 2d Sess. 95 (1974). The subsequent conference report on the bill recommended inclusion of $30 million for the VFAX, and ultimately the bill was enacted into law on August 5, 1974, as Public Law 93-365 (88 Stat. 399).

The passage of the Authorization Act did not signal the end of congressional opposition to the VFAX. When the 1975 DOD appropriation bill came before the House Appropriations Committee, the Committee recommended deletion of all funds requested for the VFAX. However, the Senate Committee on Appropriations recommended the inclusion of $20 million for the VFAX. S. Rep. No. 93-1104, 93d Cong., 2d Sess. 174 (1974). This difference was finally resolved by the conference committee on the bill, which also recommended an appropriation of $20 million but indicated that the funds were to be spent on a new program element which was designated the NACF:

> "The Managers are in agreement on the appropriation of $20,000,000 as proposed by the Senate instead of no funding as proposed by the House for the VFAX aircraft. The conferees support the need for a lower cost alternative fighter to complement the F-14A and replace F-4 and A-7 aircraft; however, the conferees direct that the development of this aircraft make maximum use of the Air Force Lightweight Fighter and Air Combat Fighter technology and hardware. The $20,000,000 provided is to be placed in a new program element titled 'Navy Air Combat Fighter' rather than VFAX. Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided. Funds may be released to a contractor for the purpose of designing the modifications required for Navy use. Future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Air Combat Fighter design."

H.R. Rep. No. 93-1363, 93d Cong., 2d Sess. 27 (1974). The DOD Appropriation Act was enacted on October 8, 1974, as Public Law 93-437 (88 Stat. 1212). However, the language of the Act itself did not include any specific direction as to how the funds were to be spent. It stated only the following:

"[T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1975, for military functions administered by the Department of Defense, and for other purposes namely:

* * * * *

"RESEARCH, DEVELOPMENT, TEST, AND EVALUATION, NAVY

"For expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law; $3,006,914,000, to remain available for obligation until June 30, 1976."

While Congress was considering the relative merits of the VFAX, NACF, and ACF programs, both the Air Force and the Navy were moving ahead on their respective programs. On September 3, 1974, the Air Force solicited full-scale development proposals for the ACF from both GD and Northrop, whose prototype aircraft had been undergoing comprehensive flight test programs. At approximately the same time, the Chief of Naval Operations released the formal VFAX Operational Requirement and directed NAVAIR to prepare an industry solicitation for VFAX Contract Definition and full-scale development. However, in view of the language in H. R. Rep. No. 93-1363, quoted above, DOD directed NAVAIR to limit the planned solicitation to derivatives of the LWF and ACF designs. This limitation, the Navy believed, was in accord with the Congressional guidance provided in that report. Hearings on Department of Defense Appropriations for 1976 Before Defense Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess. 337 (1975) [hereinafter cited as 1975 House Appropriations Hearings].

Since neither GD nor Northrop (the ACF competitors) had built carrier-capable aircraft, the Navy asked each contractor to develop a partnership arrangement with carrier-capable companies for the NACF procurement in accordance with Armed Services Procurement Regulation (ASPR) § 4-117 (1974 ed.). After a period of discussion, MDC and Northrop entered into a teaming arrangement on October 2, 1974, with MDC as the prime contractor for the

within 5 working days of the Navy's selection announcement on May 2, 1975, the Navy considers this date to be well after the time that LTV knew or should have known the basis for its protest. The Navy's consideration (and ultimate selection) of a design other than a derivative of the F-16 is what the Navy views as the basis for LTV's protest. Since the Air Force selected the F-16 as its ACF on January 13, 1975, the Navy believes LTV was required to protest within 5 days of whenever after that date LTV knew or should have known that the NACF competition was not limited to the LTV designs. The Navy asserts that LTV should have known that the competition was not so limited from the "clear and unambiguous statement of evaluation criteria of the RFQ," from the times in January and February when the Navy indicated its intent to continue the competition, and from the language of the April 4 request for best and final offers, which solicited offers from both contractors.

The procedures governing the timeliness of this protest are located in 4 C.F.R. § 20.2(a) (1975) (this protest was filed prior to the effective date of our new Bid Protest Procedures; see 40 Fed. Reg. 17979 (1975)). They provide in pertinent part as follows:

> "(a) * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. * * *
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> "(b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

We do not believe it is necessary to determine the timeliness of the issues raised by LTV, since we think it is abundantly clear that they are significant and thus proper for consideration by this Office regardless of whether they were timely raised. Fiber Materials, Inc., 54 Comp. Gen. 735 (1975), 75-1 CPD 142. In our view, the protest essentially presents two distinct issues: whether the F-18 selection was in violation of a "congressional directive" and whether the F-18 award resulted from improper and unfair competition. The first issue, raising questions concerning interpretation of a Federal appropriation act and "congressional intent" as public policy, are threshold questions of widespread interest.

NACF effort. On that same day, GD and LTV also entered into a teaming agreement, which provided that GD would be the prime contractor to the Air Force and that LTV would be the prime contractor to the Navy for any derivative versions of the YF-16. The agreement further provided that if the YF-16 were not selected by the Air Force, then GD would be the prime contractor to the Navy for the NACF. Those contractor relationships were approved by the Navy. 1975 House Appropriations Hearings at 338.

On October 12, 1974, the Air Force, on behalf of the Navy, issued request for quotations (RFQ) No. N00019-75-Q-0029 to the ACF contractors. The RFQ was originally designed for the VFAX. However, as issued, it solicited proposals for the design, development, test and demonstration of the NACF.

The RFQ called for a cost reimbursement type contract, incrementally funded in part, with proposals to be submitted on a cost-plus-incentive-fee basis. It indicated that proposals should be based on the incorporation of the essential characteristics of the former VFAX into the design of the NACF, and that significant emphasis would be placed on the design-to-cost method of contracting and on life cycle costing. It also advised that proposals should include a technical proposal and trade-off analysis, a test and evaluation plan, a management/capability/facility submission, a design to cost analysis, an ACF derivative analysis, a cost proposal, and an executive summary.

To support the contractor design effort called for by the RFQ, the Navy proposed to utilize approximately $12 million of the $20 million designated by the congressional conferees as available for the NACF program. By letter dated November 1, 1974, DOD so informed the Chairmen of the Senate and House Committees on Appropriations. Both Chairmen subsequently responded that their Committees had no objection to the proposed expenditures.

Preliminary responses from both LTV and MDC were submitted on December 2, 1974. Complete RFQ responses were received on January 13, 1975, and contractor technical discussions were held a few days later. LTV proposed two designs essentially based on the YF-16 model, the model 1601 and model 1600, while MDC proposed its model 267, which was essentially based on the F-17. The Navy regarded these initially proposed designs to be unacceptable for carrier use. However, both sets of designs were determined to merit further consideration as capable of being made

acceptable. The Navy then entered into discussions with LTV and MDC, pointing out what it considered to be unacceptable areas in the proposals. Discussions and proposal revisions continued into March 1975, when LTV offered an additional design it designated the model 1602.

During this period, the Air Force, on January 13, 1975, announced the selection of the General Dynamics design, redesignated as the F-16, as the Air Force ACF choice over the F-17. This decision was explained by the Secretary of Defense at a January 14, 1975, news conference as follows:

> "In the case of the YF-16 selection by the Air Force, that is one of those happy circumstances in which the aircraft with a higher performance happened to provide the lower cost. * * * We have carefully reviewed the data, and, according to the Air Air Force data, over a 15-year life cycle, with constant 1975 dollars, the savings for the Air Force by going in the direction of the YF-16 should amount to something on the order of $1.3 million in R&D, in production costs and in life cycle costs -- operation to maintenance costs. * * *"

On April 4, 1975, the Navy solicited "best and final" offers from LTV and MDC. Also on that date, the original RFQ was redesignated request for proposals (RFP) No. N00019-75-R-0084 (for MDC) and RFP No. N00019-75-R-0085 (for LTV). Both RFPs were essentially the same (with certain clauses and provisions individually tailored to the proposals of the specific contractors) and essentially similar to the RFQ, except that the RFPs contemplated a letter contract and revised the contract fee arrangement from an incentive fee basis to an incentive fee/award fee basis.

"Best and final" offers were received on April 15, 1975. On May 2, 1975, the Navy announced the selection of the MDC design and the resulting award of sustaining engineering contracts to MDC ($4.4 million) and GE ($2 million), the engine developer. Both contracts were to last approximately 4 months, pending award of full-scale development contracts.

TIMELINESS OF THE PROTEST

Before reaching the merits of the protest, we must consider the Navy's assertion that the protest should be dismissed because it was untimely filed. While recognizing that the protest was filed

In addition, the second basic issue, relating to the propriety, fairness, and equality of the evaluation, is substantially intertwined with the first issue since it in part involves the effect of certain legislative history on the interpretation of a solicitation's evaluation criteria. Accordingly, we deem it appropriate to consider these issues. See Fiber Materials, Inc., supra; Ira Gelber Food Services, Inc., et al., 54 Comp. Gen. 809 (1975), 75-1 CPD 186. Furthermore, our continuing audit interest in the NACF program militates against our declining to consider the issues raised. PRC Computer Center, Inc., et al., B-178205, July 15, 1975, 55 Comp. Gen. __, 75-2 CPD 35.

LEGALITY OF CONTRACT AWARD

LTV asserts that the Navy's actions in awarding contracts which will lead to development of the F-18 were illegal because they involved the expenditure of funds in violation of the 1975 DOD Appropriation Act. Title V of that Act, as pointed out above, appropriated for use by the Navy in excess of $3 billion for "expenses necessary for basic and applied scientific research, development, test, and evaluation * * *." LTV argues that this statutory provision must be read in light of its legislative history, particularly the Conference Report, H. R. Rep. No. 93-1363, 93d Cong., 2d Sess. (1974), which was was adopted by both houses of Congress when the Act was passed. See 120 Cong. Rec. H9446-57 (daily ed. Sept. 23, 1974) and id. S17445-50 (daily ed. Sept. 24, 1974). The Conference Report explicitly stated that $20 million was being provided for a Navy Combat Fighter, but that "Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." The Report also stated that "future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Combat Fighter design."

The Navy does not dispute that the F-18 is not a derivative of the F-16 or that the language of the Conference Report precluded the expenditure of the $20 million on anything other than a derivative of the fighter aircraft design selected by the Air Force. However, it disagrees with LTV's assertion that the Act must be construed in accordance with such language. Rather, the Navy argues that the Act in question appropriates a lump sum, that it is clear and unambiguous on its face, and that under the established and traditional "budgeting and appropriation process" used by Congress and

the Defense Department the law cannot be construed as incorporating any restrictions on spending authority which might appear in the Conference Report but which do not appear in the law itself. Although it admits that the congressional desire as to how a lump sum appropriation is to be spent may be indicated by legislative history, the Navy maintains that compliance with that intent when it is not manifested in the law itself is not a statutory or legal requirement, but merely a practical one dictated by an agency's need to maintain good relations with Congress in order to obtain future appropriations. The Navy states that in such situations it either complies with such nonstatutory guidance or else obtains congressional approval for deviating from it through "a mutually-developed DOD Congress working relationship referred to as 'reprogramming.'" The Navy asserts that while it did not formally reprogram in this instance, it did obtain the congressional approval.

On the other hand, LTV argues, in accordance with traditional concepts of statutory interpretation, that Title V of the Act can only mean what Congress intended it to mean and that resort to the legislative history and the Conference Report in particular is necessary to establish that intent. In this regard, LTV claims that Title V contains only broad, general language and does not indicate which projects are encompassed by the words "basic and applied scientific research, development, test, and evaluation," how the total appropriated amount is to be apportioned among the Navy's projects, or what expenses might be "necessary."

In determining the meaning of and proper effect to be given to laws enacted by Congress, the courts and this Office generally follow traditional principles of statutory interpretation. A fundamental principle basic to the interpretation of both Federal and state laws is that all such statutes are to be construed so as to give effect to the intent of the legislature. United States v. American Trucking Association, Inc., 310 U.S. 534 (1940); 2 A. Sutherland, Statutory Construction § 45.05 (Sands ed. (1973)); 38 Comp. Gen. 229 (1958). This intent may be determined from the words of the statute itself, from the "equity of the statute," from the statute's legislative history, and in a variety of other ways. See Sutherland § 45.05, supra. The legislative history of a statute may be examined as an aid in determining the intention of the lawmakers when the statute is not clear, see, e.g., United States v. Donruss Co., 393 U.S. 297 (1969); 54 Comp. Gen. 453 (1974); 53 id. 401 (1973), or when application of the statutory language would produce an

absurd or unreasonable result, United States v. American Trucking Association, Inc., supra; 46 Comp. Gen. 556 (1966), or if that legislative history provides "persuasive evidence" of what Congress intended. Boston Sand and Gravel Company v. United States, 278 U.S. 41, 48 (1928).

In construing appropriation acts, we have consistently applied these traditional statutory interpretation principles so as to give effect to the intent of Congress. In many cases, when the meaning of an appropriation act seemed clear, we resolved questions concerning the propriety of expenditures without resort to legislative history. See 54 Comp. Gen. 976 (1975); 53 id. 770 (1974); 53 id. 328 (1973); 52 id. 504 (1973); 52 id. 71 (1972); 51 id. 797 (1972); 45 id. 196 (1965); 34 id. 599 (1955); 29 id. 419 (1950). In other cases, we have referred to the legislative history of an appropriation act in order to properly interpret language in the act that purported to impose qualifications, requirements, or restrictions. For example, in 53 Comp. Gen. 560 (1974), we reviewed Congressional hearings and reports to determine whether a statutory provision stating that loans may be insured "as follows: * * * operating loans, $350,000,000" precluded an agency from making or issuing loans in excess of that amount. Similarly, in 49 Comp. Gen. 679 (1970), we examined the legislative history of various DOD appropriation acts to determine whether a provision in the 1969 Act precluded payment of certain tuition fees for ROTC students. See also 54 Comp. Gen. 944 (1975); 53 id. 695 (1974); 51 id. 631 (1972); 40 id. 58 (1960); 39 id. 665 (1960); 34 id. 309 (1954); 34 id. 199 (1954); B-178978, September 7, 1973.

LTV asserts that resort to the legislative history of the 1975 DOD Appropriation Act in this case is necessary to give effect to the intent of Congress. The objective of statutory construction, of course, whether applied to appropriation or other acts, is to ascertain legislative intent with respect to the actual statutory language employed. This necessarily assumes that statements in committee reports and other sources of legislative history are meant to address, explain, and elaborate upon the words of the statute itself. As illustrated above, we have, of course, examined legislative history for such purpose in construing restrictions or other provisions contained in an appropriation statute. At the same time, we have also recognized that, with respect to appropriations, there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a nonstatutory context.

Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. Our position in this regard is reflected both in our decisions, see 17 Comp. Gen. 147 (1937); B-149163, June 27, 1962; B-164031(3), April 16, 1975, and in various communications to members of Congress. In 17 Comp. Gen. 147, supra, we advised the President of the Board of Commissioners of the District of Columbia that the District was not precluded by the applicable appropriation act from reclassifying administrative positions within the school system merely because of the budget estimates presented to Congress which provided the basis for the appropriation. We said that "Amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself." 17 Comp. Gen. at 150.

Similarly, in B-149163, supra, we held that the Administrative Office of the United States Court could properly expend appropriated funds for rules revision purposes even though the budget estimates did not include any sum for that activity. We stated that:

> "* * * in the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which may be expended for revising and improving the Federal Rules of practice and procedure, you would not be legally bound by your budget estimates or absence thereof.
>
> "If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump sum appropriation is legally available to carry out the functions of the agency."

In B-164031(3), supra, we held that the Department of Health, Education, and Welfare was not precluded by its lump sum appropriation act from spending in excess of $9.2 million for certain research

In this regard, Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for "unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations." Fisher, "Reprogramming of Funds by the Defense Department", 36 The Journal of Politics 77, 78 (1974). This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to "keep faith" with the Congress. See Fisher, supra, at 82. As the Navy points out, there are practical reasons why agencies can be expected to comply with these Congressional expectations. If an agency finds it desirable or necessary to take advantage of that flexibility by deviating from what Congress had in mind in appropriating particular funds, the agency can be expected to so inform Congress through recognized and accepted practices.

On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. Such explicit provisions are not uncommon and are usually found in the DOD appropriation acts. For example, section 624 of the 1970 Act, Public Law 91-171, 83 Stat. 484, approved December 29, 1969, provided that "no part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, woven silk * * * or wool * * * not grown * * * or produced in the United States * * *." See 49 Comp. Gen. 606 (1970). The 1974 Act, Public Law 93-238, 87 Stat. 1026, approved January 2, 1974, appropriated $2,651,805,000 for Navy research, test, development, and evaluation activities but provided "that no part of the appropriation contained in this Act shall be used for Full Scale Development of Project Sanguine." Even the 1975 Act, upon which LTV relies, contained several of these specific restrictions. Title III of the Act provided that "not less than $355,000,000" of the Army's operation and maintenance appropriation of $6,137,532,000 "shall be available only for the maintenance of real property facilities." Similar restrictions were placed on the Navy, Air Force, and other DOD elements. Title III also provided that "of the total amount of this appropriation made available for the alteration, overhaul, and repair of naval vessels not more than $1,130,000,000 shall be available for the performance of such work in Navy shipyards." Title VIII contained several other restrictions or prohibitions on the use of the funds appropriated by the Act. See also 49 Comp. Gen. 679, supra; 40 id. 58, supra; and 39 id. 665, supra.

and development activities. We said that the "references in the legislative history * * * to $9.2 million for carrying out the research and development activities * * * are not statutory limits. Rather, these references are reflective of justifications by HEW and indications by the House and Senate Appropriations Committees as to how $9.2 million of the lump sum appropriation should be applied."

We have also taken this position recently in a letter and two reports to addressed members of Congress, which resulted from certain reviews of DOD spending. In a March 17, 1975, letter to the Chairman of the Subcommittee on Research and Development, Senate Committee on Armed Services, which has been reprinted at 121 Cong. Rec. S8148-51 (daily ed. May 14, 1975), we construed Title V of the 1975 DOD Appropriation Act, the very provision at issue in this case. We said:

> "Since the RDT&E appropriation is not a line-item appropriation, the amounts appropriated for each department * * * represent the only legally binding limits on RDT&E obligations except as may be otherwise specified in the appropriation act itself."

Also, in our Reports LCD-75-310 and LCD-75-315, both entitled "Legality of the Navy's Expenditures For Project Sanguine During Fiscal Year 1974" [hereinafter cited as Project Sanguine Report] and dated January 20, 1975, we examined a situation somewhat analogous to the instant case. DOD had requested $16,675,000 for Project Sanguine. The Senate Committee on Appropriations voted to give DOD the full amount, while the House Committee on Appropriations deleted all of it. The Conference Committee approved $8.3 million for the Project on the condition that none of the funds be used for full-scale development. The bill that was ultimately enacted into law provided a lump sum in excess of $2.6 billion for Navy RDT&E, but with the restriction, referred to above, that none of the funds could be used for full-scale development of Project Sanguine. The Navy spent in excess of $11.7 million of such 1974 year funds on the Project. After quoting from our decision at 17 Comp. Gen. 147, supra, we said that the fact that the Conference Committee limited Project Sanguine funds to $8.3 million "cannot operate so as to insert in a statute a limitation not imposed by its terms" and that "the action of the Committee of Conference is not legally binding unless carried into the appropriation act itself."

We further point out that Congress itself has often recognized the reprogramming flexibility of executive agencies, and we think it is at least implicit in such condition that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. See, e.g., H.R. Rep. No. 408, 86th Cong., 1st Sess. 20 (1959); H.R. Rep. No. 1607, 87th Cong., 2d Sess. 21 (1962); Hearings On Department of Defense Appropriations for 1971 Before Defense Subcommittee of the House Committee on Appropriations, Part 5, 91st Cong., 2d Sess. 1114-15 (1970); see also Fisher, supra, particularly at 80-87. In addition, however, there is also explicit Congressional recognition of the legal effect of enacting unrestricted lump sum appropriations. Last year a report of the House Committee on Appropriations included the following statement:

> "In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justification which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills." H.R. Rep. No. 93-662, 93d Cong., 1st Sess. 16 (1973).

However, despite our case holdings and the sundry manifestations of Congressional understanding of the distinction between imposing spending restrictions as a matter of law and imposing them on a non-statutory, legally non-enforceable basis, LTV argues that "the process of interpretation applicable to general appropriation statutes" is no different from the process "applicable to all other statutes." LTV cites several cases for the proposition that such statutes do not give the Navy "unbridled discretion in the face of specific limitations in the legislative history."

We have carefully reviewed the cases cited by LTV; however, we do not find that our view of appropriation acts is erroneous. We note that in none of the cases cited was the court faced with the issue presented here. In Beck v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), which LTV relies on for the statement "An appropriations act is like any other act of Congress," it is clear that the court was not talking about statutory interpretation, but about how an act becomes law. See 317 F. Supp. at 728. In United States v. Dickerson, 310 U.S. 554

(1940), the Court consulted the legislative history of a Public Resolution which imposed a restriction on the use of fiscal year appropriated funds to determine the proper interpretation of that restrictive provision. The case, however, involved neither a general appropriation act nor the legislative history of such an act, and was merely another case in which a restrictive provision was construed in light of its legislative history. See cases cited, p. 13, supra.

In Winston Bros. Co. v. United States, 130 F. Supp. 374 (Ct. Cl. 1955), the court relied on a statement attached to a Conference Report by the Managers of an appropriation bill from the House of Representatives to uphold an agency's allocation of funds with respect to construction work on a reclamation project. The statement indicated that the conferees agreed that the funds being appropriated, which were insufficient to fund the entire project, should be allocated for power generation purposes. Although the appropriation act itself contained no such allocation, the agency did allocate the money in accordance with that statement. As a result, irrigation contractors experienced delay and disruption because funds were not provided for their portion of the project work.

The court, in considering the contractors' claims, upheld the Bureau's allocation, stating:

> "The officials of the Bureau of Reclamation took the statement * * * as law. While it was not in the Conference Report, it said that the conferees had agreed that that was the intention of the appropriation. * * * In the circumstances it was the duty of the Bureau of Reclamation to respect the known intent of the responsible managers of the legislation." 130 F. Supp. at 377.

LTV argues that since it was the duty of the agency in Winston Bros. Co. to respect the known intent of the Congressional managers, it was the duty of the Navy in this case "to respect the known intent of Congress as expressed by the mandate of the Conference Report." Although the case does appear to lend some support to LTV's position, we do not believe the case may be read as establishing a general statutory duty on the part of the agency to comply with non-statutory legislative statements as to how funds should be spent since the court did not have to consider the question of whether the agency would have violated the appropriation act if the funds had not been allocated in accordance with the statement.

In United States v. State Bridge Commission of Michigan, 109 F. Supp. 690 (E.D. Mich. 1953), the court relied on the testimony given by an agency official at hearings on an appropriation bill to uphold a particular expenditure. The case involved a suit brought by the United States for recovery of certain lease payments. The Government argued that the lease was invalid because a specific appropriation for the lease payments had not been enacted. The court held against the Government after an examination of the legislative history of the agency's general appropriation revealed that Congress had increased the agency's appropriation in response to an agency request for additional funds to pay for the lease in question. On these facts, the court held only that "Congress is not required to set out with particularity each item in an appropriation as a requisite of validity. It is enough that the appropriation be identifiable sufficiently to make clear the intent of Congress." 109 F. Supp. at 694. We think it is evident that this case concerned no more than the question of whether an expenditure for a particular activity or purpose was within the purview of the agency's general appropriation. The fact that the court resorted to legislative history, as indeed we have done to resolve questions involving both authorization and appropriation statutes, see, e.g., 51 Comp. Gen. 245 (1971); 39 id. 388 (1959), does not establish that spending restrictions indicated in legislative history are binding on an agency when the resulting appropriation statute is silent as to those restrictions.

In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court examined in detail the legislative history of various appropriation acts to resolve the "narrow but important issue" of whether general assistance benefits are available for Indians living off, although near, a reservation. The Bureau of Indian Affairs (BIA), relying on a provision in its Indian Affairs Manual, had ruled that the respondent Indians were ineligible for assistance because they did not live on a reservation. The appropriation acts provided funds "For expenses necessary to provide education and welfare services for Indians * * * and other assistance to needy Indians * * *." The Court noted that neither the Snyder Act, which authorizes most BIA activities, nor the appropriation acts imposed any geographical restrictions on eligibility for assistance, but that BIA officials, in hearings on bills providing for BIA appropriations, had frequently stated that assistance was available for Indians who lived on or near reservations. The Court therefore concluded that BIA's appropriated funds were "intended to cover welfare services" for Indians residing "on or near" reservations, 415 U.S. at 230, and then went on to hold that BIA could not deny those benefits to the respondents since it had failed to comply with the Administrative Procedure Act in promulgating the restrictive provision in its Manual.

We fail to see how this case supports LTV's position. In essence, what the Court did was to utilize legislative history to determine whether an expenditure for a particular purpose was intended by Congress to be encompassed by a general appropriation provision, which is precisely what was done in United States v. State Bridge Commission of Michigan, supra. With respect to the absence of restrictive language in the statute, the Court stated while it was "not controlling, it is not irrelevant that the 'on reservations' limitation in the budget requests has never appeared in the final appropriation bills." 415 U.S. at 214. We would regard that statement as consistent with our view that Congress, when it intends to impose a legal spending restriction, does so through specific statutory language. However, LTV, relying on the words "not controlling," asserts that this language represents explicit Supreme Court recognition that the absence of restrictive statutory language is not "controlling" in determining whether Congress intended to impose a legally enforceable limitation on spending. We do not believe that the Court's statement should be read that way. As indicated above, the Ruiz case involved judicial resort to legislative history to aid the court in determining whether a particular expenditure was within the purview of the applicable general appropriation act. In such a situation, of course, the absence of a specific restriction in a general appropriation act indeed is not controlling. See, e.g., in addition to United States v. State Bridge Commission of Michigan, supra, 53 Comp. Gen. 770, supra; 53 id. 328, supra; and 52 id. 504, supra. Accordingly, in view of the context of the case in which it was used and in view of the otherwise uniform interpretation of Federal appropriation acts as discussed herein, we believe the Court's language reasonably must be construed as referring only to those situations in which it must be determined whether a particular expenditure is encompassed within a general appropriation.

If anything, we think the Ruiz case reflects Supreme Court recognition of executive agency flexibility to manage funds within the general framework of the applicable statutory language. Thus, Mr. Justice Blackmun, writing for the unanimous Court, stated:

> "Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing 'on or near' the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. * * * Thus, if there were only enough

> funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits." 415 U.S. at 230-31.

Finally, in Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970), cert. denied, 400 U.S. 942 (1970), the court considered a claim that BIA's expenditure of appropriated funds on an Indian irrigation project which included work that would benefit solely a non-Indian was unauthorized. The appropriation act merely referred to "construction, major repair, and improvement of irrigation and power systems." The court looked at both BIA's authorization act and the legislative history of the appropriation act, noted that the budget requests presented to Congress indicated that non-Indians would benefit from the irrigation projects, and concluded that Congress did not intend to preclude expenditures that would benefit non-Indians. The court stated that "If Congress had wanted to impose on the Bureau the restrictions urged by appellants, it could have done so easily." 428 F. 2d at 1129. LTV cites this case for the proposition that "reliance may be placed on the legislative history of a general appropriation act to determine the precise authority of the executive agency with respect to the expenditure of the appropriated funds." Once again, however, in Scholder the Court merely referred to legislative history to determine if expenditures that would benefit non-Indians were within the language of the broadly worded appropriation statute. The court did not at all consider whether an expenditure clearly within the purview of the appropriation language was nonetheless prohibited because of statements in legislative history.

We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.

If a statute clearly authorizes the use of funds for the procurement of "military aircraft" without restriction, it must be construed to provide support for the validity of procuring any such aircraft. The fact that the legislative history makes clear that one type of military

aircraft rather than another is to be acquired does not restrict the unequivocal grant of authority carried in the statute itself. To be binding as a matter of law, an intention to so restrict the legal availability of the funds provided would have to be expressed in the statute. However, if the issue is whether a particular aircraft is in fact a "military aircraft," as that term is used in the statute, resort to legislative history is required.

An accommodation has developed between the Congress and the executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.

As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The executive branch --as the Navy has recognized--has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.

Accordingly, for the reasons discussed above, we believe that the Conference Committee statement on which LTV relies constitutes, in effect, a "directive" which parallels and complements - but, in a strict legal sense, remains distinct from - the actual appropriation made. Therefore, it is our conclusion that the Navy's award of contracts to MDC and GE did not violate Title V of the 1975 DOD Appropriation Act and in that regard the contracts cannot be considered illegal.

PUBLIC POLICY CONSIDERATIONS

LTV also argues that the award to MDC must be considered "invalid and void" because it was contrary to "a clear public policy in favor of the utilization of one basic aircraft technology and design to fulfill the needs of both the Navy and the Air Force for a lightweight Air Combat Fighter."

We think this public policy argument is misplaced. It is true that courts have long declared contracts" to be illegal on the ground that they are contrary to public policy." 6A A. Corbin, Contracts § 1375 (1962). In some instances, such contracts call for a result which is contrary to statute. See, e.g., Lakos v. Saliaris, 116 F.2d 440 (4th Cir. 1940). In other instances the contracts, while themselves not illegal per se, result from behavior which is contrary to law. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); United States v. Acme Process Equipment Company, 385 U.S. 138 (1966). In the Mississippi Valley Generating Co. case, the Supreme Court held unenforceable a Government contract resulting from behavior which was violative of a conflict of interest law. In the Acme Process case, the Court held that the Government could cancel a contract because of violations of the Anti-Kickback Act. In both cases the Court found that nonenforcement and cancellation were "essential to effectuating the public policy embodied" in the statutes. 364 U.S. at 563; 385 U.S. at 145.

Contracts, however, are not lightly treated as invalid. "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated," Muschany v. United States, 324 U.S. 49, 66 (1945), and such contracts will not be regarded as invalid unless they are plainly or palpably illegal. John Reiner and Company v. United States, 385 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964); Coastal Cargo Company, Inc. v. United States, 351 F.2d 1004 (Ct. Cl. 1965); Warren Bros. Roads Co. v. United States, 355 F.2d 612 (Ct. Cl. 1965); 52 Comp. Gen. 215 (1972); 50 id. 679 (1971); 50 id. 565 (1971); 50 id. 390 (1970). When a contract is alleged to be illegal on public policy grounds, "there must be found definite indications in the law * * * to justify the invalidation of a contract as contrary to that policy. * * * In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, [the Court will not] * * * declare contracts * * * contrary to public policy." Muschany v. United States, supra, at 66-67.

Here, while it is clear that the Congressional Conference Committee desired the Navy to develop a derivative of the Air Force ACF suitable for carrier operations, there was not, as discussed above, any statutory requirement or "indication" compelling the Navy to do so. Thus, unlike the situations in the Mississippi Valley and Acme Process cases, supra, there were no statutory violations attending the award of the contract to MDC. It is also clear that the awarded contract does not require any actions which are contrary to law, and we do not perceive any violation of moral or ethical standards. Accordingly, in view of the strong presumption in favor of the validity of contracts, we are unable to conclude that the Navy's award to MDC is void as contrary to public policy.

REPROGRAMMING

LTV next argues that even if the Navy's actions were not contrary to statute or public policy considerations, those actions cannot be upheld because the Navy did not comply with the applicable DOD Directive and Instruction on reprogramming. LTV claims that since the provisions of the directives were not followed, the Navy did not effectively reprogram its RDT&E funds and therefore was without authority to fund the MDC & GE design efforts or to award the sustaining engineering contracts.

As discussed above, the Congress has recognized the desirability of maintaining executive flexibility to shift funds within a particular appropriation account. The methods by which agencies accomplish this have become known as reprogramming. See generally, Fisher, supra. Although Congress, in enacting unrestricted lump-sum appropriations, has continued to provide this reprogramming flexibility, it has also from time to time manifested a desire to subject reprogramming to closer congressional scrutiny and control. See Fisher, supra, at 79, 97. In response to this congressional desire, DOD developed a set of instructions on reprogramming. Fisher, supra, at 82. The current DOD instructions, DOD Directive 7250.5 and DOD Instruction 7250.10, both dated January 14, 1975, contemplate that in many instances approval of the Congressional Appropriations Committees and in some instances the Armed Services Committees as well is a prerequisite to a reprogramming action.

The Navy believes that it complied with both the direction of Congress and with the spirit and intent of the reprogramming directives by obtaining the necessary approval from the House and Senate Appropriations Committees. In this regard, the Navy refers both to the November 1, 1974, letters, and responses thereto, sent to the Chairmen of the two Appropriation Committees (see p. 8, supra), and to letters sent to both Chairmen again on March 7, 1975. Those letters, written after the Air Force selected the F-16, stated that the Navy was completing "its evaluation of both firms' proposals in a fully competitive atmosphere," and that if "an acceptable design [could] be found it will be necessary to use the remainder of the present appropriation to contract with the selected firm to refine its design and sustain its engineering effort pending formal program approval to undertake full scale development in FY 1976." Once again, the Chairmen did not express any objections to the Navy's intended course of action.

LTV argues that reprogramming is a narrowly structured method for obtaining congressional approval for shifting funds within an account, and that what the Navy did here fell far short of meeting reprogramming requirements. For example, LTV points out that the Navy did not utilize the formal reprogramming form (DD Form 1415) required by DOD Instruction 7250.10 and did not even refer to reprogramming in the correspondence sent to the Committee Chairmen.

While it may be that the Navy did not literally comply with the applicable DOD directives on reprogramming, these DOD directives, unlike laws and regulations, do not provide this Office with a proper basis for determining the legality of expenditures. See Project Sanguine Report at 11. As previously noted, reprogramming is a nonstatutory device based on nonstatutory agreements and understandings. See Fisher, supra, at 79. Thus, the propriety of what the Navy did in this case is properly a matter for resolution by Congress and the Navy rather than by this Office.

LTV also argues that if what the Navy did here can be characterized as reprogramming, then the 1975 DOD Appropriation Act was violated because section 843 of that Act precludes the use of funds appropriated by the Act for preparation or presentation of a reprogramming request (with certain exceptions not relevant here). Section 843 of the Appropriation Act provides:

> "No part of the Funds in this Act shall be available to prepare or present a request to the Committee on Appropriations for the reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress."

Section 843 may have been violated if the Navy's actions amounted to reprogramming. Even assuming--without conceding--that this is the case, since the conference language is not to be read into the statute, a violation of section 843 cannot serve to invalidate an otherwise legal contract award. See Project Sanguine Report at 12.

Accordingly, we are unable to object to the awards on the basis of LTV's reprogramming arguments.

THE COMPETITION

Introduction

The Navy utilized formal source selection procedures in evaluating proposals submitted by MDC and LTV and selecting a winner. For evaluation purposes, the RFQ/RFP established the equally weighted factors of performance and cost as the most important criteria. Commonality was the third most important factor. Other factors included reliability and maintainability, logistics support, development risk, lot I cost, DT&E program, management, and facilities and resources.

Rejection of the three LTV designs was based on unsatisfactory ratings in the performance area, particularly combat performance and overall carrier suitability. Although LTV does not concede the nonsuitability of its designs, it does not argue, in the context of this protest, that the Navy should have regarded one or more of its designs as acceptable. Rather, LTV argues that the competition was not fairly conducted and that it was prejudiced as a result. It also asserts that there came a point in the evaluation when the Navy was obliged by both statute and regulation to terminate the competition rather than award a contract to a firm offering an NACF design other than a derivative of the F-16.

LTV objects to the evaluation of proposals on several grounds. It argues that the LTV and MDC submissions were not evaluated on an equal basis and that MDC and LTV were not accorded equal treatment during the competition. The primary basis for LTV's argument is its belief that it was penalized by the Navy for complying with the applicable evaluation criteria while MDC was permitted to deviate from those criteria. LTV also questions whether its cost proposal was evaluated against the solicitation's criteria and in the same manner as the MDC cost proposal. Finally, LTV asserts that the Navy's conduct of this procurement resulted in a violation of the Armed Services Procurement Act, 10 U.S.C. § 2304(g) (1970) and section 3-101 of the Armed Services Procurement Regulation because the Navy improperly restricted competition.

LTV's assertions here, as they relate to its technical proposal, essentially revolve around the RFQ/RFP evaluation criterion concerning "commonality" and a listing of equipment in the RFQ that included certain aircraft engines. LTV claims that the commonality criterion referred to commonality with the F-16 and required that the NACF be a derivative of the F-16. LTV states that it complied with this requirement but MDC did not. The thrust of LTV's position here is twofold. First, LTV states that its proposal was regarded as unsuitable by the Navy precisely because it complied with the evaluation criteria and offered designs that incorporated F-16 derivative features (LTV identifies two of these features as automatic angle of attack limiter and fly by wire control system). With regard to the engines, LTV believes that the RFQ listed four engines as acceptable and that the Navy did not properly evaluate the MDC design which proposed the use of a nonlisted engine.

Commonality

As indicated above, the third most important evaluation criterion was listed as "the proposal which demonstrates the highest degree of commonality with, and makes the maximum use of Air Lightweight Fighter and Air Combat Fighter technology and hardware." It

is LTV's position that this criterion implements the statement in H.R. Rep. No. 93-1363 that the NACF be a carrier-suitable adaptation of the selected Air Force ACF and must therefore be read to require commonality with the F-16.

In support of its position, LTV focuses on the relationship between the RFQ/RFP commonality criterion and the Air Force's October 12, 1974, letter which accompanied the RFQ. That letter provided in pertinent part as follows:

> "1. The Navy is initiating a program for the development and production of a new carrier based fighter/attack aircraft weapon system to be a derivative of Air Force Lightweight Fighter program. In the House of Representatives Report No. 93.1363 of 18 September 1974, it was directed that the development of this aircraft make maximum use of the Air Force Lightweight Fighter (USAF LWF) and Air Combat Fighter (ACF) technology and hardware.
>
> "2. Enclosure (2) [the RFQ] reflects performance characteristics and other parameters of the aircraft as described in the Navy's operational requirement. Achievement of these characteristics and parameters is an important goal. Contractors should provide at least one point design of an aircraft which responds to the operational requirements as defined by the requirements specification and the desired maximum use of the USAF LWF and ACF technology and hardware. Trades should be performed which analyze the gains and penalties associated with achieving this goal. Gains may include cost and scheduled savings during development, and acquisition and lower overall life cycle costs based on commonality with the ACF Aircraft. Penalties may include failure to meet performance and specification goals, thereby reducing the potential effectiveness of the Navy aircraft. The trade studies should quantify derived benefits and identify any penalties so that the Navy can determine an acceptable balance between the two. In order to assure that all opportunities for commonality are explored, the contractors must provide a design including the same engine which they propose for use with the USAF ACF. In addition, the contractors also are requested to provide a variant which has only provisions in place of the full all weather air-to-air missile capability and identify gains and penalties associated therewith.
>
> "3. It is the Navy's intent to consider reliability, maintainability, survivability, schedule and cost along with performance and capability in accordance with the solicitation

> evaluation criteria in judging designs. Flexibility and tradeoffs are encountered where significant cost savings can be realized or reliability and maintainability can be enhanced. These trade-offs should be documented to the Navy. It may not be possible in the time allowed to submit a fully documented engineering development proposal. * * *
>
> "4. The new Navy aircraft is intended to replace F-4 aircraft in both the Navy and Marine Corps and eventually the A-7 in the Navy. Accordingly, the aircraft should have a capability to effectively perform long range fighter escort and strike missions into high threat areas. The aircraft must possess good carrier suitability features and be fully compatible with that environment. It must also provide a significant improvement in reliability, maintainability, and survivability over current Navy tactical aircraft. Furthermore, it must offer affordable acquisition and life cycle costs. Initial Fleet deliveries are required no later than calendar year 1981."

The letter also encouraged the ACF contractors to prepare their proposals so as to achieve "lower costs and increased commonality between the ACF and the Navy derivative" and stated that if a Navy derivative of the LWF program could be developed, it was anticipated that full-scale development of the NACF would be initiated by the Navy. Attached to the Air Force's cover letter was a document captioned "CRITERIA FOR EVALUATION AND SOURCE SELECTION." That document provided that "Proposals for Full Scale Development received in response to this solicitation will be evaluated by the Naval Air Systems Command pursuant to a formal source selection procedure. The following evaluation criteria apply, in the context of the considerations outlined in the covering letter." The document then set out criteria that were essentially the same as those contained in the attached RFQ.

LTV points out that this letter indicated that: 1) an important goal to the Navy was maximum reasonable commonality between the ACF and "the Navy derivative"; 2) at least one point design was desired which represented the maximum use of LWF and ACF technology and hardware; 3) contractors were encouraged to use imaginative approaches in achieving lower costs and increased commonality between the ACF and the Navy derivative; and 4) that full-scale development was anticipated if a derivative of the LWF program

could satisfy Navy needs. LTV places considerable weight on the references to a Navy derivative of the ACF as establishing the type of aircraft desired by the Navy. It also finds significance in the statement that the evaluation criteria were to be applied "in the context of the considerations of the covering letter." LTV argues that the only reasonable reading of these documents is that the commonality criterion required that the NACF be a derivative of the ACF, and that commonality could be maximized only if measured against the F-16. In addition, LTV asserts that its interpretation was buttressed on several occasions when it was told by DOD officials that the NACF would be a derivative of the ACF. While LTV recognizes that the F-16 was not chosen as the ACF until January 13, 1975, it argues that after that date the Navy was required to consider the F-16 as the basic NACF design.

The Navy concedes that the F-18 is not a derivative of the F-16. However, it is the Navy's position that the RFQ/RFP did not contain a requirement that the ACF be adapted for Navy use. Rather, the Navy states that the RFQ/RFP was designed to solicit the optimum lightweight fighter for the Navy that would, within the performance and cost parameters established for the NACF, maximize commonality of both technology and hardware of the LWF and ACF programs. The Navy contends that its selection of the F-18 is entirely consistent with that interpretation.

We think the Navy is correct. The language of the third criterion leaves little doubt that commonality was to be sought with both the LWF and ACF programs and, more specifically, with both the technology and hardware associated with the two programs. As noted, however, LTV argues that the criterion must be interpreted in light of the Air Force letter accompanying the RFQ which, LTV believes, would establish that commonality in this instance meant only a derivative of the F-16. We agree with LTV that the evaluation criteria should be read in connection with the accompanying Air Force letter. Cf. Xerox Corporation, B-180341, May 10, 1974, 74-1 CPD 242. We do not agree, however, that the letter can be reasonably read as LTV argues.

We think it is clear that the language of the letter was directed toward the overall LWF program, of which the YF-17 was a significant part, and not merely the selected F-16. For example, the initial paragraph of the letter stated that the NACF was to be a derivative of the "Air Force Lightweight Fighter Program," and characterizes the Conference Report as desiring maximum use of both LWF and ACF technology and hardware. Furthermore, the letter advised that NACF development

would be initiated if a derivative of the Air Force Lightweight Fighter program was satisfactory. In addition, many of the references to "ACF" appear to refer not to the selected Air Force design (the Air Force ACF had not yet been chosen), but to the entries of each of the offerors competing for the Air Force ACF award. See, in this regard, the second paragraph of that letter, which advises "contractors * * * [to] provide a design including the same engine which they propose for use with the USAF ACF."

It is also clear from the letter that while maximum commonality was desired (and we agree that the maximum possible commonality would result in a close derivative of the Air Force selection), contractors were expected to make tradeoffs in order to satisfy cost and performance requirements. Thus, the letter specifically referred to commonality as a goal rather than a mandatory feature. In this connection, we also point out that commonality in fact was not a requirement, but rather an evaluation factor, pursuant to which proposals would be rated on the degree to which commonality (with the totality of the LWF and ACF programs) was attained. No minimum level of commonality was ever established by the RFQ/RFP or associated documents.

LTV argues that such an interpretation would not permit realization of the significant cost savings which is the very goal of the commonality objective. We think the record suggests otherwise. The Navy has pointed out that the LWF program, which ultimately resulted in the ACF program, involved "a considerable investment * * * toward studying advanced technological developments, with particular emphasis on * * * mandates for simplification and the elimination of frills. This extensive study, including testing, was reflected in the surviving F-16 and F-17 designs * * *." How this LWF technology was utilized in the F-17 is explained by MDC as follows:

> "The MDC/[Northrop] teaming agreement assured that LWF prototype technology and cost saving would be incorporated in an NACF * * *. Cost benefits of $125 million flowed from the use of prior YF-17/J101 development effort and inured to the benefit of the Model 267. Moreover, because the Model 267 drew heavily from the extensive YF-17 and J101 design, development and test efforts, the F-18 NACF was able to incorporate the excellent high-lift aerodynamics of the unswept wing with leading edge extension; the outstanding handling qualities made possible through the aerodynamic configuration and the closed-loop electronic control augmentation system with mechanical backup; a new ejection

> seat which had already been subjected to sled tests; and the J101 (now the F404) engine with its solid development background. Consequently, the F-18 has a demonstrated technological base which substantially reduces the risks otherwise inherent in developing a new aircraft. * * *"

Furthermore, the savings available through achieving commonality with technology is also indicated in the following statement in the Navy's report filed in response to the protest:

> "'Commonality of hardware' between two aircraft designs would naturally be greatest if each and every component of the two models was identical -- its engines, landing gear, armament, electronics, flight control systems and even rivets. 'Commonality of technology,' on the other hand, could be achieved even though the individual components of the two aircrafts were different. For example, their communications equipments could be different in size, operate at different frequencies and use different antennae, but their internal designs could share a 'commonality of technology' because they both employed sub-miniaturized components. 'Commonality of technology' could also be manifested in the use of metal parts with different shapes and sizes, but whose metallurgical properties were similar in the common technology employed in their smelting, milling, and forming operations. 'Commonality of technology' produced the greatest savings in time and money in the early research and development phases of a program, whereas 'commonality of hardware' has the greatest beneficial effect in reducing later production and support costs."

In addition, we note that approximately $114 million was devoted to the demonstration phase of the LWF program, with about 60 percent of that amount being spent on the YF-17. We think the Navy acted properly in attempting to utilize in its own program the technology and hardware that resulted from that expenditure.

With regard to the assertion that DOD officials led LTV to believe that its interpretation of the RFQ was correct, LTV states that it was told by the Deputy Secretary of Defense that "commonality with the Air Force plane and cost would determine the Navy's selection." LTV also claims that it was told by the Deputy Chief of Naval Operations that, in view of H.R. Rep. No. 93-1363, "the Navy was limited to selecting a derivative of the aircraft selected by the Air Force."

The Navy strongly denies these allegations. The Navy also advises that the meeting between the Deputy Secretary and the NACF contractors was held on October 16, 1974, inter alia, to answer any questions regarding the competition. It further advises that a summary of the notes of the meeting reveals that at "no time did the Deputy Secretary state or imply that the NACF must be a derivative of the selected ACF, or that performance was of lesser importance that commonality and cost, or that the evaluation criteria were other than those clearly set forth in the solicitation."

While both the Navy and LTV have submitted differing statements as to what they believe occurred at these meetings, our record does not indicate which version is correct. See Bromley Contracting Co. Inc., B-180169, December 13, 1974, 74-2 CPD 336; Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. We do note, however, that LTV's proposals reflected an awareness that offerors were not restricted to achieving commonality only with the F-16. For example, LTV's proposed model 1602 was so different from the F-16 that the Navy suggests that it "might more accurately be described as an entirely new aircraft design both as to airframe and engine." Also, the LTV 1600/1601 proposal contained the following statement:

> "* * * One of the keys to the feasibility of a Navy derivative of the ACF is the preservation of 'technological and hardware commonality' in transitioning from ACF to NFA. A successful transition process is more directly related to 'technology commonality' than to 'hardware commonality.' The single ingredient that most directly determines the ultimate degree of program success is the validity of the technology base. If the technology base is not sound and thoroughly established early in the program, no amount of 'hardware commonality' can make up for this deficiency."

In light of the above discussion it is our conclusion that the concept of "commonality" as that term was used in the RFQ/RFP clearly referred to the technology and hardware of the LWF and ACF programs and not solely to the F-16 design. With respect to the evaluation of commonality itself, our review indicates that it took into account these three aspects: (1) the extent of commonality of the offeror's model with the F-16; (2) commonality of the offeror's model with LWF hardware and technology; and (3) commonality with regard to the use of Government Furnished Equipment and Navy Ground Support Equipment. In conducting this evaluation, the Navy requested, and the offerors provided, individual commonality estimates of the respective NACF

designs with their prior ACF designs. The MDC design obviously had little hardware commonality with the F-16, and the Navy reports that this was taken into consideration when it evaluated LTV far higher than MDC on this criterion. This was consistent with the provisions of the RFQ, and it thus appears that both offerors were treated equally and fairly in this regard.

Engines

LTV argues that it was also prejudiced by the Navy's alleged failure to act properly in considering the contractors' proposed engine selections. It argues that four engines (J101, F100, F101, F401) were called out by the RFQ as acceptable and that the MDC design was selected with an engine (F404) not listed in the solicitation. Furthermore, the protester believes that evaluation criterion F placed emphasis on the design which employed "demonstrated technology" and represented the "lower developmental risk against development cost and schedule milestones," and that weight was therefore to be accorded engines which were in the final development stage. LTV contends that its position is consistent with the Navy's desire to determine the optimum engine and airframe which would lead to the earliest possible operational engine. Since LTV considers the selected engine to be an untested "paper" engine, it questions the selection of the MDC design.

The Navy asserts that under the RFQ, MDC had discretion to propose whatever engine it desired and that the four engines listed in the RFQ only represented what the Navy intended to furnish as Government Furnished Equipment (GFE). Accordingly, it believes MDC did not propose an unauthorized engine. At any rate, argues Navy, the F404 engine represents only a minor modification to the J101 engine and that the change from J101 to F404 is merely a nomenclature change. Accordingly, the Navy asserts that the F404 is much more than a "paper" engine and is still considered to represent low-risk development. In this regard, the Navy points out that MDC's proposed engine is similar to LTV proposed engine in that LTV's designs also relied on growth versions of the engines listed in the RFQ. The Navy also states that its calculations establish the F404 to be more than adequate for its designed task.

The RFQ contained a list of equipment, including the four engines referred to above, which would be GFE if used by the contractor. However, an enclosure to a supplemental Air Force letter which provided "corrections, classifications or changes" to the RFQ, under the

heading "Acceptable Engines," stated that "The following baseline engines will be considered acceptable when modified to meet Navy requirements * * *." The engines were identified as the F100-PW-100, the F101-GE-100, the F401-PW-400A, and the J101-GE-100.

MDC proposed J101 engines. It first proposed a J101/J7A7; it subsequently proposed a J101/J7A8 engine. This latter engine was ultimately accepted by the Navy and redesignated the F404-GE-400.

Our review indicates that this F404 engine is not a new "paper" engine, but with certain modifications, is the basic J101 engine which was developed for use in the F-17. We note that the basic core elements of the J101, consisting of the compressor, combustor, and turbine, remain the same for the F404 except for some minor physical changes. The modifications that are to be made to the J101 involve a .9 inch increase in the fan diameter, the addition of a "mini-mixer," a .4 inch increase to the diameter of the low pressure turbine, a 2.4 inch increase in the diameter of the afterburner casing, and an increase of 3.1 inches in the engine's nozzle. These modifications are intended to increase the thrust available from the basic J101 which is necessitated by the increased weight of the F-18 as compared with the F-17. Since, in our view, the F404 is a modified version of the J101, we find that LTV's claim that it was prejudiced by the engine selection is without merit.

Finally, LTV believes the Navy may have improperly evaluated engine upgrading costs since the Navy allegedly estimated that modifying the J101 to the F404 would only cost $12 million while the "marinizing" cost of the F100 would be $300 million. The protester's analysis of the F404 costs, however, does not include the basic cost involved with upgrading the J101 from the YJ101, which was estimated to be approximately $264.2 million (1975 dollars). Since the Navy estimate for upgrading the F404 is thus approximately $276.2 million (1975 dollars), there appears to be no basis for questioning this evaluation.

Cost

LTV also challenges the Navy's selection on the ground that the Navy did not properly evaluate cost. LTV asserts that by choosing the F-18 the Navy acted contrary to the selection criteria because the F-18 "will be billions of dollars more costly than the

rejected YF-16 derivatives" as well as more costly than the F-16 and possibly even more costly than the F-14. In addition, LTV asserts its belief that the Navy increased LTV's proposed dollar figures "to arrive at an estimated price hundreds of millions of dollars higher than LTV's estimate" without increasing MDC's figures. LTV also questions the escalation rate used by the Navy in evaluating proposals.

We recognize that the objective of this procurement was the development of a low cost fighter that would be an acceptable alternative to the F-14. However, in considering this protest it is not our function to examine the various alternatives available to the Navy or the cost effectiveness of the alternative it selected. Rather, we are concerned solely with the legality and propriety of the Navy's selection decision in view of the applicable law and regulations. Accordingly, while we have not evaluated the cost effectiveness of the Navy's selection, we have reviewed the Navy's actions to determine if the cost evaluation was conducted in accordance with proper procedures and the established selection criteria. For the reasons discussed below, we believe the Navy's cost evaluation met those standards.

The solicitation indicated that the equally weighted areas of cost and performance would be the paramount evaluation items. With regard to cost, credibility of proposed costs was listed as the primary concern. The solicitation further indicated that the evaluation would take into account all costs related to design, development and production.

In evaluating proposed costs, the Navy developed its own independent estimates for the MDC entry and each of the LTV entries. In arriving at its estimates, the Navy utilized both parametric pricing and analogous system techniques. Parametric cost estimating involves a process in which the cost of an item is estimated by relating its cost to specific physical and/or performance characteristics. The relationship is based on empirical data observed on similar items. The analogous technique relies on cost experience with analogous systems. In addition, the Navy considered each offeror's "business base and organizational structure, the anticipated higher costs of the increased reliability and maintainability requirements in the NACF program over prior aircraft programs, and those lower costs which would flow from ACF 'commonality.'"

The Navy estimates for development of the LTV designs were substantially higher than LTV's proposed costs, while the Navy estimate for the MDC entry was only slightly higher than MDC's proposed costs. Thus, while the estimated costs of the MDC design were somewhat higher than the estimated costs of each of the LTV designs, the

Navy regarded the MDC proposal as the more acceptable one, particularly in view of the technical superiority of the MDC design. As the Navy puts it, "* * * while cost was of equal importance, it was not determinative due to the F-18's vast superiority in performance over all of the F-16 derivatives."

The Navy's use of estimates in this case was entirely consistent with sound procurement practices. We have repeatedly observed "that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved," 50 Comp. Gen. 390, 410, supra, and that it is proper to use independent Government cost estimates as an aid in determining the reasonableness and realism of cost and technical approaches. Dynalectron Corporation; Lockheed Electronics Company, Inc., 54 Comp. Gen. 562 (1975), 75-1 CPD 17; Raytheon Company, 54 id. 169 (1974), 74-2 CPD 137, and cases cited therein. Furthermore, although LTV suggests that the use of parametric pricing techniques is inappropriate, we have recognized that it is an acceptable method for estimating costs, see, e.g., Raytheon Company, supra, and we think the decision to utilize such a technique is within the sound discretion of the procuring activity. Raytheon Company, supra; Vinnell Corporation, B-180557, October 8, 1974, 74-2 CPD 190; B-176311(1), October 26, 1973.

The fact that the MDC design was estimated to cost more than any of the LTV designs does not indicate that the Navy acted improperly in selecting the MDC proposal. Under the evaluation criteria, cost was not to be controlling, but was to be considered along with performance and certain other, less important, factors. The record here clearly establishes that the Navy considered the estimated cost differences among the proposals, but regarded the cost difference between the MDC proposal and the LTV proposals to be completely offset by the technical difference between LTV's designs and the MDC design. It is, of course, well established that agencies have the discretion to award a negotiated contract on the basis of a proposal's technical superiority notwithstanding that proposal's higher cost. 52 Comp. Gen. 198, 211 (1972); 50 id. 113 (1970); Stephen J. Hall & Associates, et al., B-180440, B-132740, July 10, 1974, 74-2 CPD 17. (We also note that the Navy regarded each of LTV's designs to be unsuitable and could have treated LTV's proposals as unacceptable for technical reasons alone, thereby negating any requirement to consider cost. See 53 Comp. Gen. 1 (1973); 52 id. 382 (1972)). Accordingly, in light of the evaluation criteria applicable to this procurement, the Navy's selection of the higher-priced proposal was not improper.

With regard to LTV's claim that the Navy increased LTV's proposed costs, it is clear from our review that the Navy did not revise LTV's costs, but relied on its own estimates of what those costs would actually be. As indicated above, we have no basis for challenging the Navy's estimating techniques. With regard to the escalation factors, the proposals of both offerors reflect the escalation rates used by the Air Force in evaluation of the F-16 and F-17. However, the Navy felt that those rates were too low and devised its own inflation rates. Our review indicates that the Navy applied these rates uniformly to both the MDC proposal and the LTV proposals. Thus, while the Navy's evaluation apparently resulted in higher estimated costs for the proposals than would have been computed by using Air Force rates, it is clear that both offerors were treated equivalently by the Navy in this regard and that neither offeror was prejudiced thereby.

Necessity to Recompete

LTV also argues that the Navy violated 10 U.S.C. § 2304(g) and ASPR § 3-101(b) because it did not obtain the maximum competition required by those statutory and regulatory provisions. According to LTV, "once the Navy determined that it was not going to select a derivative of the F-16 as the NACF, the Navy was no longer justified in excluding Grumman, Lockheed, Boeing, and others from competing for NACF selection * * * hence the Navy was required to cancel the NACF procurement and to resolicit the entire aerospace industry on an unrestricted basis."

The Navy argues that LTV "has no standing to raise this issue since it knowingly and fully participated in the competition and was not one of those allegedly excluded from the competition." On the substance of the LTV allegation, the Navy claims that its actions were entirely in accord with the "principles governing the competitive source selection process" as those principles are set out in Hoffman Electronics Corp., B-182577, June 30, 1975, 54 Comp. Gen. ___, 75-1 CPD 395.

In that case, we reviewed the statutory requirement that agencies maximize competition in their procurements of supplies and services, noting that while such competition "is the cornerstone of the competitive system * * * restrictions of competition may be imposed when the legitimate needs of the agency so require." Furthermore, we upheld the use of dual prototype contracting and the restricting of competition for a follow-on production contract to the two prototype development contractors, since it appeared that under the circumstances the restriction was both legitimate and reasonable. See also Bell Aerospace Company, B-183463, September 23, 1975, 55 Comp. Gen. __. LTV

does not disagree with the Hoffman case, and agrees that the Navy did not act improperly in initially soliciting (through the Air Force) only General Dynamics and Northrop for its NACF requirement. However, LTV argues that the continuance of this restriction was not reasonable and legitimate because the Navy, when it decided it could not or would not select an F-16 derivative, abandoned its initial requirement for commonality.

On the Navy's first point, we might well agree that LTV is not in a position to raise this issue if its concern was directed entirely toward the exclusion of other firms from the competition. However, LTV's argument also goes to the restriction which LTV believed was imposed on it by the RFQ, as indicated by its assertion that the Navy had no "lawful justification for restricting competition and thereby denying the majority of airborne manufacturers the opportunity to compete for NACF selection and denying LTV the opportunity to submit a design not derived from the F-16." (Emphasis added.) Thus, LTV essentially argues that it and the aerospace industry in general should have been given an opportunity to compete for the NACF unencumbered by any requirement to achieve commonality with another airplane.

This argument, however, is predicated on LTV's erroneous belief that the solicitation's commonality provisions limited selection to a derivative of the design selected by the Air Force. As discussed above, we have concluded that the commonality requirement was not so limited and that in fact the Navy's selection was consistent with a proper reading of the RFQ/RFP provisions. Accordingly, we find no basis for concluding that the Navy unduly restricted competition in this case.

CONCLUSION

For the various reasons discussed above, we have concluded that the Navy's actions were not illegal or improper and that therefore the protest must be denied.

As indicated in the Introduction section, the Congress has manifested significant interest in DOD's LWF/ACF programs and has closely monitored the Navy's attempts to develop a lightweight, low cost fighter that could operate effectively from aircraft carriers. The statement in the Conference Report on the 1975 DOD Appropriation Act that "future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Air

Combat Fighter design" suggests that the Congress will be closely scrutinizing the Navy's choice before full-scale development funds will be provided. Thus, the ultimate determination regarding further F-18 development has yet to be made.

Comptroller General
of the United States