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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer

TABLE OF DECISION NUMBERS

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

[B-186847]

Bids—Mistakes—Recalculation of Bid—Correction *v.* Withdrawal

Agency properly permitted low bidder to withdraw rather than correct bid mistake because correction as requested would have increased low bid to within 1 percent of next acceptable bid, and other evidence submitted by bidder shows another "intended" bid price within less than ½ of one percent of next acceptable bid.

In the matter of Broken Lance Enterprises, Inc., October 6, 1976:

Invitation for bids (IFB) No. F03602-76-09024 was issued on April 15, 1976, by the Department of the Air Force to solicit bids to furnish mess attendant services for two dining halls at Little Rock Air Force Base, Arkansas. Bids were opened on May 13, 1976, and Broken Lance Enterprises, Inc. (BLE) was the low bidder at $272,577.11.

By mailgram received at the procuring office on May 17, BLE alleged a mistake in bid and requested permission to withdraw. By letter dated May 18, BLE supplemented the request as follows:

The following requirements were not included in the compilation of my bid as submitted. This occurred as a result of the worksheet for items a thru c below became attached to another set of work papers on the desk and was not discovered till after my bid was submitted and results obtained from your office after bid opening.

a. Working Supervisor Ref: par F, pg 4 of 18	$8,000.00 p/a
b. Cashier Ref: par 1B (17) page 2 of 18	$5,000.00 p/a
c. Equipment and Material Ref: par 6 of pg 5 of 18	$27,000.00
Uniforms Ref: par 3B (1) (2) pg 3 of 18	Included in above.
	$40,000.00

In addition to the total I would have added 2.4% Holiday Pay, 2.7% Vacation Pay, and 10.5% Taxes for Cashier and Supervisor cost in addition to 9.5% G & A and 10% profit for all the above items.

Subsequently, the second and third low bidders, upon request for verification of their bids, also alleged mistakes, and each requested permission to withdraw. J. T. Enterprises, Inc., the fourth low bidder, was then contacted and verified its bid of $365,726.82 ($329,154.14 with discount).

The three mistake allegations were forwarded by the procuring office to Command Headquarters, the Air Force Logistics Command (AFLC), for resolution in accordance with Armed Services Procurement Regulation (ASPR) § 2-406.3(b)(3) (1975 ed.). BLE was then requested to and did submit, by letter of June 7, worksheets to document the alleged mistake, includinged the one allegedly initially misplaced. At that time, BLE also requested permission to increase the bid price by $53,338.24 to $325,915.35, on the basis that the initially misplaced worksheet indicated that $53,388.24 was the amount not included in the bid. BLE also stated that the reason the submitted bid price was not the same as the $272,375.80 figure on the worksheet reflecting the items it had included was as follows:

* * * I utilized a unit price of $.3679 per meal in extending the total cost for the estimated number of meals shown for each month rather than the unit price of $.3679765 shown on the bottom of worksheet. * * * The purpose of this was to eliminate working with a 7 digit number.

Our Office has consistently held that to permit correction of an error in bid prior to award, a bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred, and the intended bid price. 53 Comp. Gen. 232 (1973); 51 *id.* 503 (1972). These same basic requirements for the correction of a bid are found in ASPR § 2-406.3(a)(2) (1975 ed.), which provides:

* * * if the evidence is clear and convincing both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

On June 22, pursuant to authority delegated under ASPR § 2-406.3(b), AFLC issued an administrative determination permitting BLE to withdraw but not modify the bid because, although BLE had presented clear and convincing evidence that a mistake had been made, it had not submitted clear and convincing evidence of the bid actually intended. By letter dated June 28, BLE filed a protest in this Office against award to any other firm. On June 29, BLE was informed by the Air Force of the administrative determination, and that award had been made to J. T. Enterprises, Inc., on June 28.

The rationale for the Air Force's determination was stated in a memorandum dated August 6 of the Acting Staff Judge Advocate, AFLC, as follows:

3. Regarding the * * * determination, that evidence as to the intended bid was not clear and convincing, the evidentiary documents (the mailgram, two letters, and the original "worksheets" submitted by Broken Lance) presented conflicts and uncertainties which could not all be resolved so as to achieve the clear and convincing standard required.

4. At the outset, the worksheets do not show a clear formula or procedure for integrating the figures from the two pages. Two possibilities presented themselves. First the sum ($53,338.24) from the second page could have been added to the $272,375.80 of the first page for a total of $325,714.04. Dividing this by 746,000 (the number of meals for the contract period) would result in a price per meal

of .4401541. Question, what would happen to this figure; would it be rounded off to .4402? In any event, to continue the original train, the first possible procedure would be to calculate a new unit price per meal and multiply it by the monthly meal requirements. Assuming meal price of .4402, the total price that would be achieved is $325,890.09. This does not resolve the issue of whether in calculating the monthly base prices, the price for 52,500 meals would continue to be the same as the price for 52,000 meals (see monthly prices for July 1976, October 1976, and July 1977 in the original bid).

5. The other possible procedure would be simply to add the $53,338.24 to $272,577.11, the original bid submitted, to arrive at the new total of $325,915.35. Bidder claims this was its intent, and that this intent is manifested clearly and convincingly in the worksheets. * * *

The figure used in paragraph 4 for the number of meals in the contract period should have been 740,400, rather than 740,000, in which case the total price as calculated by the Air Force would be $325,701.96. In addition, we note at least one other possible bid of $328,179.67, the sum of the bid price submitted and $55,602.56, an amount arrived at by applying the method of calculation used in the initially misplaced worksheet to the figures supplied by BLE in the May 18 letter.

The memorandum went on to state that, since the above analysis shows that the worksheets presented at least two possible bids other than the bid allegedly intended, evidence as to the intended bid was not clear and convincing. In addition, the following considerations were set forth:

a. In his letter of 18 May 1976, bidder estimates the amount of his mistake as being in the sum of $40,000, and outlines certain burdens to be added. He nowhere in that letter specifies a total figure of $53,338.24, although he clearly states that the misplaced worksheet had been discovered. Isn't it likely that he would have specified the exact dollar amounts as they appeared on the worksheet, or that the worksheet would have been presented immediately? It was not until after a request, originating in this office, for the original worksheets, that the exact figures were presented.

b. The cost figures for the cashier and the working supervisor are not consistently treated in the 18 May letter and the worksheets. As to the Working Supervisor, the figure of $8000.00 appears in both documents. In the letter, however, it represents the annual pay rate (p/a=per annum) while in the worksheets it represents the total cost for the entire 65 week contract period. On the other hand, as to the cashier, the letter shows an annual rate of $5000.00, while the worksheets reflect the 65 week period and show a total cost of $6500.00.

As we stated at 53 Comp. Gen. 232, 235 (1973):

Even though the General Accounting Office (GAO) has retained the right of review, the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency and the weight to be given the evidence in support of an alleged mistake is a question of fact to be considered by the administratively designated evaluator of evidence, whose decision will not be disturbed by our Office unless there is no reasonable basis for the decision. 41 Comp. Gen. 160, 163 (1961); 51 *id.* 1, 3 (1971) * * *.

We believe that the Air Force's determination that BLE failed to provide clear and convincing evidence was reasonable with regard to the exact bid intended. However, we have recognized that an uncertainty within a relatively narrow range is not inconsistent with clear and convincing evidence of what a bid would have been. *Treweek Construction*, B-183387, April 15, 1975, 75-1 CPD 227, citing *Chris Berg*,

Inc. v. *United States*, 426 F. 2d 314 (1970). Notwithstanding this, because of our discussion below, we do not find it necessary to decide whether the various intended possible bid prices for BLE fell within this standard.

We stated in 48 Comp. Gen. 748, 750 (1969):

> The correction of mistakes in bid has always been a vexing problem. It has been argued that bid correction after bid opening and disclosure of prices quoted compromises the integrity of the competitive bidding system, and, to some extent at least, this is true. For this reason, it has been advocated that the Government should adopt a policy which would permit contractors to withdraw, but not to correct, erroneous bids. We do not agree completely with this position, since we believe there are cases in which bid correction should be permitted. We do agree, that, regardless of the good faith of the party or parties involved, correction should be denied in any case in which there exists any reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby. * * *

We believe that the present case falls within that category. The correction amount requested by BLE would increase its bid to within $3,238.79, or less than 1 percent, of the J. T. Enterprises, Inc., bid. Moreover, the bid price arrived at from the May 18 letter brings the BLE "intended" bid within less than ½ of one percent of the successful bid. Accordingly, we agree that correction of the bid would have been improper. See *Asphalt Construction, Inc.*, B–185498, February 9, 1976, 76–1 CPD 82; *Treweek Construction*, *supra;* and B–177955, March 22, 1973.

In view of the above, the protest is denied.

[B–186848]

Bids—Late—Telegraphic Modifications—Untranscribable—Due to Western Union Machine Malfunction, etc.

Telegraphic bid modification, unable to be transcribed intelligibly from Western Union office to telex receiver at procuring activity followed by inability to transmit when activity had "run out" of forms for receiving telegrams, all prior to bid opening, was properly not considered since Western Union was substantial cause for nonreceipt by failing (1) to resupply agency with forms timely ordered and (2) to deliver telegram by other means upon being apprised on evening before bid opening that receiver could not accept further telegrams. Prior decisions involving mishandling in process of, as opposed to after, receipt at Government installation are distinguished.

In the matter of Record Electric Inc., October 6, 1976:

Record Electric Inc. protests the rejection of a modification to its bid as late and the award of a contract to Allen Electric Co., Inc., to effect electrical repairs in various buildings at the United States Marine Corps Air Station, El Toro, Santa Ana, California, under invitation for bids (IFB) No. N62474–76–B–0582, issued on May 14, 1976, by the Naval Facilities Engineering Command (NAVFAC).

The IFB was amended twice. The materiality of the amendments, one of which extended the bid opening date from June 17 to June 23

at 11 a.m., has not been questioned by the protester. Record Electric submitted a timely bid which did not acknowledge receipt of the amendments. From the evening of June 22 to the time for bid opening on June 23, several unsuccessful attempts were made by Western Union to transmit to the procuring activity a modification to the Record Electric bid. That modification (1) reduced the protester's bid prices below those of the eventual contractor; and (2) acknowledged receipt of the amendments. The Communications Watch Officer on duty at the procuring activity on the evening of June 22 discusses the pertinent circumstances, as follows:

1. On the evening of 22 June 1976, at approximately 1900, Western Union attempted to send us a telegram. At this time the Communication Center had only three forms for receiving these telegrams left. A request for these forms had been submitted a few days earlier to Western Union, however, we had not, as of that time, received the forms.
2. The first two times the message was sent to the Communication Center, that night, they were unreadable. I immediately called Western Union about this problem and the problem of having just one form left. The gentleman I was talking to at that time informed me he had a message he had to send us. He then checked his records and confirmed the fact that we did order more forms but seemed surprised we had not received them. I then asked him if he could bring the message over by courier and he said "no," that he would straighten everything out in the morning and get the message over to us then.

Counsel for NAVFAC advises that, on June 23, prior to the 11 a.m. opening of bids (1) Western Union advised the procuring activity by telephone of a telegraphic modification of bid by Record Electric; (2) Western Union was advised that the modification could not be accepted by telephone and must be delivered prior to bid opening; and (3) no such message was received prior to bid opening.

According to counsel, prior to the close of business on June 30, 1976, Record Electric was advised by telephone that the telegraphic modification still had not been received and that award was being made to the lowest bidder. Award was made to Allen Electric on that date. The record is not clear as to when or if the telegraphic modification was ever received in intelligible form at the procuring activity directly from Western Union. However, the copy of the telegraphic modification submitted by Record Electric with the protest appears to be genuine and represents the telegraphic modification which Western Union attempted to transmit. This is supported, in part, by the fact that the proffered copy of the telegraphic modification contains the procuring activity's acknowledgement of receipt.

Clause 7 of the Instructions to Bidders of the IFB as prescribed by Armed Services Procurement Regulation (ASPR) § 7-2002.2 (1975 ed.) states, in pertinent part:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before the award is made and either:

* * * * * * *

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above * * *

(c) The only acceptable evidence to establish: * * *

* * * * * * *

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

The protest here is similar to those involved in two recent decisions of our Office dealing with a timely telegraphic bid and modification not received at Government installations allegedly due to mishandling in the process of, as opposed to after, receipt at the Government installation. *Hydro Fitting Mfg. Corp.*, 54 Comp. Gen. 999 (1975), 75-1 CPD 331, and *I&E Construction Company Incorporated*, 55 Comp. Gen. 1340 (1976), 76-2 CPD 139. In the former decision, which involved the nonreceipt of a telegraphic bid due to a malfunction in a Government telex receiver, we discussed this general situation as follows:

In the past, our Office has construed ASPR § 7-2002.2 (formerly ASPR § 2-303.2) as authorizing the consideration of a late bid which arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the designated bid opening office until after bid opening due to mishandling on the part of the installation. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-148264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, there is neither the bid nor a time/date stamp or other documentary evidence of receipt maintained at the installation to establish receipt. Therefore, argues DSA, the test of ASPR § 7-2002.2(c)(ii) has not been met and Hydro's "late" bid cannot be considered.

We agree with DSA in that a reading of the regulation as implemented in the invitation would correctly appear to authorize not considering the confirming telegraphic bid of Hydro submitted after bid opening. Not only is the requisite acceptable evidence of time of receipt nonexistent but, despite DSA's statement that the original telegraphic bid was received and acknowledged, we believe that whether there was "receipt" in the context of the regulation is questionable. In this regard, consideration of a late telegraphic bid is permitted only if late receipt was due to mishandling by the Government after receipt at the Government installation. That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have involved, instances where a tangible bid was mishandled after physical receipt.

While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulation. The regulation insures that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In addition? "* * * The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." 42 Comp. Gen. 508, 514 (1963); and B-157176, August 30, 1966. This belief is particularly proper here because, in our view, the current regulation did not contemplate the instant circumstances, i.e. mishandling in the transcription of a telegraphic bid and the resultant failure of a Government installation to have actual control over the bid or evidence of time of receipt.

We believe that, in unusual circumstances like these, mishandling by the Government must be paramount in the failure of a bid or modification to be received. To this same effect, the standard late bid clause in the IFB provides that late receipt must be due "solely" to Government mishandling. In the above-cited cases, the Government was completely at fault, from which we concluded that the bidding documents should be considered. In *Hydro* there was a failure to monitor a Government telex machine, with the result that an absence of paper to accept messages and a jamming of tape went undetected. In *I&E* a Government building was closed. Furthermore, in both cases, Western Union did not contribute to the nonreceipt, either because Western Union had no knowledge of the nonreceipt (*Hydro*) or could have taken no steps to counter the Government's prevention of receipt (*I&E*).

We have no specific information on responsibility for maintaining the receiver in question other than counsel for NAVFAC's referring to "the Western Union receiver"; therefore, we cannot ascertain who was at fault, if anyone, for the malfunctioning of the machine. However, we believe the record adequately demonstrates distinguishing features from the above cases and supports the Navy's conclusion that the modification should not have been considered. While it might be argued that the "running out" of forms alone exhibited some degree of negligence on the part of the Government in contributing to the nonreceipt of the modification, we do not find that such negligence would have even approximated the requisite level as demonstrated by *Hydro* and *I&E*. Rather, we find the substantial cause for the nonreceipt to have been Western Union.

The above-quoted statement from the Communications Watch Officer shows that the Navy apparently ordered, but Western Union did not deliver, a new supply of forms for receiving telegrams sufficiently in advance for timely delivery prior to "running out." Also, Western Union was immediately apprised of the inability of the receiver to accept telegrams on the evening before bid opening. Notwithstanding this, Western Union failed to deliver the telegram clearly marked for delivery prior to bid opening by other means such as a messenger. In our opinion, the Navy had no obligation to send a messenger to Western Union or accept the modification by telephone. Parenthetically, we note that permissible telephonic receipt of telegraphic modifications was specifically deleted from the ASPR in Defense Procurement Circular No. 110, May 30, 1973. Contrast Federal Procurement Regulations § 1–2.304(a) (1964 ed., amend. 118).

In view of the above, the protest is denied.

[B-180010]

Arbitration—Award—Collective Bargaining Agreement—Violation—Agency Implementation of Award

Navy installation, in separate grievances, was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice citation and seeks a ruling on legality of the terminated awards. General Accounting Office (GAO) holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination.

Arbitration—Award—Consistent With Law, Regulations and GAO Decisions

Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation for an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office.

In the matter of Naval Air Rework Facility, Pensacola, Florida—arbitration awards for environmental differential, October 7, 1976:

This decision was requested by letter of August 15, 1975, from Joseph T. McCullen, Jr., Assistant Secretary of the Navy for Manpower and Reserve Affairs, concerning the legality of implementing two arbitration awards of environmental differential pay involving the Naval Air Rework Facility, Pensacola, Florida, and the American Federation of Government Employees (AFGE), Local 1960. Mr. McCullen states that, in the Navy's view, the arbitrator's awards are illegal because they are inconsistent with applicable regulations. Because of its grave doubts as to whether the awards may properly be implemented, the Navy seeks our decision pursuant to 54 Comp. Gen. 312, 320 (1974).

The question submitted is whether the Navy may legally pay the two awards of environmental differential under Federal Personnel Manual Supplement 532-1 and Appendix J thereto.

The Naval Air Rework Facility (NORF), Pensacola, is one of six subordinate field activities of the Naval Air Systems Command engaged in the maintenance and repair of naval aircraft. Local 1960, AFGE, represents an exclusive unit of nonsupervisory employees of the facility. In early 1972, two employees of the facility, A. C. Pereira, an aircraft oxygen equipment repairman, and John W. Melton, an aircraft surface treatment worker, filed separate "class action" grievances under the negotiated grievance procedure, contending that they, and all other employees similarly situated, were entitled to the differ-

ential under Federal Personnel Manual (FPM) Supplement 532–1, Appendix J, because of the hazardous nature of the work they were performing. Both the agency and the union agree that the collective bargaining agreement, in effect at the time, between the facility and the union authorized additional pay for employees engaged in hazardous work.

The parties were unable to adjust the grievances among themselves, and the issues in dispute were submitted to binding arbitration. The Pereira grievance resulted in an arbitration award issued October 4, 1972, by Edmund W. Schedler, Jr., Arbitrator. It sustained the grievance of Mr. Pereira, brought on behalf of himself and other similarly situated aircraft oxygen equipment repairmen in the facility's Oxygen Shop, for a 4 percent environmental differential authorized under FPM Supplement 532–1, Appendix J, for employees working in close proximity to explosive and incendiary materials. In his decision, the arbitrator summarized evidence presented during the hearing of several potentially serious accidents that had occurred in the Oxygen Shop involving the explosion of oxygen cylinders and containers. On the basis of this evidence he concluded that employees in the Oxygen Shop are exposed to potentially dangerous accidents, even if they follow prescribed safety procedures, because many materials burn in an incendiary manner when the atmosphere is enriched with oxygen.

The Melton grievance resulted in an arbitration award issued October 25, 1972, by Herbert A. Lynch, Arbitrator. It sustained the grievance of Mr. Melton, brought on behalf of himself and other similarly situated aircraft surface treatment workers at the facility, for a 4 percent environmental differential authorized under FPM Supplement 532–1, Appendix J, for employees working with or in close proximity to poisons or toxic chemicals. On the basis of evidence produced during the hearing, the arbitrator concluded that there was a definite possibility of aircraft surface treatment workers inhaling dangerous quantities of toxic fumes. He pointed out that some of the chemicals employed by these workers, even in low concentrations, can cause unpleasant reactions and in strong concentrations are quite dangerous.

The Commanding Officer of the Naval Air Rework Facility accepted the awards and began paying the approximately 50 employees affected by the awards a 4 percent environmental differential. However, the two arbitration awards were later reviewed by the Office of Civilian Manpower Management (OCMM), Department of the Navy, which reached the conclusion that its interpretation of Appendix J of the environmental pay regulations was in conflict with the stand-

ards applied by the two arbitrators. In an effort to resolve this conflict, OCMM decided to write a letter requesting a technical opinion from the Civil Service Commission (CSC) as to whether or not it would be proper for an agency to pay employees an environmental differential under the "explosives and incendiary materials" and "poisons (toxic chemicals)" categories of Appendix J, where employees work with oxygen in one situation and with caustics in the other. The OCMM letter, dated May 22, 1973, summarized the findings, conclusions and rationale of the two arbitration awards and indicated how the OCMM interpretation of the environmental pay regulations was at variance with that of the arbitrators, and invited the Commission to express its views on the correctness of OCMM's interpretations. The OCMM letter, however, did not provide copies of the arbitration awards, nor did it request the Commission to review the awards or the specific cases involved.

In a letter dated August 20, 1973, the Commission's Pay Policy Division, Bureau of Policies and Standards, expressed its agreement with the OCMM interpretation of the environmental differential pay regulations as follows:

> We agree with your position regarding the application of the categories covering explosives and incendiary material, and poisons (toxic chemicals), to the Navy situations described in your letter. Your interpretations of subchapter S8-7 of FPM Supplement 532-1, and of Appendix J of the Supplement, with respect to the propriety of differential payments by your department are, in our opinion, fully in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials.

Although the Commission's letter expressed agreement with the Navy's interpretation of the regulations, it did not purport to address the specific factual issues raised in the two arbitration awards.

On the basis of the Commission's reply, OCMM decided that the arbitrators had misinterpreted and misapplied the FPM Supplement governing environmental differential pay. However, the arbitration awards had already been implemented by Naval Air Rework Facility, Pensacola; and, under the regulations of the Federal Labor Relations Council, it was too late to seek that agency's review of the awards. Therefore, OCMM forwarded a letter dated October 26, 1973 to the facility, directing that it discontinue environmental differential payments to the aircraft surface treatment workers and the aircraft oxygen repairmen in the Oxygen Shop, except when the former class of employees worked with phenol, if the hazards associated with its use had not been practically eliminated. Upon receipt of the letter, the Commanding Officer of the facility notified the local union president of the directive to terminate payments and offered to consult on the matter prior to time he had set for the payments to cease. No written reply was received from the union, and, on December 8, 1973,

the facility terminated the payment of an environmental differential under the two arbitration awards.

The union filed an unfair labor practice complaint with the Department of Labor alleging that the Naval Air Rework Facility had violated sections 19(a) (1) and (6) of Executive Order No. 11491, as amended, when it terminated the environmental differential pay of the affected employees, and that OCMM, Headquarters, Department of the Navy, had violated 19(a)(1) of the Order when it directed the facility to cease making the payments. An Administrative Law Judge heard the case, found that both Headquarters, Department of the Navy, and the Naval Air Rework Facility had committed unfair labor practices, and ordered the Navy to post the customary notices and directed the facility to reinstate the two arbitration awards and to maintain them in effect for the remaining life of the collective bargaining agreement. Also the Administrative Law Judge ordered backpay to restore differentials that were lost by affected employees as a result of the Navy's order to terminate such payments.

The Department of the Navy appealed to the Assistant Secretary of Labor for Labor-Management Relations, who considered the matter in *Naval Air Rework Facility, Pensacola, Florida*, A/SLMR No. 608 (January 26, 1976), and affirmed the ruling of the Administrative Law Judge and issued an order that, among other things, directed the facility to:

> 2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:
> (a) Reimburse to each of the affected employees all monies deducted or withheld from them since December 8, 1973, by reason of the termination of environmental differential pay awarded pursuant to the Schedler-Lynch arbitration awards.
> (b) In the future, either file timely exceptions with the Federal Labor Relations Council, or abide by arbitration awards issued under negotiated procedures contained in any negotiated agreement with the American Federation of Government Employees, AFL–CIO, Local 1960.

The Department of the Navy has petitioned the Federal Labor Relations Council for review of the Assistant Secretary's decision and for a stay of his order, both of which were granted by the Council. Eventually, the Council will issue its decision on the labor relations issues presented by the case. Accordingly, we shall confine our consideration to the issues of the legality of Federal expenditures and matters related thereto.

The sole issue raised by the Department of the Navy before this Office is that the two arbitrators misapplied the Civil Service Commission's Environmental Differential regulations (contained in Appendix J of Federal Personnel Manual Supplement 532–1) to the working conditions of aircraft oxygen equipment repairmen and aircraft surface treatment workers at the facility. Specifically, the Navy

contends that the arbitrators erred in finding that oxygen falls within the category of "explosives and incendiary material—low-degree hazard," and that caustics fall within the category of "poisons (toxic chemicals)—low degree hazard." The Navy does not take exception to the arbitrators' right to determine the facts, but argues that, even though the arbitrators found the work to be hazardous, there is no regulatory authority to pay an environmental differential for these particular working conditions. Further, the Navy states that it obtained CSC confirmation of this.

In order to determine whether the arbitration awards in question may lawfully be implemented, we have examined the law and regulations and considered the arguments of the agency and the union. The governing statute is 5 U.S.C. § 5343(c)(4) (Supp. II, 1972), which directs the Civil Service Commission to provide by regulations "for proper differentials, as determined by the Commission, for duty involving unusually severe working conditions or unusually severe hazards * * *."

The Commission's regulations are found in subchapter S8–7 of Supplement 532–1, Federal Personnel Manual. In general, they authorize the payment of an environmental differential to wage employees who are exposed to hazards, physical hardships, or working conditions of an unusually severe nature listed under the categories in Appendix J thereto.

Although the Navy claims that it obtained CSC confirmation of its views on these matters, the Commission provided further information concerning this case in a letter dated August 19, 1974, to the National Headquarters of the American Federation of Government Employees, Washington, D.C. In that letter, signed by the same official who had signed the earlier letter to the Navy Department, the Commission's Pay Policy Division, Bureau of Policies and Standards, gave the following guidance:

> Under the Federal Wage System, environmental differentials are paid to Federal wage employees who are exposed to a hazard, physical hardship, or working condition of an unusually severe nature as listed under the categories of situations contained in Appendix J of Federal Personnel Manual Supplement 532–1. While the Civil Service Commission considers proposals for broad categories of situations for which payment of a differential may be authorized, *the system is designed so that it is incumbent upon individual installations or activities to evaluate their own situations against these broad guidelines. When the local situation is determined to be covered by one or more of the defined categories the authorized environmental differential is paid for the appropriate category.* The FPM Supplement specifically permits, where otherwise appropriate, negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Civil Service Commission for prior approval.
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> * * * * * * *

If a question arises concerning interpretation of the Commission's regulations or instructions, we would provide pertinent clarification and needed guidance. We would, of course, expect the agency to utilize this guidance as well as the basic regulation or instruction in determining which, if any, differentials are appropriate to be paid in any given case. *However, the Commission has consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases; rather, this authority has been delegated to the agencies. Whether or not an arbitrator had exceeded his authority in a specific case would be an appropriate matter for the Federal Labor Relations Council.* [Italic supplied.]

The letter of August 19, 1974 also explains that the reply made to the Navy letter of May 22, 1973 was only intended to clarify the meaning and intent of the regulations and to confirm the propriety of the Department of the Navy's interpretation of the application of the regulations, and that, although the Commission expected the Navy to utilize the guidance in particular work situations, "* * * *we have made no determinations regarding a specific case nor do we contemplate doing so.*" [Italic supplied.]

The above-quoted letter shows clearly that the Commission's earlier letter of August 20, 1973, to the Navy Department, did not, and was not intended to, constitute a ruling on the legality of the two arbitration awards in question. In fact, the second letter specifically disavowed any intention to make determinations regarding specific cases and stated that such authority had been delegated to the agencies. The correctness of this view is demonstrated by paragraph g of subchapter S8–7, FPM Supplement 532–1, which reads as follows:

g. *Determining local situations when environmental differentials are payable.* (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship, or working condition involved in performing in the category. The examples of the situations are not all inclusive but are intended to be illustrative only.

(2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.

(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category. * * *

Furthermore, in collective bargaining situations between an activity and a union, the FPM Supplement expressly allows the parties to agree to the coverage of additional local situations under Appendix J as follows (§ 88–7g(3) of FPM Supplement 532–1):

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above.

Two separate provisions of the above-quoted regulation authorize an appropriate authority to determine whether particular working conditions satisfy the criteria outlined in Appendix J. First, subparagraph S8–7g(2) of FPM Supplement 532–1 authorizes officials of installations or activities to evaluate local working conditions against the standards prescribed in Appendix J and determine whether such working conditions are covered by the standards, so as to entitle the employees involved to an environmental differential. Where a collective bargaining agreement contains a mandatory provision on environmental differentials and provides for binding arbitration of disputes, the coverage determination may properly be made by an arbitrator. Second, subparagraph S8–7g(3) of FPM Supplement 532–1 authorizes negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J. Inasmuch as binding arbitration may be considered an extension of the collective bargaining process, where the agreement contains an appropriate provision on environmental differentials, the arbitrator may also properly determine that additional local situations come within the purview of appropriate categories in Appendix J. See for example B–170182, December 26, 1973, where, pursuant to the same provision of the FPM Supplement, we accepted an arbitrator's finding that Appendix J covered a particular work situation at the Mare Island Naval Shipyard.

Here, the collective bargaining agreement between these parties provided for the payment of an environmental differential for hazardous working conditions, and the arbitrators in the two grievance proceedings found that the local working conditions for the two classes of workers were covered under the specified categories of Appendix J.

We have held that the decision of an arbitrator pursuant to an agreement provision constituting a nondiscretionary agency policy, if otherwise proper, becomes, in effect, the decision of the head of the agency involved. Absent a finding that the arbitration award is contrary to applicable law, appropriate regulations, Executive Order No. 11491, as amended, or decisions of this Office, binding arbitration awards must be given the same weight as any other exercise of administrative discretion. That is, the authority to implement the award should be refused only if the agency head's own decision to take the same action would be disallowed by this Office. 54 Comp. Gen. 312, 316 (1974). Under FPM Supplement 532–1, as elaborated upon in the Commission's letter of August 19, 1974 to AFGE, the authority to determine local coverage of the guidelines in Appendix J has been delegated to each agency. Since the Navy could have decided that the hazards involved here justified the differential, the arbitrator's decisions to the same effect may not be refused.

Since the Commission's regulations delegate authority to determine local coverage to each agency and expressly permit the collective bargaining process to determine additional coverage under appropriate categories in Appendix J, we find that the arbitrators were authorized to decide that the local working conditions at the Naval Air Rework Facility were covered by the specified categories of Appendix J of FPM Supplement 532–1. Further, on the basis of the record before us, we are unable to conclude that the arbitrators erred in their determinations that the working conditions of aircarft oxygen equipment repairmen came under the Appendix J category of "explosives and incendiary material—low degree hazard" and that the working conditions of the aircraft surface treatment workers came under the Appendix J category of "poisons (toxic chemicals)—low degree hazard," so as to entitle these employees to an environmental differential. We therefore have no reason to object to the two awards here in question.

Accordingly, we are of the opinion that both arbitration awards are legal and may be reinstated. Employees who lost the environmental differential after the awards were terminated on December 8, 1973, are entitled to backpay under 5 U.S.C. § 5596 (Supp. V, 1975), as ordered by the Assistant Secretary of Labor.

Finally, we note that in the unfair labor practice proceedings before the Administrative Law Judge and the Assistant Secretary of Labor, both these officials ordered the Department of the Navy to immediately reinstate the awards with backpay for employees involved, despite the Navy's good faith doubt as to the legality of payments required by the awards. We should like to point out that, under the provisions of 31 U.S.C. § 74, agency heads have a statutory right to apply for and obtain a ruling from this Office on the legality of any payment to be made by them from appropriated funds and that our decisions are binding on the Executive branch of the Federal Government. *Pettit* v. *United States*, 203 Ct. Cl. 207 (1973).

Therefore, we recommend that future orders of Administrative Law Judges and the Assistant Secretary requiring payments contain a statement that such payments shall be made "consistent with applicable laws, regulations, and Comptroller General Decisions." A caveat of this type would preclude orders requiring payment from conflicting with the statutory right of agency heads to obtain decisions from this Office on payments required to be made.

[B–187079]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Beginning of Occupancy—Thirty Day Period

Transferred employee occupied temporary quarters for more than 30 days.

Employee contends that the calendar day quarter on which he became eligible for reimbursement of temporary quarters expenses should be used throughout his eligibility period to determine when reimbursement should cease. Since the authorizing statute allows reimbursement only for calendar days spent in temporary quarters and the implementing regulations utilize the quarter day concept to ascertain commencement of eligibility only, date of initial eligibility constitutes one calendar day. Thereafter, reimbursement may be made only in units of whole calendar days.

In the matter of Joseph B. Stepan—subsistence—temporary quarters, October 7, 1976:

This matter is in response to a request dated July 28, 1976 from Ms. Anne C. Hansen, an authorized certifying officer of the Mining Enforcement and Safety Administration (MESA), Department of the Interior, concerning the voucher submitted by Mr. Joseph B. Stepan for reimbursement of subsistence expenses while occupying temporary quarters incurred incident to the transfer of his permanent duty station.

The record indicates that Mr. Stepan, a MESA employee, was transferred from Washington, D.C. to Duluth, Minnesota. He and his family arrived at the new duty station at 3:30 p.m. on June 27, 1975, and entered temporary quarters. The family remained in temporary quarters until September 9, 1975, when they occupied their new permanent residence.

Mr. Stepan was paid per diem through the third quarter day of June 27, 1975 for travel for himself and his family. It is undisputed that his eligibility period for subsistence while occupying temporary quarters began on the last quarter day of June 27, 1975. Mr. Stepan has claimed temporary quarters reimbursement for 30 days, from the last quarter day of June 27, 1975 through the third quarter day of July 27, 1975. It is apparently the claimant's view that paragraph 2-5.2g of the Federal Travel Regulations (FPMR 101-7) (May 1973) requires that the calendar day quarter on which the employee first became eligible for reimbursement of temporary quarters expenses be utilized throughout the period of eligibility to ascertain the intermediate 10 day periods and to determine when the reimbursement should cease. The employing agency, however, suspended $50.12 from Mr. Stepan's claim for temporary quarters expenses, contending that after the date on which the employee's eligibility commences, he may properly be reimbursed only in units of calendar days, up to a total of 30 days, including the date of initial eligibility. The certifying officer has therefore requested our decision concerning the period of time during which temporary quarters expenses may be reimbursed.

Statutory authority for the reimbursement of the subsistence expenses of transferred employees is found at 5 U.S.C. 5724a(a)(3) (1970), which provides that, under regulations prescribed by the President, such expenses may be paid "for a period of 30 days" while

occupying temporary quarters. Regulations governing these reimbursements are presently found at FTR para. 2–5.2g (May 1973) and provide as follows:

> *Effect of partial days.* In determining the eligibility period for temporary quarters, subsistence expense reimbursement and in computing maximum reimbursement when occupancy of such quarters for reimbursement purposes occurs in the same day that en route travel per diem terminates, the period shall be computed beginning with the calendar day quarter after the last calendar day quarter for which travel per diem described in 2–2.1 and 2–2.2 is paid, except that when travel is 24 hours or less the period shall begin with the calendar day quarter during which travel per diem terminates. In all other cases, the period shall be computed from the beginning of the calendar day quarter for which temporary quarters subsistence reimbursement is claimed, provided that temporary quarters are occupied in that calendar day. The temporary quarters period shall be continued for the day during which occupancy of permanent quarters begins.

The quoted provision was added to section 2.5(b)(6) of Bureau of the Budget Circular No. A–56 on June 26, 1969. By transmittal memorandum No. 5 of the same date, the revision was explained as "clarify[ing] the allowances payable for the first and last day of use of temporary quarters." The first two sentences of the regulations, then, clarify the commencement of the eligibility period; the last sentence clarifies its cessation.

The June 26, 1969 action by the Bureau of the Budget was apparently in response to, and incorporated the holdings of, our decisions B–161348, May 31, 1967 and B–161878, July 21, 1967, in which we determined that an employee is eligible for reimbursement of expenses in temporary quarters from the time he ceases to receive per diem for travel through the full day on which he occupies his permanent quarters. In each of these cases, the question for our consideration was whether reimbursement of temporary quarters expenses was precluded by the payment of per diem in lieu of subsistence for that portion of the day during which the employee was traveling to the new duty station. Since our decisions and the regulations issued promulgated thereafter utilized and intended the concept of calendar day quarters only to ascertain when an employee's eligibility begins, such authorities do not support the position that calendar day quarters should be used throughout the period to determine when eligibility ceases, as advanced here by the claimant.

As noted above, the statutory authority for temporary quarters reimbursement limits payments to a "period of 30 days." 5 U.S.C. 5724a(a)(3) (1970). The unmodified word "days" as used in statutes generally has been regarded as referring to "calendar days" in the absence of a clear intent to the contrary. 27 Comp. Gen. 245, 252 (1947). Thus, reimbursements made pursuant to that statute are limited to 30 calendar days. In view thereof, we hold that the portion of the day on which an employee becomes eligible for reimbursement of his temporary

quarters expenses constitutes one of the 30 calendar days during which such expenses may be paid. Thereafter, reimbursement may be made, if otherwise proper, for each calendar day (midnight to midnight) that the employee occupies temporary quarters, including the day on which he enters his permanent residence, up to the maximum allowable period of 30 calendar days.

Accordingly, the voucher submitted by Mr. Stepan may not be certified for payment.

[B-153751]

Contracts—Buy American Act—Computer Data—Conversion and Storage—Services *v.* Manufacturing

A contract for conversion and storage of data to machine (computer) readable form is not manufacturing for the purpose of the Buy American Act.

Buy American Act—Applicability—Contractors' Purchases From Foreign Sources—Computer Tapes

Computer tape, initially processed abroad and further processed in United States, is not a manufactured end product for purposes of Buy American Act.

In the matter of the Blodgett Keypunching Company, October 14, 1976:

This is a bid protest by Blodgett Keypunching Company relative to the application of the Buy American Act, 41 U.S.C. 10a–d (1970), to a procurement by the Department of the Air Force for processing computer tapes in support of the LITE (Legal Information Through Electronics) Project. We note that since this procurement was initiated, the Air Force now refers to this program as Federal Legal Information Through Electronics, or FLITE. The questions for our determination are whether the Act is applicable to this procurement and, if so, whether the delivered product, processed tape, is of domestic origin for purposes of the Act.

This protest arises because of the contract award by the Air Force to the low bidder without applying the Buy American evaluation factor. The Air Force takes the position that the Act is not applicable to this LITE Program data processing procurement because the procurement is one for services, that is, the conversion of existing data, rather than one for supplies. Alternatively, the Air Force contends that the delivered tapes are domestic end items even if they are evaluated pursuant to the Act.

The contractor, International Computer Resources, Inc., agreed to deliver processed "error-free" output magnetic tape to the Air Force. Information is provided by the LITE Project in the form of printed decisions of various judicial and administrative forums and ultimately is encoded or processed onto computer tape. The contractor has devel-

oped a detailed set of procedures and instructions for processing the information, and has provided the instructions and tapes to a Korean facility for processing. There the legal materials are keypunched onto cards and then processed into tapes. The same materials are also typed at the Korean facility in a form which can be scanned by an optical reader and processed into magnetic tapes. Thus, two complete sets of processed tapes are sent to the United States for verification and correction by the contractor. In this country, the electronic data contained on the two tapes are computer processed, utilizing appropriate software to produce a printout of inconsistencies. This list is manually edited to indicate the correct tape or the necessary corrections required. Thereafter, an "error-free output tape" is produced in a "three-way match-merge" operation. This tape is processed onto still another tape of domestic manufacture to fit the LITE computer format and ultimately is delivered to the Air Force.

In pertinent part, the Act provides that "only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies, mined, produced, or manufactured * * * in the United States, shall be acquired for public use." Executive Order 10582 provides that articles, materials and supplies shall be considered to be of foreign origin if the cost of foreign products used in them constitutes 50 percent or more of the cost of all component products used in them. Under these provisions, application of a Buy American Act differential is required if what will be furnished the Government (1) is not *manufactured* in the United States, or (2) is *manufactured* in the United States and consists of foreign components which make up 50 percent or more of the total component cost.

We do not believe that by any conventional standard the process of data capture and consequent computer processing can be considered to be "manufacturing," notwithstanding that the data *may* be *stored* or copied on computer tapes or other media for further use.

In *Descomp, Inc.* v. *Sampson*, 377 F. Supp. 254 (1974), the Court, in reviewing the Secretary of Labor's determination that a contract for keypunching was one for services rather than one for materials for the purpose of the Service Contract Act, stated:

> * * * It appears to this Court that the primary function of the keypunching contract is to compile certain information from the Government's own source records and to translate it into a language which can be interpreted by one of the Government's own computers. When the data is returned to the Government translated into "computer language," it is fed into the computer where it may be stored and recalled whenever necessary. Thus, it appears that what the Government is primarily buying is translation. The punch cards and tape are merely a product manifesting the service. An analogy would be a contract to translate certain documents of a Government agency into a foreign language. * * * In order to complete his task, the translator would, of course, have to write down the translated passages. Just as in the keypunching case, the "finished

product" would be a material item, in this instance a manuscript. Yet it could not seriously be asserted that the translation contract was one for materials *simply because the finished product is in material form.* * * *

* * * [T]he analogies * * * serve to illustrate that many contracts for services will involve some material end-product as a manifestation that the service was performed, and that where the value of the material returned, be it paper sheets or punched cards, is minuscule in relation to the labor expended, the contract can be treated as one for services. * * * [Italic supplied.]

We believe the logic of the Court in *Descomp, supra*, is equally applicable to this case. What is purchased here is processed information which ultimately will be resident on magnetic tape. It is clear that the primary purpose of this LITE data processing procurement is not the acquisition of articles such as computer tapes, but rather it is the conversion of information to machine readable form. For example, technology would permit the information to remain resident in the contractor's computers, so that the only product to be "delivered" to a Government computer would be electronic impulses. We are, therefore, unable to extend the reach of the Buy American Act to the procurement in question.

Accordingly, we conclude that this procurement is one for services and not subject to the Buy American Act. Accordingly, the protest is denied.

[B-187060]

Officers and Employees—Transfers—Relocation Expenses—Leases—Forfeited Prepaid Rent

Transferred employee paid lessor of rented apartment entire balance of rent due for unexpired term of 7 months immediately upon transfer. Five months later, employee removed household goods from apartment and relet premises. Reimbursement of rent paid for 5 months between transfer and date of sublease may not be reimbursed because Federal Travel Regulations (FTR) para. 2-6.2h (May 1973) requires employee to make reasonable efforts to compromise outstanding obligation, and employee failed to make such efforts.

Storage—Household Effects—Temporary Storage—In Former Residence

Transferred employee who left household goods in former residence for 5 months prior to reletting apartment may not be reimbursed for temporary storage since placement or retention of employee's goods at his residence may not serve as the basis for reimbursement.

In the matter of Jeffrey S. Kassel—settlement of unexpired lease, October 15, 1976:

This action is in response to a request dated July 26, 1976 from the Honorable Glen E. Pommerening, Assistant Attorney General for Administration, concerning a voucher submitted by Mr. Jeffrey S. Kassel, a former employee of the Department of Justice, Bureau of Prisons, for reimbursement of residence transaction expenses incurred incident to a permanent change of station.

The record indicates that the claimant, Mr. Kassel, entered on duty with the Bureau of Prisons as a staff psychologist by transfer from the

Veterans Administration on January 20, 1975. Incident to the transfer, a travel authorization was issued authorizing travel from Waukegan, Illinois to Morgantown, West Virginia and advancing $2,600 to Mr. Kassel therefor. At the time of the transfer, Mr. Kassel had been occupying rented quarters for which he paid $195 per month. On January 20, 1975, he paid his lessor, Mr. Paul A. Hansen, $1,365 for the period from February 1, 1975 through August 31, 1975, representing the unexpired term of his lease. Five months later, on June 20, 1976, Mr. Kassel placed an advertisement in a local newspaper to relet the premises. This effort was successful and, on June 29, 1975, he removed his furniture from the former residence. He subsequently received a refund from the landlord in the amount of $390 and has claimed $975, representing the balance paid on the premises. Whether that payment may be reimbursed is the subject of this action.

Reimbursement for the cost of settling an unexpired lease at the employee's old duty station incident to a change of station is governed by paragraph 2–6.2h of the Federal Travel Regulations (FPMR 101–7) (May 1973), which provides, in relevant part, that such expenses are reimbursable when they cannot be avoided by sublease or other arrangement and the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he has definite knowledge of the transfer. We note at the outset that the operative concept in these matters is that of settlement, which involves an adjustment of an account and implies, at least, an attempt to compromise the amount due. Thus, the employee is required to make reasonable efforts to relet the premises immediately upon his transfer. Such efforts include negotiation with the lessor for a reasonable payment in compromise of the outstanding term of the lease, engaging the services of a real estate broker, and placing advertisements in a newspaper or general circulation in the locality. B–183018, January 8, 1976.

In this case, the required formal notice of termination of the lease was never given by the claimant to his lessor. Instead, Mr. Kassel paid the entire outstanding term of the lease on the effective date of his transfer. Further, he did not remove his household goods from the premises until he relet the apartment, five months later. Although Mr. Kassel contends that he attempted to sublet the residence in January 1975, the conclusion that such attempts were not seriously undertaken is supported by the ease with which the apartment was relet in June 1975, by the claimant's earlier payment of the entire outstanding balance of rent, and by his failure to remove his belongings until June. In light of these circumstances, we must hold that Mr. Kassel failed to take reasonable efforts to relet his former residence or to settle the balance of his unexpired lease.

Mr. Kassel further contends that his use of the travel advance to pay off his outstanding rental obligation was proper since the travel authorization included the item—as part of estimated cost—and he had not been informed concerning the proper use of the travel advance monies. In response, the business manager of the employing agency states that the claimant was never informed that the entire term of the unexpired lease would be paid, and that he personally informed the claimant by telephone to consult his lessor, his realtor, and his attorney concerning termination of the lease.

A travel authorization merely authorizes the employee to perform the described travel at Government expense. While it may contain a list of estimated expenses, such a list is not an agreement or undertaking by the Government to pay any amount set forth therein. Such expenses may be paid only upon the submission of a voucher which has been certified by a duly authorized certifying officer as correct and proper for payment. Regarding the proper use of the travel advance, Mr. Kassel's contentions controvert the administrative report. There is, then, a dispute of fact concerning this point. Since one who asserts a claim has the burden of furnishing substantial evidence to clearly establish liability on the part of the Government, we have consistently accepted the administrative statement of the facts in the absence of a preponderance of the evidence to the contrary. 41 Comp. Gen. 47, 54 (1961); B–178654, April 8, 1974. On the record before us, the presumption in favor of the administrative report has not been overcome. Accordingly, Mr. Kassel is not entitled to reimbursement for any portion of his payment of the unexpired term of his lease at his former duty station.

We have also been asked whether the claimant is entitled to reimbursement at the commuted rate for storage of his household goods at the old residence during February and March 1975. The regulations relative to temporary storage provide that such storage may be allowed only incident to transportation of the goods at Government expense, and require submission of a receipted copy of the warehouse or other bill for storage costs. FTR para. 2–8.5 (May 1973). We have held that the evidentiary requirement is satisfied by submission of a receipted bill which shows the storage dates, storage location, and the actual weight of the household goods stored. 53 Comp. Gen. 513 (1974). We have specifically held, however, that the placement or retention of an employee's goods in his residence may not serve as the basis for reimbursement under the regulations relating to temporary storage. B–173557, August 30, 1971. Therefore, Mr. Kassel may not be reimbursed on the basis of temporary storage for any period during which his household goods remained at his former residence.

The voucher which accompanied this matter indicates that $11.20 has been claimed by Mr. Kassel for advertising expenses incurred incident to his attempts to relet the apartment in June, 1975. As adminisratively recommended, this item is properly payable. However, for the reasons set forth above, the $975 claimed by Mr. Kassel for payment of the balance of his rental obligation may not be certified for payment.

[B-149685]

Small Business Administration—Small Business Investment Act—Venture Capital

Investments (including certain long-term loans) by small business investment company (SBIC) in small business concerns which otherwise meet the requirements of 15 U.S.C. 683(b) and implementing regulations do not lose their character as "venture capital" even though the SBIC–lender reserves right to approve or disapprove future borrowings of small business concern from other potential lending institutions.

In the matter of "venture capital"—section 303(b) of the Small Business Investment Act, October 19, 1976:

This decision to the Administrator of the Small Business Administration (SBA) is in response to his request for our concurrence in SBA's interpretation of the term "venture capital" as that term appears in section 303(b) of the Small Business Investment Act, as amended, 15 U.S.C. § 683(b) (Supp. IV, 1974), and in the implementing regulations, 13 C.F.R. § 107.202(b) (1975). SBA has determined that funds loaned by small business investment companies (SBICs) to a small business concern under an agreement requiring the borrower to obtain the SBIC's approval before borrowing money from any other institutional lender can qualify as "venture capital" under the definition, notwithstanding the definitional requirement that venture capital financing be subordinate to any subsequent borrowings by the small business concern. The question is whether we agree that the two requirements are consistent.

According to the material submitted to us by SBA, a question about the validity of this determination was first raised in an internal SBA memorandum addressed to its General Counsel. The internal memorandum points out that if an SBIC has the right to disapprove any additional borrowing by a concern to which it has furnished equity capital, it could defeat the requirement that its own loan be "subordinated" by simply refusing to permit the concern to borrow from anyone else. SBA's administrator, however, has concluded that "an investment is not disqualified from serving as the basis of third-dollar leverage by the requirement of the lender's approval for subsequent loans from other institutional lenders, so long as such investment does not, in fact,

become senior to other borrowings of the small concern from other institutional lenders." We concur with SBA's position for the reasons discussed below.

SBICs have statutory authority to provide financing to eligible small business concerns pursuant to sections 304 and 305 of the Small Business Investment Act, 15 U.S.C. §§ 684 and 685 (Supp. IV, 1974). Section 304 provides that it shall be a function of each SBIC to provide a source of *equity* capital to eligible small business concerns. Section 305 authorizes each SBIC to make long-term loans to such concerns to provide them with funds needed for sound financing, growth, modernization, and expansion.

Section 303(b) of the Small Business Investment Act authorizes SBA to purchase or guarantee debentures issued by SBICs in amounts up to 300 percent of the total private capital invested in that SBIC, up to a maximum of $20,000,000, provided that the SBIC has a minimum of $500,000 of private capital and has at least 65 percent of its total funds available for investment in small business concerns invested or committed in "venture capital." This is referred to as providing "third dollar leverage" to SBICs. If an SBIC is unable to satisfy those conditions, section 303(b) authorizes SBA to purchase or guarantee only a maximum of 200 percent of the total private capital invested in the SBIC with a $15,000,000 ceiling. Thus, it is in the interest of the SBIC to have its investments qualify as "venture capital" under the statute.

"Venture capital" is defined in general terms in section 303(b) to include "such common stock, preferred stock, or other financing with subordination or nonamortization characteristics as the Administration determines to be substantially similar to equity financing." As authorized by the provision, SBA expanded the statutory definition of venture capital in its regulations as follows:

> **"Venture Capital Financing" shall mean:**
>
> (1) Common and preferred stock and equity securities as defined in § 107.302(b)(2) with no repurchase requirement for five years, except as may be specifically approved by SBA under § 107.901 for purposes of relinquishing Control over a Small Concern.
>
> (2) Any right to purchase such stock or equity securities.
>
> (3) Debentures or loans (whether or not convertible or having stock purchase rights) which are subordinated (together with security interests against the assets of the Small Concern) by their terms to all borrowings of the Small Concern from other institutional lenders, and have no part amortized during the first three years. See 13 C.F.R. § 107.202(b) (1975).

Section 304(b) of the Small Business Investment Act, 15 U.S.C. § 684(b) (1970), expressly permits an SBIC providing equity capital to a small business concern to restrict any future borrowings by the small concern as follows:

> Before any capital is provided to a small-business concern under *this section*—
>
> (1) the company may require such concern to refinance any or all of its outstanding indebtedness so that the company is the only holder of any evidence of indebtedness of such concern; and

(2) except as provided in regulations issued by the Administration, *such concern shall agree that it will not thereafter incur any indebtedness without first securing the approval of the company* and giving the company the first opportunity to finance such indebtedness. [Italic supplied.]

If the terms "equity capital" and "venture capital" were the same, no question of eligibility for third-dollar leverage would be raised since authority for prior approval is specifically granted in section 304(b), above. However, as the legislative history indicates, the term "venture capital" is considerably broader in scope. Nonconvertible long-term loans clearly fall in section 305 rather than section 304 and therefore it cannot be said that the prior approval requirement is statutorily authorized.

When the Small Business Investment Act was first enacted in 1958, equity capital for purposes of the Act was limited to convertible debentures only. See S. Rept. No. 1052, 85th Cong., 2d Sess., 12, 10 (1958). (A convertible debenture is a certificate of indebtedness or bond that can be exchanged for stock in the company.) However, in subsequent legislation this statutory restriction was eliminated and SBA was authorized to adopt, through the issuance of appropriate regulations, its own definition of the term "equity capital." The definition, adopted by SBA, is considerably broader than that provided in the 1958 Act. It includes stock and other similar forms of financing while retaining convertible debentures—together with other convertible debt instruments—in the equity capital definition. See 13 C.F.R. § 107.302 (1975).

The phrase "venture capital" was added to section 303(b) of the Small Business Investment Act by section 205 of the Small Business Act Amendments of 1967, approved October 11, 1967, Public Law 90–104, 81 Stat. 268. The initial version of S. 1862, 90th Cong., 1st Sess., the bill which was ultimately enacted as Public Law 90–104, did not contain that term. It used the words "equity capital" instead.

The Conference Report on S. 1862, the bill ultimately enacted as Public Law 90–104, explained the change as follows:

Section 207 of the House amendment contained a definition of "venture capital." Section 205 of the conference substitute adopts the term "venture capital," but defines it as including "such common stock, preferred stock, or other financing with subordination or nonamortization characteristics as the Administration shall determine to be substantially similar to equity financing." Since the term is used only in section 303(b) of the act (as amended by section 205 of the conference substitute), the definition is made part of that section. See H. Rept. No. 660, 90th Cong., 1st Sess., 9 (1967).

This explanation was amplified by Senator McIntyre in presenting the conference report to the Senate:

The Senate version of S. 1862 leaves to the determination of the SBA Administrator the definition of "equity capital" as it would be used in section 303(b) of the act.

The House version defines "venture capital" without granting any discretion to the SBA Administrator.

The conference committee accepted the Senate provision to permit the final definition to be left to the SBA Administrator but changed "equity capital" under this section to read "venture capital." This will permit SBA to accept as eligible securities a variety of debt instruments which do not meet the technical qualifications of equity but which are substantially similar to equity financing. 113 Cong. Rec., S13827 (Sept. 28, 1967).

As indicated in the foregoing explanation, by adopting the term "venture capital" instead of "equity capital" and moving the definition to section 303, Congress maintained the separate provisions applicable to equity capital under section 304 and to long-term loans under section 305 while encouraging, through the leverage provisions of section 303, certain types of investments—including those which may be substantially similar but do not meet the technical qualifications of equity financing—from both categories.

Our review of the legislative history of the Small Business Investment Act, as amended, has shown a consistent concern on the part of Congress to protect as well as encourage equity type investments by SBICs. The following explanation of the purpose and objective of the relevant provisions of the Small Business Investment Act, approved August 21, 1958, Public Law 85–699, 72 Stat. 689, as it was originally enacted, supports this view:

EQUITY-TYPE CAPITAL FOR SMALL BUSINESSES

Small-business investment companies are authorized to provide equity-type capital to small-business concerns through the purchase of convertible debentures which shall contain such terms and interest rates as the companies fix under SBA regulations. These debentures are to be convertible at the option of the company or a holder in due course, up to and including the date of call, into stock of the small-business concern at the sound book value of such stock as determined at the time the debentures were issued.

The committee believes that the use of convertible debentures, which has been developed to a high degree in recent years by many large, publicly financed companies, is the most suitable financing instrument for this type of program. This type of debenture is attractive to speculative investors who want an opportunity to share in the future prosperity of a business beyond the fixed claim of ordinary debt. In view of the risk inherent in, and the admittedly experimental nature of the financing which this bill seeks to encourage, consideration must be given to encouraging such speculative investors.

Before an investment company purchases any such convertible debentures, it may require the small-business concern to refinance its outstanding indebtedness so that the investment company is the only holder of indebtedness of such concern. Furthermore, to protect the investment company, such small-business concern may be required to agree not to incur further indebtedness without approval of the investment company. H. Rept. No. 2060, 85th Cong., 2d Sess., 8, 15 (1958). See also S. Rept. No. 1052, 85th Cong., 2d Sess., 12 (1958).

The legislative history of the Small Business Investment Act Amendments of 1960, approved June 11, 1960, Public Law 86–502, 74 Stat. 196, is also significant for purposes of this issue. The initial version of S. 2611, 86th Cong., 1st Sess., the bill which was ultimately enacted as Public Law 86–502, would have deleted from the Small Business Investment Act the borrowing approval provision presently found at section 304(b) of the Act. Although the Senate initially passed this

version of S. 2611, the deleted provision was restored by the House of Representatives with the accompanying explanation:

> The Senate bill omits from existing law certain provisions restricting additional borrowing by small business concerns to which an SBIC has supplied capital under section 304. None of the winesses who appeared during the hearings expressed any complaint about the way these provisions are working today, and many letters were received indicating that their omission from the revised section 304 would be misunderstood. *To the extent that the SBIC's investment under section 304 takes the form of a debt instrument, it should have some control over additional debt incurred by the borrower.* Your committee concluded, therefore, that it would be best to leave these provisions as they are in existing law. They appear as subsection (b) of section 304 of the 1958 act, as it would be rewritten by the reported bill. [Italic supplied.] See H. Rept. No. 1608, 86th Cong., 2d Sess., 8 (1960).

The Senate agreed to this action by the House of Representatives in restoring the deleted provisions after Senator Proxmire explained the House amendment to the Senate as follows:

> Section 6 of the Senate version of S. 2611 would eliminate the language contained in section 304(c), which provides that before any capital is provided to a small business concern, first, the SBIC may require such concern to refinance any or all of its outstanding indebtedness so that the SBIC is the holder of any evidence of indebtedness of the small business concern; and, second, except as provided in SBA regulations the small business concern shall agree that it will not thereafter incur any indebtedness without first securing the approval of the SBIC and giving the SBIC the first opportunity to finance such indebtedness.
>
> The House version of S. 2611 provides for the retention of the language of section 304(c) in the act.
>
> This is not objectionable since these provisions have not to my knowledge caused any hardship to either the SBIC's or small business concerns. *They are the type provisions that would normally be included in any financial arrangement whether they are expressly set out in the act or not.* SBA regulations provide that the SBIC shall allow appropriate exceptions to this section for open account or other short-term credit. [Italic supplied.] See 106 Cong. Rec. 11672 (June 2, 1960).

It is true that the foregoing expressions of intent refer to equity capital financing under section 304 rather than long-term loan transactions under section 305. Nevertheless, we are persuaded that Congress, in enacting section 304(b), did not intend to preclude SBICs who make long-term loans under section 305 from similarly protecting their funds. We note that section 305(e) of the Act requires that loans made by SBICs "shall be of such sound value or so secured, as reasonably to assure repayment." We agree with SBA that a restriction on new borrowings may be of great assistance in carrying out the mandate of section 305(e).

From the foregoing it is our view that, by including section 304(b), the Congress intended to assure that SBICs providing financing under the provisions of section 304 would be able to take advantage of a restrictive provision often included as a matter of commercial practice in the type of long-term loan financing contemplated under section 305 rather than to authorize the practice for equity financing but prohibit the practice for such long-term loan financing. That is, a provision which places a limitation on other indebtedness by the borrower

is used in most loan agreements as part of a lender's design to assure the borrower's liquidity and ability to pay the loan back. See, for example, J. Van Horne, *Financial Management and Policy*, 558–560 (3d ed., 1974). Providers of equity capital are not as often thought of as having such protections, and we believe the provision in question was included to avoid any doubts that SBICs supplying equity capital to small business concerns were covered. It would be anomalous to hold that the Congress intended to authorize SBIC to protect only their equity capital investments but not their investments of other types of venture capital.

In summary, it is our view that Congress did not intend to preclude SBICs making long-term loans under section 305 from requiring small business concern borrowers, as a condition to obtaining their loans, to agree to secure the SBIC's approval before incurring additional indebtedness, nor did it intend to preclude long-term loans from being considered investments or commitments in venture capital if they meet the other criteria established by the statute and SBA's implementing regulations, merely because the borrower is required to obtain the lender's approval for subsequent loans from other institutional lenders.

[A–13067]

Travel Expenses—Miscellaneous Expenses—Telephones—Long Distance Calls—Voucher Certifications

Travel Voucher, Standard Form 1012, revised August 1970, provides for certification of long distance telephone calls by officials authorized under 31 U.S.C. 680a on voucher itself. Separate certification of long distance calls is no longer required. 44 Comp. Gen. 595 and B–115511, July 3, 1953, modified.

Telephones—Long Distance Calls—Government Business Necessity

31 U.S.C. 680a provides that long distance telephone calls must be for transaction of official business and that agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. If, after examining facts surrounding long distance tolls on travel vouchers to traveler's family, properly designated official determines said calls were in interest of Government, General Accounting Office (GAO) will not question such determination.

Certifying Officers—Liability—Improper Certifications—Long Distance Telephone Calls

31 U.S.C. 680a provides that long distance telephone calls must be for transaction of public business and that department and agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. Certifying officers are not liable for payment of long distance tolls if official designated under 31 U.S.C. 680a improperly certifies toll.

In the matter of certification of travel vouchers containing long distance telephone calls, October 20, 1976:

Mr. Edward C. Capps and Mr. K. R. Fenner, Jr., authorized certifying officers of the Federal Power Commission, by letter of May 28, 1976, have requested an advance decision concerning the certification and payment of travel vouchers, Standard Form (SF) 1012, August 1970, containing long distance telephone tolls. Specifically, they request answers to 5 questions.

Question 1. Standard Form 1012, August 1970, contains a statement over the signature of the approving officer which reads: "Approved. Long distance telephone calls are certified as necessary in the interest of the Government." Is this statement sufficient to comply with 31 U.S.C. 680a?

Section 4, chapter 119 of the act of May 10, 1939, 53 Stat. 738, 31 U.S.C. 680a, states as follows:

> On and after May 10, 1939, no part of any appropriation for any executive department, establishment, or agency shall be used for the payment of long-distance telephone tolls except for the transaction of public business which the interests of the Government require to be so transacted; and all such payments shall be supported by a certificate by the head of the department, establishment, or agency concerned, or such subordinates as he may specifically designate, to the effect that the use of the telephone in such instances was necessary in the interest of the Government.

We held in decisions 44 Comp. Gen. 595 (1965) and B–115511, July 3, 1953, that administrative approval of a travel voucher, including long distance telephone calls, did not meet the certification requirement of 31 U.S.C. 680a. When those decisions were rendered, there was no provision on the travel voucher for certification of long distance calls in accordance with 31 U.S.C. 680a. As pointed out in the submission, SF 1012, Travel Voucher, August 1970, contains an administrative approval which states that long distance telephone calls are certified as necessary in the interest of the Government. Also, it should be noted that said certification must be made by an official authorized to certify long distance calls under 31 U.S.C. 680a. See third footnote on SF 1012.

In light of the revision of SF 1012 which contains a specific certification of long distance telephone calls, we now regard those portions of decisions 44 Comp. Gen. 595, *supra*, and B–115511, *supra*, and similar decisions, requiring separate certification, as modified. Accordingly, question 1 is answered in the affirmative.

Question 2. May telephone toll charges be approved by an official and certified by a certifying officer when:

(a) the traveler notifies his family of his safe arrival and the place where he may be contacted in an emergency, or his travel arrangements?

(b) the traveler, upon orders from the headquarters office, changes his temporary duty station and calls his family to advise them of his new contact point in a different city than originally intended?

Question 3. Would the answer to either question 2 (a) or (b) above be different if the traveler was on an "actual expense basis"?

31 U.S.C. 680a requires that long distance telephone calls must be for the transaction of public business and certified as being necessary in the interest of the Government, if payment for said calls is to be made from appropriated funds. We stated in 44 Comp. Gen. 595, *supra*, that 31 U.S.C. 680a "imposes on the administrative officials concerned the responsibility to determine whether a long distance call was on public business or otherwise in the interest of the Government." We also stated in said decision that this Office would not substitute its judgment for that of an agency official designated under 31 U.S.C. 680a. Thus, in B-179823, July 14, 1975, we held that this Office would not object to the payment of long distance telephone calls made to a relative by an employee traveling on official business regarding transportation from the airport to his home in a privately owned automobile after his return flight was delayed, if it was administratively determined that such a call was in the interest of the Government.

We believe that the telephone call described in question 2(a) would normally be considered a personal call since travel plans are generally known well in advance of travel and most travelers arrive safely at their destinations. However, if after investigating all of the facts involved in a given situation, an official designated under 31 U.S.C. 680a determines and certifies that such a call or one described in 2(b) was in the interest of the Government, we will not question such a determination. Accordingly, questions 2(a) and 2(b) are answered in the affirmative, and question 3 is answered in the negative.

Question 4:

(a) Must restitution be made for telephone tolls already approved, certified and paid on the revised travel vouchers under conditions described under question 2(a)?

(b) Should the answer to either or both of 2(a) or (b) be negative, is there any responsibility upon the official ordering a change in travel plan, or temporary duty station, to notify the family of the traveler of the change in locations?

In light of the answers to questions 2(a) and (b), we find it unnecessary to answer questio 4(a) or (b).

Question 5: What responsibility and/or liability rests with the certifying officer after proper certifications of long distance telephone calls are approved on either a travel voucher or a separate certification, when it is determined at a later time that the toll charge may have been incurred on strictly personal business?

The certifying officer would not be liable for such payment if the telephone call has been certified by an official designated under 31 U.S.C. 680a, since the primary responsibility for determining the official nature of the calls rests with the heads of agencies or their designees. B–1524, December 14, 1939. Also see B–185497, August 6, 1976, in which we held that certifying officers were not liable for payments made under the Military and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 240–243, if an improper administrative determination regarding settlement had been made. The rationale for such holding was that the law placed the responsibility for the determination on the head of the agency or his designee.

[B–151087]

States—Federal Aid, Grants, etc.—Payments—Prior to Availability of Appropriations

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available.

States—Federal Aid, Grants, etc.—Availability—In advance of Appropriation Availability

Concerning use of grant funds to pay for costs incurred by grantee prior to availability of appropriation to be charged, General Accounting Office (GAO) will no longer apply "general rule" that, in connection with grants, Federal Government may not participate in costs where the grantee's obligation arose before availability of appropriation to be charged unless the legislation or its history indicates a contrary intent, since such rule did not reflect actual basis on which decisions cited in support thereof were decided and, in any event, has no legal basis. 45 Comp. Gen. 515, 40 *id.* 615, 31 *id.* 308 and A–71315, February 28, 1936, modified.

Statutory Construction—Court Interpretation—Effect

Rule of statutory construction developed by courts which disfavors retroactive application of statute is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause result which might seem unfair. However, these considerations, and thus cited rule of statutory construction, do not appear relevant to allowance of grant payments for costs incurred by grantee prior to availability of appropriation to be charged. Furthermore, it is doubtful that such use of grant funds even involves retroactive application of a statute in customary sense since determination of whether to allow payment, as well as payment itself, will be made after the appropriation becomes available.

To the Honorable Robert McClory, House of Representatives, October 20, 1976:

This responds to your request for our opinion concerning the use of land and water conservation assistance funds to reimburse costs in-

curred by States prior to the availability of an appropriation for such purposes.

The Land and Water Conservation Fund Act of 1965 (Act), Public Law 88-578 (September 3, 1964), 78 Stat. 897, as amended, 16 U.S.C. §§ 460*l*-4 to 460*l*-11 (1970 and Supp. V, 1975), established a fund in the Treasury from which the Congress could make appropriations, 60 percent of which would be allocated for grant assistance to States and 40 percent would be used for other Federal purposes, 16 U.S.C. § 460*l*-7(a). Funds allocated for State purposes and apportioned pursuant to statutory direction among the several States are thereafter available to provide matching assistance of up to 50 percent of each State's costs in planning, acquiring, and developing needed land and water areas and facilities to be used for outdoor recreation purposes. 16 U.S.C. §§ 460*l*-4, 460*l*-8(a) and (c).

The Secretary may consider providing financial assistance to a State for acquisition and development projects only after the State has prepared and submitted a comprehensive statewide outdoor recreation plan. The Secretary may provide States assistance to prepare a plan when such plan is not otherwise available, 16 U.S.C. § 460*l*-8(d). The Secretary may then provide financial assistance for projects for land and water acquisition and development which are in accordance with the approved comprehensive statewide outdoor plan. 16 U.S.C. § 460*l*-8(e).

Your question is whether matching funds provided to States under the Act may be applied to reimburse States for costs incurred after the date of approval of the Act, but prior to the time that the particular appropriation to be charged became available.

It is noted that the Interior Department's Bureau of Outdoor Recreation, which administers the Act, currently permits payments for costs incurred prior to project approval under certain circumstances. The Bureau of Outdoor Recreation Manual, Part 670, provides in pertinent part as follows:

> 3. *Retroactivity.* It is the intent of the Bureau that Fund grants be awarded to assist work not yet undertaken, rather than to help pay for work already begun or completed. This applies to entire projects and to each stage of a multi-stage project.
>
> A. *Policy.* Retroactive costs are those costs incurred prior to project or stage approval by the Bureau. They include costs incurred for subsequent stages before the stages are approved. With the specific exceptions stated below, retroactive costs are not eligible for matching funds.
>
> * * * * * * *
>
> B. *Exceptions.*
>
> (1) *Retroactive Projects.* Retroactive costs will not be matched under ordinary circumstances. Exceptions will be made only when immediate action is necessary and the time necessary to process an application would result in a significant opportunity being lost. The State will notify the Bureau in writing of the necessity for it to act prior to doing so and give justification for the proposed action. Such notification must include an environmental assessment as outlined in Section 650.1.3. A finding by the Bureau that an environmental impact statement might be required will preclude the granting of a waiver. *Funds must be available*

in the State's apportionment, and a project agreement must be submitted as soon as possible. If the Bureau grants an exception, the retroactive costs will be eligible for assistance if the agreement is later approved in the normal course. Granting an exception is only an acknowledgement of the need for immediate action; it does not imply a qualitative approval of the project. The costs are incurred at the applicant's risk and granting of the exception does not in any way insure approval of the project. Under no conditions will an exception be granted during a period of State ineligibility or when the amount remaining unobligated in the State's apportionment is inadequate to cover the proposed retroactive project. [Italics supplied.]

These provisions indicate, and an official of the Bureau has confirmed, that presently a waiver is granted only when there are sufficient funds in the State's apportionment to cover the prospective project costs and those funds are set aside at that time. Thereafter, if the project is approved and the funds set aside are still available, the previously incurred costs may be reimbursed. However, the same Bureau official has informally advised that the Bureau is considering a liberalization of its current policies so as to allow retroactive costs (1) without requiring that funds available under a State's apportionment be set aside at the time of waiver, or (2) even in cases where a State's apportionment has been exhausted at the time of waiver.

Your letter notes that decisions of this Office have pronounced as a general rule that, in connection with grants, the Federal Government may not participate in costs where the grantee's obligation arose before an appropriation under the enabling legislation became available, unless the legislation or its history indicates a contrary intent. 45 Comp. Gen. 515 (1966); 40 *id.* 615 (1961); 31 *id.* 308 (1952); and A–71315, February 28, 1936.

The first decision of our Office in this area appears to be A–71315, February 28, 1936. In that decision we held that the Social Security Board could not reimburse States for administrative expenses incurred by them in connection with unemployment compensation programs during fiscal year 1936 but prior to the date of enactment of the Supplemental Appropriation Act, 1936, which first made funds available for payments to States. We based our holding in large part on the fact that the Congress, in making appropriations for State payments, had reduced the amount authorized for the entire year in proportion to the time that had elapsed between the beginning of the fiscal year and enactment of the appropriation, thereby clearly indicating an intent that the appropriation be used prospectively.

In B–11393, July 25, 1940, we considered the Second Deficiency Appropriation Act, 1940, approved June 27, 1940, which provided for payments by the Commissioner of Education to State and other public agencies for the cost of certain vocational education courses offered by them to defense workers. We concluded that the Commissioner could only make payments for costs incurred on or after July 1, 1940. It is to be noted, however, that the Deficiency Appropriation Act

apparently constituted the authorization for the program, as well as the source of the funds therefor. Thus costs incurred prior to July 1, 1940 would have predated the authorization for payment.

In 31 Comp. Gen. 308 (1952), we held that the Acting Administrator of the Federal Civil Defense Administration could not make contributions to the States, under the provisions of the Federal Civil Defense Act of 1950, for items purchased prior to the date on which the Federal appropriation to be charged became available. We observed:

> In view of the * * * legislative history, it appears that the Congress did not intend or contemplate that retroactive payments would be made for obligations incurred or expenditures made by the States prior to an appropriation becoming available. Accordingly, the holding in A–71315 dated February 28, 1936, that, in the absence of a contrary indication, sums appropriated for grants are available for use only prospectively from the date of the appropriation and not for reimbursing States for expenditures theretofore made or for liquidating obligations theretofore incurred appears for application and your second and third questions are answered in the negative. * * *. *Id.* at 310.

This decision misstated the holding in A–71315, which, as noted previously, concluded that Congress had intended the funds there involved be used prospectively only. However, the result reached in 31 Comp. Gen. 308 was correct and in accord with A–71315, since it also specifically found that the legislative history of the act involved indicated an intent that the funds involved be used prospectively only. See discussion at 31 Comp. Gen. 309–310.

In 40 Comp. Gen. 615 (1961), we held that Federal aid funds provided under the Pittman-Robinson and Dingell-Johnson Acts could not be used to share in the costs of project lands acquired by the States prior to the availability of the funds for that purpose. However, in that decision we again found that the provisions of the acts themselves indicated that the Congress intended that the Federal aid funds would be applied to restoration projects only prospectively. 40 Comp. Gen. at 618.

Thus in the foregoing three decisions, the touchstone of our rationale was that the Congress had manifested an *affirmative* intent, either in the language of the laws involved or their legislative histories, that Federal assistance be used only in connection with costs incurred subsequent to an appropriation. We did not base our result on the *absence* of a congressional expression of intent that costs incurred prior to the appropriation be included, although we concede that a "general rule" to this effect was included in each of the decisions after A–71315, *supra*. Because this "general rule" does not reflect the actual basis for each of the above mentioned decisions, we will no longer cite and apply such a rule when considering the legality of using grant funds to pay for costs incurred prior to availability of the applicable appropriation.

In any event, there seems to be no legal requirement for a "general rule" prohibiting such grant payments except under exceptional circumstances. Whether a statute operates retroactively or prospectively is, of course, a question of statutory construction which depends upon the statutory language and legislative history in any given case. While the courts have developed a rule of construction which disfavors retroactivity, this rule is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause results which might seem unfair. 73 Am. Jur. 2d, Statutes, § 350; 2 Sutherland Statutory Construction, §§ 41.02, 41.04 (4th ed., 1973). These considerations do not appear relevant to the allowance of grant payments for costs incurred prior to availability of the appropriation charged. Indeed, it is at best doubtful that such a use of appropriations for grant payments even involves the "retroactive" application of a statute in the customary sense, since the determination of whether to allow payment, as well as payment itself, will be made after the appropriation becomes available. *Cf.*, 2 Sutherland Statutory Construction, *supra*, § 41.01. It may certainly be observed that most Federal grant programs are designed to induce actions or results which would not otherwise occur, rather than to reward those which would take place in any event or to substitute Federal dollars for State or local contributions. However, there is no basis to create a rigid legal barrier in this regard, so as to limit consideration of all factors relevant to deciding how the purposes of a particular grant program can best be accomplished. For example, it could not ordinarily carry out congressional intent to reimburse a State for the costs of property acquired many years prior to its application for the particular grant in question, at a time when no Federal purpose was even contemplated. Conceivably, however, there might be special circumstances that would justify even that use of grant funds. We would prefer to base each decision from now on on the statutory language, legislative history, and particular factors operative in the particular case in question, rather than on a general rule.

Turning to the instant case, we note that section 6(c) of the Land and Water Conservation Fund Act, *supra*, 16 U.S.C. § 460*l*–8(c), provides in part:

> * * * No payment may be made to any State for or on account of any cost or obligation incurred or any service rendered prior to the date of approval of this Act.

The Act was approved on September 3, 1964, although it did not become effective until January 1, 1965. See Public Law 88–578, § 1(a), 78 Stat. 897.

Section 6(c) by its terms precludes grant payments for costs incurred before September 3, 1964. However, it does not—nor does any other specific provision of the Act—prevent the Secretary of the In-

terior from making grant payments for State costs incurred after September 3, 1964, but before the availability of the appropriation to be charged. Moreover, section 6(c) has been interpreted by the Interior Department, with the knowledge and apparent acquiescence of congressional committees, as implicitly supporting the view that the latter costs may be paid. *See, e.g., Hearings before Subcommittees of the House Appropriations Committee on the Second Supplemental Appropriation Bill, 1965*, 89th Cong., 1st Sess., pt. 1, at 580–81 (1965); *Hearings before the Senate Appropriations Committee on the Second Supplemental Appropriation Bill, 1965*, 89th Cong., 1st Sess., at 323–24 (1965); Cong. Rec., May 5, 1976 (daily ed.), H3924 (colloquy between Representatives McClory and Taylor, of North Carolina).

We note that the Department proposes to reimburse "retroactive" costs only in limited circumstances. Part 670 of the Bureau of Outdoor Recreation Manual, quoted in full, *supra*, refers to circumstances "when immediate action is necessary" to prevent a "significant opportunity" from being lost. Moreover, the State would be required to obtain Federal permission to incur the cost in question prior to taking the action. Thus there appears to be no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes.

Finally, the Department regulations make it clear that no obligation arises by virtue of its approval of costs incurred prior to project approval and prior to the availability of an appropriation for such costs. Thus there is no Anti-Deficiency Act objection to the regulatory change under consideration. The grant itself would not be made until the appropriation charged becomes available.

In view of the foregoing, it is our opinion that grants from appropriations under the Land and Water Conservation Fund Act may be applied to costs incurred by States after September 3, 1964 (the date of enactment) but prior to availability of the appropriation charged if it is determined that such payments would aid in achieving the purposes of the Act. Accordingly, we have no objection to a revision of the grant regulations along the lines previously discussed.

[B–158810]

Witnesses—Third Party—Administrative Proceedings—Fees—Searching For and Producing Records

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons.

In the matter of the reimbursement of third party costs of searching for and producing records under Internal Revenue Service summons, October 22, 1976:

The Commissioner of the Internal Revenue Service (IRS) has requested our decision as to whether the IRS may expend appropriated funds to reimburse third party witnesses for expenses incurred in search for, reproducing and transporting books, papers, records, or other data summoned by the IRS under 26 U.S.C. § 7602 (1970).

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602 (1970), authorizes the Secretary of the Treasury or his delegates (authorized personnel of the IRS) to examine books, papers, records or other data relevant or material to an inquiry as to the liability of a taxpayer for any internal revenue tax. It also gives IRS authority to issue a summons to third parties, as well as the taxpayer, requiring them to appear and give testimony that may be relevant or material to such inquires and to produce any necessary documentary evidence. If the witness does not comply voluntarily, a section 7602 summons may be enforced by a district judge, after a hearing, pursuant to 26 U.S.C. § 7604 (1970).

The Commissioner states that section 7602 investigative authority to obtain testimony and records by administrative summons is essential to IRS ability to perform its statutory functions. However, the Commissioner asserts that a major problem has arisen in recent years which has threatened to impair IRS ability to effectively administer and perform its functions. Increasingly, third party witnesses summoned to produce records have resisted the summons because of lack of reimbursement for expenses incurred by them in complying. It is noted that there are statutes which govern the reimbursement of witness fees incurred in administrative hearings, 5 U.S.C. § 503(b)(2) (1970) and 28 U.S.C. § 1821 (1970), but they are not applicable in this instance because they cover only fees and mileage to third party *witnesses* summoned by the IRS to give *testimony at proceedings* authorized under 26 U.S.C. § 7602. 49 Comp. Gen. 666 (1970); 48 *id.* 97 (1968). Our present concern is with cost associated with the actual *production* of third party records under a § 7602 summons.

The refusal to comply with the summons forces IRS to initiate enforcement proceedings under section 7604(b), which are expensive and time consuming for the Government. Furthermore, IRS investigations are disrupted pending the outcome, dissipating both investigative time and personnel, which sometimes results in the expiration of civil and criminal statutes of limitation. Accordingly, the Commissioner

requests our decision as to the use of appropriated funds for reimbursement to be made:

(a) only to third parties (*i.e.*, not to the taxpayer under investigation or officers, employees, agents, accountants or attorneys of the taxpayer); (b) served with an internal revenue summons; (c) to produce third party records (*i.e.*, records not belonging to the taxpayer under investigation); (d) for reasonably necessary costs incurred in complying with a summons; (e) at rates set by the Service (*e.g.*, records search: $3.50 per hour per employee; photocopies: $1.00 for first page $.10 for each additional page); (f) upon request and presentation of an itemized bill; (g) unless the Service (i) specifies that its own personnel will make the search, or (ii) specifies that it will provide its own reproduction equipment and supplies to make any necessary copies, or (iii) specifies production of only original summoned records. Reimbursement under such a program is to be in addition to, and not in lieu of, a summoned witness' existing right to witness and mileage fees unde 5 U.S.C. § 503(b) (1970).

Concurrent with adoption of a reimbursement program it is also anticipated that a system of internal control procedures will be instituted providing for limitations on the dollar amounts for which various personnel are authorized to incur reimbursement obligations, higher level reviews where those amounts may be exceeded, and budgetary controls.

The Commissioner contends that because this proposed program is incident to the proper execution of the investigative functions of the IRS, it should be payable from IRS appropriations, citing the following language of the Treasury Department Appropriations Act, 1976, Public Law 94–91, August 9, 1975, 89 Stat. 443:

For necessary expenses of the Internal Revenue Service, not otherwise provided for, including * * * internal audit and security, * * * $44,500,000.

* * * * * * *

For necessary expenses of the Internal Revenue Service for * * * securing unfiled tax returns, and collecting unpaid taxes * * * $771,500,000.

* * * * * * *

For necessary expenses of the Internal Revenue Service for determining and establishing tax liabilities, and for investigation and enforcement activities * * * $830,000,000.

It is further argued that even though the expenses in question are not specifically enumerated in the appropriation language, such expenditures should qualify as "necessary expenses" within the above appropriation authority.

31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made. However, where an appropriation is made for a particular object, purpose or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 53 Comp. Gen. 351 (1973); 50 *id.* 534 (1971); 44 *id.* 312 (1964); 29 *id.* 419 (1950); 17 *id.* 636 (1938); 6 *id.* 619 (1927). The question is therefore whether

the proposed reimbursement of third parties for reasonably necessary costs incurred in complying with an IRS summons to produce third party records is necessary to carry out IRS's statutory functions.

In the course of our consideration of the Commissioner's submission, we learned that the Congress was considering a provision in section 1205 of the Senate passed version of H.R. 10612, 94th Congress, which would specifically deal with the issue at hand. With the informal concurrence of IRS, we delayed our decision pending congressional action. On October 4, 1976, the Tax Reform Act of 1976, Public Law 94–455, 90 Stat. 1699, 1702, was enacted containing in section 1205 thereof a provision which would authorize the IRS to reimburse witnesses for the costs of complying with administrative summonses. Under these provisions the IRS is required to pay per diem and mileage costs when a witness is required to appear in response to a summons and, further, is authorized to reimburse a summoned party (other than the taxpayer) for direct costs incurred in locating, copying and transporting any summoned records. Such payments and reimbursements are to be made at such rates, and subject to such conditions, as may be prescribed in regulations. This measure will give authority to the IRS to make the reimbursements requested here. However, this measure would only be applicable to those summonses issued after December 31, 1976.

IRS subsequently advised us that it still needed a decision to deal with any summonses issued prior to January 1, 1977. For the reasons discussed below, we will not object if the IRS institutes a limited reimbursement program.

The judicial precedent for reimbursing third party witnesses for searching, producing and transporting documents required by IRS under a duly issued summons is ambiguous. Courts have required IRS reimbursement of third parties summoned to produce documents under § 7602, for the reasonable costs of compliance. See *Friedman* v. *United States*, 532 F. 2d 928, 937 (3rd Cir. 1976), in which it was stated that the applicaton of this rule requires consideration of the specific facts of any given case and could not be made subject to a general rule. In *United States* v. *Davey*, 426 F. 2d 842, 845 (2nd Cir. 1970), the Court stated that the Government has a right to require the production of relevant records so long as it pays its reasonable share of the costs of retrieval. See also, *United States* v. *Farmers & Merchants Bank*, 397 F. Supp. 418 (C.D. Cal. 1975), *appeal pending* (No. 75–3690, 9th Cir.); *United States* v. *Davey*, 404 F. Supp. 1283 (S.D.N.Y. 1975), *appeal pending* (2nd Cir.). Other cases have indicated that the IRS would not have to reimburse third parties for the production of documents when the costs of production claimed by the summoned persons were not unreasonable or burdensome. See *United States* v. *Continental Bank &*

Trust Co., 503 F. 2d 45 (10th Cir. 1974), in which the Court stated that although the direct costs to the bank would approximate $1,500, the summons did not impose an unreasonable financial burden on the bank. In *United States* v. *Dauphin Deposit Trust Co.*, 385 F. 2d 129, 130 (3rd Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), the Court stated that there is "no doubt that the recipient of a summons has a duty of cooperation and that at least up to some point must shoulder the financial burden of cooperation * * *." The bank in that case had refused to cooperate at all with the IRS. Compare also, *United States* v. *Jones*, 351 F. Supp. 132 (M.D. Ala. 1972) and *United States* v. *Maryland Bank & Trust Co.*, 76-1 USTC 83, 570 (D. Md. 1975). In other words, no consistent principle on a third party's entitlement to fees for producing records has been set forth by the courts.

However, in somewhat similar circumstances, this Office has determined that the Government is authorized to reimburse third parties the reasonable costs of complying with administrative proceedings, when such compliance is considered necessary to the Government. In 43 Comp. Gen. 110 (1963), we found that it was within the discretion of the Securities and Exchange Commission to reimburse the First State Bank of Abilene, Texas, which was not a party in the proceedings, and to whom a Commission *subpoena duces tecum* was addressed, for the reasonable processing expenses incident to the preparation of the reproductions of microfilm records. In 8 Comp. Gen. 19 (1928) and 1 *id.* 442 (1922), we recognized that expenses incurred by a third party in complying with a *subpoena duces tecum* issued on behalf of the Government may be paid on the basis that such expenses are necessary and incident to the procurement of the documentary evidence called for by the subpoena and needed by the Government.

In view of these decisions we hold that when IRS determines that it will avoid costly litigation and delays in obtaining necessary documents from third parties by doing so, it may enter into an agreement with those parties to pay the reasonable costs of complying with the IRS summons. After January 1, 1977, the effective date of section 1205 of the Tax Reform Act of 1976, the IRS will, of course, be governed by the terms of the reimbursement authority set forth therein.

[B-186826]

Subsistence—Per Diem—Actual Expenses—Itemization of Actual Food Expenses

National Labor Relations Board employee who is authorized reimbursement for actual subsistence expenses while on 90-day detail may not be reimbursed for meal expenses claimed on a flat-rate basis and must provide itemization of actual daily food expenses.

Subsistence—Per Diem—Rates—Lodging Costs—Apartment Rental—Cleaning Services

Although employee who rents apartment while on temporary duty may be reimbursed expenses for cleaning services as a cost of lodgings, claim for $600 for maid service for 3 months is excessive based on cleaning needs of a one-bedroom apartment occupied by one individual. Reimbursement should be limited on the basis of the cost of commercial cleaning service provided on a once-a-week basis.

Travel Expenses—Temporary Duty—Rental of Apartment—Telephones—User Charges, etc.

Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings.

In the matter of James L. Palmer—advance decision on actual subsistence allowance, October 28, 1976:

This is in response to a request of June 23, 1976 by Dorothy S. Wells, an authorized certifying officer of the National Labor Relations Board (NLRB), for an advance decision as to whether Mr. James L. Palmer, a field attorney for NLRB, is entitled to reimbursement for certain expenses incurred while authorized actual subsistence expenses during a 90-day detail in Washington, D.C.

The pertinent facts as they appear in the record are that Mr. Palmer was directed to travel from his official duty station at Houston, Texas, to Washington, D.C., for a 90-day detail lasting from September 19 to December 22, 1975. During this period, he was authorized reimbursement for the actual and necessary expenses of his official travel under the provisions of 5 U.S.C. § 5702(c) and the Federal Travel Regulations (FTR) (FPMR 101–7) chapter 1, part 8 (May 1973), as amended by FPMR Temporary Regulation A–11 (May 19, 1975). When Mr. Palmer submitted a travel voucher for reimbursement of his expenses, he was advised that he had not itemized his meal expenses in such a manner as to permit a proper review by his agency. He then revised his voucher. However, the certifying officer is still uncertain whether reimbursement is proper because his claim for meals is not itemized to show the actual daily cost for each meal, but is based on a flat rate of $3 per day for breakfast, $5 per day for lunch, and $10 per day for dinner. Mr. Palmer also claims reimbursement for maid service during this period at a cost of $600, as well as reimbursement of the cost for a private telephone and the rental of a television set. The certifying officer asks us to rule on the propriety of certifying the above-mentioned items for payment.

The authority for reimbursement of actual travel expenses is 5 U.S.C. § 5702(c) which provides, in pertinent part, that, under regulations of the General Services Administration, an employee may be

reimbursed for the actual and necessary expenses of official travel to high-rate geographical areas designated as such in the regulations. Washington, D.C., is a designated high-rate geographical area under the FTR.

With respect to the basis upon which reimbursement may be made under the above-quoted provision, the FTR contemplates payment only of subsistence expenses actually incurred. Paragraph 1-8.2a of the FTR provides:

> a. *Maximum daily reimbursement.* When the actual subsistence expenses incurred during any one day are less than the daily rate authorized, the traveler will be reimbursed only for the lesser amount * * *.

In order that the actual subsistence expenses may be determined, paragraph 1–8.5 requires an itemization of actual daily expenditures:

> 1–8.5 *Evidence of actual expenses.* Actual and necessary subsistence expenses incurred on a travel assignment for which reimbursement is claimed by a traveler shall be itemized in a manner prescribed by the heads of agencies which will permit at least a review of the amounts spent daily for lodging, meals, and all other items of subsistence expenses. Receipts shall be required at least for lodging.

The employee is responsible for maintaining a contemporaneous record of expenses incurred incident to travel and for submitting a voucher itemizing such expenses. FTR paragraphs 1–11.2 and 1–11.3.

In accordance with the above provisions, we have held that the submission of a voucher which does not clearly identify daily expenditures for meals is insufficient to allow computation of daily subsistence expenses so that such expenses may be compared to the daily maximum. B–116908, October 12, 1965. Since the rate of $18 per day claimed by Mr. Palmer for meals over the 85-day period of his temporary duty assignment is not an itemization of actual costs, but, by his own statement, represents a daily average of the total amount spent for meals, that part of his voucher for meal expenses may not be paid on the basis claimed.

The subject of telephone charges incurred by an employee who rents an apartment rather than obtaining lodgings at a hotel or motel is addressed in 52 Comp. Gen. 730 (1973). In that decision, we held that the cost of lodgings reimbursable under the statutes and regulations includes those items of expense which are for accommodations or services ordinarily included in the price of a hotel or motel room. We therefore held that a telephone user charge, but not the cost of installation, is reimbursable as a cost of lodging incident to the occupancy of an apartment while on temporary duty. See also B–168384, February 19, 1975. These cases are to be distinguished from situations in which installation of a telephone in transient quarters is a matter of official necessity and where the installation charge is reimbursable as other than a lodging cost. *Cf.* decision B–185975 of this date.

For the first month of temporary duty, Mr. Palmer claims reimbursement of telephone charges totaling $28.14. For the second and third months, respectively, he claims reimbursement for charges of $11.35 and $12.05. Of the $28.14 amount claimed, $22 represents installation charges and is not reimbursable. The remaining $6.14 is reimbursable, inasmuch as it appears to represent a proration of the monthly service charge for the first month after installation. The amounts of $11.35 and $12.05 claimed for the 2 succeeding months consist of the monthly service charge of $7.68, a charge for message units, and Federal and local taxes. The monthly base charge of $7.68 and the 75-cent charge for message units are includable as lodging costs. However, only that portion of the Federal and local tax attributable to those charges may be reimbursed as a lodging expense. We note in this regard that the tax charges of $3.67 and $3.62 for the 2 months involved are based on service charges, including long distance and installation charges, totaling $64.60 and $45.76, respectively.

Mr. Palmer's claim for $90 for rental of a television set may be allowed in accordance with 52 Comp. Gen. 730, *supra*. That decision implicitly overrules the holding of B–160914, March 20, 1967, that such charges are not reimbursable and establishes that rental charges for furniture such as stoves, refrigerators, chairs, tables, beds, sofas, televisions and vacuum cleaners may properly be considered lodging costs.

Lastly, with regard to Mr. Palmer's claim for $600 paid for maid service, our decision at 52 Comp. Gen. 730, *supra*, holds that maid fees and cleaning charges are reimbursable as lodging costs. While Mr. Palmer may be reimbursed for maid services under our holding in that decision, the amount of his entitlement is limited on the basis of his obligation, pursuant to FTR para. 1–1.3a, to "exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business." We regard Mr. Palmer's expenditure of an amount equivalent to more than $7 per day for maid services as excessive based on the cleaning needs of a one-bedroom apartment occupied by one individual. We do not believe that a prudent person traveling on personal business would engage cleaning services more than once a week. For this reason, Mr. Palmer may only be reimbursed for cleaning services on the basis of reasonable charges in the Washington, D.C., area for cleaning his apartment once a week during his temporary duty period.

[B–187008]

Bids—Competitive System—Federal Aid, Grants, etc.—Basic Principles

Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary

provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1-10.103-4(a) provides exception when only one bid is received.

In the matter of Hudgins & Company, Inc., October 28, 1976:

Hudgins & Company, Inc. (Hudgins), has objected to an award to the Continental Wrecking Corporation (Continental) made by the Metropolitan Atlanta Rapid Transit Authority (MARTA), Georgia, under a grant from the Urban Mass Transportation Administration (UMTA), Department of Transportation. The grant was made pursuant to the Urban Mass Transportation Act of 1964, as amended, Public Law 88-365, 49 U.S.C. § 1601, *et seq.* The grant covered the construction of a rapid rail transit system in the Atlanta area on a cost-sharing basis.

MARTA solicited bids for the construction of the transit system. Only two bids were received. Continental submitted a bid of $229,983 but failed to submit a bid bond prior to bid opening. Hudgins failed to include in its bid package form DCC-1, entitled "Contractors Certification," which contained the bid amount. After bid opening Continental submitted a bid bond in the required amount. Hudgins likewise filed form DCC-1 offering a price of $308,681. MARTA waived the failure to supply a bid bond and awarded the contract to Continental.

In the case of *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74-2 CPD, we made the following statement with respect to the applicability of basic principles of Federal procurement law to awards by grantees:

> It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 Comp. Gen. 289, 293 (1962); 50 Comp. Gen. 470, 472 (1970), *State of Indiana* v. *Ewing*, 99 F. Supp. 734 (1951), cause remanded 195 F. 2nd 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts.
>
> *We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant.* 37 Comp. Gen. 251 (1957); 48 Comp. Gen. *supra*. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B-168434, April 1, 1970; B-168215, September 15, 1970; B-173126, October 21, 1971; B-178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen. *supra*. * * * [Italic supplied.]

Our Office has held that to the extent our reviews will be concerned with Federal procurement policy, it will not be mechanically applied. On the contrary, we will only be concerned with the application of "basic principles." *Copeland System, Inc.*, 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

From a review of the grant agreement between MARTA and UMTA, we believe the foregoing principles are applicable here. The determinative language is found in section 109(a) of part II of the grant contract, which reads, in pertinent part:

Competitive Bidding. The Public Body shall not award or substantially amend any contract in an amount greater than $2,000 pursuant to the Project, except for professional service contracts, without formal advertising, free, open, and unrestricted competitive bidding, and award to the lowest responsive and responsible bidder, unless UMTA specifically approves some other form of procurement or award to another party upon being satisfied by the Public Body that such action will adequately protect the Government's interests in encouraging competition, optimizing efficient performance of the project and minimizing its cost. * * * [Italic in original.]

Even though not all requirements applicable to Federal procurements necessarily apply to grant contracts, conformity with such requirements, unless contrary to provisions governing the grant contract, should establish the propriety of the action. Federal Procurement Regulations § 1-10.103-4(a) (1964 ed. amend. 48), applicable to Federal procurements in this situation, reads:

Where an invitation for bids requires that a bid be supported by a bid guarantee and noncompliance occurs, the bid shall be rejected, except in the following situations when the noncompliance shall be waived unless there are compelling reasons contrary:

(a) Where only a single bid is received. In such cases, however, the Government may or may not require the furnishing of the bid guarantee before award.

MARTA has taken the position that since Continental submitted the only acceptable bid, the failure to include a bid bond could be waived. Additionally, Continental did submit the bid bond prior to award.

Counsel for Hudgins argues that while Hudgins failed to timely submit a form DCC-1, the intended bid price is ascertainable by examination of the penal sum indicated on the bid bond. Therefore, Hudgins is alleged to have submitted a valid bid which then would preclude MARTA from waiving Continental's failure to supply a bid bond prior to bid opening.

While Hudgins did submit a bid bond, the alleged intended price, computed from the bid bond, would not have been binding on Hudgins. Form DCC-1, omitted by Hudgins, reads in pertinent part:

Bidder warrants, covenants and agrees and accept the following lump sum of _____ _____/100 Dollars ($ _____), as full compensation for furnishing all materials and for doing all the Work; or from the action of the elements, or from any unforseen difficulties or obstructions which may arise or be encountered in the prosecution of the Work until its acceptance by the Authority, and for all risks of every description connected with the Work; also for all expenses incurred by or in consequence of the suspension

or discontinuance of Work and for well and faithfully completing the work, and the whole thereof, in the manner and according to the Terms of the Contract, and the requirements of the Engineer under them.

Based on the bid submitted by Hudgins, we cannot conclude that Hudgins would have been obligated to perform the contract at its alleged bid price of $308,681. The bid of Hudgins, then, was nonresponsive for failing to include a price for the work to be performed. *Regis Milk Company*, B–180302, April 18, 1974, 74–1 CPD 203. Therefore, the omission of a bid bond from Continental's bid may be waived as only one responsive bid was received in response to the solicitation. FPR § 1–10.103–4(a) *supra;* 39 Comp. Gen. 796 (1960); see also *Johnson Auto Parts*, B–182102, September 10, 1974, 74–2 CPD 157.

Accordingly, the complaint of Hudgins is denied.

[B–180391]

Transportation—Dependents—Military Personnel—Dislocation Allowance—Husband and Wife Both Members of Uniformed Services

Where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a dislocation allowance is authorized, except for members without dependents who are assigned to Government quarters. In no event can more than one dislocation allowance be paid where only one movement of a household is required. However, where both members of the uniformed services married to each other qualify for a dislocation allowance upon a permanent change of station but only one movement of the household occurs, they may elect to be paid the greater amount of the two entitlements.

In the matter of a dislocation allowance—PDTATAC Control No. 76–4, October 29, 1976:

This action is in response to a letter dated February 9, 1976, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), requesting an advance decision on several questions concerning the rights of military members, married to each other, to receive payment of a dislocation allowance (DLA). The letter was forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee and has been assigned PDTATAC Control No. 76–4.

The submission states that in our decision 54 Comp. Gen. 665 (1975), it was held that when a male and female service member are married to one another (both residing in the same household) and both are ordered on a permanent change of station, only one DLA is payable on a move to a new permanent station where they reside in the same residence at the new station. In this connection, the submission points out that the current provisions of the Joint Travel Regulations (JTR) authorize a DLA to each member in the before-mentioned circumstances, but that based on that decision a proposed change to the JTR's was forwarded to the services for consideration.

The submission goes on to state that there exists a disparity of view among the services as to whether that decision was intended to preclude payment of DLA to the second member (as a member without dependents) when moving under the before-described circumstances. In this connection, it is suggested that support for the theory that two DLA's may be paid (one at the "with dependent" rate and one at the "without dependent" rate), is to be found in decision 52 Comp. Gen. 64 (1972), and that one of the services expenses the belief that 54 Comp. Gen. 665, that decision was not modified by *supra*. The belief is also expressed that the Supreme Court decision in the case of *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and subsequent decisions that followed supporting the payment of two basic allowance for quarters (BAQ), would also support payment of two DLA's.

In addition to the foregoing, the submission requests resolution of the following questions:

a. What are the entitlements of members (residing in separate households) who are married en route before the effective date of orders and reside in the same residence after reporting to the new station?

b. A husband and wife are members residing in the same household and incident to the senior member's permanent change of station (PCS) to a vessel and his spouse's reassignment to an activity at the home port of that vessel have established their residence off-station at the home port of the vessel.

(1) Is a dislocation allowance payable to the senior member although he is assigned quarters on board the vessel?

(2) If the male member is junior to his spouse may the female member be paid a dislocation allowance at the with dependent rate (provided there are dependents involved)?

(3) What are the entitlements of these members upon subsequent PCS to the same or adjacent station when public quarters are not assigned to them?

(4) If both members have dependent parents who reside with them at their last permanent duty station but a separate residence was established for their dependent parents at the home port of the vessel, may each member be paid a dislocation allowance as a member with dependents in his or her own right?

(5) What would the entitlement be if a service couple reside together and the senior member is reassigned to new station ashore instead of to a vessel and establishes his residence off station and at a later date his spouse has a permanent change of station and moves into the same residence?

The provisions of law governing entitlement to a dislocation allowance are contained in 37 U.S.C. 407 (1970), subsection (a) of which provides:

(a) Except as provided by subsections (b) and (c) of this section, under regulations prescribed by the Secretary concerned, a member of a uniformed service--

(1) whose dependents make an authorized move in connection with his change of permanent station;

(2) whose dependents are covered by section 405(a) of this title; or

(3) without dependents, who is transferred to a permanent station where he is not assigned to quarters of the United States;

is entitled to a dislocation allowance equal to his basic allowance for quarters for one month as provided for a member of his pay grade and dependency status in section 403 of this title. For the purposes of this subsection, a member whose dependents may not make an authorized move in connection with a change of permanent station is considered a member without dependents.

In decision B-180391, February 12, 1975 (54 Comp. Gen. 665), we analyzed the legislative history of the before-quoted provisions and determined that the purpose of the DLA is to provide reimbursement for expenses normally incurred in connection with the movement of a member's household incident to a change of permanent station. We concluded in that case that as a general proposition when a husband and wife are both members of a uniformed service residing in the same household and incident to a permanent change of station the household is moved with both members continuing to reside in that household, there would be no justification for the payment of more than one DLA since only one change of residence for the family is involved.

In decision B-174478, August 4, 1972 (52 Comp. Gen. 64), we considered the entitlement of a member without dependents who, upon a change of permanent station, was furnished a certificate of nonavailability of quarters based on economic advantage to the Government. We concluded therein that where such a member is not required to occupy otherwise available quarters, he would be entitled to a DLA.

Basic allowance for quarters as authorized in 37 U.S.C. 403 (1970) was enacted on October 12, 1949, as section 302 of the Career Compensation Act of 1949, ch. 681, 63 Stat. 802, 812. The purpose of that act, including the BAQ provision, was to attract career personnel through a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry. It was intended, and is so defined at the present time in 37 U.S.C. 101(25) (1970), as a part of a service member's "regular military compensation" (RMC).

The DLA, on the other hand, was established by section 2(12) of the Career Incentive Act of 1955, ch. 20, 69 Stat. 18, approved March 31, 1955, to fill a particular need (the incidental cost associated with moving a family and relocation of that family) in which a specified event must occur before such entitlement is authorized and is not a part of RMC. An entitlement to BAQ accrues to every member regardless of sex or grade by virtue of his or her status as a member of the uniformed services if quarters are not provided by the Government; a DLA does not similarly accrue.

With regard to the decision in *Frontiero* v. *Richardson*, *supra*, it is our view that it did not establish the principle that BAQ could be paid to a husband and wife, both of whom are members of the uniformed services. The *Frontiero* case determined that the administration of 37 U.S.C. 403 (1970) and other statutes to the extent that a distinction was made and benefits were determined on the basis of sex, did deprive servicewomen of due process. Therefore, the fact that both husband

and wife may be entitled to BAQ where they are both members of the uniformed services cannot be cited as authority to authorize payment of a DLA to both on a permanent change of station where only one movement of the household occurs.

We do not consider that our decision 54 Comp. Gen. 665, *supra*, is inconsistent with, supersedes, overrules or modifies 52 Comp. Gen. 64, *supra*, nor is it in conflict with the principle established in the *Frontiero* decision. That decision is for general application and was not intended to be applied in a different manner depending on the member's sex. Therefore, the questions presented in the submission are answered as follows:

a. Where members residing in separate households are married after orders for a change of permanent station are issued to each, but before the effective date of the orders, and then reside in the same residence after reporting to the new station, it is our view that both meet the statutory entitlement for the DLA at the without dependent rate, if in fact both make a move. The critical point is whether the movement of a household has taken place incident to a change of permanent station.

b. Where a husband and wife are members residing in the same household and incident to the senior member's PCS to a vessel and his spouse's reassignment to an activity at the home port of that vessel and they have established a residence off station at the home port of the vessel:

(1) A DLA may not be paid to the senior member since he is assigned quarters on board the vessel, unless he has dependents (other his spouse) in his own right. In that connection we do not find that the relative grades of the members would effect their entitlements.

(2) Consistent with the above if the male member is junior to his spouse, the female member may be paid a DLA at the with dependent rate provided there are dependents involved.

(3) Upon a subsequent PCS to the same or adjacent station when public quarters are not assigned to them, neither member would be entitled to a DLA. Paragraph M9004–4 of the JTR's provides that a DLA will not be payable in connection with change of permanent station for travel performed between stations located within the corporate limits of the same city. See, in this connection, 54 Comp. Gen. 869 (1975) and 43 Comp. Gen. 474 (1963). Compare 48 Comp. Gen. 782 (1969).

(4) If at any time on any PCS move it can be conclusively shown that it is necessary to establish separate households by or on behalf of each member or for his or her dependents, then it would appear that each member has satisfied the statutory requirements to authorize payment of a DLA in his or her own right. Compare B–183176, No-

vember 18, 1975. Thus, if both members have dependent parents who resided with them at their last permanent station, but a separate residence is established for their dependent parents upon a PCS, each member may be paid a DLA as a member with dependents.

(5) If a service couple reside together and the senior member is reassigned to a new station ashore instead of a vessel and establishes his residence off station, which off station housing is otherwise authorized, and at a later date his spouse transfers on PCS to that station and moves into the same residence, it is our view that if at the time of the first PCS it was necessary to disrupt the household, move and reestablish the household in parts, the senior member would be entitled to DLA at the without dependent rate on the initial move and the spouse at the without dependent rate on the later move.

In summary, the controlling factor in determining whether either or both of the members of the uniformed services are entitled to a DLA where they are married to each other, and whether or not the DLA is at the with dependents or without dependents rate, does not depend upon the sex or the respective grade of the member, but rather on the factual circumstances of each case. Generally, where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a DLA is authorized, except for members without dependents who are assigned to Government quarters. The allowance is to be paid as provided by regulation; however, in no event may more than one DLA be paid where only one movement of a household is required. In these circumstances, where both members, married to each other, qualify for a single DLA on a permanent change of station move, they may elect to be paid the amount applicable to the senior member, it being recognized that such election—except in unusual circumstances—will provide the greater benefit.

[B-186867]

Bids—Late—Mishandling Determination—Bids Received at One Place for Delivery to Another Place

Determination of whether proposal is late is measured by its time of arrival at office designated in the solicitation, and not by time of arrival at agency's central mailroom.

Bids—Late—Processing and Delivery by Government

A delay of 2 hours and 5 minutes in the transmission of a proposal from the central agency mailroom to the designated office does not constitute Government mishandling since the mail distribution was accomplished in accordance with reasonable internal mail distribution procedures.

In the matter of LectroMagnetics, Inc., October 29, 1976:

LectroMagnetics, Inc. (LMI) protests the rejection as late of its proposal on Department of State (State Department) Request for Proposals RFP) ST 76–61, which contemplated a firm fixed price, indefinite quantity supply contract for radio-frequency shielded enclosures.

Blocks 7 and 8 of Standard Form 33, Solicitation, Offer and Award, for RFP ST 76–61 specified that mailed proposals would be received at the Department of State, Supply and Transportation Division, Room 530, State Annex No. 6, Washington, D.C. 20520. Block 9 specified that hand-carried offers were to be delivered to the depositary located at 1701 N. Fort Myer Drive, Arlington, Virginia 22209. Block 9 also required the receipt of all proposals by 3:00 p.m., June 17, 1976. Upon inquiry, this Office has established that State Annex No. 6 is physically located at 1701 N. Fort Myer Drive. Thus, mailed proposals for this RFP went first to the main State Department mailroom in Washington, D.C., 20520, and were then routed to their ultimate mailing address—State Annex No. 6, at 1701 N. Fort Myer Drive, Arlington, Virginia.

LMI mailed its proposal on June 16, 1976. It arrived at the State Department mailroom in Washington, D.C., at 12:55 p.m. on June 17, 1976, yet, although it was handled in accordance with the Department's normal internal mail routing procedures, it did not arrive at the office designated in the solicitation by the specified time of 3:00 p.m. Consequently, it was rejected as late and the proposal was returned to LMI.

Pursuant to Federal Procurement Regulations 1–3.802–1, the following clause was incorporated into the RFP:

LATE PROPOSALS, MODIFICATIONS OF PROPOSALS, AND WITHDRAWALS OF PROPOSALS

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and:

(1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);

(2) It was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(3) It is the only proposal received. * * *

To paraphrase LMI's arguments in support of acceptance of its offer, LMI argues that since its proposal was received at the State Department (although not at the designated office) before the time specified by the solicitation, its proposal was not late in any way and thus

should be considered. Alternatively, LMI argues that the delay in the State Department's internal mail delivery which, despite its proposal's arrival within that Department's mailroom at 12:55 p.m., caused it to be late for the 3:00 p.m. deadline, constituted mishandling so as to require acceptance of its late offer per FPR 1-3.802-1(a)(2), *supra*.

We must disagree with both of LMI's arguments. First, we think the phrase "office designated in the solicitation," used in FPR 1-3.802(a), *supra*, has reference to the ultimate destination and not to any intermediate stop in transit. *Cf.* 50 Comp. Gen. 71, 74 (1970). Thus, the timeliness of a proposal is to be measured from its arrival at the address specified in Blocks 7 and 8 of the solicitation, not from its arrival at an agency's central mailroom, as LMI contends. An offeror must allow sufficient time for a proposal to pass through an agency's central mailroom and reach the specified office by the indicated time. *See* 49 Comp. Gen. 191, 194 (1969).

Likewise, we do not agree with LMI that the delay in transmission of its proposal from the central State Department mailroom to Annex No. 6 constitutes mishandling. As we stated in B-168210(1), July 10, 1970:

> [w]here bids or modifications are received at one place by the Government for delivery by it to another place specified in the invitation, our Office has held that the Government has a duty to establish procedures calculated to insure that the physical transmission of bids is accomplished within a reasonable time after receipt. The determination of what constitutes a reasonable internal procedure and time for transmission at one Government installation is not necessarily for application at all installations; rather, it is uniquely for determination by the administrative agency involved. Our role must be restricted to determining whether the agency position is arbitrary, capricious, or unsubstantiated.

See also 49 Comp. Gen. 697, 699 (1970); *Frequency Engineering Laboratories*, B-186390, August 17, 1976, 76-2 CPD 166.

The State Department has concluded in this instance that because Main State is in Washington, D.C. and the specified office is in Arlington, Virginia, mail distributed in accordance with agency procedures resulting in its failure to deliver LMI's proposal to the designated office before 3:00 p.m.—i.e. within 2 hours and 5 minutes after its arrival in Main State—does not constitute mishandling. The State Department's mail distribution procedures under the circumstances have not been shown to be unreasonable and therefore we agree that the late receipt of the proposal has not been due solely to mishandling by the Government.

Parenthetically, LMI's predicament could have been avoided had LMI sent its proposal by registered or certified mail no later than the fifth calendar day prior to the date specified for receipt of proposals. FPR 1-3.802-1, *supra*. Although LMI interprets the 5-day requirement as a "penalty," the fact remains that by using this method an offeror can be sure that its mailed offer will be considered.

The protest is denied.

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