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[B-90867]

Experts and Consultants—Compensation—Rates—Dollar Limitation

Decision 55 Comp. Gen. 567, applicable to experts and consultants hired by Department of Agriculture pursuant to delegated authority under section 626(a) of Public Law 87-195, as amended, limits pay rates for such personnel to $100 per diem since that is maximum amount authorized by section 626(a). As no applicable law similarly limits pay rates of experts and consultants hired as authorized in 5 U.S.C. 3109 (1970) by virtue of section 702 of Public Law 94-212, general rule of section 3109 governs pay rates for such personnel and they may be compensated at rates not in excess of $145.36, currently the per diem equivalent of the top step of GS-15.

In the matter of pay rates for experts and consultants, July 1, 1976:

R. E. Breckenkamp, Accounting and Finance Officer, Defense Mapping Agency Aerospace Center (DMAAC), St. Louis Air Force Station, Missouri, has requested an advance decision pursuant to 31 U.S. Code § 82d (1970) as to whether or not that Agency may pay experts and consultants employed by virtue of section 702 of Public Law 94-212, 90 Stat. 153, 167-8, at rates in excess of $100 per diem. He explains that he has received contradictory interpretations of our decision 55 Comp. Gen. 567 (1975) and, thus, is unsure as to the proper rates authorized to be paid experts and consultants by his Agency. While it is not clear from the record before us, we must assume that the certifying officer has before him vouchers to which this decision will apply.

In 55 Comp. Gen. 567 (1975) we held that the Department of Agriculture may not pay experts and consultants in excess of $100 per diem when they are employed, through delegated authority, pursuant to section 626(a) of the Foreign Assistance Act of 1961, Public Law 87-195, 75 Stat. 424, as amended, 22 U.S.C. § 2386(a) (1970). That section provides, in pertinent part, that:

> Experts and consultants or organizations thereof may as authorized by section 3109 of Title 5 [of the United States Code], be employed for the performance of functions under this chapter, and individuals so employed may be compensated *at rates not in excess of $100 per diem,* and while away from their homes or regular places of business, they may be paid actual travel expenses and per diem in lieu of subsistence at the applicable rate prescribed in the standardized Government travel regulations, as amended from time to time. * * * [Italic supplied.]

Thus, section 626(a), as amended, authorizes the employment of experts and consultants in accordance with 5 U.S.C. § 3109 (1970) subject to a maximum pay limitation of $100 per diem.

In the case of DMAAC, section 702 of the Department of Defense Appropriation Act, 1976, Public Law 94-212, 90 Stat. 153, 167, au-

thorizes the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force, respectively:

to procure services in accordance with section 3109 of title 5, United States Code, under regulations prescribed by the Secretary of Defense; * * *

Absent contrary indications in any pertinent statute authorizing the hire of experts and consultants pursuant to 5 U.S.C. § 3109 (1970) that the rate of pay of such experts and consultants is limited to a specific dollar amount, such as was the case in 55 Comp. Gen. 567, *supra*, then the general rule for determining pay rates for experts and consultants as found in 5 U.S.C. § 3109 should be applied. That general rule, stated in 51 Comp. Gen. 224 (1971), 43 *id.* 509 (1967), 29 *id.* 267 (1949), as well as 55 *id.* 567, *supra*, is that the maximum rate authorized under 5 U.S.C. § 3109 is the rate of the top step prescribed for GS–15. That rate is presently $145.36. See United States Civil Service Commission Salary Table No. 61 (October 1975).

We are unaware of any statute that limits the rate of pay of experts and consultants employed by the Department of Defense to a specific dollar amount which is less than that authorized by 5 U.S.C. § 3109. Thus, $145.36 per diem is the maximum rate each Secretary may set for experts and consultants in his Department if employed in accordance with section 3109 and by virtue of section 702 of Public Law 94–212.

In view of the above and since there is no indication in the record that the Secretary of Defense has limited the rates of pay of experts and consultants to lesser amounts, DMAAC is statutorily authorized to hire experts and consultants at rates of pay not in excess of the per diem equivalent of the top step of GS–15, in accordance with 5 U.S.C. § 3109.

[B–182704]

Pay—Retired—Survivor Benefit Plan—Erroneous Payments—Waived

Overpayments resulting from erroneous annuity payments under Survivor Benefit Plan (SBP) made to member's widow may not be considered for waiver under 10 U.S.C. 2774, which relates to pay and allowances but are for consideration under 10 U.S.C. 1453, which is applicable specifically to SBP payments.

Debt Collections—Waiver—Military Personnel—Dependents—Erroneous Survivor Benefit Plan Payments—Criteria

Criteria for waiver of erroneous payments under the SBP pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 and 35 *id.* 401, overruled.

In the matter of Mrs. Kathryn H. Vandegrift, July 2, 1976:

This action is in response to a letter dated January 24, 1975 (file reference FDD-wdd 7202/3), with enclosures, from the Fiscal Director of the U.S. Marine Corps, recommending waiver of recovery of $2,111, representing annuity payments erroneously paid under the Survivor Benefit Plan (SBP), to Mrs. Kathryn H. Vandegrift, widow of the late General Alexander A. Vandegrift who died May 8, 1973.

According to the submission the member elected to provide SBP coverage for his wife on the full amount of his retired pay. On April 30, 1974, Mrs. Vandegrift was entitled to an SBP annuity in the monthly amount of $847.45. She was also entitled to a Dependency and Indemnity Compensation (DIC) payment of $503 per month from the Veterans Administration, which amount was required to be offset against her annuity entitlement. Effective May 1, 1974, her DIC payment was increased to $589. On July 1, 1974, her SBP entitlement increased to $901.69, less the $589 DIC offset. However, through administrative error, her DIC offset was continued in the $503 amount from May 1 through August 31, 1974, with the result that she received excess SBP payments of $86 a month, a total of $344, for the period. Beginning September 1 and continuing through November 30, 1974, the error was compounded by a failure to make any DIC offset, with the result that she received excess SBP payments of $589 a month, a total of $1,767, for this period. The total erroneous payments thus amounted to $2,111.

Although it is recognized that the payment of the full SBP together with DIC for the period September through November 1974 normally should have been recognized as an overpayment by the recipient, it is indicated that there had been an effort to secure increased pay for General Vandegrift for some time prior to his death. The submission asserts that when Mrs. Vandegrift received the $503 annuity increase in September 1974, she assumed the efforts on her husband's behalf had finally been successful and that the increase in her annuity was a result. The possibility of error therefore did not occur to her.

It is reported in the submission that there is no indication of fault on the part of Mrs. Vandegrift and that she accepted the erroneous payments in good faith. It is recommended that the amount of the claim be waived. Waiver is requested under authority of 10 U.S. Code 2774.

Section 2774 of Title 10, U.S. Code, provides authority under which recovery by the United States of erroneous payments of pay and allowances (including retired pay) of military personnel may be

waived. However, the overpayment of an SBP annuity is neither retired military pay nor a portion of active duty military pay and allowances. Therefore an SBP annuity overpayment may not be considered for waiver under the provisions of 10 U.S.C. 2774.

However, pursuant to provisions of 10 U.S.C. 1453, recovery of an erroneous payment of an SBP annuity is not required if in the judgment of the Secretary concerned and the Comptroller General, "there has been no fault by the person to whom the amount was erroneously paid and recovery would be contrary to the purposes of this subchapter or against equity and good conscience."

In 54 Comp. Gen. 249 (1974), we held that something more than freedom from fault must be shown before a basis exists for exercising the judgment as to whether the collection of a particular erroneous payment under the SBP should be waived. The view was expressed that unless it can be established that collection of the erroneous payments would work an undue hardship, or some other reason can be shown as to why collection should not be made, no proper basis exists for the exercise of the waiver authority. The 54 Comp. Gen. 249 decision applies the rules which were previously applied under the waiver provision of the Retired Servicemen's Family Protection Plan, as stated in 35 Comp. Gen. 401 (1956), to the waiver provision of the SBP law.

There is nothing in the submission to show the present state of Mrs. Vandegrift's finances or any other facts which could support a determination that collection of the overpayment would work an undue hardship.

We note that the statutory authority for waiver of other erroneous payments made by the United States Government contain language very similar to that of 10 U.S.C. 1453, namely that recovery would be "against equity and good conscience," but a showing of financial hardship is not required in connection with waivers under those provisions. See, for example: 5 U.S.C. 4108(c) (obligation for training received as a civil servant); 5 U.S.C. 5522(c) (advance payment of civilian pay and allowances in emergency circumstances); 5 U.S.C. 5584 (erroneous pay and allowances of Civil Service employees); 5 U.S.C. 5922(b) (overseas differential and allowances paid to Civil Service employees); 5 U.S.C. 8129(b) (compensation for injuries of Civil Service employees); 5 U.S.C. 8346(b) (erroneous Civil Service retirement benefits); 10 U.S.C. 2774 (erroneous payments of military pay and allowances); 32 U.S.C. 716 (erroneous pay and allowances of members of the National Guard). The standards for waiver of claims for erroneous payment of pay and allowances under 5 U.S.C. 5584, 10 U.S.C. 2774 and 32 U.S.C. 716 are set forth in subchapter G of title 4 CFR, part 91-93. In spite of the similarity of those statutory provi-

sions to 10 U.S.C. 1453 there is no provision in the regulations thereunder requiring a specific showing of undue hardship.

It is also noted that in processing a request for waiver under 5 U.S.C. 8346(b)—the authority for waiver of erroneous payments made to survivors of Civil Service employees—there is no general requirement that the one requesting waiver demonstrate lack of ability to pay. Waiver under this statute is administered by the Civil Service Commission and we understand that when overpayments do occur no greater standard is required of the survivor in a request for waiver than that which would be required in the case of overpayment of pay and allowances under 5 U.S.C. 5584.

In the circumstances we believe that the rule being applied under 10 U.S.C. 1453 is unnecessarily restrictive to the extent that it is interpreted as requiring a showing of undue hardship on the debtor in each case. Accordingly, we will no longer require a showing that collection of the erroneous payment would work a financial hardship. To the extent that 54 Comp. Gen. 249 and 35 Comp. Gen. 401 are inconsistent with the above these will no longer be followed.

Under the facts in this case, it appears that the erroneous payment of SBP annuities to Mrs. Vandegrift was an administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on her part or any other person having an interest in obtaining a waiver of the claim. It may be concluded that recovery would be contrary to the purpose of the Plan and against equity and good conscience. We agree that recovery of the erroneous payments in the amount of $2,111 in this case should be waived.

[B-184747]

Subsistence—Per Diem—Reduction—Ground Accommodations Package—Air Travel

Employee of National Oceanic and Atmospheric Administration whose per diem was reduced by 55 percent as he purchased ground accommodations package in conjunction with airline ticket may be reimbursed full London per diem. Rule is that travel orders may not be retroactively changed to increase or decrease entitlements after travel has been performed.

Travel Expenses—Air Travel—Excursion Rates—Ground Accommodations Package

Employee of National Oceanic and Atmospheric Administration traveling on official business may not be reimbursed for difference between cost of excursion fare and lesser fare actually used which was obtained by purchasing ground accommodations package, as employee received per diem to cover lodging costs. Payment to employee of excursion fare would have effect of double reimbursement for lodging cost. 54 Comp. Gen. 268 distinguished.

221-639 O - 76 - 2

In the matter of Dr. Sigmund Fritz—reimbursement of travel expenses, July 2, 1976:

Ms. Helen R. Machin, an authorized certifying officer with the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, requests an advance decision on the propriety of paying the reclaim of Dr. Sigmund Fritz for per diem and land travel arrangement incurred incident to travel on official business.

The record shows that Dr. Fritz was issued Travel Order No. 20–5–A5A–1856, dated April 22, 1975, for travel on official business from Washington, D.C., to London, Bracknell, and Oxford, England, and return. The travel order authorized travel expenses, London per diem rate, and special expenses. Dr. Fritz purchased an airline ticket at a reduced fare. Eligibility for the reduced fare was predicted upon the purchase of a land accommodations package which included hotel room and breakfast, *inter alia.*

In his travel voucher Dr. Fritz claimed reimbursement for the reduced air fare of $402.68, plus London per diem and other allowable expenses amounting to $666.20, for a total of $1,068.88. The NOAA allowed Dr. Fritz the cost of the reduced air fare. In addition, it allowed Dr. Fritz $170 for the cost of the accommodations package purchased in connection with his reduced air fare. However, NOAA allowed only 55 percent of London per diem as the accommodations package included hotel and breakfast.

In his reclaim Dr. Fritz requests reimbursement of full London per diem plus the difference between the regular excursion fare ($542) and the reduced fare ($402.68) citing our decision 54 Comp. Gen. 268 (1974).

We first consider the claim for full London per diem rate. We note that Travel Order No. 20–5–A5A–1856, dated April 22, 1975, authorized per diem at the established London rate. When Dr. Fritz submitted his travel voucher, the per diem rate was reduced by 55 percent and payment for the accommodations package substituted in lieu thereof. The rule regarding retroactive modification or amendment of travel orders is that under orders entitling an officer or employee to travel allowances, a legal right to such allowances vests in the traveler at and when the travel is performed. It may not be divested or modified retroactively so as to increase or decrease the right which has accrued. In other words, such a right becomes fixed under the applicable statutes, regulations, and orders for travel already performed. The only exception to this rule is in the case of errors when orders may be corrected or completed retroactively to show the original intent. 23 Comp. Gen. 713 (1944), 48 *id.* 119 (1968), B–174428, April 17, 1972.

Accordingly, Dr. Fritz' claim for full London per diem may be allowed, if otherwise correct.

We now consider the claim for the difference between the excursion fare ($542) and the reduced air fare ($402.68) amounting to $139.92. The record shows that Dr. Fritz paid $402.68 for a reduced fare. In order to get this reduced fare he had to purchase a land arrangement for $170 or a total package of $572.68.

In 54 Comp. Gen. 268, *supra*, we considered the claims of two employees of the Internal Revenue Service who had arranged a vacation while en route to their temporary duty assignments. In that case the employees had indirectly routed their travel through Colorado in order to take annual leave there. While the regular air fare for direct travel from Detroit to Fresno to San Francisco to Detroit was $320.92 each, the employees had obtained a special "tour-basing" fare of $228.15 each. In order to obtain the tour-basing fare they had been required to purchase a minimum of $65 in accommodations. The question presented was whether the claimants could be reimbursed the $65 amount paid for accommodations inasmuch as that amount combined with the tour-basing fare of $228.15 did not exceed the regular economy fare. We held that the $65 charge was an allowable additional air fare expense rather than a subsistence expense inasmuch as the employees' use of the accommodations qualified them for the lesser tour-basing fare and resulted in no additional expense to the Government.

In light of that decision Dr. Fritz claims reimbursement for the cost of the reduced air fare plus the cost of the land arrangements ($572.68) not to exceed the cost of the regular excursion fare ($542). However, the situation in Dr. Fritz' case is different from the facts stated above in 54 Comp. Gen. 268, *supra*, in that Dr. Fritz is being reimbursed for his land arrangements by receiving full London per diem. The employees in 54 Comp. Gen. 268, *supra*, were not traveling on official business while in Colorado and received no per diem during the time period covered by the ground accommodations package. Were Dr. Fritz to be paid for the cost of the regular excursion fare, he would in effect be reimbursed twice for the cost of his ground accommodations.

The Federal Travel Regulations (FPMR 101–7), paragraph 1–3.4b (1) (May 1973), require that employees use special or reduced fares when it can be determined in advance that such travel is beneficial to the Government. While the payment of the "tour-basing" fare of $228.15 plus an accommodations package of $65 in 54 Comp. Gen. 268, *supra*, represented a saving of $27.77 to the Government over the cost of the $320.92 fare for direct travel, the payment of Dr. Fritz' claim, as presented, would represent an additional expense to the Government.

Accordingly, Dr. Fritz is entitled to full per diem while in London plus the actual cost of his air fare, namely $402.68. Action on the claim should be taken in accordance with the foregoing.

[B–183824]

Gratuities—Reenlistment Bonus—Recoupment for Failure To Complete Enlistment—Computation of Time Lost

Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based.

In the matter of leave incident to court-martial, July 6, 1976:

This action is in response to letter (ATZLCM–FA (MP)) from Major Kenneth M. West, USA, Finance and Accounting Officer, Fort Leavenworth, Kansas, requesting an advance decision concerning whether a period of excess leave should be considered as a portion of the unexpired part of the term of enlistment of a former private of the United States Army, in computing the amount of reenlistment bonuses to be recouped from him. The request was assigned control number DO–A–1235 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by Office of the Comptroller of the Army letter dated April 30, 1975 (DACA–FAF–P).

The submission presents the following facts. The private reenlisted in the Army for a period of 6 years on October 21, 1970, at which time he was a Specialist, E–5, with over 2 years of service. Incident to that reenlistment he was paid a total of $6,000 in reenlistment and variable reenlistment bonuses. During the period of December 24, 1972, through January 23, 1973, he was in an absent without official leave status. He was tried before a special court-martial, found guilty on various charges and sentenced to be confined at hard labor for 2 months and to be discharged from the service with a bad conduct discharge. He served the confinement portion of his sentence and, pending the completion of the appellate review of his trial as required by Article 66, Uniform Code of Military Justice, 10 U.S. Code 866 (1970), was restored to duty. Effective the date he was restored to duty (May 4, 1973), the private was authorized excess leave under paragraph 5–2d(3) of Army Regulation 630–5, in effect at the time, which leave was voluntary on his part with the understanding that no pay or allowances would accrue to him during such leave. He remained in such

excess leave status until his sentence was affirmed and his bad conduct discharge was executed effective October 25, 1974.

Since because of his misconduct the member failed to complete the 6-year term of enlistment for which the bonuses were paid, partial recoupment of the bonuses is required. The Finance and Accounting Officer indicates that under the applicable provisions of Part One, Chapter 9, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), the amount of such bonuses to be recouped is computed on a percentage basis for that portion of the reenlistment remaining to be served. He indicates that since the period of excess leave was an authorized absence from duty, and is considered creditable service in accordance with current regulations, it is considered as time served on the enlistment when determining the amount of the bonuses to be recouped. However, the Finance and Accounting Officer questions whether the inclusion of excess leave as creditable service in computing bonus recoupment is proper since, although the member's excess leave was authorized, he was not (at his own request) performing the duties of his military occupational specialty, or any other military duties, for which he contracted when he reenlisted. Thus, the Finance and Accounting Officer asks whether such excess leave is to be considered creditable service and, therefore, also considered as time served when determining the amount of reenlistment bonuses to be recouped from the former member.

The statutory authority under which the private was paid reenlistment and variable reenlistment bonuses is 37 U.S.C. 308 (1970). Subsection 308(d) of Title 37 (Supp. IV, 1974), as amended by the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Public Law 93-277, 88 Stat. 119, 120, which essentially restated former subsection 308(e), provides as follows:

> (d) A member who voluntarily, or because of his misconduct does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that *the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.* [Italic supplied.]

That provision is the sole statutory authority for denying or curtailing bonuses otherwise authorized under 37 U.S.C. 308. Cf. 49 Comp. Gen. 829 (1970). Under its provisions the amount to be recouped is to be based on "the unexpired part of" the member's "enlistment."

In this regard paragraph 10923, DODPM (change 35, January 25, 1974), in effect at the time of the member's discharge, provided that time lost during a period for which a reenlistment bonus was paid must be made good before discharge, or a *pro rata* part of the bonus must be recouped. Such "time lost," however, is that time which an enlisted member is to make up pursuant to 10 U.S.C. 972 (1970). *See*

49 Comp. Gen. 829, *supra*, and 33 *id.* 513 (1954). Section 972 provides as follows:

> An enlisted member of an armed force who—
> (1) deserts;
> (2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;
> (3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;
> (4) is confined for more than one day under a sentence that has become final; or
> (5) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his misconduct;
>
> is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted.

While such time lost includes periods of absence without leave and periods of confinement, it does not include periods of excess leave and, as the Finance and Accounting Officer recognizes, the applicable provisions of the DODPM do not require excluding excess leave from creditable service in computing recoupment of reenlistment bonuses or for other purposes. See DODPM paragraph 10104b and Table 1–1–2, Rule 1.

The member's excess leave status was authorized under paragraph 5–2d(3) of AR 630–5 (change 5, September 3, 1971) which provided that the officer exercising general court-martial jurisdiction over an accused "may grant excess leave for an idefinite period, pending appellate review, upon application by an accused" whose sentence includes a dismissal, dishonorable discharge, or bad conduct discharge. Such excess leave is leave authorized pursuant to 37 U.S.C. 502(b) (1970) for which pay and most allowances do not accrue. We have indicated that pursuant to 37 U.S.C. 502(b), a member may be in an excess leave active duty status. *See* 47 Comp. Gen. 467, 469 (1968), and 44 *id.* 830 (1965).

While a member may not be placed in an excess leave status without his consent (52 Comp. Gen. 482 (1973) and 46 *id.* 261 (1966)), the decision whether or not to grant such leave is still generally discretionary with the military commander. Thus, the member could have been denied excess leave and required to remain at his military duty station and to perform military duties. In any event it has been held that the purpose of enlistment bonuses is to offer a substantial financial inducement solely in exchange for reenlistment. Once the right to a bonus is vested in the member nothing appears in 37 U.S.C. 308 to authorize curtailing such bonus by requiring the member to continue to qualify in a critical military skill or to satisfactorily perform his duties in the specialty for which the bonus was authorized. *See* 45 Comp. Gen. 379 (1966) and *cf.* 49 Comp. Gen. 829 (1970).

Accordingly, it is our view that in accordance with applicable regulations the private's period of excess leave is to be included as creditable service in determining the unexpired part of his enlistment for bonus recoupment purposes. The voucher and leave record enclosed with the submission are returned.

In addition the Finance and Accounting Officer presents a question which does not apply to this member's case. The situation involves excess leave which begins subsequent to or extends beyond the date the member's enlistment would have expired. In that situation, if the member has lost time which must be made good as required by DODPM, paragraph 10104c, is the period of excess leave to be counted towards making up the lost time?

In view of the conclusion reached in this case it appears that a period of excess leave after expiration of the member's term of enlistment would be counted towards making up lost time.

[B-185098]

Travel Expenses—Military Personnel—Commercial *v.* Government Transportation—Advantageous to Government

The use of Aero Club-owned or Government-loaned aircraft is considered a Government conveyance when used as a mode of official travel but under current regulations such use will not take precedence over normal Government conveyance irrespective of whether use of the aircraft may be considered advantageous to the Government. See M4406-3 and M4405-2 of 1 JTR.

Subsistence—Per Diem—Military Personnel—Temporary Duty—Layover Time—Aero Club Aircraft Mechanical Difficulties

Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties causing a layover of four days may not be reimbursed per diem for the layover time since M4406-3 of 1 JTR provides that per diem in this circumstance not exceed the amount which would have been payable had the member used such commercial transportation as would have been available.

Travel Expenses—Military Personnel—Personal Convenience—Delay En Route

Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties may not be reimbursed for travel to and from San Francisco, his permanent duty station, while waiting for the aircraft to be repaired, since the trip was not a necessary expense pursuant to public business but an expense as a result of a personal choice. See M4406-3 of 1 JTR.

Travel Expenses—Constructive Travel Costs—Computation—Aero Club or Private Aircraft—Operation (Pilot) Plus Passengers (Employees)

The determination of the constructive transportation cost ceiling on Air Force travel vouchers involving Aero Club aircraft or private aircraft by including those commercial fares for the operator (pilot) plus corresponding fares for any passengers accompanying the operator who are also in an official travel status does not appear to be improper.

In the matter of Colonel John V. Hawkins, USAF, July 6, 1976:

This action is in response to a letter dated August 15, 1975, from the Chief, Accounting and Finance Division, Defense Supply Agency, Department of Defense, requesting an advance decision as to the propriety of making payment on a travel voucher in the case of Colonel John V. Hawkins, USAF, SSN 524–36–5531, and in connection with his case, resolution of several questions concerning the use of Aero Club aircraft in the performance of public business. The request was forwarded here by endorsement dated October 8, 1975, from the Per Diem, Travel and Transportation Allowance Committee and has been assigned PDTATAC Control No. 75–30.

The submission indicates that the member, by Travel Order Number DCRC–Q–620, dated May 29, 1975, issued by Headquarters, Defense Contract Administration Services Region, San Francisco, was ordered to perform temporary duty travel away from his permanent duty station in San Francisco, beginning June 22, 1975, and was authorized the use of the Aero Club aircraft. On July 1, 1975, while enroute from Great Falls, Montana, to Fairchild Air Force Base, Washington, the Aero Club aircraft developed mechanical problems, forcing return to Great Falls for repairs. Due to delays in the delivery of needed parts, it was determined that the aircraft could not be repaired prior to July 7. As a result, the member chose to fly back to San Francisco by commercial airline on July 4 and return to Great Falls on July 8 to bring the repaired Aero Club aircraft back to San Francisco.

The member filed a supplemental travel voucher for previously disallowed items which included per diem for layover time spent in Great Falls while the aircraft was being repaired and travel to and from San Francisco by commercial airlines on July 4 and July 8.

The following questions were asked concerning the supplemental travel voucher:

1. Can the use of Aero Club aircraft be designated as more advantageous to the Government by the travel approving official?
2. If the answer to question 1 is yes, can the subject order be amended to designate use of Aero Club aircraft as more advantageous to the Government by the travel approving official?
3. If the answer to question 1 is no can the traveller be reimbursed for the layover time on 1–3 July and the commercial air fares involved in travelling from Great Falls, MT to San Francisco on 4 July and return on 8 July to pickup the Aero Club aircraft?
4. If the answer to question 1 is yes, and the answer to question 2 is yes, then can the traveller be reimbursed for the layover time on 1–3 July and the commercial air fares involved in travelling from Great Falls, MT to San Francisco on 4 July and return on 8 July to pickup the Aero Club aircraft?
5. In determining the constructive transportation cost ceiling on vouchers involving Aero Club aircraft or private aircraft this Office has been including those commercial fares for the operator (pilot) plus corresponding fares for any travellers accompanying the operator in an official travel status. For example, in computing the maximum transportation cost for the travel of Col Hawkins, who was accompanied by two employees, we determined the total air fares for three

persons through the itinerary and commercial airline rates and used this sum as a limit on the aircraft expenses to be reimbursed. Is this procedure proper?

With regard to whether the use of Aero Club aircraft can be designated as more advantageous to the Government, paragraph M4406–3 of Volume 1 of the Joint Travel Regulations (1 JTR) provides in part:

> * * * The use of Aero Club-owned or Government-loaned aircraft will not take precedence over normal Government conveyance. However, when the use of such aircraft is authorized for official duty travel, reimbursement for any necessary expenses will not exceed the cost to the Government for transportation by such commercial carrier as would have been available for use and per diem will not exceed that amount which would have been payable had such commercial transportation been used. Necessary expenses incurred include the hourly fee imposed by the Aero Club and "tie down" fees charged at airports. Authorization or approval for travel by Aero Club aircraft will be in accordance with administrative regulations of the Service concerned.

Although paragraph M4405–2 of 1 JTR provides that the official directing travel may authorize or approve travel by special conveyance to, from, or between duty stations, either permanent or temporary, under circumstances not permitting travel by the usual means of transportation, or when he has determined that the use of special conveyance is advantageous to the Government, it is noted that paragraph M4406–3 states specifically that the use of Aero Club aircraft will not take precedence over normal Government conveyance. No exception is made for cases where use of such aircraft is advantageous to the Government. It is further noted that although paragraph M4405–2 provides for reimbursement for the total expenses incurred in the use of a special conveyance, paragraph M4406–3 specifically provides reimbursement only for necessary expenses not to exceed the cost to the Government for transportation by such commercial carrier as would have been available for use.

Furthermore, although aircraft owned by the Aero Club is considered a Government conveyance when used as a mode of official travel—*see* 40 Comp. Gen. 587 (1961)—the purpose of the Aero Club is not to provide a more advantageous means of Government travel, but rather to provide a recreational activity which would give eligible personnel an opportunity to enjoy safe, low cost, light aircraft operations and to promote positive morale. See Air Force Regulation 215–2, February 13, 1970. Therefore, question one is answered in the negative.

In view of the negative answer to question one, answers to questions two and four are unnecessary.

With respect to whether the member can be reimbursed per diem for the layover time from July 1 to July 4, it is noted that paragraph M4406–3 of 1 JTR provides that per diem will not exceed the amount which would have been payable had the member used such commercial transportation as would have been available had he traveled by com-

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mercial carrier. Under that provision the per diem expenses incurred during the member's layover in Great Falls due to the breakdown of the plane would be reimbursable only to the extent per diem would have been paid had he continued his travel by commercial means.

With respect to whether the member may be reimbursed for the commercial air fares involved in traveling from Great Falls to San Francisco on July 4, 1975, and from San Francisco to Great Falls on July 8, 1975, such reimbursement is to be determined on the basis of whether the expense was necessary in the performance of public business.

The record indicates that the member chose to return to San Francisco while the aircraft was being repaired in Great Falls rather than to remain with the aircraft in Great Falls. There is nothing in the record to show that the interim trip to and from San Francisco was pursuant to public business. Rather, it is indicated that it was an expense incurred as a result of a personal choice. Therefore, it is our view that reimbursement for commercial air fare is not authorized for such purpose in this case, nor is such cost includable in the determination of the amount which would have been payable had commercial transportation been used. Question three is answered in the negative.

With respect to the question involving the proper procedure to be used in computing the constructive transportation cost ceiling for the travel of the member, it is to be noted that a comprehensive definition for the determination of constructive travel cannot be given in view of the many different situations which may arise. Each case must be treated on the basis of the particular facts involved.

It appears reasonable in this instance, however, to compute the constructive cost ceiling for the member by determining what his cost would have been for travel over a usually traveled route by common carrier with times of departure and arrival reasonably coinciding with possible time of departure and arrival reasonably required to carry out the purpose of the travel order. Thus, in answer to question five as it relates to the present case, the determination of the constructive transportation cost ceiling on travel vouchers involving Aero Club aircraft or private aircraft by including those commercial fares for the operator (pilot) plus corresponding fares for any passengers accompanying the operator who are also in an official travel status does not appear to be improper.

Accordingly, since it appears from the file that the member has received reimbursement for all travel expenses to which entitled, the supplemental travel voucher accompanying the submission will be retained here.

[B-185024]

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Evidence for Expenses in Excess of $200

Employee claims miscellaneous expense for alteration of draperies and purchase of new rug incident to establishing new residence upon transfer. Claim was denied by Transportation and Claims Division since employee failed to submit documentation required by Federal Travel Regulations (FPMR 101-7) para. 2-3.3a (May 1973) for alteration of draperies and since reimbursement for new items such as rugs is specifically prohibited by FTR para. 2-3.1c. Upon submission of proper documentation, amount claimed for alteration of draperies may be reconsidered. However, denial of cost of new rug was proper, and is sustained.

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Allowable Amount

Incident to transfer, employee claims miscellaneous expense for alteration of draperies and cost of new rug. Employee states that $500 miscellaneous expense was authorized on work sheets utilized in preparing budget estimates on travel authorization. Such figures are mere estimates and are without legal effect to create entitlement. Entitlement to relocation expenses, including miscellaneous expense, flows from and must be determined by statute and implementing regulations.

Officers and Employees—Transfers—Relocation Expenses—Taxes

Employee claims reimbursement for withholding taxes deducted from 1975 settlement by Transportation and Claims Division. Settlement reimbursed employee for lease-breaking expenses in amount of $108.66. Under 26 U.S.C. 217 (1970), it appears that employee would be permitted deduction and that amount reimbursed would not be subject to withholding. However, 3 Treasury Fiscal Requirements Manual 3020.50 (April 1970) allows adjustment of errors in withholding only during same calendar year in which error was made. Since error was made during 1975 calendar year, adjustment was automatically effected when employee filed income tax returns for that year.

In the Matter of Johnstone D. Cockerille—Claim for Miscellaneous Expense and Reimbursement of Withholding Tax Erroneously Deducted, July 9, 1976:

This action results from the appeal by Johnstone D. Cockerille, of the settlement Z-2585648, July 31, 1975, by our Transportation and Claims Division (now Claims Division). The settlement allowed that portion of Mr. Cockerille's claim which was for lease-breaking expenses, but denied the remainder of the claim concerning miscellaneous expense.

Mr. Cockerille, an employee of the Department of the Army, was transferred from Fort Monmouth, New Jersey, to Washington, D.C., to be effective July 29, 1973. Incident to that transfer the Army allowed credit for, *inter alia*, a total of $208.25 miscellaneous expense. An additional $259.45 was claimed as miscellaneous expenses but was questioned by the Army. The claimed amount constituted the cost of having his draperies altered for his new residence ($77.45) and the cost of obtaining and installing a new hall rug ($182). Also questioned

by the Army were certain lease-breaking expenses incurred by Mr. Cockerille incident to his transfer.

The Claims Division disallowed Mr. Cockerille's claim for the additional $259.45 miscellaneous expense on the basis that the documentation required by the applicable regulation in support of his claim for alteration of draperies was not provided, and that the cost of obtaining and installing a *new* rug was also prohibited by such regulation. The Claims Division settlement allowed Mr. Cockerille the amount of $108.66, which he had claimed as lease-breaking expenses. Federal withholding tax in the amount of $21.73 was deducted from this amount, with the net to the claimant being $86.93.

Mr. Cockerille has appealed that portion of the settlement which denied reimbursement of the $259.45 miscellaneous expense, and also that portion which deducted Federal withholding tax in the amount of $21.73 on the payment of lease-breaking expenses.

Concerning his claim for miscellaneous expenses, Mr. Cockerille states that:

> It is obvious that no attempt to obtain complete facts regarding approval and authorizations pertaining to Miscellaneous Expenses is being made at any point concerned with reimbursement for my PCS move to Washington, D.C. As for authorizations, my advance travel was computed to be $2,800.00. A work sheet was prepared showing each item and approved amount that was involved in the PCS move. In this work sheet was approval for $500.00 for Miscellaneous Expenses, including the rug and drapery items. There can be no question that these items were approved.

An allowance for miscellaneous expense is authorized by Federal Travel Regulations (FPMR 101–7) chapter 2, part 3 (May 1973). For an employee with immediate family, FTR para. 2–3.3a authorizes a miscellaneous expense of $200 without support or other documentation. Federal Travel Regulations para. 2–3.3b authorizes an allowance in excess of that authorized by FTR para. 2–3.3a, if supported by acceptable documentation of the entire amount claimed, provided that the aggregate amount does not exceed the employee's basic pay for 2 weeks if the employee has an immediate family. It was because Mr. Cockerille did not submit the requisite documentation that his claim for the $77.45 for alteration of his draperies was disallowed. Upon submission to our Claims Division of acceptable documentation, such as a copy of the paid bill, that part of his claim may be further considered. Under the existing regulations the burden is clearly on the employee to support his claim for reimbursement of such expenditures by providing the requisite documentation.

The $182 claimed as the cost for the new rug may not be allowed since FTR para. 2–3.1c(5) (May 1973) specifically excludes from reimbursement the cost "of newly acquired items, such as the purchase of installation cost of new rugs or draperies."

Mr. Cockerille also argues in support of his claim that $500 was approved for miscellaneous expense on a work sheet used in preparing his orders. While the record does not contain a copy of such work papers, we assume they were utilized in preparing the information contained in block 18 of DD form 1614. That block is labeled "ESTIMATED COST" and is used for budget purposes. Such figures are merely estimates and do not constitute "approval." Notwithstanding the above, an employee's entitlement to relocation expenses, including miscellaneous expense, flows from and must be determined by the statute authorizing such expenses, in this case 5 U.S. Code 5724a (1970), and the implementing regulations, which are contained in the Federal Travel Regulations. Thus, the alleged "approval" of miscellaneous expense in the amount of $500 is without legal effect and establishes no entitlement to miscellaneous expense other than as authorized pursuant to the applicable law and regulations, the effect of which was discussed above.

Mr. Cockerille has also appealed the withholding of Federal taxes on the payment of lease-breaking expenses made by the Claims Division settlement. The Tax Reform Act of 1969 (Public Law 91–172, December 30, 1969, 26 U.S.C. 1 note) broadened the scope of moving expenses which may, for income tax purposes, be deducted under 26 U.S.C. 217 (1970) by an employee from his gross income, and for which the related reimbursement or allowance is not subject to tax withholding.

Regulations concerning withholding of Federal income taxes for Federal employees are contained in Treasury Fiscal Requirements Manual (Treasury FRM). Specifically, 3 Treasury FRM 3080.10 (March 1970), in effect at the time of the change of official station, provided that:

> TAX WITHHOLDING. An allowance or reimbursement to an employee for moving expenses paid by the employee is not subject to tax withholding if (and to the extent that) the employee may, for income tax purposes, deduct the moving expenses from his gross income. Those moving expenses which may be deducted by the employee (subject to certain conditions), and for which the corresponding allowance or reimbursement is not subject to tax withholding, are the reasonable expenses of traveling (including meals and lodging) and of moving household goods and personal effects, from the former residence to the new residence; of traveling (including meals and lodging) for the purpose of searching for a new residence; of meals and lodging while occupying temporary quarters; or constituting qualified residence sale, purchase, or lease expenses. The aggregate amount allowable as a deduction for the househunting trip and temporary quarters is $1,000 * * *. The aggregate amount allowable as a deduction for the residence sale, purchase, or lease expenses is $2,500 * * *, reduced by the aggregate amount allowable for the househunting trip and temporary quarters. Allowances or reimbursements to employees which exceed the above aggregate amounts allowable as deductions, along with reimbursements for any other moving expenses, are subject to tax withholding.

Prior to our Claims Division settlement, Mr. Cockerille apparently had not been reimbursed for "residence sale, purchase, or lease ex-

penses." Thus, the $108.66 for lease-breaking expenses allowed by our Claims Division settlement would appear to be within the aggregate amount for which a deduction for income tax purposes would appear to be proper, and, pursuant to 3 Treasury FRM 3080.10, that amount would not be subject to tax withholding. However, in the absence of an administrative report from the concerned agency indicating the amount previously reimbursed for these expenses, the Claims Division would be required to withhold taxes on such settlements.

Concerning reimbursement of the amount erroneously withheld, 3 Treasury Fiscal Requirements Manual 3020.50 (April 1970) in effect at the time of change of official station provided that:

> A clerical error in withholding income taxes made in a prior pay period of the current calendar year should be corrected if the employee is still on the agency's payroll. Correction is made by adjusting the deduction for the current pay period by an amount sufficient to offset the error in the witheld taxes and the net pay of the employee. If the error occurred in a prior calendar year or the employee is no longer on the payroll no adjustment should be made. (Adjustment is effected through the filing of the tax return by the employee.) * * *

Since the error in withholding occurred during calendar year 1975, adjustment should have been reflected in Mr. Cockerille's tax returns for the applicable taxable year.

[B-185790]

Contracts—Awards—Federal Aid, Grants, etc.—Federal Law Compliance—Regulations

Where grant conditions indicate that State law shall govern procurement by grantee and State law exists on specific point in question and is followed, General Accounting Office cannot say result reached is irrational. However, since here no State law exists as to particular point in question, then consideration of the matter under Federal frame of reference is appropriate.

Corporations—Corporate Entity—Bid Submission

Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga. * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures.

States—Federal Aid, Grants, etc.—Federal Regulations—Compliance

Where grantor agency issues regulation requiring grantees to make contract awards under grants through maximum competition to low responsive, responsible bidder, unless grantor takes action necessary to assure grantee compliance, there will be no guarantee that conditions which agency requires to carry out congressional purposes will be met.

In the matter of the Griffin Construction Company, July 9, 1976:

The subject complaint involves the award of a contract by the city of Monticello, Georgia, for improvements and additions to its munici-

pal water distribution facilities made under a grant from the Economic Development Administration (EDA), Department of Commerce. The grant was made pursuant to title I of the Public Works and Economic Development Act of 1965, as amended, Public Law 89–136, 42 U.S. Code §§ 3121, 3113–3136 (1970). The grant called for the Government to provide 60 percent of the actual cost of the project.

Monticello solicited bids for the construction of the water system. The two lowest bids received were as follows:

Firm	Price
"Ethridge & Griffin Const. Co."	$1,006,637.77
Turner Murphy Company	1,008,427.45

Subsequent to the receipt of bids, the city attorney of Monticello advised the mayor and city council that the low bid was not proper for consideration based on grounds characterized as "technical" and as "serious." The technical problems were as follows: "* * * the bid is not dated; the correct names of the bidders are not set forth in the bid proposal; the amount of the bid on Section A is not given in the Base Proposal, but instead is given in Subtotal Section 'A' by stating one figure with a second figure beneath to be subtracted from the figure above." The serious problems were as follows: "* * * the bid is not signed by Ethridge Construction Co. or any authorized agent for it nor is there any bond for the Ethridge Construction Company attached to the subject bid; further, signature for Griffin Construction Co. is apparently by the secretary, without having that signature attested to or the corporate seal affixed." Because of the above, he concluded "that the subject bid by Ethridge Construction Co. and Griffin Construction Co. would not be binding on the subject bidders and consequently is not a proper bid for consideration by the City on the referenced project."

By resolution of November 21, 1975, the city of Monticello accepted the bid of Turner Murphy Company as the lowest acceptable and proper bid.

Griffin thereafter protested this action to the city. The matter was also brought to the attention of EDA's Southeastern Regional Office. By memorandum of December 9, 1975, EDA's regional counsel indicated that he could find no basis to say that the decision of Monticello in not awarding to Griffin was wrong. Consequently, the indication was made that EDA should concur in the grantee's proposed award to Turner Murphy. By letter of December 22, 1975, Monticello was advised that the EDA regional office concurred in the award of the contract to Turner Murphy.

Choice of Law

The EDA regulations regarding the award of contracts by its grantees, 13 C.F.R. § 305.95 (1975), provide that:

> Recipients may use their own procurement procedure regulations which reflect applicable State and local law, rules, and regulations provided that procurements made with Federal grant funds adhere to the following standards:
>
> * * * * * * *
>
> (5) * * * Awards shall be made to the responsible bidder whose bid is responsive to the invitation, price, and other factors considered. Any and all bids may be rejected when it is in the grantee's interest and such action is in accord with applicable law.
>
> (6) Competition shall be obtained to the maximum extent possible. * * *

Our Office has held that, where grant conditions indicate that State law shall be followed in certain aspects of procurements handled by Federal grantees, the initial frame of reference for deciding the propriety of those actions is the State and local law. *Lametti & Sons, Inc.*, 55 Comp. Gen. 413 (1975), 75-2 CPD 265; *Blount Brothers Corporation, et al.*, B-185322, March 11, 1976, 76-1 CPD 172. This is consistent with attachment "O" of Federal Management Circular (FMC) 74-7 which permits the use by the grantee of its own law (with certain exceptions) in awarding contracts under Federal grants. FMC 74-7, para. 3 of attachment "O." As recognized in *Copeland Systems, Inc.*, 55 Comp. Gen. 390 (1975), 75-2 CPD 237:

> Many grant agreements require application of "local" procurement law (usually State) to govern the procurement procedures being following in the award of contracts under the grants. Presumably grantees are familiar with local procurement law and practices. To the extent our reviews will be partially concerned with the application and interpretation of local procurement law of which the grantee should have a degree of familiarity, we do not think the grantee will be disadvantaged. * * *

In *Copeland*, *supra*, we further recognized the grantor's primary authority to determine the grantee's compliance with grant provisions and also our right to recommend corrective action when we believed that the determinations reached were not rationally founded. As can be seen in *Lametti*, *supra*, and *Blount*, *supra*, where the grant indicates that State law shall govern and State law exists on the specific point in question and is followed, even if that State law differs from Federal law, General Accounting Office cannot say that the results reached in following State law were not rationally founded.

Therefore, where grant conditions indicate that State and local law will govern, the initial frame of reference must be to State law. However, if no State law exists as to the particular point in question, then consideration of the matter under a Federal frame of reference is appropriate. While this would appear to diminish the intent of the grant conditions to allow State and local law to control,

it must be noted that FMC 74–7 in paragraph 3 of attachment "O" and, indeed, most grant conditions seek to have grantee procurements accomplished with a maximization of competition and fairness to all participants. To that end, these policy statements are entirely consistent with basic Federal principles of competitive bidding which are intended to produce rational decisions and fair treatment. See *Copeland Systems*, *supra*. Therefore, it would seem that to the extent that a grantee decision is not rationally founded, it could be considered inconsistent with almost any system of competitive bidding, i.e., the aim of FMC 74–7 and the grant conditions such as 13 C.F.R. § 305.95, *supra*. As we stated in *Copeland*—

> Under a "rational basis" test we do not consider that a grantee's possible ignorance of our decisions or the intricacies of Federal procurement law will work to the grantee's disadvantage since what is "rational" under the particular circumstances involved will be more a matter of logic than knowledge of detailed rules. * * *

With regard to the instant case, it would appear that the initial frame of reference as to the applicable law must be State and local law. As noted above, the regulations provide that the grantee may utilize its own State and local law and there is no indication that anything other than State and local law was followed by Monticello in reaching its conclusion. Moreover, EDA in its report states that "* * * this matter represents an interpretation of State and local law rather than the allegation of a violation of Federal law or regulations * * *." But, the complainant does indicate that State precedent in the area of bid responsiveness is lacking and the matter should be resolved by resorting to the Federal frame of reference. We agree since our review has also uncovered no Georgia law specifically on the issue involved in the protest.

Griffin's Alleged Nonresponsiveness

Griffin argues that the bid in the name of "Ethridge & Griffin Const. Co." indicates an intention on its part to perform the work which was the subject of the IFB as a joint venture. However, it indicates that no joint venture was ever in fact formed and, therefore, Ethridge was never bound on the bid in that the only signatory was "Tommy L. Griffin, Sec." Griffin also argues that listing both firms on the bid did not alter the actual legal relationship which existed between the firms at the time of bid opening, i.e., that they were two separate entities and not a joint venture. It is for this reason that Griffin states that the bid bond had to be written in favor of an existing entity, Griffin Construction Company. Griffin argues, therefore, that since it was listed as a bidding entity, the bid was signed by Tommy L. Griffin and the bid bond listed Griffin Construction Company as principal, it

is entitled to award of the subject contract irrespective of the fact that Ethridge Construction Company is also listed as a bidding entity.

Griffin's argument, however, overlooks what the bidding entity indicated as its status in the bid. The bid states:

> Proposal of Ethridge, & Griffin Const. Co. (hereinafter called "Bidder") a corporation, organized and existing under the laws of the State of Ga. a partnership, or an individual doing business as _____.

As Griffin itself notes, the joint venture represents a partnership for a single transaction. *Bowman* v. *Fuller*, 66 S.E. 2d 249 (Ga. 1951); 46 Am. Jur. 2d *Joint Venture* § 4 (1969). However, the bidder's representation that it was a corporation (by filling in the appropriate blank with "Ga") rather than a partnership is determinative of the represented status of the bidding entity. It is clear from the record that no corporation named Ethridge & Griffin Const. Co. was ever formed. Thus, we have a situation of a bid submitted by a nonexistent corporate entity, i.e., Ethridge & Griffin Const. Co., signed by a similarly "nonexistent" secretary. Further, the solicitation required that a bid submitted by a corporation was to be impressed with the corporate seal. This, however, was not done with regard to the instant bid.

The instant case is analogous to an earlier decision of our Office, *Martin Company*, B–178540, May 8, 1974, 74–1 CPD 234. There, the bid was also submitted by an entity which had certified itself to be a corporation incorporated in the State of Oklahoma. However, no such corporation existed. The bid was, however, executed by "Terry L. Martin, Vice President." The issue was raised as to whether an award could have been made to the Martin Company which was a sole proprietorship, even though the bid was signed showing a corporate status. We concluded that Martin Company, an existing sole proprietorship, could not properly be substituted for the bidding entity, Martin Co., Inc., since an award to anyone other than the bidder named in the bid as bidding entity would be an improper substitution. *See also* 41 Comp. Gen. 61 (1961); 33 *id* 549 (1954). *Cf. Oscar Holmes & Sons, Inc., et al.*, B–184099, October 24, 1975, 75–2 CPD 251. In the latter decision, we set forth the rationale for this approach as follows:

> * * * We stated that such action could serve to undermine sound competitive bidding procedures in that it would facilitate the submission of bids through irresponsible parties, whose bids could be avoided or backed up by the real principals as their interests might dictate.

Based on the above, we conclude that the rejection of the low bid was proper. While the precise reasons enunciated by the city attorney for rejecting the low bid are not identical to the analysis expressed above, we believe that the concern of the city of Monticello, EDA, and our Office was the same—the lack of a binding commitment by the bidding entity. Therefore, we find rational support for the procure-

ment decision made by the city of Monticello and the concurrence in that decision by EDA. In view of this conclusion, we see no reason to address further the detailed reasons for Monticello's actions.

The Assistant Secretary for Economic Development, Department of Commerce, expresses concern as to GAO's role in reviewing the award of contracts by grantees of the Federal Government. In this regard, he states:

> We are aware of the General Accounting Office's heightened interest in reviewing grantee contract award procedures as published in 40 FR 42406-7, 9/12/75, and in the Matter of Lametti & Sons, Inc. B-183444, October 31, 1975, in which the Deputy Comptroller General found, *inter alia*, that a city improperly awarded a contract under an EPA grant. We believe, however, any future GAO guidelines which would place upon Federal grantor agencies responsibility for monitoring and passing upon grantee contract awards beyond acceptance of competent legal advice from local counsel would derogate from State and local responsibilities under FMC 74-7, Attachment 0, and would place an onerous administrative burden upon grantor agencies.

It has long been recognized that when the Federal Government makes grants it has the right to impose conditions upon those grants. *State of Indiana* v. *Ewing*, 99 F. Supp. 734 (D.D.C., 1951), vacated as moot 195 F. 2d 556 (D.C. Ct., 1952). See *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. With regard to the instant case, the regulations under which grantee awards were to be made were issued pursuant to 42 U.S.C. § 3211(12) (1970) which authorizes the Secretary of Commerce to "establish such rules, regulations, and procedures as he may deem appropriate in carrying out the provisions of this chapter" (42 U.S.C. §§ 3121-3226 (1970)). As noted in part above, the subject regulations require that EDA grantees award their contracts on the basis of procurement procedures that provide for maximum competition with award to be made to the low responsive, responsible bidder. Under these circumstances, we believe that unless a grantor takes such actions as circumstances indicate are necessary to assure compliance with conditions it imposes upon grantees, there will be no guarantee that what the agency requires to carry out congressional purposes will be met.

We recognize again that in grantee awards a review of the grantee's compliance is primarily within the grantor's authority although GAO does have a right to make further recommendations when the determinations reached with regard to grantee compliance are not rationally founded.

[B-185212]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Commitment Requirement

Bidder who signed Part I certificate as member of Topeka Plan and inserted "Does not apply." under Part II which sets forth requirements for non-members

of Topeka Plan is not responsive to affirmative action requirements of solicitation where bidder is not member of Topeka Plan at time of bid opening. Bidder's certification to Part I is not commitment to be bound to affirmative action requirements of solicitation where bid conditions require current membership in Topeka Plan as prerequisite to Government's acceptance of Part I certification.

In the matter of the Sachs Electric Company, July 12, 1976:

Sachs Electric Company (Sachs) has protested the rejection of its low bid as nonresponsive to the affirmative action requirements of invitation for bids (IFB) No. GS–06B–13625, issued by the General Services Administration, and the award of a contract to the second low bidder for the construction of an integrated ceiling background system for the new Federal building, courthouse, and parking facility, Topeka, Kansas.

The bid conditions defined the bidder's obligation for performance of all construction work (both Federal and non-Federal) in the metropolitan Topeka area in that each trade to be utilized was required to be covered by the requirements of the "Topeka Plan" (an affirmative action program for minority manpower utilization in the construction industry in the metropolitan Topeka area), or by the minimum requirements of a detailed affirmative action plan as described in the bid conditions.

In a section of the IFB entitled "Bid Conditions—Affirmative Action Requirements—Equal Employment Opportunity," bidders were required to commit themselves to either Part I or Part II of the bid conditions for each construction trade proposed to be used on the project. Part I involved a commitment to the Topeka Plan, while Part II involved a commitment to the various goals and specific steps set forth in the conditions. In Part III captioned, "*Certifications*," bidders were to indicate their specific commitment to either Part I or Part II for each trade intended to be used.

The following specific provisions of the bid conditions are relevant:

Part I

The provisions of this Part I apply to bidders, contractors and subcontractors with respect to those construction trades for which they are parties to collective bargaining agreements with a labor organization or organizations and who together with such labor organizations have agreed to the Metropolitan Topeka Area Construction Program for equal opportunity (but only as to those trades as to which there are commitments by labor organizations to specific goals of minority manpower utilization) * * *.

* * * * * * *

To be eligible for award of a contract under Part I of this invitation, a bidder * * * must execute the certification required by Part III hereof.

Part II

A. *Coverage.* The provisions of this Part II shall be applicable to those bidders, contractors and subcontractors, who, in regard to those construction trades to be utilized on the project to which these bid conditions pertain:

1. Are not or hereafter cease to be signatories to the Topeka Plan referred to in Part I hereof;

* * * * * * *

5. Are no longer participating in an affirmative action plan acceptable to the Director, OFCC, including the Topeka Plan.

B. *Requirements—An Affirmative Action Plan.* The bidders, contractors and subcontractors described * * * above will not be eligible for award of a contract under this invitation for bids, unless it certifies as prescribed in paragraph 2b of the certification specified in Part III hereof that it adopts the minimum goals and timetables of minority manpower utilization * * *.

* * * * * * *

3. *Contractors and Subcontractors Deemed to be Bound by Part II.* In the event a contractor or subcontractor, who is at the time of bidding eligible under Part I of these Bid Conditions, is no longer participating in an affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, including the Topeka Plan, he shall be deemed to be committed to Part II of these Bid Conditions. * * *

4. *Subsequent Signatory to the Topeka Plan.* Any contractor or subcontractor subject to the requirements of this Part II for any trade at the time of the submission of his bid who together with the labor organization with whom it has a collective bargaining agreement subsequently becomes a signatory to the Topeka Plan, either individually or through an association may meet its requirements under these Bid Conditions for such trade, if such contractor or subcontractor executes and submits a new certification committing himself to Part I of these Bid Conditions. * * *

Part III

Certifications

A. *Bidders Certifications.* A bidder will not be eligible for award of a contract under this Invitation for Bids unless such bidder has submitted as a part of its bid the following certification, which will be deemed a part of the resulting contract:

BIDDERS' CERTIFICATION

_____(Name of Bidder) certifies that:

1. it intends to use the following listed construction trades in the work under the contract _____; and

2. (a) as to those trades set forth in the preceding paragraph one hereof for which it is eligible under Part I of these Bid Conditions for participation in the Topeka Plan, it will comply with the Topeka Plan on all construction work (both federal and non-federal) in the Metropolitan Topeka area within the scope of coverage of that Plan, those trades being:_____, and/or

(b) as to those trades for which it is required by these Bid Conditions to comply with Part II of these Bid Conditions, it adopts the minimum minority manpower utilization goals and the specific affirmative action steps contained in said Part II, for all construction work (both federal and non-federal) in the Metropolitan Topeka area subject to these Bid Conditions, those trades being:_____; and

3. it will obtain from each of its subcontractors and submit to the contracting or administering agency prior to the award of any subcontract under this contract the subcontractor certification required by these Bid Conditions.

_____

(Signature of authorized representative of bidder)

Sachs' bid contained a signed certification with "Electricians, Sheetmetal workers, Teamsters, Carpenters" inserted in paragraphs 1 and 2a. In paragraph 2b of the certification, Sachs inserted "Does not apply." Subsequent to bid opening, the contracting officer learned that Sachs was not a signatory to the Topeka Plan at the time of submission of its bid. The contracting officer, therefore, concluded that the bid was nonresponsive since Sachs was ineligible to certify as a signatory to the Topeka Plan and had not committed itself to Part II.

Sachs contends that its bid was responsive because (1) under the wording of the bid conditions, it was eligible to commit itself to Part I, and (2) in any event, its bid should be read as evidencing a commitment to Part II. We disagree.

Sachs' first contention is based on its prior status (in 1973) as signatory to the Topeka Plan through membership in a trade association. Sachs claims that this prior signatory status is encompassed by the Part I bid conditions which refer to bidders which "have agreed" to the Topeka Plan because, in Sachs' opinion, the term "have agreed" refers to what occurred in the past. However, the verb form "have agreed" is not in the past tense as asserted by Sachs, but rather is in the present perfect tense, which refers to "past action extending to the present." *Harbrace College Handbook* 74 (5th ed. 1968). Furthermore, we think it is clear from a reading of the bid conditions as a whole that the Part I conditions referred only to bidders which were currently (at time of bid submission) committed to the Topeka Plan. Since Sachs was not so committed, we cannot agree that it could satisfy the requirements of the solicitation merely by committting itself to Part I of the bid conditions.

We have consistently held that a bidder's failure to commit itself, prior to bid opening, to applicable affirmative action requirements of a solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B–176328, November 8, 1972; 52 Comp. Gen. 874 (1973). Because the failure to comply with such requirements is a material deviation, it cannot be regarded as a minor informality which can be waived or corrected. See *Veterans Administration re Welch Construction, Inc.*, B–183173, March 11, 1975, 75–1 CPD 146 and cases cited therein. However, we have recognized that a bidder may commit itself to such requirements in a manner other than that specified in the solicitation. 51 Comp. Gen. 329 (1971); B–176260, August 2, 1972; B–177846, March 27, 1973. Accordingly, what must be determined is whether Sachs' bid can be read as a commitment to Part II since Sachs was not signatory to the Topeka Plan.

We have held that under certain circumstances a commitment to Part II of affirmative action requirements may exist notwithstanding a bidder's failure to complete the certification(s) in accordance with solicitation instructions. For example, in *Bartley, Inc.*, 53 Comp. Gen. 451 (1974), 74–1 CPD 1, the low bidder properly completed a Part I certification (which included a listing of trades covered by the local plan and those not signatory to the plan), but did not execute the separately required Part II certification or otherwise submit an acceptable Part II affirmative action plan. We held that the bid was responsive because the low bidder, by virtue of language in the Part I certification which provided that the bidder would "submit an af-

firmative action plan in accordance with the requirements of Part II of these 'Bid Conditions' * * *," had committed itself to all material requirements of Part II. We reached a similar result in *O. C. Holmes Corporation*, 55 Comp. Gen. 262 (1975), 75-2 CPD 174, where the completed Part I certification provided that "[the bidder] will be bound by the provisions of Part II * * * for all other trades as set forth in paragraph (c) * * *" (in which the bidder had listed proposed trades not covered by the local plan). In other cases, involving the same certification as that used in the instant case, we found the requisite commitment to Part II to exist (1) where the bidder listed the trades it intended to use in paragraph 1 of a signed certification, but did not list any trades in either paragraph 2(a) or 2(b), *Chicago Bridge and Iron Company*, B-179100, February 28, 1974, 74-1 CPD 100, and (2) where the bidder listed trades in paragraphs 1 and 2(b) but did not sign the certification. *Pacific West Constructors*, B-181608, November 22, 1974, 74-2 CPD 282.

We have also held that where a bidder commits itself to Part I requirements for a trade that is not eligible for a Part I commitment, the bid need not be considered nonresponsive if it also evidences the bidder's commitment to Part II for that trade. *Locascio Electric Co., Inc.*, B-181746, December 13, 1974, 74-2 CPD 338; B-177846, March 27, 1973. In the latter case, the low bidder listed certain trades in paragraph 2(a) of its signed certification and one other trade in paragraph 2(b). None of the trades, however, was eligible for Part I. We found the requisite commitment to Part II to exist for all trades because the bidder submitted its own affirmative action plan which was applicable to all trades and which satisfied all requirements of the Part II bid conditions. In *Locascio*, which involved the type of certification used in 53 Comp. Gen. 451, *supra*, rather than the one used here, we stated the following:

> A review of Budin's bid shows that Budin signed the part I certification, and indicated in paragraph (b) thereof that the trades it intended to use—electrical workers, laborers, carpenters, and lathers—were covered by the Nassau-Suffolk Plan. Paragraph (c) of the certification, dealing with trade unions not signatory to the Plan, was left blank. However, we understand from the Department of Commerce that Locascio is correct in asserting that the electrical workers union is not signatory to the Plan. Nevertheless, we believe Budin's bid should be regarded as responsive. Paragraph (e) of the part I certification provides that the bidder will comply with the Nassau-Suffolk Plan "in any trade as set forth in paragraph (b) hereof for which it or its subcontractors are committed to the Nassau-Suffolk Plan and will be bound by the provisions of part II of these Bid Conditions * * * for all other trades as set forth in paragraph (c) * * *." We have held that a bidder submitting a substantially similar certification is bound to the material provisions of part II notwithstanding the bidder's failure to submit a part II plan with its bid. [citation omitted] Thus, with respect to electrical workers, Budin's bid would be considered responsive unless the listing of that trade in paragraph (b) rather than paragraph (c) creates doubt as to Budin's intention to be bound to the required affirmative action provision for

that trade. In our opinion, it is clear from the bid itself that Budin intended to be bound to either the Nassau-Suffolk Plan or to the part II conditions, as might be applicable, to each trade it would use in performing the contract. This is indicated by paragraph (f) of the signed certification by which Budin agreed to comply with the part II provisions in the event it or its union "ceases to be a participating signatory to the Nassau-Suffolk Plan." Since Budin committed itself to part II in the event of subsequent nonparticipation in the Plan by one of its trade unions, and since Budin's completed certification itself reflects an intent to be bound to the solicitation's affirmative action requirements, we think it is clear that Budin is bound to the affirmative action requirements of the solicitation.

Here, Sachs' bid reflects a commitment to the Part I requirements. However, Sachs did not submit a separate Part II affirmative action plan. Neither, because of the certification form used, did it certify its commitment to Part II in the event of "subsequent nonparticipation" in the Topeka Plan. Although the Part II bid conditions did state that a contractor "who is at the time of bidding eligible under Part I" would be deemed to be bound to Part II in the event the contractor "is no longer participating in * * * the Topeka Plan," the record shows that Sachs was not eligible under Part I at the time of bidding and that in any event Sachs specified that Part II "Does not apply." Although the record further shows that Sachs believed, in good faith, that it was eligible for Part I coverage and it may well be that it was only for that reason that Sachs inserted "Does not apply." in paragraph 2(b), we believe that the insertion of those words, at the very least, created doubt as to Sachs' commitment to Part II for this procurement. Under these circumstances, therefore, we must conclude that GSA properly rejected the Sachs bid. *See* 51 Comp. Gen. 329 (1971).

Accordingly, the protest is denied.

[B–70371]

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

Computation of jury service fee payable to Federal Government employees whose period of jury service in Federal courts overlaps in part their normal workday shall be based on jury service fee of $20 prorated over standard 8-hour workday, that is $2.50 for each hour of jury service outside hours employees worked or would have worked but for jury service. 53 Comp. Gen. 407 modified.

Courts—Jurors—Government Employees—Jury Service—Excess Hours—Fractional Hours

In computing excess hours of jury service in Federal court over number of employee's working hours in day, fractional hours shall be rounded off, one-half hour or more being considered one hour.

Leaves of Absence—Court—Jury Duty—Travel Time—Between Duty Station and Court

When end of employee's scheduled workday coincides with beginning of Federal jury service, there is no necessity to prorate jury fee. Any travel time between duty station and court is to be considered as court leave.

In the matter of jury service fees—Government employees in Federal courts, July 13, 1976:

The Deputy Director, Administrative Office of the United States Courts, by letter of December 29, 1975, has requested modification of our decision in 53 Comp. Gen. 407 (1973) concerning the payment of jury fees to Federal employees on a prorated basis when the hours of jury service in a Federal court overlaps the employee's working hours and are in excess of the hours the employee would be required to work. We have been requested to modify the method of computing the prorated fees so as to eliminate certain administrative problems which have resulted from implementation of the decision. In this connection we have also been requested to determine how fractional hours are to be treated in the computations and to advise whether proration is required when the beginning of the jury service coincides with the end of the employee's normal working hours but does not overlap.

In 53 Comp. Gen. 407, *supra*, we overruled prior decisions which prohibited the payment of jury fees by Federal courts to Federal employees where the period of jury duty overlapped any portion of the employee's duty status period. In the cited decision, we held that an employee is entitled to a proportionate part of the jury fee for each hour of jury service performed, in a court of the United States or the District of Columbia, outside of the hours of duty the employee worked, or, but for jury service, would have been required to work on that day. The decision allowed the jury fees for the employees involved to be prorated and paid in the proportion that the hours served on jury duty after the commencement of the half-day holiday bears to the total hours of jury duty on that day.

In so deciding, we recognized that the prorating of jury fees might cause some administrative difficulties. The letter of December 29, 1975, from the Administrative Officer of the U.S. Courts advised us that the clerks of the Federal courts have encountered numerous problems in the application of the formula for computing jury fees set forth in 53 Comp. Gen. 407 and that the formula results in an hourly rate which varies inversely with the number of hours of compensated jury service. The Administrative Office proposes that the formula be modified to permit proration of jury service fee on the basis of the ratio of the number of hours of jury service not overlapping the workday to the standard 8-hour day rather than to the actual hours of jury service. The effect of the proposed modification would be to establish a fixed rate of $2.50 per hour ($20 divided by 8 hours) for each hour of jury service beyond the employee's normal workday. According to the Administrative Officer, this method would simplify the computations required in determining the fees payable to Federal employees on jury duty.

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Under the present formula, an employee excused from work for 8 hours who performed 10 hours of jury service would receive two-tenths of the jury service fee, or $4. However, an employee who was excused for only 2 hours of an 8-hour workday, but who performed 4 hours of jury service, would receive two-fourths of the jury service fee, or $10. Thus, although each employee in the examples above performed 2 hours of jury service beyond his normal workday, each would receive a different fee. Under the proposed formula each employee would receive the same amount, namely $5, for the 2 hours of jury service beyond the normal workday. The proposed formula appears to offer a more equitable and consistent result.

After careful consideration of the above two methods of proration, we are of the opinion that the proposed formula is both consistent with the intent of our decision in 53 Comp. Gen. 407 (1973) and easier and more practical to administer. We therefore approve the proposed change in the method of computing jury service fees.

In computing the excess hours of jury service over the number of an employee's working hours in a day, a fractional hour shall be rounded off, one-half hour or more being considered one hour. Where the end of an employee's scheduled workday coincides with the beginning of jury duty, such as when the employee's workday ends at 3 p.m. and the jury service begins at exactly that time, there is no necessity to prorate. The time required to travel between the duty station and the court is to be considered as court leave.

Our decision 53 Comp. Gen. 407 (1973) is modified and amplified as indicated above.

[B–119969]

Courts—Jurors—Fees—Government Employees in State Courts—Prorated Fees

Principle of 53 Comp. Gen. 407 permitting pro-rata payment of jury fees to employees for jury service in Federal courts extending beyond scheduled workday is equally applicable to jury duty performed in State courts. Employees may be permitted to retain a pro-rata portion of fee for jury service in State or municipal courts extending beyond their scheduled workday. Contrary prior decisions are no longer controlling.

In the matter of jury fees—State courts—jury duty extending beyond employee's workday, July 13, 1976:

By letter dated January 27, 1976, the Department of the Army has requested our opinion regarding a request by a civilan employee for refund of jury service fees for jury duty in a State court extending beyond the employee's scheduled workday.

The record submitted by the Army shows that the employee performed jury duty in a State court (the State is not identified) during

the months of April and May 1974. With few exceptions the employee's jury service extended for 2 to 3 hours beyond the end of his scheduled workday and in excess of the period of court leave granted under 5 U.S. Code § 6322 (1970). The employee also worked in the morning on 22 of the 24 days on which he had jury duty. He has requested refund of the fees for jury service performed beyond his scheduled tour of duty.

Section 5515 of Title 5, U.S. Code, as amended, concerning the crediting of amounts received by Federal employees for jury or witness service in a State or municipal court provides as follows:

> An amount received by an employee * * * for service as a juror or witness during a period for which he is entitled to leave under section 6322(a) of this title, or is performing official duty under section 6322(b) of this title, shall be credited against pay payable to him by the United States or the District of Columbia with respect to that period.

We have consistently interpreted this provision as requiring an employee who performs such duty in a State or municipal court to remit all jury or witness fees to the Federal Government, except any portion of the amount paid that was intended to be reimbursement of travel expenses. B–119969, September 14, 1973; 52 Comp. Gen. 325 (1972). However, employees have been permitted to retain any excess of jury fees over the amount of compensation due.

In our decision 53 Comp. Gen. 407 (1973), we reconsidered past interpretations of the parallel statute, 5 U.S.C. § 5537 (1970), concerning payments to Federal employees of fees for jury service in courts of the United States and the District of Columbia. We stated there that past decisions, which had precluded payment to the employee of any portion of the jury fee where the period of jury service overlapped in any part the employee's scheduled workday, were unduly restrictive, and we held that employees may be paid a pro-rata portion of the jury service fee for jury duty performed beyond the normal workday. In our decision B–70371, August 5, 1975, we suggested that the same standard might be for application to employees who serve as witnesses or jurors in State and municipal courts, although the question was not addressed specifically.

After careful consideration, we now hold that the principle announced in 53 Comp. Gen. 407, *supra*, regarding employees who perform jury service in courts of the United States or the District of Columbia is equally for application to employees who perform jury or witness service in State or municipal courts. Accordingly, employees who are granted court leave under 5 U.S.C. § 6322 (1970) and who perform jury or witness service in a State or municipal court beyond the end of their scheduled workday now may be permitted to retain a pro-rata portion of the fee for such service. Prior decisions inconsistent with this opinion are to be regarded as no longer controlling.

Computation of the pro-rata jury fee retainable by the employee should be made in accordance with our decision B–70371 of this date concerning proration of jury fees when Federal employees serve in a Federal court. We hold in that decision that the jury fee may be prorated on the basis of the normal 8-hour workday, e.g., by dividing the total jury fee by 8 to arrive at a constant hourly rate. The portion of the jury fee retainable by the employee may then be computed by multiplying the hourly rate by the number of hours of jury service performed beyond the end or prior to the beginning of the employee's normal workday. Fractional hours of 30 minutes or greater duration are to be treated as a whole hour for the purposes of this computation; periods of less than one-half hour are to be excluded. No proration is required when the beginning of the employee's period of jury service coincides with the end of the employee's normal workday or when the end of the employee's jury service coincides with the beginning of the employee's normal workday; necessary travel time in such circumstances should be treated as court leave.

[B–163084, B–186675]

Property—Public—Exchange or Sale for Similar Items—Silver for Gold

General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished.

In the matter of exchange or sale of similar items under Federal Property Act, July 15, 1976:

This decision concerns section 201(c) of the Federal Property and Administrative Services Act of 1949, as amended, and implementing regulations by the General Services Administration (GSA), *infra*, which authorize executive agencies to exchange or sell similar items of personal property. The question is whether a proposed exchange of certain quantities of silver for equivalent dollar amounts of gold is proper under the above authorities.

By letter dated June 7, 1976, the Acting Deputy Director of the Defense Supply Agency (DSA) advised us that DSA had proposed to commercially exchange on a competitive basis one million troy ounces of refined silver, recovered from excess and surplus end items and other sources under the Defense Department's "Precious Metals Recovery Program," for an equivalent dollar amount of refined gold, to supplement Defense Department generated gold and to satisfy exist-

ing and projected gold requirements of the Defense Department and other Federal agencies.

DSA desired to effect the proposed exchange under the authority of section 201(c) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S. Code § 481(c) (Supp. IV, 1974), and as implemented by the Administrator of General Services in Federal Property Management Regulations (FPMR), 41 C.F.R., Subpart 101–46.2 (1975).

Section 201(c) grants any Executive agency the authority to exchange or sell "similar" items pursuant to regulations prescribed by the Administrator of General Services, as follows:

> In acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator [of General Services], subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Procurement Policy Act, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment of the property acquired: *Provided*, That any transaction carried out under the authority of this subsection shall be evidenced in writing.

The Administrator's implementing regulations state, for purposes here relevant, items shall be deemed similar when (1) both the item to be exchanged or sold and the item to be acquired fall within any one of the categories of property listed in FPMR § 101–46.4902; or (2) if the items are not so listed, when "the item to be acquired is designed and constructed for the same specific purpose as the item to be replaced * * *." FPMR § 101–46.202(b)(2).

Since the Administrator has no category of "precious metals" listed under 101–46.4902, in order for the proposed exchange to quality under the regulations as an exchange of similar items it was necessary to show that the gold had "the same specific purpose" as the silver it would replace. However, GSA determined that the instant proposed transaction did not meet the statutory and regulatory criteria in this regard, and advised DSA as follows:

> The exchange/sale authority was intended to be limited in scope. The Congress has, on several occasions, expressed its interest in this area and has indicated the desire that the exchange/sale authority be monitored closely to avoid any misuse. With regard to the subject proposal, we have closely examined this case and have concluded that we cannot approve the proposal without contravening the Congressional intent in the law. In our opinion, this case would involve an augmentation of appropriations rather than the exchange of similar items. We do not feel that gold and silver can be considered similar for the purposes of the exchange/sale authority.
>
> If you disagree with our opinion and wish to pursue this further, we encourage you to submit this matter to the General Accounting Office. If you receive an opinion from the Comptroller General that differs from ours, we will reconsider the matter at that time.

In accordance with the suggestion in GSA's letter, DSA now requests our views on the matter. The National Aeronautics and Space Administration (NASA), which would apparently be a substantial beneficiary of the silver-gold exchange in connection with its Space

Shuttle needs, has also challenged the validity of GSA's position in a separate letter to our Office.

DSA contends that gold and silver are similar for purposes of exchange under the statute and the implementing regulations. It cites examples based on the similarity of the metals with respect to their malleability, conductivity and resistance to temperatures that make them interchangeable for use in such things as dental items, brazing alloys and electronic circuits. DSA also refers to our decision at 41 Comp. Gen. 227 (1961) in support of the position that gold and silver are similar items. In that decision we construed section 201(c) to authorize the Administrator of General Services to exchange used regular-type ambulances for station wagons adapted for use as ambulances. Our decision observed that the term "similar items" is not a precise one, and that the legislative history of section 201(c) does not require a narrow construction of the term. We held that the term affords the Administrator "a flexible standard in the promulgation of regulations" implementing the statute. *Id.* at 229.

NASA's letter to us generally endorses the DSA position. In addition, NASA emphasizes the "similarity" of silver and gold with specific reference to the Space Shuttle program:

> * * * In the Space Shuttle, one of the main uses of the gold is in a multilayer insulating film (Kapton film) which protects wiring from reentry heat and post landing heat soakback. The high performance in low emittance and high reflectance suggested several possible metals, among them both gold and silver. Gold was selected over silver because it is not as susceptible to oxidation as silver, which reduces life cycle costs and increases reliability.

Having carefully considered this matter, we are of the view that GSA's decision to reject the proposed silver-gold exchange is a reasonable application of the statute and regulations. While silver and gold may be similar for some purposes, the GSA regulation requires that the item acquired be for "the same specific purpose" as the item replaced. For the reasons stated hereafter, we believe that this requirement is fully justified under the statute and has not been satisfied by the instant proposal.[1]

As indicated in 41 Comp. Gen. 227, *supra*, at 229, section 201(c) of the Federal Property and Administrative Services Act was designed to generalize exchange authorities previously available to certain agencies for certain types of transactions under a number of separate

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[1] We also note that the GSA regulations—FPMR § 101-46.202(d)(9)—do not authorize:

> The sale, transfer, or exchange of scrap materials in connection with the acquisition of personal property *except* in the case of scrap gold for fine gold. [Italic supplied.]

Although GSA did not refer to this provision in connection with its decision, the provision would seem to flatly preclude the instant silver-gold exchange since the silver to be used was recovered as scrap material.

statutes. While the prior statutes differed somewhat, their common purpose—retained by section 201(c)—was to facilitate the replacement of old equipment for newer equipment. *See* 27 Comp. Gen. 540, 542 (1948); 23 *id.* 931, 934 (1944).[2] GSA's requirement that the acquired item be for "the same specific purpose" implements this concept of replacement.

It is difficult to understand how a silver-gold exchange could be viewed as a replacement in this sense considering that these metals do not depreciate in usefulness. Even apart from this, it seems at best doubtful that the gold to be acquired would in fact serve "the same specific purpose" as the silver to be exchanged. In this regard, NASA's statement, quoted above, concerning the needs of the Space Shuttle program appears to support the opposite conclusion. It indicates that NASA's "specific purpose," *i.e.*, obtaining a metal with certain properties, would be served best by gold *to the exclusion of silver.*

DSA's submission is more general in describing the relationship between silver and gold, but the same dilemma is present. DSA asserts that silver and gold are "virtually interchangeable" in filling Government requirements, except that gold does not require "replacement" as often as silver. However, DSA apparently receives very distinct orders for the two metals. Thus its submission states:

> This Agency has generated sufficient refined silver from scrap and other silver-bearing materials to meet known silver requirements. The recovery of gold, however, has not reached the same state of the art as that of silver recovery and as a result, the availability of refined gold has been depleted temporarily.

If silver and gold are "virtually interchangeable" to the extent of serving "the same specific purpose[s]" contemplated by the exchange proposal, the exchange seems unnecessary, particularly since the quantity of silver to be exchanged would far exceed the quantity of gold to be acquired. Rather, it appears that silver could be diverted from silver orders and applied directly to gold orders. (We assume that some diversion from stated silver requirements is contemplated in any event since, with the exception of automatic data processing equipment, excess property cannot be used for exchange. See FPMR § 101–46.202 (a)(2).)

Further, the proposed exchange of silver for gold by DSA is distinguishable on its facts from the exchange of used ambulances for converted station wagons to be used as ambulances approved in 41 Comp. Gen. 227, *supra.* In that decision, the converted station wagons acquired were to be used for the same specific purpose as the ambulances replaced.

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[2] It is unnecessary to consider here whether or to what extent the specific holdings of the cited cases, which construed prior statutes, would apply under the present statute and implementing regulations.

In view of the foregoing, we conclude that GSA's determination in this matter represents, at the very least, a reasonable application of its "same specific purpose" requirement, which, in turn, is an appropriate criterion under section 201(c).

[B-185178]

Contracts—Protests—Merits—Subcontract Awards

Where Government was integrally involved in approving "equal" equipment of prospective subcontractor, jurisdiction will be exercised to consider merits of protest against award of subcontract.

Contracts—Specifications—Evaluation Factors

Invitation specifications did not provide for evaluation of equipment on basis of operation and maintenance costs and thus those factors were not for consideration in selecting equipment.

Contracts—Specifications—Stock Model Requirements—Interpretation

Requirement that "All equipment furnished by Contractor shall be stock models for which parts are readily available" is more reasonably construed to mean that end products must be stock models rather than components or parts of equipment which are merely required to be "readily available."

Patents—Infringement—Government Liability—Rule

Contention that manufacture of system being procured by Government will violate patents of protester will not be considered, since exclusive remedy of aggrieved party is action in Court of Claims against Government for damages.

Contracts—Protests—Patent Infringement

Allegation that private parties may have violated protester's patents or proprietary information raises questions dealing with dispute solely between private parties and is not for General Accounting Office consideration.

Contracts—Data, Rights, etc.—Disclosure—Relief Procedure

Allegation that Government disclosed properietary information to private party is matter for courts as contract has been substantially performed.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Evaluation of Technical Acceptability

Where specification calling for "light sensing" display is silent as to how nonfunctioning of ultraviolet lamps is to be communicated to the display, "light sensing" by process accomplished by electrical sensing would not be unreasonable.

In the matter of Ultraviolet Purification Systems, Inc., July 15, 1976:

Ultraviolet Purification Systems, Inc. (Ultraviolet), protests the award and the approval by the Government of the subcontractor's design for the system being procured from the Aquafine Corporation (Aquafine) by the prime contractor, the Carvel Company (Carvel), under prime contract No. 14–16–0005–6013, awarded by the Fish and Wildlife Service (Service), Department of the Interior. Since the protest presents a question regarding the propriety of a subcontract

award by a Government prime contractor, it is necessary to first determine whether our Office will exercise jurisdiction to as to rule on the merits of the protest.

Our Office has consistently recognized that the contracting practices and procedures employed by prime contractors—who are normally acting merely as independent contractors—in the award of subcontracts are generally not subject to the statutory and regulatory requirements governing direct procurements of the Federal Government. 49 Comp. Gen. 668 (1970). While we have enunciated this general rule, we have stated that we will consider such protests under certain limited circumstances: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the active or direct participation of the Government in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision. *Optimum Systems, Incorporated*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

The pertinent facts necessary to the resolution of the jurisdictional issue are as follows. Invitation for bids No. FWS5-636 was issued by the Service on April 9, 1975, for the construction of a reinforced concrete, insulated, preengineered metal structure containing water filtering and purification units with the necessary piping, valves, metering, control, and monitoring equipment for the Green Lake National Fish Hatchery. Bids were opened on May 16, and the contract was awarded to Carvel on May 29, 1975.

Prior to the award to Carvel, a representative of Aquafine—on or about May 8—met with the design engineer of the Service working on this proceurement and presented for approval its preliminary design for the ultraviolet system called for under invitation FWS5-636. The engineer did not approve the design. On May 15, Aquafine sent a telegram to all potential bidders increasing the price of its system by approximately $100,000 and stating that after a clarification of the specification by the Department of the Interior its system met the Service's requirements. Several bidders called the Service engineer to ask if this statement was true and were told that it was not. At the post-award June 5 preconstruction conference, Carvel submitted to the Service for approval data regarding the Aquafine system. However, the submittals were considered incomplete and were rejected. Resubmissions of data continued off and on for the next several months until the Aquafine system was finally found acceptable by the Service

on October 17. During this time period, Carvel threatened to stop work and to institute proceedings against the Service unless the system was approved.

The provisions in the prime contract dealing with the system procured under the subcontract were set forth in pertinent part as follows. The Technical Specifications provided:

SECTION 8—UV PURIFICATION UNITS

8.01 *General*—The Contractor shall furnish and install five (5) 3000 g.p.m. UV purification units complete with free standing ballast enclosures, ballasts and wiring as manufactured by Ultra Violet Purification Systems, Inc. *or approved equal* at the locations shown on the drawings. [Italic supplied.]

Paragraph 8 of the Special Conditions provided:

Prior to installation of any equipment, the successful bidder shall submit to the Government Engineer, for approval, manufacturers' literature and design data in five (5) copies fully describing any equipment as specified or not specified which he proposes to install. Only equipment approved in writing by the Engineer or specified by the drawings or technical specifications shall be installed.

The above-cited factual pattern falls within the second exception (compare B–174521, March 24, 1972) set forth in *Optimum Systems, Incorporated, supra*, in view of the fact that the Service was so integrally involved in approving the "equal" equipment. The actions by the Service—informing Aquafine on numerous occasions of what was in general necessary to submit an acceptable system and permitting resubmittal of technical plans until Aquafine was able to gain Service acceptance for its system—constituted more than a disinterested, arm's length relationship. Accordingly, the protest will be considered on its merits.

The first basis for the Ultraviolet protest stems from the issuance by Aquafine on May 15, 1975, to all bidders for the prime contract, and the actions or lack thereof by the Government when such fact came to its attention, of a telegram which stated:

DUE TO CLARIFICATION OF TECHNICAL SPECIFICATIONS BY U.S. DEPARTMENT OF INTERIOR OUR QUOTATION * * * IS INCREASED TO $254,000.00 * * * WE CERTIFY AQUAFINE EQUIPMENT TO BE "APPROVED EQUAL" AND TO BE IN CONFORMANCE WITH ALL APPLICABLE REQUIREMENTS * * *

Ultraviolet believes that this misrepresentation of the facts was possibly detrimental to bidders bidding only on Ultraviolet equipment (those informed by the Government that the Aquafine equipment had not been approved) inasmuch as Ultraviolet equipment costs would have been higher and that the Government had a duty (which it failed to meet) to advise all bidders that no such approval had been given. In this connection it is also alleged that the Government improperly gave some bidders information (of the lack of approval) regarding the procurement which was not given to other bidders.

While we agree that the telegram at least implicitly misrepresented the true facts as they existed, we do not believe that the Government's failure to advise all bidders of this implicit misrepresentation (it did advise only those who inquired as to the truth of the assertion in the telegram) represents a sufficient basis for upholding the protest. Ultraviolet strongly implies that, in view of a conversation between the Carvel project manager and the Government design engineer (who was responsible for approving any "equal" submission) concerning the May 15 telegram, it would be "logical" to conclude that Carvel was informed of the misrepresentation. Thus, Carvel's bid may not have been influenced by the misrepresentation.

Secondly, not necessarily in the order raised, Ultraviolet contends that the Aquafine system should not have been found acceptable because vis-a-vis the Ultraviolet system the former will cost approximately $100,000 more for maintenance and operation due to substantially higher energy consumption and to additional component replacement costs. However, the invitation specifications dealing with the ultraviolet system did not provide for evaluation on that basis and, consequently, those factors were not for consideration in selecting equipment.

Thirdly, it is protested that the Aquafine system did not conform to paragraph 8 of the invitation "SPECIAL CONDITIONS," wherein the following was provided:

> All equipment furnished by the Contractor shall be stock models for which parts are readily available and shall be products of reputable manufacturers regularly engaged in the production of these types of equipment.

Ultraviolet contends that the Aquafine ultraviolet purification units are not "stock models." The procurement activity has responded that no manufacturer is regularly engaged in the production of stock models, and that it is only the components of the equipment which must be stock models. However, the above-quoted requirement governs "[a]ll equipment" to be provided under the prime contract and not merely the ultraviolet units. It is the equipment which must be a "stock model," not the components or parts thereof which are merely required to be "readily available." Thus, the more reasonable interpretation would be that the end products are supposed to be the "stock models." While it may be true that neither Ultraviolet nor Aquafine could satisfy the rquirement, it is equally true that Aquafine did not and yet received a contract award.

Fourthly and fifthly, Ultraviolet protests two similar matters: the possible or actual violation by Aquafine in its providing the Government with its system of Ultraviolet patents and/or patent applications and the providing to Aquafine by Carvel of information given Carvel

by Ultraviolet on a restricted basis. As regards the first contention, 28 U.S. Code § 1498 (1970) prevents Government contractors or subcontractors from being subjected by aggrieved parties to suits for alleged infringement of any patents in providing items to the Government. In such matters, the exclusive remedy of the aggrieved party is an action against the Government in the Court of Claims for damages. Because it is desirable that all potential companies be permitted to bid on Government contracts, regardless of any possible patent infringements, 46 Comp. Gen. 205 (1966), our Office has concluded that it will not consider protests based solely upon the claim that performance by a contractor will result in patent infringement. *Pressure Sensors, Inc.*, B–184269, July 31, 1975, 75–2 CPD 73; *Aeroquip Corporation*, B–184598, September 25, 1975, 75–2 CPD 188. As regards any allegations that Aquafine or Carvel as corporate entities has infringed Ultraviolet patents or potential patents, they involve disputes solely between private parties—matters which are beyond the jurisdiction of our Bid Protest Procedures. *PSC Technology, Inc.*, B–183648, May 27, 1975, 75–1 CPD 316.

Next, Ultraviolet protests the disclosure of information involving its patents, potential patents, and/or other restricted information by the Government as regards this procurement. From 1972 to the issuance of the procurement, Ultraviolet helped the contracting activity develop the ultraviolet system specifications, with the limitation that the information provided by Ultraviolet for such purpose was not to be divulged beyond the Government. While not specifically pinpointing the precise information disclosed, Ultraviolet states that by a comparison of the specifications to the features outlined in its patent applications the areas and items disclosed which are the proprietary property of Ultraviolet may clearly be discerned. Ultraviolet also believes that some of this information may have been divulged during the process of approving the Aquafine system. The contracting activity states that it has examined the specifications and finds nothing that indicates a violation of any proprietary information. The activity also notes that Ultraviolet alleges no facts to back up its claim that any such information was disclosed during the process leading to the approval of the Aquafine system. We note that, even if the specifications did disclose proprietary information, the possibility exists that by permitting the publication of the specifications and by not protesting against this publication until the time that the Aquafine system was approved, Ultraviolet may have estopped itself from now complaining against any disclosure in the specifications. Notwithstanding, since a contract was awarded Aquafine and has now been substantially—at minimum—completed, we believe the proper forum for a remedy

would not be with our Office but rather with the courts. B–152410, June 9, 1964; B–166022, May 22, 1969.

The final bases of the Ultraviolet protest are that the Aquafine system as proposed and approved does not meet the specifications called for in the prime contract. First, it is contended that Aquafine does not meet the "or equal" provisions of Technical Specifications paragraph 8.01 (set forth above) in that its system does not have an in-place cleaning system and in that it has an inadequate flow rate. The Department of the Interior advises that the system does have an in-place cleaning system (which we note is in the Aquafine drawings, although the cleaning chemical to be used therein is left to a later determination after a water analysis is made) and that the flow rate proposed exceeds that of the Ultraviolet system.

Ultraviolet also speculates that paragraph 8.03 of the technical specifications will not be met if the Aquafine system is used (unless Aquafine violates an Ultraviolet patent) because the Aquafine ultraviolet intensity meter will possibly depend on circuit amplification, photomultiplier tubes, or avalanched-type devices. The contracting activity states that after a careful review of the Aquafine submittal the Aquafine meter was found to fully comply with the specifications without utilizing the prohibited features. The design engineer with whom Ultraviolet developed the ultraviolet system specifications approved the meter.

Further, Ultraviolet contends that paragraph 8.04 of the technical specifications is not met in that the Aquafine system does not provide "a light sensing display" on each unit to indicate the location of any ultraviolet lamp that should go out. Ultraviolet states:

> Aquafine has not offered a *light sensing* display on each unit to locate the position of the specific lamp which may have failed. Instead, Aquafine has offered a questionable circuit requiring additional electrical components, a special DC power supply which works on the principle of sensing the flow of electricity through a wire rather than the presence or absence of an illuminated ultraviolet lamp.
>
> The significance of this variation is that additional and unnecessary components are utilized, the original premise of sensing whether or not the ultraviolet lamp is illuminated is by-passed and situations such as short-circuiting of the ultraviolet lamp which would allow current flow without illumination would not record whether or not the lamp is truly on or not. Failure of the DC power supply would result in no indication as to a U–V lamp being out, and the dependency upon thirteen hundred or more indicating pilot lamps also poses considerable problems. A situation whereby condensation could form between the lamp socket and the lamp itself can cause the ultraviolet lamp to go out and still allow electrical current to flow through the wires thereby providing a false indication that the ultraviolet lamp is on when in fact it is not.

It is the position of the Department of the Interior that either system (Ultraviolet's or Aquafine's) would meet the specifications in that both provide a "light sensing display," i.e., a display to indicate when a tube is not functioning. The Ultraviolet system uses fiber optics

which will not glow when the fluorescent lamp is not working. Interior admits that the Aquafine system accomplishes this by sensing the electrical flow through the individual ballasts and tubes, but contends that the problems portrayed by Ultraviolet, while possible, are almost certain never to occur.

Although the specification calls for a "light sensing display," it is silent as to how the nonfunctioning of the ultraviolet lamps is to be communicated to the display. Therefore, "light sensing" by a process accomplished by electrical sensing would not be unreasonable.

While we have recognized the validity of Ultraviolet's protest on one point, it is too late for a recommendation for corrective action on the immediate procurement to be made. However, if it is not the intent of the procuring activity that all equipment be stock models, but only the components, we are suggesting to the Department of the Interior that paragraph 8 of the "SPECIAL CONDITIONS" be clarified before any future utilization.

[B–172621]

Indian Affairs—Indian Students—Hotel-Motel Tax—Alaska

When Bureau of Indian Affairs (BIA) contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary is the renter. The legal incidence of the hotel-motel rental tax imposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 is modified accordingly.

Taxes—State—Federal Employees—Temporary Duty

Cost of hotel or motel room to BIA employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof.

In the matter of hotel-motel tax—Anchorage, Alaska, July 16, 1976:

In a letter dated February 13, 1976, the Acting Area Finance Officer, United States Department of the Interior, Bureau of Indian Affairs (BIA), Juneau Area Office, requested our decision as to the legality of the application of a 5 percent Hotel-Motel Rental Tax charged to all transient guests renting hotel or motel facilities in the city of Anchorage, Alaska, to billings submitted to the BIA for Indian students staying overnight in Anchorage while traveling between BIA schools and their homes. The BIA has contracted with certain hotels and motels to pay housing and subsistence costs for such students. Specifically the question presented is whether the BIA is required to pay the 5 percent rental tax in view of the constitutional immunity of the

Federal Government from State and local taxation. The question was also raised, in the enclosures to that letter, as to the applicability of the tax to Federal employees traveling on official business.

In order to exercise its constitutional immunity from State and local taxation, the Government must show that the legal incidence of the particular tax involved falls directly on the Government. Unless the Government or an agent on its behalf is purchasing the goods or services for the Government's benefit, the Government may not assert its constitutional exemption from paying State or local taxes. For example, it has been held that a State sales tax, the legal incidence of which falls on the buyer, does not infringe the constitutional immunity of the Government where it is determined that the Government is not in fact the "purchaser" within the meaning of the tax statute, even though the Government is obligated to reimburse the buyer for the total costs of the item. *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941). Similarly, when an employee of the Government secures a hotel room or other lodging while traveling on official business, the Government is not ordinarily a party to the transaction. The fact that the Government is obligated to reimburse the employee for his travel expenses and thereby assumes the economic burden of the total costs, including the tax, does not thereby make it a tax upon the United States.

We have reviewed the provisions of Chapter 3.12 of the Anchorage Municipal Code. It is clear that the subject tax is imposed on all transient guests who occupy or rent for fewer than 30 days, and the hotel-motel operator is required to collect it from the transient guests. The ordinance provides that "The tax imposed shall be shown on the billing to the guest as a separate and distinct item." The term "guest" is defined as "an individual corporation, partnership or association paying monetary consideration for the use of a sleeping room or rooms in the hotel-motel."

The applicability of the tax depends on the identity of the transient guest. Ordinarily, a Federal employee on official duty rents a hotel or motel room directly from the proprietor. The Government is in no sense a party to this arrangement with the establishment. In the absence of a specific State or local statute exempting room rentals to Federal employees from this tax, that employee is liable to pay it. That the Government, via statute and regulations, may be obligated to reimburse that person for expenses incurred while away on official business does not affect that individual's liability for this tax. In this regard it is clear that the legal incidence of the tax is on the employee, and not on the Government, and that when the Government pays a per diem or actual expenses allowance, it is not paying the tax but reim-

bursing the employee for the employee's total expenses. That is, by statute and regulation the Government has agreed, in effect, to accept the economic burden of a tax imposed not on it but on its employees. We therefore conclude that under such circumstances, Government employees may not assert the Government's exemption from the payment of State and local taxes levied upon motel and hotel rooms. B–172621, April 4, 1973.

The situation with regard to the Bureau of Indian Affairs students is quite different; as pointed out in an opinion by the Department's Field Solicitor, dated September 9, 1975, the BIA had a contract with hotels or motels to pay housing and other subsistence costs for Indian students traveling between home and BIA-sponsored boarding schools. The Field Solicitor concludes that the legal incidence of the tax falls on the transient students and not on the Government "because the transients are neither employees of the Government nor its agents; they are merely beneficiaries under the contracts." We disagree. The fact that the students are not Government employees or Government agents is immaterial. In fact, as explained above, in most instances a Government employee would be directly liable for the tax. The important factor is the existence of a direct contractual obligation by the Government to the hotels or motels to rent the rooms in question which makes the Government the "guest" under the Anchorage Ordinance. Under the agreement, the Government is solely liable for the charges incurred, and not the students who benefit from the Government's arrangements. Therefore, the Government is entitled to assert its immunity from imposition of the Anchorage rental tax, and the billings to the BIA should be adjusted accordingly.

The applicability of a room rental tax to the Federal Government under similar circumstance was considered in 53 Comp. Gen. 69 (1973). In our decision there was considered the Montgomery County (Maryland) Code which provides for the imposition of a hotel-motel room rental tax on all transients. The case involved a contract between the Government and a motel corporation under which the motel would provide, among other things, rooms for participants in the National Institutes of Health Leukemia Program and the Government would pay for the rooms. While the decision turned on the tax clause in the contract involved, the decision held, in effect, that the occupant of the room (*i.e.*, the beneficiary of the contract between the Government and the motel), rather than the Government was the transient and, hence, the legal incidence of the tax was not on the Government. However, the County Code defines "transient" as a "person" who obtains sleeping accommodations and defines "person" as any "individual, corporation, company, association, firm," etc. Since the Government is the "person" who obtained and paid for these rooms under the County Code, the

Government is the transient. Hence, our holding above as to the Anchorage motel tax would be equally applicable to the Montgomery County motel tax. Therefore, our holding in 53 Comp. Gen. 69 is modified to the extent it is inconsistent with the foregoing.

[B-184194]

Contracts—Protests—Timeliness—Untimely Protest Consideration Basis

General Accounting Office Bid Protest Procedures provide that requests for reconsideration must be filed within 10 working days by appropriate interested party or agency. However, considering agency's request that modification of recommendation in GAO decision be allowed—due to changing circumstances in procurement—has also been recognized as appropriate and is not inconsistent with Bid Protest Procedures. To decline to consider such information could jeopardize best interests of Government.

Contracts—Protests—Delays—Protester *v.* Agency

Though it is contended that contracting agency's procrastination in responding to protest has prevented protester from obtaining equitable and just result, record does not support allegation that all delays were caused by agency, but rather shows that substantial delays in protest proceedings are directly attributable to protester's actions.

Contracts—Negotiation—Requests for Proposals—Amendment—Required for Changes in RFP

Some changes in request for proposals (RFP) can be made appropriately by amendment, but substantial changes may justify canceling RFP and issuing new, revised RFP. While several reasons offered by agency for canceling RFP are subject to question, others indicate that certain amendments to RFP are appropriate and necessary. Amendments may revise RFP's terms to extent that, as agency claims, it would become preferable to cancel and resolicit.

Contracts—Negotiation—Requests for Proposals—Additional—Pending Protest

Contention that agency issued three RFP's to circumvent effect of protest pending under separate RFP involves subjective motives of agency officials which cannot be conclusively established on written record. No provision of procurement law specifically prohibits concurrent procurement of work similar to work being sought under protested solicitation. Moreover, three additional RFP's have not eliminated need for work involved in protested procurement, and protester has not been deprived of its opportunity to compete for award.

Contracts—Negotiation—Competition—Request for Proposals Defective

Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled—formally documented for first time 3 months after decision and 10 months after protest was filed—raises serious questions concerning Agency's understanding of and adherence to fundamental procurements policies and procedures, since inaction by Agency in failing to ascertain and promptly disclose RFP deficiencies has created delay and confusion in procurement process.

Contracts—Negotiation—Requests for Proposals—Cancellation

After considering all circumstances of procurement, GAO cannot conclude that EPA's justifications for canceling RFP are clearly without reasonable basis. How-

ever, since several of alleged justifications are subject to question, GAO recommends that EPA Administrator review and reconsider proposed cancellation in light of points addressed in decision.

In the matter of Environmental Protection Agency—request for modification of GAO recommendation, July 19, 1976:

The United States Environmental Protection Agency (EPA) requests that we allow a modification in the corrective action recommended in our decision which sustained a protest by the University of New Orleans (UNO).

The decision (*University of New Orleans*, B–184194, January 14, 1976, 76–1 CPD 22) recommended that EPA (1) amend request for proposals (RFP) No. WA 75–R148 to rescind an earlier amendment which had created problems in the procurement, and (2) reopen and continue the competition among the six offerors which had submitted proposals under the RFP. Details of the procurement, which involves scientific study of halogenated organic substances in the environment, are set forth in our earlier decision.

EPA wishes to cancel RFP WA 75–R148 and issue a new RFP in its place. EPA requests that we concur in this action and thereby modify our recommendation to this extent.

Procedural Issues Involved in EPA Request and UNO Protest

Certain procedural matters must be addressed at the outset. UNO contends that EPA's request for modification of the recommendation in our prior decision cannot properly be considered under our Office's Bid Protest Procedures (40 Fed. Reg. 17979 (1975), codified at 4 C.F.R. part 20 (1976)). UNO cites section 20.9 of our procedures, which provides in pertinent part:

(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

UNO believes that EPA's request is not a "request for reconsideration," because it does not allege "errors of law" in our decision, nor does it set forth "information not previously considered." Moreover, UNO suggests that EPA's request is untimely, because our decision was rendered on January 14, 1976, and EPA's initial request is dated February 2, 1976.

Where it is alleged that a protest decision of our Office contains errors of fact or law, we believe that a request for reconsideration

must be filed within 10 working days by an appropriate party in interest. On the other hand, we note that there are situations where a contracting agency does not disagree with the basic holding in GAO's decision, but nevertheless develops and presents information showing that carrying out our decision's recommendation would be inappropriate, or that a different course of action would better serve the Government's interests.

See, for example, *Michael O'Connor, Inc.*, B–185502, May 14, 1976, 76–1 CPD 326. Our Office had recommended in an earlier decision that a solicitation be canceled. The contracting agency, by letter dated 12 working days after our decision, presented information indicating that because of a change in one of its existing contracts involving similar work, it had become appropriate to make an award under the solicitation rather than canceling it. After considering this information, our Office stated that we had no objection to the proposed award.

Another similar case is *Linolex Systems, Inc.*, 54 Comp. Gen. 483 (1974), 74–2 CPD 344. Our earlier decision on the protest had recommended a resolicitation. The contracting agency subsequently pointed out, however, that under the developing circumstances it would be preferable simply to wait for the normal reprocurement cycle to begin before resoliciting. We concurred in the agency's request to do so.

We believe it would not be proper for our Office to decline to consider the agency's views in situations of this kind. The best interests of the Government could be jeopardized by a refusal to at least consider and hear the agency's position. Accordingly, we believe that considering EPA's request in the present case is appropriate and not inconsistent with our Bid Protest Procedures.

UNO has also complained that delay and procrastination on EPA's part throughout these proceedings have prevented UNO from obtaining an equitable and just result in this matter. UNO feels that all delays connected with the protest and subsequent proceedings have been caused by EPA.

We believe that a speedier resolution of this matter would have been facilitated if some of EPA's submissions to our Office had been made in a more prompt manner. However, we must disagree with UNO's assertion that all delays have been caused by EPA. Initially, we note that shortly after it filed its protest in June 1975, UNO contacted our Office and expressed a desire to submit further details in support of its position. We advised UNO that any further details should be submitted as soon as possible, because delay in doing so could result in delay in EPA's report responding to the protest.

However, UNO's additional details were not received until July 22, 1975. By that time, EPA's report (dated July 30, 1975) was in its final

stages of preparation. EPA's report did not respond to all of the points made in UNO's submission received on July 22, 1975. As a result, a supplementary report was requested from EPA. EPA responded by letter dated September 24, 1975. We believe that delay on UNO's part in promptly documenting all of the grounds of its protest substantially contributed to the need to obtain a supplementary report from EPA.

Notwithstanding this delay, our Office was in a position to begin preparing a decision on October 14, 1975. However, UNO raised a number of procedural questions and objections. UNO maintained that another supplementary report from EPA was needed. UNO requested that our Office obtain assistance from independent scientific experts to review the issues in the protest. UNO declined to schedule the protest conference it had requested until these procedural points were considered and resolved.

Our Office believed that the procedural measures requested by UNO were neither necessary nor desirable under the circumstances of the case. However, UNO had submitted arguments in support of its position, and we carefully considered these before rejecting them. The result was a considerable delay in the proceedings. Our Office was not able to begin preparing a decision on UNO's protest until December 19, 1975.

It is noteworthy that our Office's decision sustained UNO's protest. We believe that but for the delays attributable to UNO, it is conceivable that a decision upholding the protest might have been rendered in September or October 1975 instead of January 1976.

Analysis of EPA Justification for Canceling RFP

EPA's position, as stated in letters to our Office dated February 2 and April 22, 1976, is that numerous deficiencies in RFP WA 75–R148 so seriously impair the offerors' ability to submit meaningful proposals that only a major revision of the RFP could correct the situation. Accordingly, EPA believes that RFP WA 75–R148 should be canceled.

The following is a list of justifications offered by EPA in support of its request. For several of these, our comments are provided. In considering EPA's position and making our comments, we have reviewed the revised statement of work which EPA intends to include in the new RFP.

1. Issuing a new RFP would maximize competition (i.e., it would allow concerns other than the six original offerors an opportunity to submit proposals).

GAO comment: Federal Procurement Regulations § 1–3.101(d) (1964 ed. amend. 153) provides that negotiated procurement shall be on a competitive basis to the maximum practical extent. However, we do not believe that this principle, considered in and of itself, neces-

sarily justifies canceling an existing RFP and issuing a new RFP. Unless there is a reasonable basis to believe that continuing the competition under an existing RFP will not lead to the receipt of technically acceptable proposals whose realistic probable costs are considered reasonable, we see no grounds why the RFP should be canceled in the hope of experiencing better results under a new RFP.

2. A substantial amount of time has passed since RFP WA 75–R148 was originally issued in December 1974.

GAO: This, in itself, is not a sufficient justification for canceling the RFP. It would become a significant factor only if EPA's needs have substantially changed over the course of time, or if, as indicated *supra*, so few offerors under the RFP are willing to continue to participate that a competition leading to satisfactory results cannot reasonably be expected to take place.

3. To amend the RFP, as GAO recommended in its decision on the protest, might be confusing to the offerors.

GAO: Copies of our protest decision were furnished to the six offerors involved in the procurement. None has indicated to us that it has experienced difficulty or confusion on this point. Given the amount of time this procurement has been ongoing and its history, it is possible that any action taken—including issuing a new RFP—could create some confusion.

4. The work requirements in RFP WA 75–R148 are so vast and comprehensive that they could not reasonably be accomplished within the time and cost limitations considered appropriate by EPA.

GAO: In comparing the offerors' proposed costs under RFP WA 75–R148 and the projected duration of the study (27 months) with the proposed budget and projected study duration of the new RFP, we have difficulty seeing a significant degree of difference.

5. The RFP's list of chemicals to be studied was mixed and unspecific as to classes of compounds to be examined.

GAO: It is likely that this problem could be satisfactorily corrected by an amendment to the RFP.

6. The RFP's criteria for selecting chemicals and geographical sites were lacking or conceptually inappropriate to the study design.

GAO: No comment.

7. The RFP was not clear as to how the initial environmental monitoring studies could be accomplished without undertaking a prohibitively expensive nationwide study.

GAO: It is not apparent to us why amending RFP WA 75–R148 and further negotiations could not definitize both the amount of monitoring required and its probable realistic cost. At that point in time, the contracting officer would be in a position to determine whether the probable costs are unreasonably high.

8. The RFP was unclear as to which links in the chain of events from industrial sources to human health effects are of highest priority.

GAO: No comment.

9. The RFP did not clearly indicate how the chemicals were to be selected for study, and by whom.

GAO: See comment to item No. 5, *supra.*

10. The RFP did not clearly indicate how geographic areas and study sites were to be selected.

GAO: No comment.

11. The RFP did not clearly indicate how much monitoring was required to select study sites.

GAO: See comment to item No. 7, *supra.*

12. The reason for collecting body burden data, and their relationships to health effects and/or environmental levels, were not clear in the RFP.

GAO: No comment.

13. The RFP did not clearly indicate whether the contractor should determine industrial sources of halogenated organics.

GAO: This could possibly be corrected by an amendment to the RFP.

14. The relative weights to be given different environmental media were not clearly indicated in the RFP.

GAO: This deficiency in the RFP was extensively discussed in our earlier decision, wherein we recommended correcting it by an amendment to the RFP.

It may be appropriate to make some changes in an RFP's terms or specifications by amendment rather than cancellation and resolicitation. See, for example, *Rantec Division, Emerson Electric Co.*, B-185764, June 4, 1976. On the other hand, substantial changes in the specifications may justify cancellation of the RFP. 53 Comp. Gen. 139 (1973). Regardless of the particular factual situation, deciding whether to cancel an RFP is in the first instance a matter for the sound judgment and discretion of responsible agency officials. A decision to cancel is subject to objection upon review by our Office only if it is clearly shown to be without a reasonable basis. See *Federal Leasing, Inc., et al.*, 54 Comp. Gen. 872 (1975), 75-1 CPD 236. The same standard of review applies to an agency's determination of its minimum needs and to the agency's drafting of specifications which properly reflect those needs. *Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374 (1975), 75-2 CPD 232.

As our comments above indicate, we believe that several of the justifications for canceling the RFP advanced by EPA are subject to question. At the same time, we recognize that some of the reasons cited by

EPA may indicate that changes in the current RFP's statement of work requirements have become appropriate and necessary. While a certain number of changes could possibly be made by amending the current RFP, it is apparent that as the number of changes increases, the RFP may be revised to such an extent that it would become preferable to cancel it altogether and issue a new RFP in its place.

In addition, there are other points bearing upon the proposed cancellation which must be considered. In its protest, UNO alleged that three RFP's were issued by EPA in September and October 1975 which duplicate or diminish the scope of work under RFP WA 75–R148. These were:

RFP	Issue Date	Scope of Work
WA 76–R022	September 4, 1975	On-call collection and analysis of samples to determine levels of selected heavy metals, chlorinated hydrocarbons, and other toxic organic chemicals in air, water, soil and sediments.
WA 76–R020	September 9, 1975	On-call collection and analysis of human tissue, blood and urine samples to determine levels of selected heavy metals, chlorinated hydrocarbons, and other organic and inorganic toxic chemicals.
WA 76–X031	October 20, 1975	Sampling and analysis of selected toxic substances in various environmental media.

UNO suggested in its protest that the purpose of these procurements may have been to eliminate the need for the work to be obtained under RFP WA 75–R148 and thereby justify its cancellation. Since EPA is now proposing to cancel RFP WA 75–R148, UNO has reasserted this objection.

We believe that UNO's contention, in effect, is that EPA issued the three additional RFP's with the intention of circumventing the possible effect of the protest under RFP WA 75–R148. This necessarily

calls into question the subjective motivations of EPA procurement personnel. We are unaware of how the alleged improper intentions which UNO attributes to EPA could be conclusively established in light of the written record which forms the basis for our protest decisions. Moreover, there are several points which militate against any such conclusion. First, as we observed in our earlier decision, we are not aware of any provision of procurement law which specifically prohibits a contracting agency from separately procuring work similar to the work being sought under a protested solicitation. See, in this regard, *Poloron Products, Inc.*, B–184420, B–185206, April 7, 1976, 76–1 CPD 230. Second, we note that the three RFP's mentioned above have not eliminated the need for a scientific study of halogenated organic substances in the environment, and that EPA's issuance of a new RFP for this study does not deprive UNO of an opportunity to compete for an award.

Nonetheless, any action which might create even the appearance of adversely affecting the integrity of the Federal procurement system must be carefully weighed by the contracting agency. In addition, we believe that certain circumstances in this case raise serious questions concerning EPA's understanding of and adherence to basic procurement policies and procedures which are essential if the Government is to effectively obtain services to meet its needs. The most serious question, in our opinion, is the point in time at which EPA became aware or should have become aware of the numerous deficiencies in the RFP which the agency now believes justify cancellation and resolicitation. To again review the chronology of this matter, the RFP was issued in December 1974; initial proposals were received in January 1975; UNO protested in June 1975; and our decision was rendered in January 1976. EPA first requested in February 1976 that we concur in the issuance of a new RFP. However, EPA did not furnish its detailed explanation of why RFP WA 75–R148 was defective until April 1976.

We find it difficult to understand why, during this extended period of time, EPA did nothing to call to the attention of our Office and the offerors the RFP deficiencies which it now believes would preclude making an award to any offeror under the solicitation. It appears that the problems with the RFP should have been apparent to EPA long before they were formally reported to our Office in April 1976. EPA's inaction had several unfortunate effects. For one thing, it meant that our Office's January 14, 1976, decision in this matter was not directed at the most pertinent issues in the procurement—since the numerous deficiencies in the RFP which EPA now asserts were not brought

before our Office while UNO's protest was under consideration. Also, it left several of the offerors in a confused and uncertain position, because they did not know whether or when any award would be made. Further, it delayed the procurement of services necessary to meet EPA's needs.

Conclusion and Recommendation

Considering all of the circumstances of this case, we cannot conclude that the justifications for EPA's proposed cancellation of RFP WA 75–R148 are clearly without a reasonable basis. Accordingly, it is inappropriate for our Office to interpose any legal objection to this action. However, since we believe that several of the justifications are subject to question, we are recommending by letter of today that the EPA Administrator review and reconsider the proposed cancellation in light of the points discussed in this decision.

[B–186063]

Contracts—Data, Rights, etc.—Use by Government—Internal Use

Agency may use data supplied with restrictive legend to evaluate drawings submitted by other offerors so long as such data is not released outside the Government. Moreover, where it appears that drawings were furnished to agency without restriction, General Accounting Office is precluded from concluding that Government does not have unrestricted rights in such drawings.

In the matter of the Curtiss-Wright Corporation, July 19, 1976:

Curtiss-Wright Corporation (CWC) protests the award of any contract under request for proposals (RFP) No. F41608–76–R–7875 on the basis that the making or performance of such contract would involve the utilization of CWC proprietary data.

The RFP called for the supply of 1,132 aircraft engine pinions described as Curtiss-Wright Corporation Part Number 171242 or Aircraft Supplies Part Number AS171242 or Trylon Machine and Gear Co. Part Number EG171242. CWC maintains that the pinion-reduction gear is described by Curtiss-Wright Corporation Drawing Number 171242, which was furnished to the Government under two prior contracts between CWC and the Air Force. CWC alleges that this data remained proprietary to CWC under the terms of the contracts in question.

The Air Force reports that no CWC data was published in the RFP or distributed outside the Government in any other fashion and that both Aircraft Supplies and Trylon Machine and Gear submitted their own drawings and specifications. According to the Air Force, CWC's data was used only to check those drawings. The Air Force argues that this limited use of the CWC data was in accordance with the decision

of this Office in 49 Comp. Gen. 471 (1970) in which we held that the use of proprietary data for comparison purposes was proper. Further, the Air Force claims that there is a question as to the proprietary nature of the CWC drawing, since although Revisions G and H of the drawing were provided with a restrictive legend, Revisions E and F of the drawing were provided to the Government without restrictive legends.

CWC, on the other hand, claims that the Air Force is mistaken about the revised drawing which the Air Force states was submitted without a restrictive legend, and argues that insofar as the agency's use of the CWC drawing was consistent with the decision in 49 Comp. Gen. 471, *supra*, that decision was incorrectly decided.

This Office has on several occasions provided some protection against the unauthorized disclosure of proprietary data by directing cancellation of solicitations which improperly disclosed such data. 49 Comp. Gen. 28 (1969); 43 *id.* 193 (1973); 41 *id.* 148 (1961). Here, no claim is made that the RFP improperly reveals CWC's proprietary data. Rather, CWC asserts that the Air Force made improper use of the restricted data by using it to evaluate drawings submitted by CWC competitors. However, as indicated above, we have held that the Government may properly use data in which it has limited rights for such comparison purposes. 49 Comp. Gen. 471, *supra*. We reached that conclusion after a careful and thorough consideration of the purpose of and policy behind the use of the legend giving the Government limited rights in data furnished under Government contracts, and have consistently adhered to it. *See Garrett Corporation*, B–182991, B–182903, January 13, 1976, 76–1 CPD 20 and cases cited therein. Although CWC argues at length that our holding in 49 Comp. Gen. 471 was incorrect, we do not find CWC's position in this regard to be persuasive. Accordingly, we cannot agree that the Air Force's use of the CWC data in this case was improper.

Furthermore, it is not clear from the record before us that the Government has only limited rights in the CWC data. Although CWC asserts that it never furnished the data in question to the Air Force without a restrictive legend on it, the Air Force records indicate the contrary. In this regard, the Air Force has furnished this Office with copies of Revisions E, F, G and H of drawing 171242. Revisions E and F show no restrictive legend whatsoever. Although this does not unequivocably establish that the drawings were furnished without restriction, it does, in the absence of probative evidence to the contrary, preclude us from concluding that the Government does not have unrestricted rights in the drawing.

In view of these circumstances, the protest is denied.

[B–130082]

Travel Expenses—Return to Official Station on Nonworkdays—Cost *v.* Increased Efficiency and Productivity

Where agency after cost analysis determines that the costs of reimbursing employees who are required to perform extended periods of temporary duty for expense of periodically traveling between the temporary duty point and official station for nonworkdays is outweighed by savings in terms of employee efficiency and productivity, and reduced costs of employment and retention of such employees, the cost of authorized weekend return travel may be considered a necessary travel expense of the agency.

In the matter of reimbursement for travel on nonworkdays between temporary duty and official stations, July 20, 1976:

This action concerns the propriety of Government agencies paying civilian employees for the expense of travel, prior to the completion of a temporary duty (TDY) assignment, between their TDY stations and their official stations for weekends or other nonworkdays under orders authorizing or requiring such travel.

This subject has been discussed over a period of time between representatives of the General Accounting Office and the General Services Administration. From those discussions and other inquiries, our Office has concluded that agency officials are in need of guidance on the extent of their authority to authorize or require weekend return travel. We, therefore, are issuing this decision to clarify the matter.

The primary statutory authority of general application which relates to official travel is contained in subchapter I (sections 5701–5709), Chapter 57, Title 5, U.S. Code, as amended by Public Law 94–22, approved May 19, 1975, 89 Stat. 84.

Section 5707 of Title 5, U.S. Code, as amended by Public Law 94–22, 5 U.S.C. 5701 note, directs the Administrator of General Services to prescribe regulations to carry out the subchapter. The Federal Travel Regulations (FPMR 101–7), chapter 1, issued thereunder by the General Services Administration, govern travel for civilian employees of the Government. FTR paras. 1–7.5c and 1–8.4f (May 1973) provide that an employee who voluntarily returns for nonworkdays to his official station, or his place of abode to which he commutes daily to his official station, may be allowed round-trip travel and transportation expenses, not to exceed the travel expenses which would have been allowable had the employee remained at his TDY station. In addition, those paragraphs provide that, "at the discretion of the administrative officials, a traveler may be required to return to his official station for nonworkdays." There are no prescribed monetary standards under the latter provision as to when travel on nonworkdays would or should be required. Also, we view the term "required" in the regulation as sufficiently broad in scope to include an "author-

ized" return. We so hold because the primary distinction the regulation seems to be concerned with is that between a "voluntary" return at the employee's discretion and a return required or authorized at the discretion of the administration officials.

A question raised is whether the appropriations of the agencies concerned are available for the payment of these expenses. In this regard appropriations acts commonly provide for the necessary expenses of the agency concerned. To determine the availability of appropriations of this type for a particular expense, our Office has applied the test of whether the expense involved is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation. In situations involving the availability of appropriations for expenses other than travel, our Office has not objected to determinations that expenditures for particular purposes constituted necessary expenses under the appropriation involved on the basis of factors such as improvement of employee morale, increased productivity and resulting savings to the Government, and assisting the agency in hiring and retaining employees. B–169141, November 17, 1970, and B–169141, March 23, 1970, and 51 Comp. Gen. 797 (1972).

We recognize that difficulties may be encountered by agencies in employing and retaining employees for positions requiring extended periods of TDY and believe that the cost impact of problems in these areas may, to some degree, be reduced by authorizing the periodic weekend return travel. Thus, if after appropriate cost analysis, the agency determines that the costs of periodic weekend return travel are outweighed by savings in terms of increased efficiency and productivity, as well as reduced costs of recruitment and retention, such return travel may be authorized within the limits of appropriations available for payment of travel expenses. The cost analysis necessary to a determination that net savings will accrue to the Government and, hence, that authorization of weekend return travel is warranted, should be conducted no less frequently than every other year. Agencies should implement their determinations by appropriate guidelines.

Weekend return travel constitutes an exception to the directive on scheduling of travel contained at 5 U.S.C. 6101(b)(2) and should be performed outside the employee's regular duty hours or during periods of authorized leave. However, in the case of employees not exempt from the Fair Labor Standards Act overtime provisions, consideration should be given to scheduling required travel to minimize payment of overtime, including scheduling of travel during regular duty hours where necessary.

Until such time as the General Services Administration takes action to specifically include in the above-cited regulations guidelines covering this matter, agencies should make prudent use of the weekend return authority outlined in this decision.

[B-172621]

Travel Expenses—Contributions From Private Sources—Acceptance by Agency—Tax Exempt Organizations

Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970).

In the matter of donor payments to Internal Revenue Service for employee meeting attendance costs, July 21, 1976:

This decision is in response to a request from Warren F. Brecht, Assistant Secretary for Administration, Department of the Treasury, concerning the following matter.

Under the authority of 5 U.S. Code § 4111 (1970) as implemented by 5 CFR §§ 410.701–410.706, an employee may be allowed to accept payment of travel, subsistence, and other expenses incident to attendance at a meeting, if the payment is made by an organization described by 26 U.S.C. § 501(c)(3) (1970) which is exempt from taxation under 26 U.S.C. § 501(a) (1970).

The request stated that:

> The Internal Revenue Service wants to take advantage of this provision in connection with some travel by its employees. However, it is proposed that payment for the travel be made by the Service; and that payment by the organization be received by the Service for credit to the appropriation concerned. As this procedure would be contrary to a literal interpretation of the law, its propriety has been questioned. The Internal Revenue Service does not have authority to accept gifts.

Consequently, our decision as to the propriety of the described procedure was requested.

Absent specific authorizing legislation, there is no authority for an official of the Government to accept on behalf of the United States voluntary donations or contributions of cash since this would constitute an augmentation of appropriations made by Congress to the agency. See 49 Comp. Gen. 572 (1970); 46 *id.* 689 (1967; 36 *id.* 268 (1956); 2 *id.* 775 (1923); and 26 Comp. Dec. 43 (1919). Any such donations or contributions (where the agency does not have specific statutory authority to receive them) must be deposited into miscellaneous

receipts of the Treasury, 31 U.S.C. § 484 (1970). *See* 49 Comp. Gen. 572 (1970) and 26 Comp. Dec. 43 (1919).

The submission mentions 5 U.S.C. § 4111 (1970), which provides that:

> (a) To the extent authorized by regulation of the President, contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee, without regard to section 209 of title 18, if the contributions, awards, and payments are made by an organization determined by the Secretary of the Treasury to be an organization described by section 501(c)(3) of title 26 which is exempt from taxation under section 501(a) of title 26.
>
> (b) When a contribution, award, or payment, in cash or in kind, is made to an employee for travel, subsistence, or other expenses under subsection (a) of this section, an appropriate reduction, under regulations of the Director of the Bureau of the Budget, shall be made from payment by the Government to the employee for travel, subsistence, or other expenses incident to training in a non-Government facility or to attendance at a meeting.

The Assistant Secretary for Administration suggests:

> The proposed procedure would have the same effect as direct payment by an organization to an employee, so long as the Service returns to its appropriation no more than the amount of the travel expenses incurred by the employee. It seems logical, therefore, to have the organization make its payment to the Service instead of to the employee.

Section 4111, *supra*, provides a specific exemption to the prohibition against officers and employees of the Executive branch of Government receiving any salary, or any contribution to or supplementation of salary, from any source other than the Government of the United States (18 US.C. § 209). It allows an employee to accept from eligible tax-exempt organizations payment, in cash or in kind, towards some or all of his or her personal expenses incurred in the scope of the employee's official duties while attending a meeting. However, this exemption is personal with the officer or employee, and does not extend to the employing agency or department of Government. Moreover, the exemption cannot be read to authorize the agency to accept voluntary payments for the purpose of reimbursing its employees for expenses they incur in the activities mentioned in 5 U.S.C. § 4111. That is, the statute is directed primarily at the authority of Government employees and not of Government agencies. In the absence of statutory authority allowing it to accept and retain voluntary contributions, an agency is bound by the provisions of 31 U.S.C. § 484, requiring deposit in miscellaneous receipts. Therefore, there is no authority for Internal Revenue Service's (IRS) proposal to accept contributions directly and use the funds to pay the employee's expenses.

Of course, if the Government has already paid the employee for travel, subsistence or other expenses incident to attendance at a meeting, and thereafter contributions authorized by 5 U.S.C. § 4111(a) are received by the employee, he is not entitled to retain all those funds. In that case, the employee must refund to the Government such amounts

as are determined, pursuant to regulations promulgated under 5 U.S.C. § 4111(b) to be attributable to travel expenses for which the Government is responsible. The amounts refunded by the employee to the Government are properly for credit to the appropriation originally charged. *See* 5 Comp. Gen. 734, 736 (1926).

While it may be true, as the submission suggests, that the practical effect of adopting the IRS proposal to accept payments directly from the tax-exempt organization will generally be the same as the procedure authorized by 5 U.S.C. § 4111(a), questions may arise as to the employee's entitlement to any excess payments, over the travel costs, since even if we allowed the agency to retain so much of the total payment as was attributable to the costs of travel, the balance would then have to go to miscellaneous receipts rather than to the employee. In any case, we cannot approve a procedure which would contravene three specific statutory provisions, 5 U.S.C. § 4111, discussed *supra;* 31 U.S.C. § 484, requiring deposit into miscellaneous receipts without deduction for any reason; and 31 U.S.C. § 901, setting forth the only conditions upon which voluntary contributions to the Government may be accepted, in the absence of another statute to the contrary.

[B-184328]

General Accounting Office—Contracts—Contractor's Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions

General Accounting Office does not review bid protests involving affirmative responsibility determinations except for actions by procuring officials which are tantamount to fraud or where definitive responsibility criteria set forth in a solicitation allegedly are violated.

Contractors—Incumbent—Employees—Recruitment by Competitor

Agency points out that hiring of incumbent contractor personnel is common business practice in custodial services industry; and that such practice is not contrary to law or business ethics. Accordingly, protest based on allegation that competing offeror has attempted to recruit members of protester's work force is without merit.

Contracts—Negotiation—Reopening—Submission of Best and Final Offers—Time Limit—Reasonable

Where offerors within competitive range are advised in morning of reopening of negotiations and requested to submit best and final offers by that same afternoon, reasonableness of action will not be questioned where all offerors are in fact able to respond within time limit.

Contracts—Negotiation—Changes During Negotiation—Submission of Additional Data

Where contracting officer determines it to be in the Government's interest to allow all offerors within competitive range opportunity to provide data which was omitted in some initial proposals, notwithstanding presence of clause in re-

quest for proposals allowing contracting officer to find proposal submitted without such data to be nonresponsive, contracting officer's action was proper.

Contracts—Negotiation—Offers or Proposals—Qualifications of Offerors—Foreign Business Authority

Question of offeror's authority to do business in foreign country cannot be determined conclusively by contracting agency. Contracting officer acted reasonably in awarding contract to offeror where information indicated that awardee was authorized by local authorities to do business. However, contracting officer should have determined whether in attempting to qualify itself to do business offeror has retained original identity so as to be eligible to receive award.

In the matter of Martin Widerker, Eng., July 21, 1976:

Martin Widerker, Eng. (Widerker) protests the U.S. Army Procurement Agency Europe's (Army's) award of four contracts for custodial services under requests for proposals DAJA-37-75-R-0499 (RFP-0499), DAJA-37-75-R-0564 (RFP-0564), DAJA-37-75-R-0495 (RFP-0495), and DAJA 37-75-R0496 (RFP-0496) to the firms of N.R. Neue Raumpflege Gebaudereiningung & Service GmbH & Co. (NR) and Euro Services GmbH (Euro GmbH). The RFPs were issued in mid-May 1975 with performance set to run from July 1, 1975 to June 30, 1976. RFPs -0499 and -0564 were awarded to NR while RFPs -0495 and -0496 were awarded to Euro GmbH.

Widerker protests the awards to NR of RFPs -0499 and -0564 on the following bases: (1) the preaward survey was inadequate; (2) there were ambiguities in the solicitation which caused the protester to make an offer on one basis while the successful offeror made its offer on a different and erroneous basis; and (3) the Army failed to properly notify the protester of the awards to the successful offeror. In the case of RFP-0499, which was awarded subsequent to the filing of the protest, Widerker questions the propriety of the award on the ground of urgency.

The protester's first argument in essence questions NR's responsibility and the Army's affirmative finding thereof. While this Office does review protests involving negative determinations of responsibility to assure that bids or offers are fairly considered, we no longer review affirmative determinations of responsibility except where the protester alleges actions by procuring officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See *Central Metal Products, Inc.*, 54 Comp. Gen. 66 (1974). Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. We note in passing that the record indicates that the Army made a detailed preaward survey of NR. The survey showed NR to be an established, experienced, and qualified custodial firm which had made all necessary

preparations for performance in both the Ludwigsburg and Stuttgart areas.

The protester also questions NR's efforts to recruit members of the protester's work force. As the Army points out, the hiring of incumbent contractor personnel is a common business practice in the custodial services industry. Moreover, the Army notes neither law nor business ethics precludes the practice. It appears that NR's recruiting was less successful in the Stuttgart (RFP –0564) area because Widerker asserts that "[i]n desperation it [NR] recruited a variety of questionable characters, so that a storm of protest came from the Army Occupants of Patch Barracks." The record indicates that the Army in fact experienced difficulties in securing the desired level of performance from NR even to the extent that sums were deducted from NR's invoices, by direction of the contracting officer, for deficiencies in performance. However, notwithstanding the initial difficulties which the Army has had with NR, the contracting officer observes that it is his experience:

> * * * that all firms utilize in performance of custodial contracts a work force composed of part time, transient, untrained workers; and all firms experience a high turnover in employees, other than supervisors and foremen, during the performance period.

The Army further states that it anticipated, in light of the late award, that a new contractor would encounter difficulties in providing full service immediately. The Army noted that Widerker was confronted with similar custodial contract performance difficulties in the Heilbronn area, an area which the protester had itself entered for the first time. Accordingly, we find this aspect of the protest to be without merit.

Widerker's next contention concerns certain portions of RFPs–0499 and –0564, which the protester had noted were ambiguous. In both instances the protester took prompt action to clarify the meaning of the ambiguous specification with Army officials prior to submitting its proposals. Widerker argues that its diligence and the resultant clarifications worked to its detriment. NR, it is alleged, in working up its proposal, had read the ambiguities in the light most favorable to NR, which reading was not the reading the Army had given to the protester.

The Army states that upon being put on notice by Widerker of the ambiguity in RFP –0499, it reexamined the solicitation and concluded that there was indeed a potential source of confusion inherent in the solicitation as it was initially issued. Thereupon all firms within the competitive range were contacted and furnished with a clarified version of the Government's requirement. The same firms were at that time given an opportunity to revise their initial proposals.

Regarding RFP–0564, the contracting officer felt both that NR understood the requirement and that NR had considered the total

requirement in determining its proposed total price. In Widerker's protest reference is made to a Telex of June 23, 1975. The date set by the Army for best and final offers on RFP–0564 was June 20, 1975. The June 23, 1975, Telex was just one of a series of Telexes (in German) which arose out of the following situation: When the contracting officer received the Government price analysis report on June 10, 1975, he found that NR's initial proposal had been rejected by the Army price analyst on the ground that it was incomplete. The NR proposal was, however, the lowest proposal and the contracting officer made a determination that NR should be given an opportunity to clarify its proposal. In this connection, all the solicitations issued for custodial services required the offeror to submit a Cost Data Break Out for the purpose of allowing the contracting officer to assess whether firms in making their proposals had taken all of the requirements set forth in the RFP into consideration. Notwithstanding the fact that the clause allowed the contracting officer to declare an offeror nonresponsive should he submit incomplete data, the contracting officer took the position that, in all cases, firms within the competitive range submitting incomplete data would be contacted and requested to provide it. He took this position because the requirement for cost data was a new one which was not always understood by the custodial firms and, second, because he deemed it in the best interests of the Government to seek clarification, especially from a low offeror, rather than declare the firm nonresponsive.

After several Telexes between itself and NR, the Army, unsure as to whether or not its exchanges with NR had gone beyond mere clarification and had in fact become negotiations, decided to telephonically reopen negotiations on June 20, 1975. It also set 1600 hours that same day as the deadline for best and final offers. Both the protester and NR replied, but neither confirmed a best and final price at that time. By Telex of June 23, 1975, NR did confirm its price.

As the contracting officer notes the June 23, 1975, Telex changed nothing. It merely confirmed what he already knew on June 20, 1975. The record evidences considerable confusion on the part of the German nationals involved regarding exactly what the proper solicitation procedures were and what role the Army expected them to play in relation to the procedures. An example is provided by the following excerpt from the record:

> On Saturday, 21 June 1975, I was in receipt of two phone calls from the Widerkers. The first was at approximately 0930 hours by Mr. Widerker which was handled by Mr. Yasi, Deputy Chief, Procurement Division. Mr. Widerker wanted to know why Mrs. Pitschke had contacted him earlier during the preceding week and requested a "best and final" not later than 1600 hours, 20 June at Patch Barracks. Mr. Yasi explained that this was the normal method of conducting negotiations, and that this year since we were now on standard specifications and that some firms required clarification we were contacting prospective offerors in this regard.

In this context we do not find that the Army was arbitrary in its handling of the negotiations in question. The protester and the other offerors were able to respond in time to the request for best and final offers.

The next ground of protest is the issue of whether the Army complied with applicable regulations in its notification to the protester that NR had been awarded both contracts.

As background to a consideration of the events surrounding the Army's awards it should be noted that Widerker's contract to provide the Army with custodial services in the Ludwigsburg area was set to expire on Monday, June 30, 1975. Widerker had been the incumbent custodial contractor in the Ludwigsburg area for a number of years. On June 27, 1975, the protester was informed that he was not the successful offeror on RFP –0499. The protester contends that the late notification of award worked a hardship on both it and NR; on the protester to the extent that it was given only one working day to prepare for contract expiration and on NR to the extent that it received so little time to prepare for performance. Widerker was under the impression that the successful offeror would receive 10 days notice prior to award.

However, there was in fact no such stipulation in the solicitation documents. Moreover, Widerker was promptly notified by telephone of the award to NR. Therefore, we find no reason to question the Army's actions in this respect.

The protester also questions the contracting officer's determination to award RFP –0499 notwithstanding the protest on the ground of urgency. Widerker points out that the required janitorial services under RFP –0499 covered a total cleaning area of 15,000 square meters, 14,000 square meters of which consisted of school buildings that would be closed for the summer, the balance consisting of operational, administrative areas. The contracting officer in his June 27, 1975, findings and determination found as follows:

> The subject RFP is for custodial services for U.S. dependent schools at Pattonville. Services are urgently required as the present contract expires on 30 June 1975. Since a new contractor must begin performance immediately in order to avoid any lapse in services that would create a health hazard, and since there is no "in house" capability to perform these services temporarily, performance of these services would be unduly delayed [ASPR] (2–407.8(b)(3)(ii)) by failure to make award promptly. It is to be noted that the school area is to be completely cleaned, floors swept and walls cleaned during the summer vacation period; therefore, it is vital that performance begin on 1 July.

In addition, the contracting officer offers as a further justification that:

> * * * certain areas of the school are used for summer classes and community activities and require daily performance of cleaning services in these areas. Since this is a matter of health and welfare a determination of essentiality was properly made.

Thus, the record shows that there was a need to perform a substantial portion of the services while the schools were empty and before they reopened.

For the reasons stated, Widerker's protest of the awards to NR is denied.

Widerker's protest of the award to Euro GmbH reiterates the arguments which we have already considered and decided in the above protest of the award to NR. There is, however, an additional allegation that Euro Services had not complied with requirements to do work in Germany, and therefore the contractor should not be permitted to perform these contracts because of its failure to comply with German law. The record however shows otherwise.

During the month of June 1975 the Army received offers from Euro Inc. on both RFPs –0495 and –0496. In both instances, the offers were on Euro Inc.'s Dunn, North Carolina, stationery and were signed by a Mr. Franklin in his capacity as Euro Inc.'s "Special Representative." The Mannheim Chamber of Commerce informed the Army on June 23, 1975, that Euro Inc. had not been officially registered to do business in Germany. On June 25, 1975, a conference was held with Euro Inc. representatives. The following is an extract of the portion of the Army preaward survey which treats the conference:

> On 25 June 1975 prospective contractor with legal counsel presented documentary evidence in the office of USAPAE Procurement Judge Advocate, that the firm had been registered previously that day as a legal entity under German law, with official address given as Euro Services Germany GmbH, * * * Heidelberg * * *. In effect Euro Services Germany is now established as an independent legal partnership under German law (prime members Robert P. Stallings and Happy I. Franklin), and is no longer a subsidiary or branch of Euro Services, Inc.

With the above evidence in hand, and presumably upon the advice of counsel, the contracting officer proceeded that same day to award both contracts to Euro Services, GmbH, of Heidelberg, Germany.

In this regard, Army counsel states as follows:

> Also discussed at this meeting with the attorneys for Euro Services were the consequences of a default termination should Euro Services subsequently be unable to perform because of not possessing the proper authorization to do business. This right of the Government was recognized for Euro Services but the possibility dismissed for the reasons as previously stated that their firm was authorized to do business in Germany.
>
> In view of the above it is submitted that the contracting officer's actions were proper in awarding to Euro Services * * *. The contracting officer had obtained reasonable documentation and assurances from Euro Services and its attorneys that the firm was authorized to do business in Germany. Further the contracting officer had the assurance provided by the "Authorization to Perform" clause that the Government's interests would be protected should the contractor default in its performance for want of proper authorization to perform. For the contracting officer not to award to Euro Services in this situation would require the contracting officer to be in a position to authoritatively determine that Euro Services was not authorized to do business in Germany. The contracting officer could not make such a determination—as recognized by the Comptroller General such a question if it is ever placed in issue may have to be determined by a court.

It is pertinent to note in this respect that there presently is to our knowledge no court challenge to the right of Euro Services to perform in Germany, and the company is in fact performing.

We agree with Army counsel's assessment. As we stated in 51 Comp. Gen. 377 (1971), the validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts. We believe the same situation exists in the case of an offshore procurement. Therefore, it seems to us the contracting officer acted reasonably in awarding these contracts to the otherwise eligible offeror, based on the information he had obtained. In this connection, it appears to us that in the process of attempting to qualify itself, the low offeror may have undergone a change in identity so that the firm receiving the award differed from the entity submitting the offer. Absent a corporate merger or acquisition, or the sale of an entire business or the transfer of the entire portion of a business embraced by the contract, this circumstance would preclude an award. This issue was not argued before our Office. However, we are bringing it to the attention of the Secretary of the Army for consideration in future similar procurements.

Accordingly, the protest is denied.

[B-185662]

Foreign Differentials and Overseas Allowances—Post Allowance—Supplemental

Civilian employee and his family transferred to new duty station at Frankfurt, Germany, occupied nonhousekeeping transient-type quarters during which their cost for restaurant meals substantially exceeded the cost of such meals if prepared in housekeeping quarters. Since supplementary post allowance is available to defray extraordinary subsistence costs which exceed that portion of employee's salary and post allowance ordinarily spent for food and household expenses while occupying housekeeping quarters, employee may be granted allowance, not to exceed amount prescribed by Department of State Standardized Regulations section 235 (August 27, 1974).

In the matter of James P. Thorne—supplementary post allowance, July 21, 1976:

This action concerns a request dated December 5, 1975, from Samuel B. Gilreath, Jr., a disbursing officer for the Corps of Engineers, Department of the Army, as to the propriety of certifying for payment the voucher of Mr. James P. Thorne for a supplementary post allowance incident to the transfer of his official duty station from Mobile, Alabama, to Frankfurt, Germany, in November, 1974.

The record indicates that the claimant, Mr. Thorne, accepted a position as Reproduction Foreman, U.S. Army Engineer Division, in Frankfurt upon the understanding that Government quarters would be provided for him and his family. Upon arrival on November 8, 1974,

Mr. Thorne was advised by the Civilian Personnel Office that he was eligible for Government quarters and that he should not seek housing on the local economy since assignment to such quarters would be made in 4 to 12 weeks. He was subsequently informed that by reason of his wage grade, WS–6, he was eligible only for assignment to excess housing, which would not be available for an indefinite period. Because of the unavailability of Government housing and other factors, the claimant requested a release from his transportation agreement, which was granted. After reassignment to his former duty station, the U.S. Army Engineer District, Mobile, Alabama, Mr. Thorne departed on January 21, 1975, for authorized travel to Mobile.

Mr. Thorne and his family occupied hotel rooms without kitchen facilities during their residence in Frankfurt. Although reimbursed for temporary lodging expenses actually incurred, the claimant has not been specifically reimbursed for additional subsistence expenses incurred while occupying transient quarters. He has stated that his actual subsistence costs during that period were $33 per day, and has estimated that, were he living in temporary housing with a kitchen, those costs would have been $12.72 per day. He therefore has claimed $1,500 for the supplemental post allowance.

Mr. Thorne's claim was administratively denied on April 23, 1975, by the Frankfurt Area Civilian Personnel Officer. In denying the claim, the officer cited as authority therefor, the Department of the Army Civilian Personnel Regulations (DA CPR) ch. 592, Department of State Standardized Regulations (Government Civilians, Foreign Areas) Section 230, and United States Army, Europe (USAREUR) letter AEAGA–CE dated March 26, 1973. Bearing the legend "this letter expires 1 year from date of publication," the USAREUR letter states, in relevant part:

> An employee should normally expect to spend a substantial portion of his salary for restaurant meals while living in a hotel; the supplementary post allowance is intended to help only those employees with unusually heavy food expenses. The Department of the Army advised that employee expenditures beyond the alleged costs of preparing meals in the home are not necessarily "unusually heavy food expenses." Menu prices comparable to those prices in Army clubs and messes, for example, would not warrant considering such meals as "high cost." One of the conditions governing eligibility for the allowance in this connection is that the family is unable to use less expensive eating facilities.

Concluding that Army clubs and messes were available to Mr. Thorne, a point contested by the claimant, the personnel officer denied the claim.

In a previous decision we stated that it was our understanding that the purpose of the supplementary post allowance was to reimburse an employee for the difference in cost between high cost hotel and restaurant meals and those he ordinarily would have incurred, had moderate cost meals been available in the area of his hotel or temporary

lodging place. B–176979, April 30, 1973. In that case, the employee's cost of meals at a Navy Snack Bar exceeded the cost of similar meals prepared at home by about $360. In B–176979, November 27, 1972, an earlier decision with regard to the same claim, we affirmed denial of the supplementary post allowance. We there stated:

> the pertinent regulation, however, does not predicate entitlement to the supplementary post allowance upon the extent to which an employee's family's meal costs exceed their costs while living at home, but rather upon the extent to which their actual meal costs exceed the cost of obtaining meals at less expensive commercial eating facilities.

Our decision in that case was based on Section 233d of the Standardized Regulations (December 10, 1971) which then provided that the allowance may be granted only among other conditions:

> d. while the family is unable to utilize less expensive eating facilities, such as an inexpensive nearby restaurant * * *.

Subsequent to the dates of our decisions in B–176979, the Department of State revised Section 230 of the Standardized Regulations to broaden the scope and availability of the supplementary post allowance. Explaining the changes, which became effective on August 27, 1974, the Department stated in its transmittal letter TL:SR–250 dated September 1, 1974:

> The revisions are made in order to avoid penalizing employees, given the significant increase in restaurant meal prices in foreign areas due to inflation and currency revaluation.

Prior to the 1974 revision, section 232 of the Standardized Regulations had provided, in part:

> * * * Authorizing officers should, of course, bear in mind that an employee should normally expect to spend a substantial portion of his *salary* for restaurant meals while living in a hotel, and that this allowance is intended to help only those employees faced with *unusually* heavy food expenses. [Italic in original]

This sentence was omitted by the 1974 revision, thus liberalizing the availability of benefits. Section 233, which sets forth the conditions of eligibility, was substantially altered. Deleted were requirements that the head of the agency make an eligibility determination (§ 233a), that the family exceed one person (§ 233b), and that the family be unable to utilize less expensive eating facilities, such as inexpensive nearby restaurants (§ 233d). As revised (August 27, 1974), section 233 provides:

> 233 *Conditions Governing Eligibility*
>
> A supplementary post allowance may be granted:
>
> a. on behalf of the employee and each family member;
>
> b. while the employee is required, by lack of available temporary quarters having kitchen facilities adequate for the preparation of meals, to occupy nonhousekeeping transient-type quarters;
>
> c. for periods not in excess of three months after date of first arrival at a new post and for periods not in excess of one month preceding date of departure from the post.

Because under section 231a the supplementary post allowance is granted to defray extraordinary subsistence costs, the incurrence of such costs is, by necessary implication, a further condition of eligibility. Extraordinary subsistence costs are defined in section 231b as:

> * * * those costs which exceed (a) that portion of the employee's salary which he or she would ordinarily spend for food and household expenses while occupying housekeeping quarters and (b) that portion of his or her post allowance, if any, related to his or her food and household expenses. Standardized Regulations § 231b (August 27, 1974).

By this new section, and by omitting the former section 233d, also quoted above, the Department has eliminated the previous limitation that the family utilize "less expensive commercial eating facilities." Because our earlier decisions in B–176979, *supra*, were based upon the regulation as it read prior to modification, those decisions must be limited to the facts and circumstances described therein and are no longer to be followed with regard to the granting of a supplementary post allowance occurring on or after August 27, 1974.

Regarding the personnel officer's reliance on the March 26, 1973, USAREUR letter in denying Mr. Thorne's claim, we note that the letter had, by its own terms, expired prior to the events which form the basis of his claim. Since there is no indication in the record that the letter was extended for an additional period of time, reliance thereon was inappropriate.

Concerning the claimant's eligibility for the allowance, the record indicates that he and his family occupied nonhousekeeping transient-type quarters for a period of less than three months after his arrival in Frankfurt. Mr. Thorne's computation of his family's actual subsistence expenses and of such expenses ordinarily incurred while occupying housekeeping quarters are not administratively questioned, and reasonably support the conclusion that he incurred extraordinary subsistence cost. Accordingly, the claimant is eligible for the supplementary post allowance.

The manner of calculation of the allowance is set forth in the Standardized Regulations (August 27, 1974) as follows:

> 235 *Determination of Rate*
>
> A supplementary post allowance shall be granted to an employee at the daily rate prescribed in section 941.6 as determined by the classification of the post for post allowance in column 4, section 920, and the travel per diem rate prescribed for the post in section 925, unless the officer designated to authorize allowances determines that a lesser amount is warranted. Married couple employees do not receive duplicate payments.

Since the post classification for Frankfurt is 0 (zero) and the travel per diem rate therefor is in excess of $18, the maximum allowable supplementary post allowance prescribed at section 941.6 of the Standardized Regulation is $6 per day for the employee and an equal amount for each family member. Accordingly, although the voucher

for $1,500 may not be certified for payment, a supplementary cost allowance determined on the basis of $6 per day for the employee and each of his two dependents, or such lesser amount as is determined to be appropriate under section 235, above, may be paid to the claimant.

In addition to the above, the disbursing officer has asked whether amounts determined to be due Mr. Thorne may be paid by the Army's disbursing office in Mobile, Alabama, and billed to the European Division, Corps of Engineers. Insofar as the proposed payment procedure does not involve more than a single appropriation and is consistent with Army procedures, we see no basis for objection.

[B–185661]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Consultants—Reduction in Retired Pay—Exemption Period

A renewed 30-day exemption from reduction in retired pay in the fiscal year in which a retired Regular military officer's previous excepted appointment as a consultant to a Federal agency is converted would be in violation of the Dual Compensation Act (5 U.S.C. 5532). Where an appointment conversion is merely in the nature of a continuation and an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. 5532(c)(2)(ii), but is, instead, a routine personnel action.

Experts and Consultants—Two Appointments—Retired Member of the Uniformed Services

Where a retired military member consultant receives a second intermittent appointment, and an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-day exemption from reduction in military retired pay if the second appointment appears to be only a renewal of the initial appointment.

In the matter of General William W. Momyer, USAF, retired, July 22, 1976:

This action is in response to a letter dated October 3, 1975, with enclosures, from the Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado 80205, requesting an advance decision concerning the propriety of making payment on a voucher for $1,305.60, in favor of General William W. Momyer, 715–03–3995, USAF, Retired, for additional retired pay for the period April 15, 1975, through June 5, 1975. The letter was forwarded to our Office by the Chief, Finance Group, Directorate of Accounting and Finance, Headquarters United States Air Force, and has been assigned Air Force Request No. DO–AF–1244 by the Department of Defense Military Pay and Allowance Committee.

The record in the case shows that on April 23, 1974, the member, a retired Regular officer of the Air Force, accepted employment as a

consultant with Headquarters United States Air Force, under an excepted appointment (Intermittent, Code 171), not to exceed April 14, 1975. It is further indicated in the file that on April 15, 1975, General Momyer's appointment in the same position was converted to an excepted appointment (Intermittent, Code 651), not to exceed August 31, 1975.

It is stated in the submission that under the initial appointment effective April 23, 1974, through April 14, 1975, the member worked 18 days in fiscal year 1974 and 70 days in fiscal year 1975. In accordance with 5 U.S. Code 5532(c)(2)(i), the member's retired pay was exempted from reduction for the first 30 days worked under this appointment. During the succeeding period (April 15, 1975, through July 31, 1975), he worked 30 additional days in fiscal year 1975 and 25 days in fiscal year 1976.

The Accounting and Finance Officer requests a decision as to whether the second period of employment may be treated as a "new appointment" which would thereby entitle the member to a renewed 30-day dual compensation exemption for fiscal year 1975 under the multiple appointment rule of 5 U.S.C. 5532(c)(2)(ii), and whether the answer would be the same if, in fact, the appointments were respectively dated July 1, 1973, not to exceed June 30, 1974, and July 1, 1975, not to exceed June 30, 1976.

Section 5532 of Title 5, U.S. Code (1970), provides in pertinent part:

"(a) For the purpose of this section, "period for which he receives pay" means the full calendar period for which a retired officer of a regular component of a uniformed service receives the pay of a position when employed on a full-time basis, but only the days for which he actually receives that pay when employed on a part-time or intermittent basis.

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage in direct proportion to each increase in retired or retirement pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

"(c) The reduction in retired or retirement pay required by subection (b) of this section does not apply to a retired officer of a regular component of a uniformed service—

* * * * * * *

(2) employed on a temporary (full-time or part-time) basis, any other part-time basis, or an intermittent basis, for the first 30-day period for which he receives pay.

The exemption from reduction in retired or retirement pay under paragraph (2) of this subsection does not apply longer than—

"(i) the first 30-day period for which he receives pay under one appointment from the position in which he is employed, if he is serving under not more than one appointment; and

(ii) the first period for which he receives pay under more than one appointment, in a fiscal year, which consists in the aggregate of 30 days, from all

positions in which he is employed, if he is serving under more than one appointment in that fiscal year.

In our decision B–173292, October 1, 1971 (51 Comp. Gen. 189), we held that the exemption granted by 5532(c)(2)(ii) is to be applied to the first 30 days of work in each fiscal year during which the retired officer receives civilian pay under two or more appointments.

The present case is distinguishable from that case in that the appointments presently at issue involve no change in the appropriation to be charged with the salary and traveling expenses of the employee and no change in the agency under which the service is to be performed. Although this Office has not previously addressed itself to the interpretation of the words, "more than one appointment" as embraced by 5 U.S.C. 5532(c)(2)(ii), we have on several occasions held that routine personnel actions within the same agency which involve no change in the salary rate and little apparent change in duties are not deemed to be new appointments. *See* B–171181, December 14, 1970; B–167815(1), January 13, 1970; and B–166146, May 15, 1969.

It is our view, therefore, that where an appointment conversion involves no change in the appropriation to be charged with the salary and traveling expenses of the officer or employee, no change in the department or agency under which the service is to be performed and no change in the position, but rather an extension in the original appointment thereto, it is not a "new appointment." Accordingly, such a conversion under the present circumstances operates only as an extension of the initial appointment beyond its original termination date, and subsequent compensation to the retired officer may not be regarded as being made, "under more than one appointment" within the meaning of the statute. Therefore, General Momyer's entitlement to the 30-day dual compensation exemption is limited to the first 30 days for which he received civilian pay under his appointment dated April 23, 1974, and payment on his voucher in the amount of $1,305.60 is not authorized.

With regard to the question as to whether the answer would be the same if, in fact, the appointments were respectively dated July 1, 1973, not to be exceed June 30, 1974, and July 1, 1975, not to exceed June 30, 1976, paragraph 1–3c(3), Federal Personnel Manual, July 16, 1971, provides that in the context of whether a position filled by a consultant in 1 year is different from the one he filled in a previous service year, a different position means a position having duties and responsibilities that are recognizably different from those of the previous assignment and that cannot be considered a continuation, outgrowth, or extension of that assignment. Paragraph 1–3c(1), *id.*, permits the renewal of consultants' intermittent appointments from year to year. Since the

appointment presently in question involves no change in appropriation, agency or position but is an extension of the original appointment, it would appear that the second appointment would be considered as only a renewal of the initial appointment.

Based on the foregoing, it is our view that 5 U.S.C. 5532(c)(2)(i) would apply and the exemption from the reduction in retired pay would apply only to the first 30-day period for which the retired officer received pay under the appointment.

[B-133001]

Checks—Payees—Vietnam Evacuees—Piaster Checks—Conversion to American Dollars

Section 492a of 31 U.S. Code, and Treasury regulations issued pursuant thereto permit exchange transactions of U.S. and foreign currency or instruments for certain categories of people for accommodation purposes or for official purposes. Employees of Vietnamese-American Association (VAA), a binational orgainization receiving United States Information Agency grants, received piaster checks from VAA. Employees were evacuated from Vietnam to the United States before checks could be converted to American dollars. General Accounting Office agrees pay employees who are in United States directly from its appropriation, except checks to American dollars.

Vietnam—Evacuation—Vietnamese-American Association Employees—Salaries—Appropriation Availability

Under grant agreement between United States Information Agency (USIA) and VAA, a binational organization operating in Vietnam, United States was to make payments to VAA in four annual installments. VAA employees were evacuated from Vietnam before they could be paid (or in case of 16, before piaster checks issued by VAA could be exchanged for American dollars). USIA may not now pay employees who are in United States directly from its appropriation, except to extent of final unpaid grant installment.

In the matter of payment of VAA employees evacuated from Saigon, July 23, 1976:

This decision is in response to a request from the Deputy Director of the United States Information Agency (USIA) for an opinion regarding that agency's authority to pay from its appropriation final salary, severance pay, and pay in lieu of notice to former employees of the Vietnamese-American Association (VAA) who were evacuated from Saigon with the United States Mission at the end of April 1975, and now are residing in the United States as refugees.

Specifically, the Deputy Director asked the following:

* * * whether (a) salary payments originally made to sixteen employees in piasters may be converted to U.S. dollars by the Treasury Department, crediting the Agency's appropriation; and (b) whether the Agency has the legal authority to make payments directly from its appropriation to the other thirty-four individuals who received no payments. Should it seem more readily convenient or appropriate to avoid conversion of the piaster checks into dollars, the sixteen individuals who received their payments in piasters could also be paid directly from the Agency's appropriation as in (b) *supra*.

Circumstances leading to the request are outlined by the Deputy Director in his letter as follows:

The Vietnamese-American Association (VAA) was a binational center chartered under the laws of the Republic of Vietnam. It was founded for the purpose of strengthening ties of friendship and understanding between the peoples of Vietnam and the United States by promoting intellectual and cultural exchange. The VAA was governed by a Board of Directors consisting of Vietnamese and American citizens. The Director of the VAA was a USIA Foreign Service Officer. Over the years, USIS Saigon conducted many joint cultural programs with the VAA and supported these activities with limited cash grants and materials. The USIS library was housed in the VAA building. The VAA's principal source of income was English teaching course tuitions. The staff and teachers were employees of the VAA, not direct-hire employees of the U.S. Government. Copies of the Memorandum of Agreement and of the Grant Agreements executed during FY 1975 by USIS and the VAA are enclosed as Exhibit A.

Before the evacuation from Saigon, the VAA Board of Directors authorized final salary and severance payments for the staff, and final salary and one month's pay in lieu of notice for teachers. The Director of the VAA, a USIA officer, issued piaster checks to sixteen staff employees, as the VAA held no dollar funds of its own. Unfortunately, there was insufficient time for the U.S. Embassy Disbursing Officer in Saigon to convert these piaster checks to dollars before the employees had to leave Vietnam. It was expected that the piasters could be converted later at the refugee center in Guam or in the United States. The thirty-four teachers at the VAA who departed during the evacuation received no payment at all. * * *

The Agency and the Department of State, working with the Interagency Task Force for Indo-China, sought to have the piasters converted. However, the Fiscal Assistant Secretary of Treasury rejected the requests to purchase piasters for dollars from refugees located outside Vietnam. * * *

* * * The Memorandum of Agreement and Grant Agreement Number IA 298–1386 [between USIS and the VAA] provided for payment of the grant in four installments and also provided for changes in the size of the grant due to changes in the size of the VAA staff and the costs of employees' payrolls. * * * It appears that the fourth quarterly installment payment which was to be paid by USIS in April was never received by the VAA, probably because of the heavy demands placed upon the U.S. Disbursing Officer prior to the evacuation. * * *

We received the views of the Department of the Treasury in a letter from the Fiscal Assistant Secretary of the Treasury. Attached to the letter is a memorandum dated July 7, 1975, stating the reasons for Treasury's denial of a request by USIA that Treasury convert piaster checks to American dollars for the 16 VAA employees described above. Treasury takes the position that the checks are not obligations of the U.S. Government, and that even if they were, it could not make the conversion.

The following excerpts from the Treasury memorandum add background information concerning the Saigon evacuation of April 1975, and discuss Treasury's refusal to convert the 16 piaster checks to American dollars, notwithstanding that similar conversions were made prior to the evacuation:

In essence, the [Deputy Chief of Mission Saigon] states that they needed large amounts of piasters for final payments of leases, contracts, and other piaster liabilities; and, since all banking institutions in Saigon closed on or about April 23, 1975, a decision was made by the Mission to purchase piasters from Mission personnel (Americans, locals and third-country nationals) prior to their evacuation. * * *

* * * If we accept the Mission's statement that the piasters were needed by the Embassy, the purchase transactions could be considered for "official purposes" and such transactions would be permissible under the applicable statute, 31 U.S.C. 492, as well as Treasury regulations * * *

* * * The rationale for ratifying the purchase of piasters by the Embassy prior to evacuation, based on the need for such piasters by the Embassy, cannot, of course, provide a valid basis for purchasing piasters at this time. I find no other reasonable basis for purchasing the piasters.

* * * * * * *

Countering our informal advice to [the Department of] State that we see no way in which we can purchase piasters held by refugees outside of Vietnam, they have proposed that they accept the piasters from former employees of the Mission as a reversal of a pay transaction, return the piasters to the [disbursing officer] with a corresponding credit to a State Department appropriation, and then pay the salary in dollars. We see no rationale for Treasury accepting piasters at this time with the corresponding dollar credit to the State Department appropriation.

For the reasons set out below we agree with Treasury that it is precluded from converting the 16 piaster checks to American dollars and giving a corresponding dollar credit to the State Department appropriation. Moreover, with regard to the other 34 employees of the VAA, USIA may pay salaries from its appropriation only in the total amount of the final, unpaid, grant installment.

With respect to conversion of the piaster checks received by 16 of the VAA employees, section 1 of the Act of December 23, 1944, Public Law 83–61, 58 Stat. 921, as amended, 31 U.S. Code §§ 492a–492c (1970), authorizes disbursing officers to conduct exchange transactions involving United States and foreign currency or checks either for official purposes or for the accommodation of certain named classes of people, subject to regulations promulgated pursuant to the Act.

Section 3 of Public Law 83–61, as amended, 31 U.S.C. § 492c (1970), authorizes the Secretary of the Treasury to issue rules and regulations, governing disbursing officers under his jurisdiction deemed necessary or proper to carry out the purposes of sections 492a–492c of Title 31. Treasury Department Circular No. 830, as amended, was issued pursuant to section 3 of the Act to provide foreign exchange transaction guidance to disbursing officers.

With respect to exchanges for official purposes, the Circular allows foreign currency checks to be exchanged for dollars only when the checks represent official funds for which the disbursing officer is accountable, and then only "* * * for disbursing purposes." Cir. 830, par. 3(c). The proposed exchange in this case would not appear to meet these conditions and, since it involves foreign currency checks, is distinguishable from the purchase of foreign currency from Vietnamese nationals by the United States Mission, which Treasury has accepted as an "official purpose" transaction under 31 U.S.C. § 492a and Cir. 830.

As for accommodation exchanges, the Circular allows the purchase from individuals of instruments payable in foreign currencies only

when the individuals are members of United States Armed Forces or civilian employees of the United States who are United States citizens. *Id.*, par. 5A. These conditions were not met either. Accordingly, we believe that Treasury acted properly in refusing to make the exchange in this case.

We turn next to the question of whether USIA can pay directly from its appropriation final salary, severance pay, and payments in lieu of notice to former VAA employees. Because the fourth grant installment for fiscal year 1975 was apparently never received by the VAA, USIA contends that it has an unfulfilled obligation under the grant to the VAA, and by extension to the VAA employees.

The scheduled final installment of the grant was in the amount of 1,641,542 piasters, or approximately $2174 (at an exchange rate of $1=755 piasters). The total which USIA now proposes to pay to the former VAA employees is $22,240.02. USIA may not use the non-payment of the final grant installment to support the payment now of a far larger sum.

We would agree that there is an unfulfilled obligation, which may be paid, to the extent of the final grant installment. That amount may be apportioned administratively among the 34 employees of the VAA who did not receive their final salary payments. (Since the VAA apparently did not rely on the last grant installment for funds to issue checks to the other 16 employees, we are aware of no basis to apportion the grant funds among those individuals.

However, we cannot agree that payments in excess of the final grant installment may now be made. The employees in question were not employees of the United States. The grant was apparently not amended to ratify the approval by the VAA Board of Directors of additional payments for the employees in question. The piaster checks issued by the VAA to 16 of the employees are in no sense obligations of the United States. Under the circumstances, we are aware of no basis for the USIA to pay what would be, in effect, a gratuity to the VAA employees in the United States.

[B–181972]

Compensation—Night Work—Denial of Assignment to Night Shift—Violation of Collective Bargaining Agreement—Back Pay Entitlement

Labor union appealed General Accounting Office decision holding arbitrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agreement may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's

award may be implemented where employees were improperly denied assignment to night shift. B–181972, August 28, 1974, reversed.

In the matter of Charleston Naval Shipyard—reconsideration of arbitrators award of backpay for night differential, July 23, 1976:

This action is in response to the request of November 10, 1975, from the Federal Employees Metal Trades Council of Charleston for reconsideration of decision B–181972, August 28, 1974, holding that an arbitrator's award of premium pay for night shifts improperly denied to certain employees may not be implemented. The union has requested reconsideration on the basis of subsequent decisions of this Office, B–180010, October 31, 1974 (54 Comp. Gen. 312) and B–180010, August 25, 1975 (55 Comp. Gen. 171).

Pursuant to a negotiated collective bargaining agreement, the union and the Charleston Naval Shipyard established a procedure for manning the "swing" or second shift which operated from 4:15 p.m. to 12:00 p.m. The procedure, as set forth in Article VIII, Section 9, provided that the shift would be manned by volunteers picked on the basis of seniority and rotated every 90 days, with certain exceptions to that procedure. One employee filed a grievance over the fact that the Shipyard had retained three employees on this shift continuously over a 9-month period and thus denied the grievant "fair and equitable application" of the negotiated agreement. The arbitrator found that the staffing of the swing shift for educational purposes (the three employees were enrolled in college) on a "continuing, quasi-permanent basis" violated Article VIII, Section 9, as well as Article IV, Section 3 of the agreement, the latter providing that the agreement will be applied fairly and equitably to all employees. The arbitrator's award of backpay held:

> The parties are to ascertain which volunteers according to rotation and seniority would have received premium pay on or after July 23, 1973, and pay them such amounts of premium they would have received for such work.

The Assistant Secretary of the Navy (Manpower and Reserve Affairs), by letter dated July 24, 1974, requested a decision whether the arbitrator's award of backpay could be implemented. By decision B–181972, dated August 28, 1974, we held that "[t]he denial of the opportunity for overtime to the employees, though found to be in violation of the collective bargaining agreement by the arbitrator, is not an unjustified or unwarranted personnel action" within the meaning of the Back Pay Act, 5 U.S. Code 5596 (1970) and the implementing Civil Service Commission regulations, 5 C.F.R. Part 550, Subpart H (1974). The decision cited a prior decision B–175867, June 19, 1972. In our decision B–181972, *supra*, we held further that since the night shift was not actually performed, premium payment was not authorized, citing our prior decisions in 46 Comp. Gen. 217 (1966); 42 *id.* 195 (1962); and B–175867, *supra*.

In its request for reconsideration, the union has cited two subsequent decisions of this Office, 54 Comp. Gen. 312 (1974) and 55 *id.* 171 (1975). In the 1974 decision we held on page 318 that a violation of a mandatory provision in a collective bargaining agreement, if properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as an improper suspension, furlough without pay, demotion or reduction in pay. Therefore, we held that the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement, and we stated further that to the extent that our previous decisions may have been interpreted as holding to the contrary, such decisions would no longer be followed.

In 54 Comp. Gen. 1071 (1975), we had occasion to reexamine our position with respect to our "no work, no pay" policy where the improper personnel action was one of omission. We held in that case that an unjustified personnel action may involve acts of omission as well as commission, such as a failure to afford an opportunity for overtime work in accordance with the requirements of agency regulations or a collective bargaining agreement. Therefore, we held that an employee may be awarded backpay for overtime lost because of violation of a mandatory provision of a labor-management agreement and that our decision B–175867, June 19, 1972, would no longer be followed. This position has been followed in 55 Comp. Gen. 171 (1975) and 55 *id.* 405 (1975).

Subsequent to the decisions cited above the Supreme Court of the United States in *United States* v. *Testan*, decided March 2, 1976, ——— U.S. ———, 47 L. Ed. 2d 114, 44 U.S.L.W. 4245, held that neither the Classification Act, 5 U.S.C. 5101 *et seq.* (1970), nor the Back Pay Act, 5 U.S.C. 5596 (1970), creates a substantive right to backpay for the period of an improper classification. We have examined the *Testan* case, and we find that it is not applicable to the night work pay issue in the present case.

In the instant case certain employees were deprived of night shift work in violation of the collective bargaining agreement—an act of omission—and the arbitrator found that but for the Shipyard's improper action other employees would have received such work on the basis of rotation and seniority. On reconsideration of this case in light of our subsequent decisions, we now hold that B–181972, August 28, 1974, is reversed and that the arbitrator's award may be properly implemented. The amount of payment and the employees entitled to payment must be determined by an appropriate authority and the award made in accordance with the provisions of 5 U.S.C. 5596 and implementing regulations.

[B-176934]

Compensation—Overtime—Standby, etc., Time—Home as Duty Station

Based upon the determination of the Court of Claims in *Hugh J. Hyde* v. *United States*, Ct. Cl. No. 322–73, decided April 16, 1976, 52 Comp. Gen. 587, which denied petitioner Hyde overtime compensation for time spent in a standby status, is overruled. Where petitioner's performance of the Duty Security Officer function required him to remain at his residence located within the limits of his duty station, the Court found that, under the particular circumstances, his whereabouts were narrowly limited and his activities substantially restricted so as to entitle him to overtime compensation.

In the matter of Hugh J. Hyde—standby duty, July 26, 1976:

This action is in response to a request by Mr. Hugh J. Hyde for reconsideration of our decision in 52 Comp. Gen. 587 (1973) denying him overtime compensation for time claimed to have been spent in a standby status. His request is based on the favorable disposition of the same issue by the Court of Claims in *Hugh J. Hyde* v. *United States*, Ct. Cl. No. 322–73, decided April 16, 1976. Incident to that request, Mr. Hyde seeks recovery of overtime compensation for the period prior to August 23, 1967, during which he served as Duty Security Officer at the Naval Ship Research and Development Center, Acoustic Research Detachment, Bayview, Idaho. A part of that period is not covered by the Court of Claims judgment because it is outside the 6-year statute of limitations applicable to the Court of Claims, but it is within the 10-year period that was allowed for claims filed with this Office under the Barring Act, 31 U.S. Code § 71a, as in effect when Mr. Hyde filed his claim.

The facts relied on by this Office in previously denying Mr. Hyde's claim for overtime compensation are set forth in 52 Comp. Gen. 587, *supra*. Based on those facts we were unable to conclude that the Navy's determination that his whereabouts were not narrowly limited and that his activities were not substantially restricted was incorrect. In the absence of any showing that Mr. Hyde received a substantial number of calls or alarms which would militate toward a contrary conclusion, we were unable to find that the time spent by Mr. Hyde while serving as Duty Security Officer was spent predominantly for the Navy's benefit so as to entitle him to overtime compensation.

Contrary to information we relied on that emergency calls occurred from six to eight times per year, the Court of Claims found that the Duty Security Officer was called upon irregularly for emergencies between 40 and 50 times a year. Based on the facts adduced at trial, including the particularly significant finding that Mr. Hyde received a substantial number of emergency calls, the Court of Claims held that the circumstances under which the Duty Security Officer function was performed met the criteria of the Civilian Manpower and Management Instruction No. 610–S1–A–1(c)(1) as interpreted by the Navy for

payment of overtime compensation for time spent in a standby status. Specifically, the Court found that while performing the Duty Security Officer function, Mr. Hyde's whereabouts were narrowly limited and his activities substantially restricted. The following excerpt from the Trial Judge's opinion as adopted by the Court summarizes the basis for that determination:

> The fact remains that in the instant case, the only freedom available to plaintiff was to return to his family; he could not shop, visit nearby relatives, or enjoy any recreational activities, all of which were located off the base. The ARD station was far removed from any metropolitan area, for Bayview, Idaho, a township with one general store, a few taverns, and a population of 300, was 40 miles from Spokane, Washington, population of 184,000; and 330 miles from Seattle, population of 565,000. Thus, although plaintiff could engage in any activity he desired when not actually working, in fact there were virtually no activities for him to engage in.
>
> Another striking similarity between plaintiff's case and that of *Detling* is the degree of preparedness required in order to respond to emergencies. The Court in *Detling* found great significance in the fact that the plaintiffs were to "be immediately available in case of an emergency." This degree of readiness appears even more pronounced in the instant case, where the DSO's were required to respond as often as 50 times a year, the possibility of an emergency being sufficiently great so that plaintiff was never able to relax completely. Thus, plaintiff's officer in charge testified: "I required my duty officers to be on alert and be ready to handle anything that came up immediately."
>
> It is clear, then, that plaintiff (1) was substantially limited in his movements, (2) was significantly restricted in his activities, and (3) was in a state of ready alert to respond to an emergency, even when not performing actual work in his function as DSO. This represents a degree of restriction sufficient to satisfy even the most stringent guidelines established by CSC in its regulation of general schedule employees. Since plaintiff meets the stringent criteria established by the CSC, he also meets the criteria of the Navy regulation as interpreted by defendant. Accordingly, he is entitled to compensation.

Based upon the Court of Claims' determination of entitlement under the facts as found in *Hugh J. Hyde* v. *United States*, *supra*, our decision at 52 Comp. Gen. 587 is overruled. Our Claims Division has been instructed to determine and pay the overtime compensation due Mr. Hyde based upon his original claim insofar as compensation therefor has not been provided for under the judgment entered in the *Hyde* case and to the extent otherwise proper. Claims of other individuals for performance of the Duty Security Officer function at the Navy's Bayview test facility may be similarly allowed.

[B–185871]

Contracts—Specifications—Conformability of Equipment, etc., Offered—Administrative Determination—Conclusiveness

There has been no showing that agency determination that awardee should receive award lacked reasonable basis, notwithstanding awardee's brief response to request for proposals (RFP) informational provision requiring detailing of amount of time contract team members would be devoted to contract, in view of agency determination based on awardee's technical and cost proposals and discussions with awardee that there was sufficient commitment of team members to satisfy agency requirements.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Formula

Use of formula, which gave negligible weight to cost as evaluation factor, to evaluate cost proposals was improper because it was inconsistent with RFP statement that cost be given 20 percent of total evaluation weight. However, since protester was found in competitive range only because of clerical error in technical evaluation scoring and was improperly assigned maximum points for cost even though its cost proposal was determined to be unrealistic, and since RFP clearly indicated technical excellence was far more important (four times) than low cost, there was no prejudice justifying disturbing award.

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

Agency improperly assigned maximum points for cost in evaluating offerors' cost proposals where costs were not considered to be realistic without making independent cost projection of offerors' estimated costs.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—"Meaningful" Discussions

Agency's failure to give opportunity to offerors, who had been informed during discussions that cost proposals were not realistic, to revise proposals to respond to this criticism was improper and in violation of FPR 1-3.805-1(b). Under such circumstances, discussions cannot be regarded as meaningful under applicable regulations.

In the matter of Group Operations, Inc., July 26, 1976:

Request for proposals (RFP) 2 CCR, issued by the United States Commission on Civil Rights (USCCR), solicited proposals for a cost-plus-fixed-fee contract to provide data processing services for a national survey of opinions on desegregation. The RFP called for separate technical and cost proposals and indicated that the evaluation of technical proposals represented 80 percent and cost proposals represented 20 percent of the total evaluation points.

Twelve proposals were received by the closing date for receipt of proposals. Five offerors were eliminated because of insufficient technical responsiveness. The remaining seven offerors' technical and cost proposals were separately evaluated and rated as follows:

Offeror	Technical Score	Proposed Estimated Cost	Cost Score	Total Initial Score
Applied Management Sciences (AMS)	67.5	$18,262	20	87.5
Dudley W. Gill (Gill)	67.5	10,810	20	87.5
Teknekron, Inc. (Teknekron)	66	17,018	20	86
Bureau of Social Science Research, Inc. (BSSR)	65	22,790	18	83
Delta Research Corp. (Delta)	64	23,216	18	82
Fein-Marquart (Fein)	53	22,372	19	72
Group Operations, Incorporated (GOI)	50	12,735	20	70

The cost scores were based on the following formula:

$$\frac{\text{Average cost of all technically acceptable proposals}}{\text{Offeror's proposed cost}} \times 20 = \text{Cost Score}$$

Since no offeror could be assigned more than 20 points for cost, all offerors proposing costs below the average cost received 20 points. Those offerors proposing costs higher than the average cost received slightly lower scores based on the formula. The proposed costs of Gill and GOI were not used in determining the average cost figure because USCCR determined that their costs were not realistic. Instead, these two offerors were assigned the maximum 20 points for their low proposed costs. The costs proposed by the other five offerors, which were found realistic, were used in the application of the formula.

There were a number of computational and clerical errors in the initial scores assigned to some of the technical proposals, which were only discovered after award was made. The actual intended initial technical scores of BSSR and GOI were 62.5 and 51.5, respectively.

There were five members of the panel evaluating the technical proposals. The panelists did not individually rate each proposal. Rather, each proposal was rated by only two or three of the panelists. Since some of the panelists rated consistently lower than other panelists, it was decided that the seven initially acceptable technical proposals would be read and evaluated by additional panelists.

The offerors were rated as follows after the additional panelists' evaluation:

	Technical Score	Cost Score	Total Score
BSSR	67.33	18	85.3
AMS	64.75	20	84.75
GOI	62.0	20	82.0
Gill	60.0	20	80.0
Teknekron	59.6	20	79.6
Delta	58.3	18	76.3
Fein	56.3	19	75.3

As a result of the second reading and further discussions by the panel, the three lowest-rated proposals of Delta, Fein and Teknekron were eliminated from further consideration.

Computational and clerical errors, which were only discovered after award, also occurred in determining the technical proposal scores after the second reading. The intended technical score of Gill was 62 for a total score of 82 points. The intended technical score of GOI was 54.8 for a total score of 74.8 points.

In view of the limited time allowed for the submission of proposals, it was felt possible that the four remaining acceptable offerors may

have had a lack of understanding of the scope of work and USCCR's needs. Therefore, USCCR made on-site visits to and conducted discussions with the four remaining offerors. Based on these discussions, the firms visited were ranked as follows:

BSSR	*First*
AMS	*Second*
GOI	*Third*
Gill	*Fourth*

None of the offerors was invited to revise proposals as a result of the discussions.

Based on the foregoing evaluation, BSSR was selected for award.

GOI has protested that the award selection lacked a rational basis. Specifically, GOI refers to USCCR's determination that BSSR's technical proposal was satisfactory, even though BSSR did not itemize in its proposal the time which each of its proposed project team members assigned to the contract was to devote to the contract. GOI states that this information was required in order to have an acceptable proposal by section B.2.C.2 of Article VI of the RFP.

In addition, GOI protests that the formula used to evaluate the cost proposals distorted the differences between the proposals so as to give all offerors essentially the same score for cost. GOI claims that this had the effect of giving substantially less weight to cost than the 20 percent stated in the RFP. GOI states that had the weight indicated in the RFP been actually used in rating the proposals, GOI would have been rated higher than BSSR.

With regard to GOI's first contention, it is not the function of this Office to evaluate proposals, and we will not substitute our judgment for that of contracting officials by making an independent determination as to which offeror in a negotiated procurement should be rated first and thereby receive an award. Therefore, determinations by contracting officials regarding the technical merits of proposals will be questioned by our Office only upon a clear showing of unreasonableness, abuse of discretion or a violation of the procurement statutes and regulations. *Applied Systems Corporation*, B–181696, October 8, 1974, 74–2 CPD 195; *Shapell Government Housing, Inc.*, B–183830, March 9, 1976, 55 Comp. Gen. 839, 76–1 CPD 161.

From our review of the record, including the evaluation panel's scoring sheets and the BSSR and GOI proposals, there has been no showing that USCCR's determination that BSSR's proposal was deserving of award lacked a reasonable basis. In this regard, we note that two of the three panel members, who read and evaluated the BSSR technical proposal, scored BSSR's proposal higher than any other proposal they had read. In addition, after the on-site discussions, the

majority of the panelists believed BSSR's proposal was the best received.

BSSR only briefly responded to the aforementioned RFP informational requirement that technical proposals include details regarding the amount of time the offeror was proposing to commit each of its listed team members to this contract. BSSR's response was:

> Personnel are available for time specified during contract period.

However, BSSR listed in its technical proposal the contract team members and the tasks they would perform. Also, the BSSR technical proposal included a graphic schedule of the contract tasks indicating by weeks the timeframe during which the tasks would be performed. Also, BSSR's cost proposal, which was evaluated prior to the award selection, indicated by number of estimated hours the time proposed to be devoted to the various contract tasks. Moreover, the on-site discussions with BSSR satisfied USCCR that there was a sufficient commitment of the designated team members to fulfill USCCR's requirements. In view of the foregoing, we do not believe BSSR's brief response to the RFP informational requirement negates the reasonableness of USCCR's award selection.

With regard to the formula used to evaluate cost, we agree with the protester that its application in this case had the effect of giving cost much less weight than indicated in the RFP. The majority of the initially acceptable offerors received the maximum 20 possible points. Moreover, there was no meaningful difference between the scores assigned the offerors, even though the proposed costs ranged from $10,810 (20 points) to $23,216 (18 points).

We have consistently recognized that offerors should be advised of the evaluation factors to be used in evaluating the proposals and the relative weight of those factors, since "[c]ompetition is not served if offerors are not given any idea of the relative value of technical excellence and price." *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74–2 CPD 386; *PRC Computer Center, Inc.*, 55 Comp. Gen. 60 (1975), 75–2 CPD 35, and cases cited therein. Moreover, once offerors are informed of the criteria against which their proposals are to be evaluated, it is incumbent on the procuring agency to adhere to that criteria or inform all offerors of the changes made in the evaluation scheme. *EPSCO, Incorporated*, B–183816, November 21, 1975, 75–2 CPD 338; *Willamette-Western Corporation*, 54 Comp. Gen. 375 (1974), 74–2 CPD 259.

By assigning essentially equal scores to all cost proposals, regardless of proposed costs, cost was given negligible weight as an evaluation factor. This was inconsistent with the RFP statement that the cost proposal would be given 20 percent of the total evaluation weight. Consequently, the cost evaluation was improperly conducted since it

gave cost significantly less weight than indicated in the RFP. See *Design Concepts, Inc.*, B–184658, January 23, 1976, 76–1 CPD 39. *Cf.* 50 Comp. Gen. 16 (1970); 53 *id.* 253 (1973).

However, GOI was only found to be within a competitive range after the second reading and consequently eligible for further consideration because of a clerical error. USCCR states that the 62 score tallied for GOI's technical proposal was actually intended for Gill, and GOI should have received a 54.8 for its technical proposal. We have completely reviewed the individual evaluators' score sheets and have determined the technical score which should have been assigned to GOI under the USCCR evaluation scheme after the second reading was 54.8 for a total score of 74.8 points. This was last among the seven proposals which were initially found acceptable and is outside the range of offerors with whom it was decided that discussions should be held.

Moreover, GOI was given the maximum 20 points for cost, even though its proposed costs were not considered realistic. Our Office has consistently recognized that a low cost estimate proposed by an offeror should not be accepted at face value, and that under Federal Procurement Regulations (FPR) § 1–3.807–2 (1964 ed. amend. 103), an agency should make an independent cost projection of the estimated costs reflected in the cost proposal. See *PRC Computer Center, Inc.*, 55 Comp. Gen. *supra*, at 78, and cases cited therein. Although USCCR had a cost estimate of $25,000 to $30,000, which it apparently used in determining that the cost proposals of GOI and Gill were not realistic, the agency made no attempt to independently project GOI's or Gill's estimated costs. While we recognize the scope of a cost analysis "is dependent on the facts surrounding the procurement and pricing situation" and on "the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis," see FPR § 1–3.807–2 and *PRC Computer Center, Inc., supra*, it is not a sufficient cost analysis merely to ignore unrealistic estimated cost proposals by assigning those proposals the maximum possible points for cost. It is probable that GOI's proposed costs, if they had been independently projected, would have been evaluated to be significantly higher. Indeed, after the protest was filed, USCCR made an independent projection of GOI's cost proposal which indicated that its costs, as evaluated, were almost equal to BSSR's estimated costs.

Finally, and of particular significance, the RFP clearly indicated that technical excellence was far more important (four times) than low cost. Therefore, although the cost evaluation was improper, we do not believe it was so prejudicial to GOI as to justify disturbing the award.

During our review, we found that although discussions were conducted with the offerors determined to be within a competitive range, those offerors were not given an opportunity to revise their proposals. In order for discussions to be regarded as meaningful as contemplated by FPR § 1–3.805–1 (1964 ed. amend. 153), offerors should be advised of the reasons their proposals have been judged deficient, so that they may have the opportunity to satisfy the Government's requirements, and thereby the Government may obtain the full benefits of competition. See *Operations Research, Incorporated*, 53 Comp. Gen. 593 (1974), 74–1 CPD 70, as modified in 53 Comp. Gen. 860, 74–1 CPD 252, and cases cited therein; *Gulton Industries, Incorporated*, B–180734, May 31, 1974, 74–1 CPD 293. Although USCCR states that it indicated to Gill and GOI during the on-site discussions that their cost proposals were not considered realistic, neither offeror was given an opportunity to revise its proposal to respond to this criticism. In this regard, FPR § 1–3.805–1(b) (1964 ed. amend. 153) specifically requires that offerors be given such an opportunity to submit a "best and final offer" after discussions are conducted. See *Gulton Industries, Incorporated, supra.* However, since GOI still insists that its cost proposal was realistic, GOI was only included in the competitive range because of a clerical error, and BSSR's proposal was adjudged to be clearly superior, we do not believe the award should be disturbed because of USCCR's failure to call for "best and final offers." See *Operations Research, Incorporated, supra.*

In any case, USCCR reports that after BSSR substantially completed the contract in a satisfactory manner, the contract was terminated for the convenience of the Government. USCCR is now performing the remainder of the contract work in-house.

We are, however, bringing the procurement deficiencies we have found to the attention of the Chairman of USCCR.

[B–114827]

Insurance—Government—Self-Insurer—Exception—Federal Home Loan Bank Board Building

Federal Home Loan Bank Board may purchase insurance covering risk of loss to new building. Government policy of insuring its own risks of loss, based on wide distribution of type and geographical location of its risks, does not apply here since total loss may be ultimately sustained by Federal Home Loan Bank System due to nature of funding for building.

In the matter of Federal Home Loan Bank Board building insurance, July 28, 1976:

The Federal Home Loan Bank Board (the Board) requests our decision as to whether it has authority to purchase insurance cover-

ing risk of loss on its new office building. Although the property in question is to be held in the name of the United States, the Board indicates that it could find no authority for concluding that general funds of the Treasury would be available to replace or repair the structure for the benefit of the Board in the event of loss. The Board recognizes that it is established Government policy that, unless expressly authorized by statute, an agency may not expend funds for insurance to cover loss or damage to Government property. It suggests, however, that this rule is inapplicable because any loss or damage would be payable from Federal Home Loan Bank System funds and not from appropriated funds.

Pursuant to section 18(c) of the Federal Home Loan Bank Act, as amended, 12 U.S. Code § 1438(c)(1970), the Board was authorized to acquire a site in the District of Columbia and to construct thereon suitable buildings and facilities for the Board and the agencies under its administration or supervision. The subject building is expected to be completed early in 1977.

Although the property is to be held in the name of the United States (see 12 U.S.C. § 1438(c)(1)(A)), we have been advised that funds for its construction are being obtained from the Federal Home Loan Banks under the Board's administration or supervision through assessments made by the Board pursuant to 12 U.S.C. § 1438(b). The proceeds from such assessments, as well as other receipts of the Board, are deposited in a special account in the United States Treasury, and are made available to the Board pursuant to annual appropriation acts. See 12 U.S.C. §§ 1439, 1439a (1970); 15 U.S.C. § 712 (1970); *see, e.g.*, the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1976, Public Law 94-116, 89 Stat. 581, 598-99 (October 17, 1975).

It appears, therefore, that while sums are appropriated to the Federal Home Loan Bank Board every fiscal year for its administrative expenses, the original source of these funds is the Federal Home Loan Banks themselves, and the costs of construction of the building are actually being borne by the Banks. If a deficiency occurs in the amount available for the Board's expenses, it is authorized under 12 U.S.C. § 1438(b), *supra*, to make an immediate additional assessment. Similarly, it would appear that if deficiencies occurred due to loss or damage to the property, additional assessments could also be made against the Banks. Therefore, any loss occurring to the building could be ultimately borne by the Banks under the administration or supervision of the Federal Home Loan Bank Board.

It has been a long-standing policy of the Government to self-insure its own risks of loss. As far back as February 9, 1892, the first Comptroller of the Treasury so advised the Department of State. This pol-

icy has been restated and followed in numerous decisions ever since that time. *See, e.g.*, 13 Comp. Dec. 779 (1907); 21 Comp. Gen. 928, 929 (1942). It is important to note, however, that the Government's practice of self-insurance is one of policy, not law. This policy arose because it was felt that the magnitude of the Government's resources and the wide dispersion of the types and geographical location of the risks made a self-insurance policy generally more advantageous to the Government, in that it would save the items of cost and profit which private insurers have to include in their premiums. See B-175086, May 16, 1972; 19 Comp. Gen. 211, 214 (1939); 21 *id.* 928, 929 (1942). Nevertheless, when the economy sought to be obtained under this rule would be defeated, when sound business practice indicates that a saving can be effected, or when services or benefits not otherwise available can be obtained by purchasing insurance, exceptions to the general rule have been made. *See* B–151876, April 24, 1964; B–35379, July 17, 1943; B–59941, October 8, 1946. While not precisely on point, these cases indicate that the self-insurance policy need not be applied where the *reasons* for the policy would not be carried out by applying it in the particular circumstances involved.

Moreover, the policy of self-insurance has not been strictly applied against Government corporations. *See, e.g.*, 21 Comp. Gen. 928, 929 (1942) citing to 23 Comp. Dec. 297, 298 (1916). While the Board is a supervisory Federal agency, rather than a Government corporation (see 12 U.S.C. § 1437(b) (1970)), it is treated as a corporation for purposes of the activities here involved. 12 U.S.C. § 1438(c)(6) (1970). Moreover, as noted previously, while its funds are made available by appropriation acts, they derive originally from assessments against the Banks. Thus since any loss on the building would be ultimately sustained by the Federal Home Loan Bank System, the basic rationale for the self-insurance policy, of lessening the burden of individual losses by a wide distribution of risks, would not apply here.

It is our view that under all the foregoing circumstances, an exception to the general rule against the purchase of insurance by Government agencies should be made, so that the Federal Home Loan Bank Board can, if it determines it is in the best interest of the Government to do so, purchase insurance to cover loss or damage to its new building.

[B–183468]

Mileage—Travel by Privately Owned Automobile—Between Residence and Terminal—Headquarters Residence

Agency may issue regulations limiting the mileage allowable to an employee traveling to and from his residence where his residence is outside the limits of his headquarters to the distance between the origin or destination of his trip

and a point not exceeding 25 miles from the corporate limits of his official duty station measured in the direction of his residence (25-mile point). However, where employee maintains residence at headquarters from which he commutes daily to work and another residence 103 miles away which he visits on weekends, when traveling from airport after official trip, he is entitled to mileage from airport to residence at headquarters.

Subsistence—Per Diem—Area of Entitlement—Mileage From Permanent Duty Station

Employee, who traveled to temporary duty station (TDS) which was within commuting distance from his office, was not entitled to per diem but may be allowed mileage between the TDS and his official station.

Mileage—Travel by Privately Owned Automobile—Between Official Station and Temporary Duty Points

Employee who traveled from his residence to his office, and then on the following day traveled to a temporary duty station (TDS), may be allowed mileage from his office to the TDS.

In the matter of Gilbert C. Morgan—claim for mileage and per diem, July 28, 1976:

This decision is in response to a request dated March 3, 1975, by June S. Long, certifying officer of the Federal Home Loan Bank Board (FHLBB) for an advance decision concerning several claims for travel expenses by Gilbert C. Morgan, an FHLBB employee.

The information furnished shows that Mr. Morgan, whose duty station is in Oklahoma City, Oklahoma, elected to retain his residence in Ponca City, Oklahoma, after his transfer to Oklahoma City. Ponca City is approximately 103 miles north of Oklahoma City, and it has been informally ascertained that Mr. Morgan claims that he maintained a residence in Oklahoma City during the week from which he commuted to work and that he visited Ponca City on weekends. Mr. Morgan is a Savings and Loan Examiner whose duty is to make periodic examinations of all federally insured savings and loan associations and all members of the Federal Home Loan Bank System. The Savings and Loan Examiners are in a travel status up to 80 percent of the time.

The voucher submitted by Mr. Morgan indicates that on Friday, September 27, 1974, he arrived at the Oklahoma City Airport en route to his residence from a temporary duty trip. He traveled by privately owned automobile from the airport to his residence in Ponca City, 103 miles north of his official duty station, Oklahoma City. He claims 62 miles of reimbursable mileage for this trip.

On Monday, September 30, 1974, Mr. Morgan departed from his residence and arrived in Oklahoma City for office duty at 9 a.m. At 3:15 p.m. he departed from Oklahoma City and arrived at Norman, Oklahoma, to conduct interviews. On October 1 and 2, 1974, he apparently stayed overnight in Norman. On October 3, 1974, he departed Norman and arrived in Oklahoma City at 8 a.m. for office duty. On

Friday, October 4, 1974, he departed Oklahoma City at 3:30 p.m. and arrived at Ponca City at 6 p.m. The employee claims 49 miles each for the trips between his office and residence on Monday, September 30, 1974, in reporting to work from his home, and Friday, October 4, 1974, in returning home from work. He also claims per diem for the period of his temporary duty in Norman for the period September 30 to October 2, 1974.

On Tuesday, October 15, 1974, the employee departed his residence and reported for work at 9 a.m. at his headquarters in Oklahoma City. That following afternoon, October 16, 1974, at 3:30 p.m., he departed his headquarters for temporary duty at Lawton, Oklahoma. On Friday, October 18, 1974, he departed Lawton and returned to Ponca City. He claims 49 miles for travel from that residence to his office on October 15, 1974, and 96 miles from Lawton to that residence on October 18, 1974.

FHLBB Travel Policy Memorandum A–312, at page 3, effective February 1, 1970, defines "official station" as the employee's "residence if within the designated official station or a point not exceeding 25 miles from the corporate limit of the designated official station nearest [the employee's] * * * residence." As a result of this definition, the agency computes the mileage entitlement of an employee who does not maintain a residence within the designated official duty station by measuring the distance between the destination or origin of the trip and a point 25 miles from the corporate limits of the city in the direction of the employee's residence (hereinafter "25-mile point").

Decisions of this Office have held that:

> * * * the matter of authorizing mileage to an employee for the use of his automobile in connection with official travel is discretionary with the agency in which he is employed. 52 Comp. Gen. 446, 451 (1973); B–175608, June 19, 1972.

Thus the agency has authority to restrict mileage payments in consideration of the interests of both the employee and the Government. B–175608, December 28, 1973. The FHLBB restriction of mileage while traveling on official business to or from an employee's residence to 25 miles from the designated official duty station is within the agency's discretion to limit mileage payment. It allows the employee some mileage for a trip to or from his residence while eliminating any extra expense to the Government caused by the employee's decision to live further than normal commuting distance from his designated official station. Accordingly, the "25-mile point" rule adopted by the FHLBB may be applied to the facts presented to us by the certifying officer.

The certifying officer has submitted several questions concerning the employee's travel allowances and they will be answered in the order presented.

1. Upon return to Oklahoma City airport, wouldn't the mileage allowable be that actually driven from the airport to the twenty-five-mile point from the near-

est corporate limit of official duty station to residence, or a distance of approximately 48 miles (10 miles from the airport to the center of the city, 13 miles from the center of city to the outer corporate limits and from the corporate limits to the twenty-five-mile point allowed if residing outside municipality of official duty station.)?

The first question posed to us by the certifying officer is what mileage was allowable when the employee traveled returning from temporary duty from the airport to his residence on Friday, September 27, 1974. An employee's residence is that place from which he ordinarily commutes to work each day. Since the record shows that the employee maintained a residence in Oklahoma City, i.e., he ordinarily traveled to his official duty station from that location, he would be entitled to reimbursement for mileage from the airport to his residence in Oklahoma City. Any further travel to Ponca City would be personal.

The certifying officer's second question asks what mileage would be allowable if the employee were assigned to a temporary duty station and the most direct and usually traveled route from his official duty station to the temporary duty station would take him through his place of residence. The authority of this Office to issue advance decisions to certifying officers pursuant to 31 U.S. Code § 82d is limited to questions involved in specific vouchers presented to us for certification. There is no authority under that section for a certifying officer to present or to obtain a decision on a general question not involved in the particular voucher before the certifying officer for certification. 26 Comp. Gen. 797, 799 (1947); 24 *id.* 546, 548 (1945). Consequently, since the second question presented to us is not involved in the voucher submitted to us, this Office cannot undertake to render a decision with respect to the matter on the basis of the request as presented.

3. Based on Agency regulations defining commuting trips and per diem, and since the traveler does not give the address of his temporary residence, if any, in Oklahoma City: (a) Would the traveler be entitled to mileage from office in Oklahoma City to Norman, Oklahoma, and return to the temporary residence in Oklahoma City, plus the allowable per diem for the period September 30–October 2, or, (b) Would he be entitled to allowable per diem and mileage from Norman to the twenty-five-mile point on his return on September 30, and for round-trip costs and allowable per diem for such travel on October 1 and 2?

The certifying officer's third question asks what per diem the employee was entitled to during the period from September 30 through October 2, 1974, when he was at a temporary duty post in Norman. The general statutory authority for a per diem allowance is 5 U.S.C. § 5702 (1970) which provides in pertinent part that "an employee, while traveling on official business away from his designated post of duty, is entitled to a per diem allowance prescribed by the agency concerned." The Federal Travel Regulations (FPMR 101–7) para. 1–7.3a (May 1973), which implement the statute, state in pertinent part that "It is the responsibility of each department and agency to authorize only such per diem allowances as are justified by the circumstances affecting the travel." Thus, there is no requirement that

per diem in lieu of subsistence *must* be administratively authorized upon assignment to a temporary duty station. *See* B–182728, February 18, 1975. Our Office has recognized that agencies generally have the authority and the responsibility to restrict payment of per diem upon a reasonable basis, such as the distance to the temporary duty station.

The FHLBB has expressed its policy towards per diem allowances in FHLBB Policy Memorandum A–312. That memorandum, at page 3, defines the "normal commuting distance" as:

> a distance not in excess of 40 miles from the nearest corporate limit of the designated official station or residence, whichever is nearest the temporary duty station.

Full per diem is not allowed for travel within the 25 to 40 mile commuting area of the official duty station except when approved by the Chief Examiner.

In the present case the distance from the "designated official station," Oklahoma City, to the temporary duty station, Norman, was less than 40 miles (21 miles). Consequently, the employee was within "normal commuting distance" of the temporary duty station.

Furthermore, the agency's discretion in allowing per diem is limited by FTR para. 1–7.6d(1) which provides that:

> * * * per diem shall not be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6 a.m. or terminates after 8 p.m. * * *

In the present case, there is no indication that the employee's travel either took more than 10 hours or that the employee, had he commuted as he was supposed to, would have been required to return to his office after 8 p.m. Thus, it does not appear that per diem could have been allowed in this case even if the FHLBB Travel Policy Memorandum did not prohibit it.

The certifying officer's third question also asks what mileage the employee would be entitled to for the period from Monday, September 30, through Wednesday, October 2, 1974.

Generally, an employee must bear the expense of travel between his residence and his official duty station. 36 Comp. Gen. 450, 453 (1956); B–171969.42, January 9, 1976. Mileage may be allowed in certain instances of travel between an employee's residence and his office. Subparagraph 1–4.2c(2) of the FTR provides that:

> (2) *Round trip when in lieu of taxicab between residence and office on day of travel.* In lieu of the use of taxicab under 1–2.3d, payment on a mileage basis at the rate of 15 cents per mile and other allowable costs as set forth in 1–4.1c shall be allowed for round-trip mileage of a privately owned automobile used by an employee going from his residence to his place of business or returning from place of business to residence on a day travel is performed. However, the amount of reimbursement for the round trip shall not exceed the taxicab fare, including tip, allowable under 1–2.3d for a one-way trip between the points involved.

Subparagraph 1–2.3d of the FTR pertaining to local transportation provides that:

d. *Between residence and office on day travel is performed.* Reimbursement may be authorized or approved for the usual taxicab fares, plus tip, from the employee's home to his office on the day he departs from his office on an official trip requiring at least 1 night's lodging and from his office to his home on the day he returns to his office from the trip, in addition to taxi fares for travel between office and carrier terminal.

In the present case, the employee traveled, on September 30, 1974, from Ponca City to his official duty station and worked in his office until 3:15 p.m. Then, on the same day, he traveled to a temporary duty station at Norman. However, since the trip to the temporary duty station was a "commuting trip," as explained above, it did not require at least one night's lodging and, thus, does not qualify for the exception contained in para. 1–2.3d of the FTR to the general rule that an employee must bear the expense of travel between his residence and his office. Thus, the employee is not entitled to mileage for the portion of the trip from his residence to his office on September 30, 1974.

Even though the leg of the trip from the employee's office to his temporary duty station is defined by the FHLBB Travel Policy Memorandum A–312, at page 2, as a "commuting trip," nothing contained in that memorandum implies that mileage shall not be allowed for such a trip. An agency may authorize or approve mileage for official travel close to or even within the limits of the official duty station, except for travel from the employee's residence to his official headquarters. *See* 46 Comp. Gen. 718 (1967); 36 Comp. Gen. 795 (1957); B–175608, June 19, 1972. Accordingly, the employee may be reimbursed mileage for the trip from his office to his temporary duty station at Norman on September 30, 1974, and return to his office on October 3, 1974.

4. If the traveler should have commuted on October 1–2, would any mileage be allowed on October 3 and 4, since he was performing duties at the office in Oklahoma City those days?

See answer to question number 3 for return to office on October 3. However, as to October 4, which apparently involved no official travel, no mileage is allowable.

5. On October 15, he is returning to Oklahoma City for regular duty, rather than reporting to Lawton, Oklahoma. Would there be any mileage claim allowed based on the same question asked in number 4?

The voucher shows he traveled from Ponca City to his office on October 15, 1974, and, on the afternoon of October 16, 1974, he commenced travel at 3:30 p.m. to a temporary duty station at Lawton, Oklahoma, arriving at 5:45 p.m. Since an employee is not entitled to reimbursement for travel costs from his residence to his headquarters he is not entitled to reimbursement of mileage on October 15. *See* 46 Comp. Gen. 718 (1967). However, for the travel to Lawton on October 16, he is entitled to mileage.

6. On October 18, would the mileage allowed be the miles driven from Lawton, Oklahoma, to the twenty-five-mile point?

The certifying officer's sixth question asks what mileage would be allowable when the employee returned to Ponca City from his temporary duty station in Lawton on October 18, 1974. The allowable mileage would be the distance from Lawton to the employee's headquarters where he maintained a residence.

Action on the voucher should be taken in accordance with the foregoing.

[B-184300]

Community Services Administration—Office of Economic Opportunity Grant Programs—Grantee Tax Indebtedness—Delinquencies

Section 115 of Economic Opportunity Amendments of 1969, 42 U.S.C. 2705, requires that upon notification from Treasury Secretary of grantee tax delinquency, Director, Community Services Administration, must suspend grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" in amount sufficient to satisfy delinquency. Statute does not distinguish between delinquencies incurred before and those incurred after awarding of grant but legislative history indicates all outstanding delinquencies were intended to be included. Hence, all grant payments, up to amount of total delinquency, must be suspended until satisfactory provision for payment of delinquency is made.

Set-Off—Federal Aid Funds—Tax Debts

Set-off of grant payments suspended or withheld against tax delinquency of grantee is not appropriate since grant payments are not reimbursements for expenses already incurred by grantee and therefore do not constitute debts of the United States.

Taxes—Federal—Indebtedness—Grantees of Grant Programs

Since statute authorizing grant to college for equal opportunity demonstration program contemplates that portion of grant will be used to pay employment and other taxes required by Internal Revenue Service Code, tax delinquency may be paid by granting agency to IRS on behalf of grantee from suspended or withheld grant funds to extent of delinquencies arising from current or prior Federal grants. However, delinquenciees not attributable to current or prior Federal grants may not be paid from suspended grant funds.

In the matter of Community Services Administration—grantee tax indebtedness, July 28, 1976:

The Commissioner of Internal Revenue requested our opinion as to whether the Internal Revenue Service (IRS) has a right to setoff certain grant proceeds being held by the Community Services Administration (CSA), successor agency to the Office of Economic Opportunity (OEO), against the grantee's tax indebtedness.

On June 8, 1973, the OEO awarded $453,300 to Kittrell College in Henderson, North Carolina, for an equal opportunity demonstration project (OEO Grant No. 40622). By letters dated June 10, 1974, and November 1, 1974, the IRS informed OEO that it had been unable to negotiate an acceptable liquidation of $93,039.13 in delinquent employment taxes which the prior administration of Kittrell College allowed to arise for the first and second quarters of 1972 and the third quarter of 1973. The IRS asked that an amount of the grant proceeds suffi-

cient to satisfy Kittrell's outstanding tax liability be withheld and paid to the IRS. In November, 1974, OEO suspended further payments under the grant, retaining $151,108 in undisbursed funds. However, no setoff has been made against either the suspended funds or other grant funds not yet disbursed to Kittrell. We have been informally advised that at least some grant payments have since been resumed.

We have received the views of CSA in this matter in a letter from its General Counsel. CSA takes the position that the proceeds of awarded grants do not represent claims or demands upon the United States, and are not otherwise debts owed to the grantees which would be appropriate for setoff. To require setoff in such circumstances would have a deleterious effect on the agency's ability to carry out the purposes of their statutory mission—to assist the poor. CSA also maintains that section 115 of the Economic Opportunity Amendments of 1969, 42 U.S. Code § 2705 (1970), which requires suspension of economic opportunity grants upon notification by the Secretary of the Treasury or his delegate that the grantee is delinquent in his tax payments, preempts general setoff authority and in any case is applicable only to delinquencies incurred subsequent to award of the grant—in the case of Kittrell College, those incurred for the third quarter of 1973.

Section 115 of the Economic Opportunity Amendments of 1969, 42 U.S.C. § 2705 (1970), provides that:

> Upon notice from the Secretary of the Treasury or his delegate that any person otherwise entitled to receive a payment made pursuant to a grant, contract, agreement, loan or other assistance made or entered into under this chapter is delinquent in paying or depositing (1) the taxes imposed on such person under chapters 21 and 23 of the Internal Revenue Code of 1954, Title 26, or (2) the taxes deducted and withheld by such person under chapters 21 and 24 of such Code, *the Director of the Office of Economic Opportunity shall suspend such portion of such payment due to such person, which, if possible, is sufficient to satisfy such delinquency, and shall not make or enter into any new grant,* contract, agreement, loan or other assistance under this chapter with such person until the Secretary of the Treasury or his delegate has notified him that such person is no longer delinquent in paying or depositing such tax or the Director of the Office of Economic Opportunity determines that adequate provision has been made for such payment. In order to effectuate the purpose of this section on a reasonable basis the Secretary of the Treasury and the Director of the Office of Economic Opportunity shall consult on a quarterly basis. [Italic supplied.]

The regulations implementing section 115 provide, in part, that:

> (a) Any grantee receiving financial assistance under the Economic Opportunity Act of 1964 will comply with the applicable sections of the Federal tax code by withholding taxes, filing the appropriate tax returns and remitting taxes to the designated Internal Revenue Service District Office.
>
> (b) Failure to comply with IRS requirements for reporting and remitting the withheld taxes will result in IRS notifying OEO to suspend further payments due the grantee and to refuse to refund, make supplements, or provide any other assistance, as prescribed in section 115 of the 1969 amendments to the Economic Opportunity Act of 1964, until adequate provisions have been made to satisfy tax obligations. 45 C.F.R. § 1068.6–3 (1974).

OEO Grant No. 40622 was accepted by Kittrell College on a Statement of OEO Grant (OEO Instruction 6710–1) on June 22, 1973. The General Conditions attached to the Statement provide that:

> Program funds expended under authority of this funding action are subject to the provisions of the Economic Opportunity Act as amended, the general conditions listed below, any attached special grant conditions, and OEO directives.
>
> * * * * * * *
>
> 14. SUSPENSION AND TERMINATION. The Director of OEO may in accordance with published regulations, suspend or terminate this grant in whole or in part for cause, which shall include: (1) failure or unwillingness of the grantee or its delegate agencies to comply with the approved program including attached conditions, with applicable statutes and Executive Order, or with such OEO directives as may become generally applicable at any time * * *.

We think it is clear from the words of the statute that upon receipt of the required statutory notice from the Secretary of the Treasury, the Director of CSA *must* suspend payment of grant funds until the tax deficiency has been taken care of.

In the instant situation CSA withheld only those grant funds from Kittrell which arose after the date of grant award and paid out the remaining grant funds. Hence, we are initially called on to determine whether grant payments must be suspended upon notification of tax delinquencies incurred prior to award of the grant.

Neither the language nor the legislative history of the statute is entirely compelling on this point. The Act requires suspension of grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" and does not distinguish between tax delinquencies incurred before and those incurred after the awarding of the grant. However, it must be noted that while the Senate bill originally required the recipient of a grant to set aside an amount sufficient to satisfy "expected liability" under the various employment tax statutes, the conference committee eliminated this requirement in favor of the compulsory suspension of payments in an amount sufficient to satisfy "such delinquency." The conference report describes this delinquency as "*any* delinquency which is outstanding." [Italic supplied.] This suggests that the suspension was not intended to apply only to tax liabilities directly related to the grant but to any outstanding tax liability, regardless of when incurred.

Remaining for consideration is whether the portion of the grant proceeds held by CSA are subject to setoff as proposed by the Internal Revenue Service or may otherwise be paid over to IRS in satisfaction of the tax delinquency. The statute provides that the Director should suspend such portion of any payment due to a grantee which will, if possible, satisfy the grantee's tax delinquency but it does not specifically provide for the disposition of the suspended funds.

With respect to setoff, it has long been recognized that the Federal Government has the right "which belongs to every creditor to apply the unappropriated moneys of his debtor, in his hands, in the extinguishment of the debts due to him." *Gratiot* v. *United States*, 40 U.S.

(15 Pet.) 336, 370 (1841); accord, *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Seaboard Surety Co.* v. *United States*, 107 Ct. Cl. 34, 44, *cert. denied* 330 U.S. 826 (1946); 1 Comp. Gen. 605, 606 (1922).

Thus, no specific statutory authority is necessary to authorize the Government to exercise its common law right of setoff. If the Federal payments in question were in the nature of reimbursements to Kittrell College for expenses already incurred in carrying out the program, we would agree with IRS that the funds withheld could be offset against the Government debt. However, we must agree with CSA that the grant payments in question are not reimbursements and do not constitute a Government debt in order to qualify for offset.

Nevertheless, it is clear that a portion of the amounts awarded under these grants is intended, by both the granting agency and the grantee, to be used to pay employment, and any other, taxes due from salary payments made from the grants. The use of grant funds to pay this tax liability is therefore authorized as one of the grant's purposes.

It is our view that by authorizing the suspension of current grant payments, even though the delinquency may have arisen from previous grants and by precluding the awarding of new grants (or other forms of assistance) to grantees who are delinquent in their taxes, it was intended that the suspended payments be used to satisfy, to the extent possible, such delinquencies. While this approach may result in a decrease in the service performed under the current grant, presumably the grantee provided additional services (by expending funds which should have gone to taxes for other grant purposes) under the previous grants. Thus, on balance the public will have received the amount of services for which the grants were made. Accordingly, we believe that the statute expects CSA to satisfy, to the extent of the suspended grant payments, the tax delinquency. In this circumstance, CSA would be making direct payment on the grantee's behalf to one of its creditors for a debt incurred in carrying out past and present CSA grant programs.

Suspended payments are not available, however, to satisfy tax delinquencies which were not incurred in carrying out CSA grants since this would not be one of the grant's purposes. Nonetheless, until such other delinquencies have been satisfied in accordance with the statute, CSA may not make any new grants, or provide any other new kind of assistance, to the grantee.

[B–183110]

Awards—Honor—Travel Expenses To Attend Award Ceremonies—Non-Federally Sponsored Awards

The Secretaries concerned may issue regulations authorizing the payment of travel and transportation expenses of civilian employees of the Department of

Defense and military members who travel on temporary duty to receive non-Federally sponsored honor awards provided such awards are determined in each case to be reasonably related to the duties of the employee or member and the functions and activities of the agency to which the recipient is attached. Travel to receive awards in which such determination cannot clearly be made is not travel on public (official) business and no authority exists for such travel at Government expense.

Travel Expenses—Conventions, Conferences, etc.—Incident to Acceptance of Non-Federally Sponsored Honor Awards

If travel of Department of Defense civilian employees and military members to receive non-Federally sponsored honor awards includes attending meetings or conventions of organizations covered by 37 U.S.C. 412 (1970), 5 U.S.C. 5946 and 4110 (1970), proposed regulations which would authorize such travel at Government expense must be in accord with those statutes.

Transportation—Dependents—Travel To Attend Award Ceremonies for Honor Award Recipients

There is no authority for the Secretaries concerned to issue regulations authorizing the payment of travel and transportation expenses of dependents of civilian employees or military members to accompany such employees or members who are receiving honor awards, nor is there authority for the payment of travel and transportation expenses of such dependents to receive awards themselves.

In the matter of travel expenses—honor awards, July 29, 1976:

This action is in response to a letter from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting an advance decision concerning the propriety of amending the Joint Travel Regulations to authorize travel of military members and civilian employees of the Department of Defense in a temporary duty status at Government expense and to pay the travel expenses of their dependents or next of kin to certain awards ceremonies sponsored by non-Federal organizations. The request was assigned control No. 74–48 by the Per Diem, Travel and Transportation Allowance Committee, and forwarded to this Office by letter dated January 11, 1975.

The submission indicates that the Secretary of the Army considers such travel necessary in the furtherance of the Department of Defense awards program since the publicized acceptance of competitive non-Federal awards of national and international significance is an incentive to other military members and civilian employees of the Department of the Army. The submission states that while the Joint Travel Regulations (JTR), Volumes 1 and 2, do not contain specific authority for the travel of military members and civilian employees in temporary duty status (TDY) to a location for the acceptance of an award from a non-Federal organization, neither do they specifically prohibit such travel. The question is then raised as to whether the Secretary of the service concerned, or his designee, may authorize the travel of a civilian employee or a military member in a TDY status and their respective dependents or next of kin on an invitational basis at Government expense to a location of an awards presentation ceremony for the purpose of receiving an award of national and/or in-

ternational significance when their attendance is considered to be in the best interest of the Government. Enclosed with the submission was a "partial listing" of 29 such awards.

There is no specific statutory authority of which we are aware for the travel at Government expense of civilian employees to receive awards from non-Federal organizations. While 5 U.S. Code 4503 (1970) authorizes the head of an agency to incur necessary expenses for the honorary recognition of employees under certain circumstances, such authority does not relate to awards by other than Federal agencies. *See* 40 Comp. Gen. 706 (1961) and cf. 32 Comp. Gen. 134 (1952). Similarly, there is no specific statutory authority for the travel of members of the Armed Forces at Government expense to receive awards from non-Federal organizations. Therefore, if such authority exists, it must be found in the general statutory authority for the travel of employees and members at Government expense on temporary duty.

The authority for temporary duty travel of employees is found in subchapter I of Chapter 57, Title 5, U.S. Code (1970). It has long been held that in order for an employee to be entitled to travel expenses under those provisions (and their predecessor statutes), the employee must be traveling on "official business." *See* 43 Comp. Gen. 171, 173 (1963). In accordance with that principle, 2 JTR, paragraph C3000, specifically provides that temporary duty assignments for civilian employees of the Department of Defense will be authorized or approved only when necessary in connection with "official activities of the Department of Defense or Government business" and when such assignments are on "essential official business."

Similarly, it is well settled that temporary duty travel of military members authorized at Government expense pursuant to 37 U.S.C. 404 (1970) and the implementing provisions of 1 JTR, paragraphs M3050 and M6454 must be on "public business." Public business as so used (which in this connection appears to be nearly synonymous with "official business") relates to the activities or functions of the service to which the traveler is attached, and the travel and temporary duty contemplated is that which reasonably may be considered as having been performed in the accomplishment of the purpose and requirements of such activities and functions. Expenses incurred during periods of travel under orders which do not involve public business are not payable by the Government. *See* 38 Comp. Gen. 873, 874 (1959); 40 *id.* 156 (1960); 49 *id.* 663 (1970), and cases cited therein.

Therefore, in order for the travel of civilian employees or military members to receive non-Federally sponsored awards to be authorized at Government expense, a determination would have to be made based on the facts of each case, that the travel was performed on public (official) business. In making such a determination careful consideration

must be given to the closeness of the relation of the particular award to the official duties of the recipient in connection with the activities or functions of the service to which the recipient is attached.

Awards primarily for such general accomplishment as good citizenship or overall achievement in a field not closely related to the recipient's official duties would appear to be personal to the recipient, not related to the functions or activities of the service, and thus travel to receive such awards would not be on public (official) business. For example, we have held that public business was not involved in such activities as (1) the travel of a Navy officer to appear before a committee of selection as a candidate for a Rhodes scholarship (9 Comp. Gen. 490 (1930)); (2) the travel of an Army Medical Corps officer to take an examination given by the American Board of Pathology (33 Comp. Gen. 196 (1953)); and (3) the cost of a civilian employee's attendance at a civilian defense observer class dinner at Edgewood Arsenal (B–23978, February 27, 1942). Also, generally compare 55 Comp. Gen. 346 (1975) and 51 *id.* 701 (1972).

The information provided in the partial list of awards included with the submission is not sufficient for us to determine whether travel to receive such awards could be authorized at Government expense, particularly since we do not know who the recipients are, their official duties, and the agencies to which they are attached. Also, no information is provided as to where and under what circumstances each award would be presented and, we presume, such circumstances may vary between awards. However, it should be noted that if the receipt of an award involves travel to attend a meeting or convention of the organization presenting the award, the provisions of 37 U.S.C. 412 (1970), 5 U.S.C. 5946 and 4110 (1970) must also be considered.

Concerning travel of military members to attend certain meetings, 37 U.S.C. 412 specifically provides:

> Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization.

Therefore, should travel by a military member to receive an award entail attendance at a meeting of such an organization, it must receive the approval of the Secretary concerned or his designee. *Cf.* 50 Comp. Gen. 527, 530 (1971).

Concerning the attendance of civilian employees at certain meetings, 5 U.S.C. 5946 provides in pertinent part:

> Except as authorized by a specific appropriation, by express terms in a general appropriation, or by sections 4109 and 4110 of this title, appropriated funds may not be used for payment of—
>
> (1) membership fees or dues of an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia in a society or association; or

(2) expenses of attendance of an individual at meetings or conventions of members of a society or association.

However, 5 U.S.C. 4110 (1970), which is an exception to the general prohibition in 5 U.S.C. 5946, *supra* (38 Comp. Gen. 800 (1959)), provides as follows:

Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.

Therefore, should the contemplated travel of civilian employees to receive awards involve their attendance at meetings or conventions as described in 5 U.S.C. 5946, *supra*, such travel must also meet the standards imposed by 5 U.S.C. 4110, *supra*, to be travel at Government expense.

We would not object to a change in regulations to authorize military members or civilian employees to travel in a TDY status at Government expense to receive awards closely related to their official duties and the functions and activities of the service to which they are attached, provided such regulations clearly state that a specific determination must be made in each case, after careful consideration of the above, that such travel is on public (official) business and provided such regulations are in accord with 5 U.S.C. 4110 and 37 U.S.C. 412. It is our view that such travel sholuld be strictly limited to only those cases where the facts clearly so demonstrate.

We note that the Kitty Hawk Memorial Award, included in the partial list of awards, provides travel expenses for the winner and his wife to attend the award ceremony. In this regard we have held that in the absence of statutory authority to accept gifts, the reimbursement by a private organization for travel and other expenses to an officer or employee traveling at Government expense would be an unauthorized augmentation of the agency's appropriation. *See* 46 Comp. Gen. 689 (1967), 36 *id.* 268 (1956) and 18 U.S.C. 209 (1970). Any change in regulations should also take into consideration those decisions and that statute.

Concerning the question of whether regulations may be changed to authorize the travel at Government expense to non-Federal awards ceremonies of the dependents or next of kin of employees or members, we are aware of no statutory authority for such travel. Accordingly, such travel at Government expense is unauthorized and we would object to a change in regulations authorizing reimbursement of such expenses. Compare 54 Comp. Gen. 1054 (1975), in which we held that in the absence of specific statutory authority, regulations could not be issued to authorize travel at Government expense of civilian employees' family members to accompany employees when they travel to receive a Federal Government award.

The questions are answered accordingly.

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