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Contracts—Protests—Interested Party Requirement

Air carrier who was at all times eligible for contract to perform charter flights is interested party under bid protest procedures.

Transportation—Air Carriers—Fly America Act—Intent of Sec. 5

Intent of Section 5 of Fly America Act (49 U.S.C. 1517) is to prefer United States air carriers over foreign air carriers rather than to prefer certificated over non-certificated air carriers.

Contracts—Specifications—Failure to Furnish Something Required—Licensing-Type Requirement—Aircraft Services Procurement

A carrier awarded a contract without the Civil Aeronautics Board authority needed to perform assumes the risk of obtaining the authority.

In the matter of Saturn Airways, Inc.; Alaska International Air, Inc., April 3, 1978:

The Agency for International Development (AID), Department of State, solicited quotations from several air carriers for the transportation of two one-way outsized cargo charter flights from Carswell Air Force Base, Texas, to Rangoon, Burma. The solicitation was subject to section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1517 (Supp. V, 1975) (Fly America Act). None of the air carriers holding certificates of public convenience and necessity under section 401 of the Federal Aviation Act of 1958, 49 U.S.C. 1371 (1970) (certificated air carrier), with the operating authority to serve Rangoon, responded to the charter solicitation. (There was no regularly scheduled cargo service to Rangoon from Carswell Air Force Base, although there was regularly scheduled service from one of the surrounding municipal airports.) Only two firms responded to the solicitation: Saturn Airways, Inc. (Saturn), a certificated air carrier, and Alaska International Air, Inc. (AIA), a commercial operator not holding a certificate of public convenience and necessity under section 401 (non-certificated air carrier). Neither had operating authority to serve Rangoon. AID awarded the two charter flights to AIA which offered the low price.

AIA, by application filed June 20, 1975, asked the Civil Aeronautics Board (CAB) to issue an emergency exemption from the certificate requirement of section 401 to perform the two charter flights during the period June 24–27, 1975. Despite Saturn's opposition, the exemp-

tion was issued. See CAB Docket 27984, Order 75–6–111. Saturn's protest was received in General Accounting Office (GAO) after the flights were performed.

The primary issue is whether one subclass of the class of "air carriers," defined in 49 U.S.C. 1301(3) (1970) as United States citizens providing common carriage by air—the subclass holding certificates issued under section 401, represented by Saturn—is to be preferred in Government-financed international air transportation over the other subclass of air carriers—the subclass not holding section 401 certificates but which operates under the exemption authority of the CAB, represented by AIA.

Saturn contends that the subclass of certificated air carriers is to be preferred over the subclass of non-certificated air carriers by the plain meaning of the clause in the first sentence of section 5 of the Fly America Act, which states in pertinent part:

> * * * transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is available.

Saturn argues that only a certificated air carrier, to the extent of its certificate, regulation, or exemption authority, is eligible to perform air transportation of this type and that the award and subsequent payment to AIA were prohibited because AIA was not a certificated air carrier.

AIA argues, on the other hand, that a non-certificated air carrier is equally eligible to perform this kind of carriage without holding a certificate if it is otherwise authorized by regulations or exemption of the CAB. AIA suggests that because Saturn had no authority to serve Rangoon, it is not an interested party whose protest should be considered under the GAO bid protest procedures.

We find that Saturn is an interested party under our bid protest procedures. Although in some situations persons ineligible to receive awards are not considered to be interested parties, Saturn was at no time ineligible to receive the award.

Section 5 of the Fly America Act does not mean that certificated air carriers have a preference over non-certificated air carriers.

The language of section 5 must be considered in the context of the entire Fly America Act. Section 2 of the Act notes that "United States air carriers" or "United States carriers" are subject to a variety of discriminatory and unfair competitive practices. Section 3 establishes a monitoring and adjustment system for the charges made by foreign governments to "air carriers" for their use of overseas airport or airway property. Section 4 discusses the rates charged for the transporta-

tion of mail in terms of competitive disadvantage to "United States flag air carriers." Section 6 encourages maximum travel on "United States carriers." Section 7 prohibits a travel agent, foreign air carrier, and "air carrier" from discriminating in their charges and grants the CAB access to certain property and records of any foreign air carrier or "air carrier." Section 8, the last section of the Act, prohibits soliciting or accepting rebates from air carriers and foreign air carriers. The entire Act is written in terms of and is concerned with the single class of "air carriers," previously defined as United States citizens, in contrast with the class of "foreign air carriers," defined in 49 U.S.C. 1301(19) (1970) as non-United States citizens providing foreign air transportation.

The legislative history of the Fly America Act clearly shows that its purpose was to help improve the economic and competitive position of the U.S.-flag carriers against the foreign air carriers. The Senate and House Reports (S. Rept. No. 93–1257, 93rd Cong., 2d Sess. (1974); H.R. Rept. No. 93–1475, 93rd Cong., 2d Sess. (1974) on the bills containing the identical language of section 5 as enacted always referred to "U.S.-flag carriers," "U.S.-flag airlines," "U.S. carriers," "U.S. air carriers," "American-flag carriers," and "American airlines," having a preference over foreign air carriers, and the agency comments contained consistent references. The apparent intent was to include *all* United States air carriers in a single class. There is no indication of an intent to divide air carriers into two sub-classes: certificated (to be preferred) and non-certificated. Therefore, we conclude that section 5 should be construed to give a preference to air carriers authorized by certificate, regulation, or exemption of the CAB over foreign air carriers authorized by permit of the Board.

We note that the CAB agrees with our interpretation of the statute.

When AIA applied to the CAB for the exemption authority required to perform the charter flights for AID, Saturn argued to the CAB that the application should be denied because of an alleged preference under the Fly America Act for certificated air carriers over non-certificated air carriers. The CAB under Docket 27984 said in Order 75–6–111, June 24, 1975, in foot note 3 that, "* * * we do not read the statute as requiring that the Board must, in exercising its responsibilities, prefer one class of U.S. carriers to another," and granted AIA the exemption authority. The CAB in Order 75–6–113, June 24, 1975, has supported the Department of Defense (DOD) policy of preferring certificated air carriers over non-certificated air carriers by not granting exemption authority to a non-certificated air carrier to haul DOD cargo. But the CAB has made clear that the support of the DOD policy is peculiar to DOD traffic and finds no basis in the

Fly America Act. In fact the CAB has stated, "* * * we believe that the phrase 'exemption or regulation [sic] of the Civil Aeronautics Board' contained in section 5 reflects an underlying intent to promote the use of all authorized U.S. flag carriers, not merely those possessing certificates." Order 76–5–84, May 19, 1976. See also Order 76–4–64, April 14, 1976.

We recognize that under our decision a contract may be awarded to a carrier who, after award, may be denied the authority by the CAB to perform the carriage. This is not materially different from the case of a contractor who is unable to obtain licenses and permits required to perform the work. It is a risk the contractor assumes.

Protest denied.

[B–191369]

Classification—Back Pay—Applicability

Employee of Smithsonian Institution occupied position which the Civil Service Commission determined was erroneously included in the General Schedule and Commission instructed agency to classify position under Federal Wage System. Employee seeks backpay for period of erroneous classification. Claim may not be allowed as civil service regulations provide for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 511.703; 5 C.F.R. 532.702(b)(9).

In the matter of Francis J. McGrath—claim for backpay for period of erroneous classification under the General Schedule, April 3, 1978:

This decision concerns a claim by Mr. Francis J. McGrath for retroactive classification and accompanying backpay in connection with his employment with the Smithsonian Institution as a Planner Estimator.

The record shows that Mr. McGrath was employed in the Office of Plant Services, Management Services Division, Work Coordination Branch, as a Planner Estimator grade GS–302–9. By letter dated September 30, 1976, Mr. McGrath appealed his classification to the U.S. Civil Service Commission (Commission). We also note that on October 22, 1976, a group of Planner Estimators, including Mr. McGrath, sent a memorandum to the Chief, Management Services Division, of the Smithsonian, requesting that their Planner Estimator positions be "reclassified" from the General Schedule to the Federal Wage System.

Upon an examination of the duties and responsibilities of Mr. McGrath's position, on March 18, 1977, the Classification Appeal Office of the Commission issued a Classification Appeal Decision

which held that Mr. McGrath's position was exempt from the General Schedule classification system under 5 U.S.C. 5102(c)(7) and that the position was properly classifiable under the Federal Wage System. Since the Commission's regulations set forth at 5 C.F.R. 532.703(a) do not provide that the Commission can render a classification decision as to grade under the Federal Wage System where the agency has not classified the position, the Commission remanded Mr. McGrath's case to the Smithsonian Institution for a classification action. Accordingly, on April 24, 1977, the Smithsonian Institution converted the classification of Mr. McGrath's position to that of Planner Estimator General, WD-6701-8, step 1. Mr. McGrath states that he was performing the duties of a WD-8 position for several years prior to his conversion to the Federal Wage System and he claims backpay representing the difference between the compensation of his current WD-8 position and that of his prior grade GS-9 position.

The general rule in cases of this nature is that an employee of the Government is entitled only to the salary of the position to which he is appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than one he holds, he is not entitled to the salary of the higher level until such time as he is promoted to the higher level. *Matter of Norman M. Rusell*, B-183218, March 31, 1975.

The classification of positions in the General Schedule and the job grading of prevailing rate positions is governed by 5 U.S.C. 5101-5115 and 5 U.S.C. 5346 (Supp. II, 1972). Sections 5115 and 5346 empower the Commission to prescribe regulations regarding the classification of positions. Under the Commission's regulations the only provision for a retroactive effective date for classification is when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 511.703 and 5 C.F.R. 532.702(b)(9).

In *United States* v. *Testan, et al.*, 424 U.S. 392 (1976) the United States Supreme Court held that there is no substantive right to backpay for periods of wrongful position classification where the pertinent classification statutes 5 U.S.C. 5101-5115 did not expressly make the United States liable for pay lost through an improper classification. We note that the classification statute applicable in this instance, 5 U.S.C. 5346 (Supp. II, 1972), also does not contain any express provision making the United States liable for pay lost during a period of improper classification. In addition, the court held in *Testan, su-*

pra, that the Back Pay Act, 5 U.S.C. 5596 (1970), did not afford a remedy for periods of erroneous classification.

In view of the Supreme Court's holding in *Testan* and since Mr. McGrath does not qualify for retroactive promotion and backpay under the above-discussed civil service regulations, there is no authority which would allow the claim for backpay for the period he occupied a position classified in the General Schedule classification system.

We note that Mr. McGrath also presents claims for backpay for periods of erroneous classification for other Planner Estimators who occupied positions under the General Schedule. Our determination with regard to Mr. McGrath would also be applicable to other employees similarly situated who were erroneously included in the General Schedule and who do not fall under the provisions of 4 C.F.R. 511.703 or 5 C.F.R. 532.702(b) (9).

[B-189741]

Officers and Employees—*De Facto*—Compensation—Reasonable Value of Services Performed

Employee was hired by Forest Service and began working about 2 weeks prior to the date the position description was approved. He filed a claim for compensation and leave for this period. Employee may be considered a *de facto* employee since he performed his duties in good faith and hence may be compensated for the reasonable value of his service during *de facto* period. However, *de facto* employees do not earn leave and hence the leave portion of the claim is disallowed.

In the matter of James C. Howard III—Forest Service, Department of Agriculture—*de facto* employee, April 4, 1978:

This action involves a request for an advance decision submitted by Ms. Orris C. Huet, authorized certifying officer, Department of Agriculture, regarding a claim from Mr. James C. Howard III, for work performed prior to the effective date of his appointment.

Mr. Howard was hired by the Hiawatha National Forest, Forest Service, Department of Agriculture, as a Cooperative-Education student. He began work on June 7, 1976, at which time he completed all necessary personnel forms as instructed by the employing office. However, officials of the Hiawatha National Forest were not aware that an approved and classified position description was required before an employee could be properly appointed. As a result of this error, the position filled by Mr. Howard was not officially established until June 21, 1976, and hence Mr. Howard's first official workday in the position was June 22, 1976.

Mr. Howard is claiming compensation for 88 hours of work for the period of June 7 through June 21, 1976. In addition he is claiming 8 hours of annual leave and 8 hours of sick leave because he was not allowed: (1) leave for pay period 12 (June 7 through June 18, 1976) inasmuch as his appointment was not in effect, and (2) leave for pay period 13 (June 21 through July 2, 1976) inasmuch as he did not officially work a full pay period since his appointment was not effective until June 22. 31 Comp. Gen. 215 (1951) and B–125537, October 6, 1955.

A *de facto* officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs the duties, his actions are those of a *de facto* officer or employee. 30 Comp. Gen. 228 (1958). We have recently extended the *de facto* rule to permit payment for the reasonable value of services rendered by persons who served in good faith. 52 Comp. Gen. 700 (1973); 55 *id.* 109 (1975); and *Matter of William A. Keel, Jr., and Richard Hernandez*, B–188424, March 22, 1977. However, because he is not an employee within the meaning of 5 U.S.C. § 2105, a *de facto* employee does not accrue any annual leave during the *de facto* period so as to be entitled to a lum-sum payment. See 31 Comp. Gen. 262 (1952).

Accordingly, we conclude that the Department of Agriculture may compensate Mr. Howard for the reasonable value of the services he rendered while in a *de facto* status inasmuch as he served in good faith during the period in question. In this instance, the reasonable value of service rendered may be established at the rate of basic compensation set for the position to which he was officially appointed on June 22, 1976. However, he may not be compensated for accrued leave because no leave was earned during the period of his *de facto* status.

[B–191140]

Contracts—Releases—Finality of Release

Contractor, having mistakenly failed to reserve claims against the Government in general release, may nevertheless have claims considered on merits since contracting officer knew of contractor's active interest in larger claims and prior to payment was informed of error by contractor.

In the matter of DNH Development Corporation, April 5, 1978:

The United States Coast Guard, on January 30, 1978, requested an advance decision regarding the validity of a release executed by

DNH Development Corporation (DNH), under contract No. SB0228 (a)-76-C-090 (Contract 090). By letter dated February 8, 1978, DNH elected to submit the matter to our Office for decision in lieu of pursuing an appeal to the Board of Contract Appeals under the disputes procedure. The material facts are not disputed.

The Small Business Administration (SBA) entered into Contract No. DOT-CG17-2249 with the Coast Guard on March 19, 1976, under the provisions of section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970). DNH was awarded Contract 090 by the SBA on April 1, 1976, pursuant to the "8(a) subcontracting program," a program designed to assist small business concerns owned and controlled by socially or economically disadvantaged persons. The contract was for the construction of one duplex family house and one fourplex family house at Tok, Alaska, for a total contract price of $522,065. Construction was to begin within 60 days of receipt of a notice to proceed and work was to be completed by September 30, 1976. The contract was modified on September 2, 1976 to include the construction of Bachelor Enlisted Quarters at an amended total price of $724,475.

On September 13, 1977, DNH filed a claim for $560,125 against the SBA and the Coast Guard. The basis of the claim was that the SBA failed to advise and assist the contractor in meeting production schedules and overcoming construction problems during performance, contrary to the nature and purpose of the "8(a) program." DNH's claim was also based on additional work necessitated by changes and defective specifications, as well as the alleged failure of the Coast Guard to have sufficient field inspectors available during construction. Included with the claim was a detailed cost breakdown of the various portions of the claim.

The contracting agency retained $3,749, or .005 percent of the $724,475 contract price, pending the completion by the contractor of several minor repairs to the family houses. On October 10, 1977, DNH wrote the following letter to the contracting officer:

> Please be advised that the necessary repairs have been completed to correct the water seepage at the duplex in Tok.
> At this time we respectfully request the Coast Guard to remit the remainder of funds being retained.

The reason for this request was that the president of DNH believed that the $3,749 would "give DNH a little more money." By letter dated October 31, 1977, the contracting officer, who was fully aware of the extensive claim filed by DNH, replied as follows:

> Reference is made to letter dated 10 October 1977.
> The letter's second paragraph requests the release of the remaining funds left in the contract. In order that the remaining funds can be released I am forwarding a Contractor's Release form for your signature. Please execute as indicated and return.

In the event that the release is not returned I will have to retain funds in order to keep the contract open on the Government books.

On November 17, 1977, DNH's president executed the release accompanying the contracting officer's letter. The release provided as follows:

In consideration of the sum stated above, which has been paid or is to be paid to the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

According to DNH's president, he mistakenly and inadvertently failed to except or reserve the pending claims of DNH from the general terms of the release. On November 22, 1977, upon being informed of the mistake, DNH immediately sent a telegram to the contracting officer to "give notice that DNH does not waive rights to claims against this project." A United States Treasury check in the amount of $3,749 was issued and mailed to the contractor on December 1, 1977. The check has not been negotiated.

In 46 Comp. Gen. 414 (1966) we held, consistent with court decisions, that a general release executed without reserving claims against the Government was a valid defense to a contractor's claim for unliquidated damages. See, e.g., *United States* v. *Wm. Cramp & Sons Co.*, 206 U.S. 118 (1907); *J. G. Watts Construction Company* v. *United States*, 161 Ct. Cl. 801 (1963). However, we also found in that case that the attendant circumstances did not place the contracting officer on notice of possible error. We reach a different conclusion here.

The contracting officer knew of the recently filed claim of DNH for $560,125 and that it was pending and under active consideration. The contracting officer sent the letter with the release at the request of DNH solely for the purpose of allowing payment of the retained amount of $3,749 to be made after the necessary minor repairs had been completed. Additionally, in this instance, unlike the situation in 46 Comp. Gen. 414, *supra*, the contracting officer was aware of DNH's active interest in its larger claim when the erroneous release was received. Therefore, the contracting officer had no reasonable basis for reliance upon the mistakenly signed release since, in view of the attendant circumstances, he was on notice of the mistake. See, e.g., *Colonial Navigation Company* v. *United States*, 149 Ct. Cl. 242 (1960). Further, by its very terms, the release was not to become effective until payment by the Government of the amounts withheld. Prior to such payment, DNH had expressly notified the contracting officer by telegram of its error. We believe that where the contracting officer has been actually notified of a mistake in the execution of a release before final payment effectuating the release has been made, subsequent payment with such

knowledge by the contracting officer does not extinguish the Government's liability under the contract.

Accordingly, the release does not preclude consideration of DNH's claim on the merits. However, since the execution of a valid and binding release without claims excepted on the face of the release was the consideration for the issuance of the December 1, 1977 check, DNH should return that check to the Government. This decision does not preclude the negotiation of a new release by the parties.

[B–190206]

Bids—Mistakes—Price—Subitems

Invitation for bids provided spaces to insert prices for extended price, unit price and subunit price. Although award was based only on evaluation of extended and unit price, subunit price may not be ignored, since it cannot be determined from bid which price is correct.

In the matter of Broken Lance Enterprises, Inc., April 13, 1978:

Broken Lance Enterprises, Inc. (Broken Lance) protests against award of a contract under solicitation No. DAKF4477–B–0089, issued by the Department of the Army, for custodial services to be performed at Fort Indiantown Gap, Annville, Pennsylvania.

Broken Lance contends that W. & L. Hughes Service, Inc. (Hughes), the apparent low bidder, made an error in its bid regarding Item No. 4 of the solicitation which caused the bid to be nonresponsive. They argue that if Hughes is allowed to correct its bid, it will be receiving "two bites of the apple," thus giving Hughes an unfair competitive advantage over the other firms.

The solicitation required each bidder to provide a unit price per month, an extended price for a 12-month period, and a price per square foot for each of five custodial services to be performed. Section D of the solicitation provided as follows:

> Bids will be evaluated on the fixed monthly unit price. (The square footage price is for information purposes only.) Award will be made to the bidder whose bid represents the lowest overall total.

Hughes filled out Item No. 4 as follow:

price per square foot—$.033
unit price per month—$111.68
extended 12 month price—$1,340.16

When the per square foot price of $.033 is multiplied by the estimated number of square feet per month, a unit price per month of $363 and a 12-month extended price of $4,356 is obtained. Using the extended figures based on the per square foot price of $.033, Broken Lance, rather than Hughes, would have the lowest total bid at $52,825.19.

When the discrepancy was discovered, the contracting officer contacted Hughes and was informed that Hughes had made a mathematical error in computing the price per square foot, but that the unit price per month was correct. The correct per square foot price was stated to be $.01015. The Army contends that since the error concerned a price not subject to bid evaluation, and since the unit price per month of $111.68, which is the only price that is subject to evaluation, was verified by Hughes, Hughes should be declared the low bidder at $50,885.75.

In accepting Hughes' bid the agency appears to have adopted the position that since the subunit price is not to be evaluated in determining the low bidder the general rule which pertains to the correction of bids such as the instant one where extended prices are concerned and where the relative standing of bids is affected does not apply. The general rule in such cases is that where there is an obvious mistake in either the unit or extended price the bid should be disregarded where it cannot be determined from the face of the bid whether the error was in the unit price (subunit price), or extended price. 51 Comp. Gen 488 (1972).

Although we are not aware of any cases directly on point our Office has refused to permit the acceptance of a bid with an obvious error in a subunit price even though that subunit price was not a factor in the evaluation of bids. 49 Comp. Gen. 107 (1969); *Amos Construction Co., Inc.*, B–186623, July 22, 1976, 76–2 CPD 70. However in each of these cases it was unclear from the face of the IFB whether the subunit prices would be included in the evaluation.

Although it is clear from the face of the invitation for bids (IFB) in this case that the subunit price would have no immediate impact on the evaluation of the bid, it is to be used by the Army, as information, in developing its estimates to be employed in negotiating the price of any change orders issued under the contract. Its significance is illustrated by the fact that the space provided for it was on the face of the IFB schedule in line with both the unit and extended prices. It was also included in the abstract of bids. Moreover, the inclusion of a subunit price appears to have been treated by the agency as a matter of responsiveness.

Further, in this connection it is important to note that our Office has held that where an apparent error exists in a subunit price the contracting officer is under a duty to verify that price notwithstanding the fact that the subunit price was not a factor in the evaluation of bids. 51 Comp. Gen. 488, *supra;* 50 *id.* 151 (1970).

In view of the fact that bidders were required by the IFB to include a subunit price and considering that an apparent error in that price

would require verification, the discrepancy between the subunit price and the unit or extended price may not be ignored because one interpretation of Hughes' bid would cause it to be low bidder (unit and extended price are correct) and the other (subunit price is correct) would not.

In reaching this conclusion we note that available evidence is not sufficient to determine that the lower price bid by Hughes on item 4 is most logical. In this regard the abstract reveals that of the six bidders, two bid more than .033 as a subunit price for Item 4, while none bid lower than Hughes' alleged corrected figure of $.01015. Further, there is no mathematical error apparent from the face of the bid such as a misplaced decimal or multiplication by a wrong factor.

The agency points out that Hughes, the incumbent contractor on this requirement, bid in the identical manner on the prior procurement. The discrepancy was not discovered and no problems in performance or payment were encountered. We do not believe the fact that an error was made in a prior procurement, without adverse consequences, justifies the perpetuation of that error, once discovered, in a subsequent procurement.

In view of the above we do not believe that Hughes' bid could be corrected so as to cause it to displace the Broken Lance bid. In this regard the agency notes in the report that Broken Lance may not have properly filled out an itemized price breakdown on pages 11 and 12 of the IFB. The agency does not indicate in the report whether it considers the bid of Broken Lance nonresponsive for this reason.

In view of the fact that the matter of responsiveness of Broken Lance's bid was not presented by any of the parties to this protest and not addressed in the record we are referring this matter back to the agency for its determination. If Broken Lance's bid is found to be responsive and Broken Lance is determined to be responsible we recommend that consideration be given to terminating Hughes' contract and awarding the remainder of the requirement to Broken Lance as the low bidder. If Broken Lance is found to be nonresponsive we have no objection to the award to Hughes under its bid as verified because the relative standing of the remaining bids is not affected.

Protest sustained.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

[B–190774]

Contracts — Specifications — Descriptive Data — Waiver of Requirement

Invitation for bids (IFB) may permit waiver of technical data requirement for bidders who had furnished such data under prior contracts even though not specifically authorized by Armed Services Procurement Regulation.

Contracts — Specifications — Descriptive Data — Waiver of Requirement

Waiver of technical data under terms of IFB is not improper even though it clearly results in substantial competitive advantage to bidder.

In the matter of Keuffel & Esser Company, April 13, 1978:

An invitation for bids was issued by the U.S. Army Troop Support and Aviation Material Readiness Command on September 15, 1977, for 116 Surveying Levels, Dumpy Style, FOB Destination, and associated technical data. There were amendments to the solicitation not affecting this protest which extended the bid opening date to November 29, 1977.

The solicitation is being protested by Keuffel & Esser Company (Keuffel & Esser) due to the inclusion of paragraphs B–7 and D–2 which read respectively as follows:

B–7 Prior Submission of Bids. An offeror submitting firm prices for data who has delivered or is obligated to deliver to the Government under another contract or subcontract the same data and is agreeable to waiver of such data in the award may identify one such other contract or subcontract for each item of data and state where he has already delivered such data.

D–2 Data Evaluation. (a) Offerors submitting a specific response other than firm prices for data will be evaluated on the total amount of their offer. If award is made to such offerors, it will include all data items whether or not previously furnished. Whether or not the offeror is eligible for waiver of such data, it will not be an evaluation factor considered in making award.

(b) Award to offerors submitting firm prices for data previously furnished may be made for less than the total data requirements listed. The price reduction attributable to waiver of such data items will be an evaluation factor considered in making award.

At the time the solicitation was issued, Dietzgen Corporation had a contract for the same item under an award dated September 25, 1976, requiring the submission of technical data. Dietzgen was experiencing problems on that contract and could not qualify for the waiver of technical data included in the subject solicitation. The protested provisions were included in the invitation for bids (IFB) in case Dietzgen, or, presumably, anyone else, might qualify for the waiver prior to bid opening.

Neither Dietzgen nor Keuffel & Esser was the lowest bidder. None of the six firms submitting bids qualified for the waiver of technical data.

Keuffel & Esser protests the inclusion of the two noted provisions in the solicitation on the grounds that the goal of full and free competition as found in 10 U.S.C. § 2305(a) (1970) will be violated. Protester contends that the inclusion of such provisions in a future IFB will effectively preclude competition in favor of an incumbent bidder far beyond the limits of normal competitive advantages enjoyed by any incumbent. Additionally, Keuffel & Esser argues that since the type of waiver involved is not specifically permitted by statute or regulation, inclusion of such a provision should be viewed as illegal.

The relief requested is that the contested provisions be stricken from the present as well as future solicitations. It is argued that even though no bidder qualified for the waiver under the present IFB, denial of this protest will create an unfair advantage akin to a monopoly in favor of the low bidder under this solicitation in all future soliciations.

We will first respond to the argument than an IFB containing such a waiver violates the "full and free competition clause" in 10 U.S.C. § 2305(a) (1970). The concept of full and free competition is not an absolute term but rather a relative one. The achievement of "full and free competition" by the specifications and invitations for bids is limited by the qualification that such competition be "consistent with the procurement of the property and services needed by the agency." An agency should not have to pay twice for what it has already bought nor pay for what it does not need.

Competitive advantages such as incumbency may be found in virtually every procurement and the mere existence of such an advantage does not, in and of itself, violate the principles of full and free competition. In *ENSEC Service Corp.*, 55 Comp. Gen. 656 (1976), 76-1 CPD 34, our Office stated that "we have long recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances or as a result of Federal or other public programs." In many cases, we have stated that it is not possible or necessary to eliminate advantages which might accrue to a given firm whether by foreign subsidies, B-175496, November 10, 1972; or the acquisition of substantial facilities due to prior contracts, *Houston Films, Inc.*, B-184402, December 22, 1975, 75-2 CPD 404; or the waiver of preproduction tests, B-140361, November 10, 1959; or the waiver of preliminary samples and testing, 42 Comp. Gen. 717 (1963). There is no requirement that factors or handicaps be provided to equalize the competitive advantage enjoyed by a bidder over his competition. B-1884402, December 22, 1975, 75-2 CPD 404; 53 Comp. Gen. 86 (1973); 42 *id.* 717, 721 (1963); B-140361, February 3, 1960. The test to be applied is whether the competitive advantage enjoyed by a particular firm would be the "result of preference or unfair action by the Government." See B-175834, December 19, 1972.

Applying such a test, we find no objection to an award where the advantage resulting from a contractual provision is the type of normal commercial advantage enjoyed by bidders who are in production of an article on which the Government is soliciting. See *Piasecki Aircraft Corporation*, B–181913, June 27, 1975, 75–1 CPD 391. We see no difference in the data provisions in this case and the many other situations previously accepted by this Office which results in one party having some advantage over another in the evaluation process.

Consequently, we hold that the mere fact that a competitive advantage may result from a provision in an IFB does not by itself violate the principles of full and free competition so as to render the solicitation void.

Next, we consider protester's argument that provisions providing for the waiver of technical data are illegal because they are not specifically provided for by the Armed Services Procurement Regulation (ASPR § 1–900, *et seq.* (1976 ed.)).

We find no provisions prohibiting the waiver of tehnical data in any regulation or statute applicable to this situation. While such a waiver is not specifically enumerated in the regulations, we believe such an evaluation factor, along with other items not specifically enumerated, was contemplated by the language used in the ASPR:

> The factors set forth in (i) through (vi), *among others*, may be considered in evaluating bids * * * (ASPR § 2–407.5 (1976 ed.)). [Italic supplied.]

The absence of a specific provision prohibiting such a waiver indicates that the contracting officer's action in including the waiver in the IFB is proper. This conclusion is consistent with the statutory framework and administrative decisions declaring that procurement procedures be utilized to fulfill the minimum needs of the Government. We are not persuaded by protester's suggestion that the omission of an evaluation factor mandates that it be prohibited from the evaluation especially considering the broad language used in the ASPR provision quoted above.

Since there is nothing improper in the inclusion of a waiver of technical data provision in an IFB, we find no reason to further respond to protester's argument as it relates to future solicitations.

Accordingly, the protest is denied.

[B–189597]

Property—Private—Damage, Loss, etc.—Household Effects—Carrier Liability—Inventory

Household goods carrier receiving packaged goods from warehouse or another carrier is not required by provisions of Basic Tender of Service, Department of Defense Regulations 4500.34R, to unpack and examine goods to prepare inventory.

Property—Private—Damage, Loss, etc.—More Than One Custodian—Presumption

Loss of or damage to goods which pass through the hands of several custodians is presumed at common law to occur in the custody of the last custodian.

Property—Private—Damage, Loss, etc.—Carrier's Liability—*Prima Facie* Case

Shipper establishes prima facie case of carrier liability for loss or damage in transit by showing failure to deliver the same quantity or quality of goods at destination.

Property—Private—Damage, Loss, etc.—Carrier's Liability—*Prima Facie* Case

Once prima facie case of loss or damage in transit is established, burden is on carrier to show by affirmative evidence that loss or damage did not occur in its custody or was sole result of an excepted cause and mere suggestion or allegation is not sufficient.

Property—Private—Damage, Loss, etc.—Evidence

Determination by administrative office that additional damage was caused will be accepted by the General Accounting Office in the absence of clear and convincing contrary evidence.

Property—Private—Damage, Loss, etc.—Household Effects—Carrier Liability

Carriers of household goods have entered into agreement with branches of the military departments to accept liability for damages or loss noted to the carrier within 30 days of delivery.

In the matter of McNamara-Lunz Vans and Warehouses, Inc., April 18, 1978:

The Department of the Air Force referred to the General Accounting Office the protest of McNamara-Lunz Vans and Warehouses, Inc. (McNamara), to the recovery by setoff of $550.30, the value of damages to an Air Force member's household effects while in transit from nontemporary storage at Armstrong Moving and Storage Inc. (Armstrong), San Antonio, Texas, to the residence of the Air Force member in Houston, Texas. We will treat McNamara's protest as a claim for refund of the $550.30.

The household effects were picked up at the residence of the member in Schertz, Texas, by Armstrong as agent for United Van Lines, Inc., on March 16, 1976, and transported to nontemporary storage at Armstrong in San Antonio, Texas. At the time of the pickup the goods were packed by Armstrong and a detailed inventory was prepared. On April 14, 1976, the household effects were picked up from non-

temporary storage by McNamara, and transported to Houston, Texas, under Government bill of lading No. K–5833042, dated April 14, 1976. At the time of the pickup by McNamara an inventory rider was prepared by McNamara and Armstrong which listed preexisting damage to certain items included in the shipment. The household effects were delivered at the member's residence at destination on April 16 and on the last page of the Armstrong inventory he noted exceptions to 21 items damaged and that a ring was missing. The inventory was then signed by McNamara's driver and by the member.

Pursuant to the Military Personnel and Civilian Employees' Claims Act, Public Law 88–558, as amended, 31 U.S.C. 240–243 (1970), the member filed a claim against the Government; he was allowed $2,127.85. The Government thereby became subrogated to the member's rights, and on April 25, 1976, a claim in an unstated amount was made by the Government against Armstrong and McNamara; on July 28, 1976, a formal demand for $881.30 was addressed to McNamara. After an exchange of correspondence the claim was forwarded to the Headquarters of the Air Force's Tactical Air Command which, after careful and extensive comparison of the Armstrong and McNamara inventories, the delivery exceptions and the Government report of inspection, DD Form 1841, reduced the Government's claim to $550.30, the value of 12 damaged items and two missing items. When McNamara failed to refund, the $550.30 was recovered by setoff.

McNamara protests the setoff, denying liability for damage to the items packaged by Armstrong and alleging preexisting damage on other items.

McNamara contends that paragraph 54j of the Tender of Service does not require the carrier to unpack each and every prepackaged container in order to determine whether any of the items are missing or damaged when there is "*no visible damage to the external shipping container.*"

Paragraph 41k (now Paragraph 54j) of the Basic Tender of Service, DOD Regulations 4500.34R, titled "Inventory," provides that the carrier agrees to:

> Annotate the inventory to show any overage, shortage, and damage found, including visible damage to external shipping containers each time custody of the property changes from a storage contractor (warehouseman) to a carrier or from one carrier to another.

Therefore, when a carrier receives a shipment from a warehouseman or another carrier, it undertakes only to note overages, shortages and damages to unpacked items or "visible damage to external shiping containers." There does not appear to be any undertaking to unpack prepacked items.

However, once a shipper has made a prima facie case of liability for loss or damage in transit by showing a failure to deliver at destination the same quantity or quality of goods as received at origin, the burden is placed upon the carrier or other bailee to show either that the damage or loss did not occur while in its custody, or that the loss or damage occurred as a result of one of the causes for which the carrier is not liable. See *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134 (1964). And when the goods pass through the custody of several bailees it is a presumption of the common law that the loss or damage occurred in the hands of the last bailee. See *Modern Wholesale Florist* v. *Braniff International Airways, Inc.*, 350 S.W. 2d 539 (Sup. Ct. Texas 1961). Thus, in *General Electric Co.* v. *Pennsylvania R.R.*, 160 F. Supp. 186, 188 (WD Pa. 1958), which involved intrastate rail shipments of refrigerators in cartons from Erie, Pennsylvania, to warehouses in Pittsburgh, where after storage damage was noted, the court found that:

> . . . proof of delivery of the carton-packed refrigerators in good condition to the carrier in Erie and the discovery of the damaged refrigerators in the possession of the warehousemen in Pittsburgh would make out a prima facie case for plaintiff . . . . The burden of going forward with the evidence . . . is thus cast upon the defendant bailees.

And in *Julius Klugman's Sons, Inc.* v. *Oceanic Steam Nav. Co., et al.*, 42 F. 2d 461 (SD NY 1930), in an action brought against (1) an ocean carrier, which transported packaged furs from London to New York, (2) a trucker, which moved the goods to a New York warehouse, and (3) the warehouse, for loss of furs pilfered, the court held that "where goods passed through the hands of successive custodians, in apparent good order, any loss is presumed to have occurred while they were under the control of the last custodian," and plaintiff was held entitled to a verdict against the warehouse.

Of the 14 items constituting the Government's claim, nine were packed by Armstrong and no exceptions were taken by Armstrong on its inventory to either the condition or the number of the items. On delivery at destination, however, exceptions were noted to either the condition or the number of items in the packages, establishing a failure to deliver the same quantity or quality at destination, and establishing a prima facie case for loss or damage in transit, which, in the absence of evidence to the contrary, is presumed to have occurred in the custody of McNamara.

McNamara also has suggested that the damage to the prepackaged items occurred as a result of improper packing on the part of the firm which originally had responsibility for packing and sealing the shipping containers. Assuming, without deciding, that Armstrong acted as an agent of the shipper, and that damage resulting from improper packing would, therefore, result from an act of the shipper, one of

the excepted causes to carrier liability, no evidence has been presented or otherwise appears in the record to substantiate this suggestion. The burden is on the carrier to prove that faulty packaging was the sole cause of the damage. A mere allegation or suggestion does not satisfy this burden. See 55 Comp. Gen. 611 at 613 (1976).

McNamara also alleges that a number of the items had preexisting damage. However, of the items comprising the Government's claim, McNamara took exceptions on its inventory to only two: inventory item 34, a king headboard from which an item was missing for which the Government claims $24.50, and inventory item 47, a sewing cabinet, for damage to which the Government claims $60. The exceptions noted, however, are not legible on the photo copy in the record. McNamara also alleges preexisting damage to inventory item No. 4, a piano, but an exception was not taken at the time of pickup from the warehouse.

The record shows that an inspection official of the Department of the Air Force personally inspected the goods and prepared a Report of Inspection, DD Form 1841. The record further shows that the Department of the Air Force carefully compared the Armstrong inventory, the exceptions taken in the McNamara inventory, and the Report of Inspection, and determined that additional damages existed to the several items for which claims were made. While some damages apparently did exist prior to receipt of the items by McNamara, the record reasonably supports the administrative determination that additional damage was caused while in the custody of McNamara. Also, because the administrative office is in a better position to consider and evaluate the facts, it is the rule of our Office, on disputed questions of fact between the claimant and the administrative officers of the Government, to accept the statement of fact furnished by the administrative officers, in the absence of clear and convincing contrary evidence. 48 Comp. Gen. 638, 644 (1969).

McNamara has also contested the measure of some of the damages. However, the measure of damages is supported by estimates furnished by the member and contained in the record. No contrary evidence has been presented by McNamara.

Finally, McNamara alleges that the shipper signed for item 126, missing bedrails, for which the Government claims $4.20. While the bedrails were not initially noted by the member on carrier's inventory, the loss was noted shortly thereafter and was reported to the carrier within a 30-day period. The household goods carriers have entered into an agreement to accept liability for items noted within a 30-day period of delivery as though noted on delivery.

Accordingly, McNamara's claim for $550.30 is disallowed.

[B-190985]

Garnishment—Military Pay, etc.—Community Property Settlement

An Air Force disbursing officer may not pay a retired officer's pay into the Registry of a Texas State court as directed by the court in a garnishment proceeding for the collection of the officer's debt to his former wife incident to a community property settlement, since community property is not within the definition of "alimony" for which the Federal Government has waived its immunity to State garnishment proceedings pursuant to 42 U.S.C. 659 (Supp. V, 1975).

Garnishment—Military Pay, etc.—Alimony or Child Support

The amount of a military member's or Federal employee's pay or salary subject to garnishment for child support or alimony pursuant to 42 U.S.C. 659 (Supp. V, 1975) is limited by section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673(b) (1970), as amended by section 501(e), Title V, Public Law 95-30. Thus, a State court garnishment order, to the extent it exceeds such limitations, should not be followed by a disbursing officer.

In the matter of Major Herbert G. Wells, USAF (Retired), April 18, 1978:

This action responds to a letter, with enclosures, from the Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $4,817.83 to the Registry, District Court of Foard County, Texas, pursuant to the order of that court for payment incident to a writ of garnishment of retirement benefits owed to Major Herbert G. Wells, USAF (Retired), 459-44-2925. The request was approved by the Department of Defense Military Pay and Allowance Committee and forwarded to us on December 30, 1977, as submission No. DO-AF-1283.

On January 21, 1977, the United States Attorney in Fort Worth, Texas, was served notice of application by Ellen V. Wells for a writ of garnishment against Major Wells based on a division of community property, included in a November 4, 1975 divorce decree, awarding Mrs. Wells $253.57 per month, plus a portion of cost of living or other increases, from her former husband's military retired pay. The notice indicated that Major Wells was indebted to Mrs. Wells and directed the United States, acting through the Department of the Air Force, to appear before the District Court of Foard County, Texas, and disclose the amount in which it was indebted to Herbert G. Wells for retired pay. Mrs. Wells subsequently moved to have the Air Force pay Major Wells' retirement pay into the Registry of the court to be held subject to the court's further orders. On June 3, 1977, the court granted the motion and entered the following order:

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED that Defendant, United States Air Force and United States of America pay all monies that have been accumulated and that have come due and that will come due

during the pendency of this suit to the extent of $4,817.83, and remit same in the amount of $4,817.83 into the Registry of the Court.

IT IS FURTHER ORDERED that the monies paid into the Registry of this Court shall be held subject to the further orders of this Court.

In a legal memorandum submitted with the request for advance decision it is indicated that the member's debt to Mrs. Wells arises out of a community property settlement and not from child support, since there were no minor children of the marriage, or alimony, since under Texas law there is no alimony after divorce. It is also pointed out that under Texas law garnishment against "current wages" is prohibited. In addition, it is noted that the order to pay "all monies that have been accumulated and that have come due and that will come due" appears contrary to the maximum earnings subject to garnishment as prescribed by 15 U.S.C. 1673 as amended. Therefore, the Accounting and Finance Officer submits the following specific questions for consideration:

a. Is retired pay received by Herbert G. Wells "current wages" within the meaning of Article 16, Section 28, Constitution of Texas?

b. Based on Article 16, Section 28, Constitution of Texas, may a disbursing officer of the United States remit to the Registry of the Court pursuant to a Writ of Garnishment served pursuant to 42 U.S.C. S659?

c. Is a community property settlement from Texas excluded from the definition of alimony by Public Law 95–30 thereby demonstrating that such is not within the waiver of sovereign immunity?

d. Based on PL 95–30, may a disbursing officer remit funds pursuant to a Writ of Garnishment and subsequent order purporting to compel the United States to pay into court to satisfy a community property obligation?

e. May a disbursing officer remit funds in excess of the maximum prescribed by the Consumer Credit Protection Act (15 U.S.C. S1673 (b)(2), as amended by PL 95–30) if so ordered by a state court?

The primary question in this case is that addressed in question c and d above. That is, may the disbursing officer pay over the member's retired pay to someone other than the member as directed by the State court's garnishment order to satisfy a community property debt?

Section 459 of the Social Security Act, as added by the Social Services Amendments of 1974, Public Law 93–647, January 4, 1975, 88 Stat. 2337, 2357, 42 U.S.C. 659 (Supp. V, 1975), operates to remove, in very limited circumstances, the bar of sovereign immunity that prevented garnishment of the pay of Federal employees and members of the Armed Forces. That statute provides in effect that such pay due from, or payable by, the United States—

* * * shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations *to provide child support or make alimony payments.* [Italic supplied.]

For the purpose of clarifying such garnishment provisions, section 501, Public Law 95–30, May 23, 1977, 91 Stat. 126, 157–162, amended the Social Security Act to, among other things, add section 462(c) defining the term "alimony" for the purpose of section 459 as follows:

(c) The term "alimony," when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent and that same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. *Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement*, equitable distribution of property, or other division of property between spouses or former spouses. [Italic supplied.]

Since from the divorce decree, and in view of Texas law which does not provide alimony after divorce, it is clear that the debt for which the garnishment order was issued in this case arises out of a community property settlement and not from alimony, the United States is not subject to that garnishment order. See *Marin* v. *Hatfield*, 546 F. 2d 1230 (5th Cir. 1977), and *Kelly* v. *Kelly*, 425 F. Supp. 181 (W.D. La., 1977). Accordingly, there is no authority to pay Major Wells' retired pay to the Registry of the court, and payment on the voucher submitted may not be made. See 44 Comp. Gen. 86 (1964); 54 *id.* 424 (1974). Questions c and d are answered in the negative.

Questions a and b are predicated upon arguments relating to the validity of the court's order under Texas law. Since our answers to questions c and d provide a basis for response to the court's order and for the payment of the member's retired pay, answers to questions a and b will not be provided.

Also, while question e concerning limitations on the amount of pay subject to garnishment need not be answered for the purposes of this case, we believe the following to be appropriate. Section 501(e), Public Law 95-30, *supra*, 91 Stat. 161, in clarifying the garnishment provisions, also amended section 303(b) of the Consumer Credit Protection Act, Public Law 90-321, May 29, 1968, 82 Stat. 163, 15 U.S.C. 1673(b) (1970), to provide that the maximum disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 percentum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

Those restrictions were clearly meant to apply to garnishment proceedings for child support or alimony authorized by section 459 of the

Social Security Act. See the material included in the Congressional Record by Senator Russell Long, Chairman of the Senate Committee on Finance, in connection with the amendment to section 303(b) of the Consumer Credit Protection Act, 122 Cong. Rec. S10848, S10850 (daily ed. June 28, 1976). Pursuant to section 303(c) of the Consumer Credit Protection Act, 15 U.S.C. 1673(c), no court of the United States or any State may make, execute, or enforce any order or process in violation of section 303. Accordingly, it appears that to the extent a garnishment order exceeds the limitations in section 303, it would be unlawful and should not be followed by the disbursing officer. Question e is, therefore, answered in the negative.

[B-190466]

Voluntary Services—Officers and Employees—Waiver of Portion or All of Statutory Salary

Agency for International Development may not pay officers and employees less than the compensation for their positions set forth in the Executive Schedule, the General Schedule, and the Foreign Service Schedule. While 22 U.S.C. 2395(d) authorizes AID to accept gifts of services, it does not authorize the waiver of all or part of the compensation fixed by or pursuant to statute.

In the matter of The Agency for International Development—waiver of compensation fixed by or pursuant to statute, April 19, 1978:

This is in response to a letter of October 11, 1977, from John J. Gilligan, Administrator, Agency for International Development, in which he requested our opinion on the following questions:

(1) Does the Agency for International Development (AID) have authority, in conjunction with appointing a person to an Executive Level position on the staff of this Agency, to enter into a valid agreement with the appointee under which the appointee agrees to accept as full salary or compensation for services in such appointed position an amount which is less than the annual rate of basic pay established for that position by Title 5 of the U.S. Code?

(2) Does AID have authority, in conjunction with appointing a person to a position on the staff of this Agency for which an annual rate of basic pay is established by Title 5 U.S.C. § 5332 (General Schedule), Title 22 U.S.C. § 869 (Foreign Service Reserve Officers), or Title 22 U.S.C. § 870 (Foreign Service Staff Officers), to enter into a valid agreement with the appointee under which the appointee agrees to accept as full salary or compensation for services in such appointed position an amount which is less than the annual rate of basic pay established for that position by the pertinent foregoing statutory provision?

(3) With respect to a person who has already been appointed to a staff position in the agency for which Title 5 of the U.S. Code establishes an annual rate of basic pay under either the Executive Schedule or the General Schedule or for which Title 22 of the U.S. Code establishes an annual rate of basic pay under the salary schedules either for Foreign Service Reserve Officers or for Foreign Service Staff Officers, does AID have authority to enter into a valid agreement under which the occupant of the position agrees to receive as compensation for future services in such position an amount less than the annual rate of basic pay established for the position by the pertinent provision of Title 5 or of Title 22 of the U.S. Code?

Our Office has consistently held on the basis of court decisions that it is contrary to public policy for an appointee to a position in the Federal Government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority. 54 Comp. Gen. 393 (1974); 27 *id.* 194 (1947); 26 *id.* 956 (1947); *United States* v. *Jones*, 100 F. 2d 65 (8th Cir. 1938); *Cochnower* v. *United States*, 248 U.S. 405, 407 (1919); *Glavey* v. *United States*, 182 U.S. 595 (1900); *Miller* v. *United States*, 103 F. 413 (S.D.N.Y. 1900).

In 27 Comp. Gen. 194 (1947) it was held that the person occupying a position could waive his right to all or part of the compensation if there was some applicable provision of law authorizing the acceptance of services without compensation or at a rate less than the rate for such position. In that case the law permitting the employment of experts and consultants on a temporary or intermittent basis provided that such employment should be without regard to civil service and classification laws and fixed only the maximum rate that could be paid.

The Administrator's letter cites 22 U.S.C. 2395(d) (1970) and asks whether it is a provision of law authorizing the acceptance of services without compensation. Section 2395(d) provides as follows:

> The President may accept and use in furtherance of the purposes of this chapter, money, funds, property, and services of any kind made available by gift, devise, bequest, grant, or otherwise for such purpose.

Section 2403(k), title 22, United States Code, defines "services" as follows:

> "Services" include any service, repair, training of personnel, or technical or other assistance or information used for the purposes of furnishing nonmilitary assistance.

The above definition is broad enough to cover personal services. The question, therefore, is whether the provisions of 22 U.S.C. 2395(d) authorize a full-time regular employee to be validly compensated at a rate less than the compensation rate for his position fixed by or pursuant to statute.

It has also been held that, in the absence of statutory authority to accept gifts, the acceptance of donations from private sources is an unlawful augmentation of appropriations. 49 Comp. Gen. 572 (1970); 46 *id.* 689 (1967); 36 *id.* 268 (1956). Section 2395(d), title 22, United States Code, authorizes the acceptance of gifts. Therefore, AID may accept services from private sources either gratuitously or at a fraction of their value. However, section 2395(d) does not authorize individuals to be appointed to regular positions having compensation rates fixed by or pursuant to statute at rates less than those specified. It, therefore, differs from the statute, which was the subject of 27 Comp. Gen. 194, *supra*, and accordingly is not a provision of law authorizing employees

whose compensation is fixed by or pursuant to statute to waive any part of such compensation.

We have also considered the provisions of 22 U.S.C. 2384(b) (1970) which concern the rates of compensation and duties of the 12 officers in the agency primarily responsible for administering the Foreign Assistance Act of 1961, *supra*. Section 2384(b) provides:

> Within the limitations established by subsection (a) of this section, the President may fix the rate of compensation, and may designate the title of, any officer appointed pursuant to the authority contained in that subsection. The President may also fix the order of succession among the officers provided for in subsection (a) of this section in the event of the absence, death, resignation, or disability of one or more of said officers.

The officers referred to in the above section are those who are appointed by the President with the advice and consent of the Senate. In addition to such officers we understand that AID has two officers who are not appointed by the President but whose positions have been assigned rates of pay in the Executive Schedule. The compensation rates of all of these positions are listed in 5 U.S.C. 5313–5316 and are, therefore, statutory rates of pay. Accordingly, the appointees to such positions may not waive part of their compensation and be estopped from later claiming and receiving the amounts waived.

We have also examined the provisions of 22 U.S.C. 2385(b) (1970) which provide in pertinent part:

> (b) Of the personnel employed in the United States to carry out part I or coordinate part I and part II, not to exceed one hundred and ten may be appointed, compensated, or removed without regard to the provisions of any law * * *.

The Aid regulations covering appointments under the above authority provide for each position to be evaluated and assigned an appropriate Administratively Determined (AD) grade. The AD grades assigned are based on the responsibilities, duties, and compensation rates of General Schedule grades. Each AD position is evaluated prior to the appointment of an individual to the position. The compensation of the appointee is made at any rate within the range of rates for the position which is filled depending on the appointee's qualifications. Also, each position may be reevaluated without reference to civil service laws whenever changed responsibilities and duties indicate the necessity therefor. However, although AID has broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation are fixed pursuant to statute. Therefore, the compensation for AD officers and employees may not be validly waived.

In view of the above it is our opinion that officers and employees who fall within the purview of questions 1, 2, and 3 may not be paid less than the fixed annual compensation for their positions.

[B-190609]

Pay—Retired—Survivor Benefit Plan—Spouse—Prior Undissolved Marriage

A married service member retired prior to the effective date of the Survivor Benefit Plan (SBP) entered into a ceremonial marriage without having dissolved a prior marriage and subsequently elected SBP coverage for his alleged second spouse listing her by name on the election form. Since the member's entry into the SBP was pursuant to section 3(b) of Public Law 92-425, which required an affirmative election into the SBP, and since the person for whom he elected the annuity was not his lawful wife (and therefore was not entitled to an annuity under 10 U.S.C. 1450(a)(1)) his election into the SBP was invalid and no annuity is payable.

In the matter of Staff Sergeant Roger A. Cline, USA, Retired (deceased), April 20, 1978:

This action is in response to letter dated September 16, 1977, with enclosures, from Lieutenant Colonel R. J. Withington, Finance and Accounting Officer, United States Army Finance and Accounting Center, Indianapolis, Indiana, submitting a voucher and requesting an advance decision concerning payment of a Survivor Benefit Plan (SBP) annuity to Mrs. Dorothy J. Cline as spouse of Staff Sergeant Roger A. Cline, deceased, in the circumstances described. This request was assigned Control Number DO-A-1277 by the Department of Defense, Military Pay and Allowance Committee, and was forwarded to this Office by the Office of the Comptroller of the Army letter dated November 1, 1977.

The record indicates that Staff Sergeant Roger A. Cline, USA (Retired), 273-14-3209, elected on January 28, 1974, to participate in the SBP on the full amount of his retired pay as authorized under section 3(b), Public Law 92-425, approved September 21, 1972, 86 Stat. 706, 711 (10 U.S. Code 1448 note). At that time, he executed DD Form 1883 (Survivor Benefit Plan—Election Certificate) stating that he was married and had dependent children. In section III of this application form relative to family information, he listed as his spouse, Christine Cline; the place of marriage, Columbus, Franklin County, Ohio; and the date of marriage, September 18, 1970. He further named as dependent children under age 22, Gregory S. Backus and Robert B. Backus, with relationship of stepsons.

Records further disclose Roger Adrian Cline retired June 1, 1963, with creditable service of 20 years, 11 months and 4 days. He died November 3, 1976. An SBP annuity effective November 4, 1976, was established for Christine Cline after application on November 24, 1976, but was suspended when the Army Finance and Accounting Center was notified on December 9, 1976, that the member had been married previously to Dorothy Cline and never divorced. Annuity

payments were terminated as of December 31, 1976, because there was no evidence that a legal divorce from Dorothy Cline had been granted which would allow Christine Cline to meet the criteria of widow under 10 U.S.C. 1447(3).

Attorneys for Christine Cline and Dorothy Cline have submitted conflicting claims for the SBP benefits on behalf of their clients. The submission expresses the view that while Dorothy Cline does qualify as the widow under Public Law 92–425, *supra*, payment of the annuity has not been made to her. Although Roger Cline married Dorothy Cline on February 4, 1944, and 5 children born of the marriage are now alive, they were legally separated on February 21, 1964. On or about October 18, 1970, Roger Cline married Christine Backus and he filed a document dated March 5, 1976, designating Christine Cline as his wife to receive unpaid retired pay. When Public Law 92–425, *supra*, was enacted, he was living with Christine Cline as man and wife and he made a timely election to participate in SBP naming Christine Cline and her children on his election. Thus, it appears clear that it was his intention for her to receive the annuity, although she does not qualify as his lawful wife.

The submission further states that since documentation of marital status was not required at the time of election into the SBP, it is not possible to know whether Sergeant Cline believed his prior marriage had been dissolved. Payment of the annuity to Dorothy Cline is questioned since the evidence clearly indicates his intent to provide an annuity for Christine Cline.

There is nothing in the record and no evidence has been furnished by any of the parties to indicate that the marriage of Sergeant Cline and Dorothy Cline was termined by divorce at any time subsequent to the decree of separate maintenance on February 21, 1964. Mrs. Dorothy J. Cline has submitted further evidence that during the period May 19, 1969, through May 19, 1975, she was issued a Uniformed Services Identification and Privilege Card (DD Form 1173), which authorized her use of theatre, commissary, unlimited exchange, and medical care facilities as the wife of Sergeant Roger A. Cline. She contends that she had not renewed this authorization prior to the death of the member because her residence was located in an area which made it expensive and inconvenient to use the facilities.

Therefore, it appears that at the time of his purported marriage to Christine in 1970, Sergeant Cline was still legally married to Dorothy. Thus, the attempted marriage by him in Ohio to Christine Backus while he still had a living spouse from an undissolved marraige is illegal and bigamous and void from its inception. 52 Am. Jur. 2d, Marriage, sect. 67. The law of Ohio has always held attempted mar-

riages by parties already in lawful wedlock as absolutely void. *Nyhurs* v. *Pierce*, 114 N.E. 2d 75, 80 (Ct. of Appeals of Ohio, Cuyahoga County, 1952). Further, in the State of Colorado, the apparent residence of the parties involved, the marriage was a nullity on account of the incapacity of Sergeant Cline to contract marriage. *Poole* v. *People*, 52 P. 1025, 1026 (Sup. Ct. of Col. 1898).

Since Sergeant Cline was retired prior to September 21, 1972, the effective date of Public Law 92-425, *supra*, which established the SBP (10 U.S.C. 1447-1455 (Supp. II, 1972)), his election to coverage under the SBP was a voluntary act under section 3(b) of that law. Section 3(b) authorized any person who was entitled to retired pay on the effective date of the act to elect to participate in the SBP. As is indicated above, when he elected to participate in the SBP, Dorothy was his legal wife, not Christine. Therefore, at the time he retired in June 1963 and elected SBP coverage in January 1974, he was still married to Dorothy. Compare B-189133, September 21, 1977.

Under 10 U.S.C. 1450(a) effective as of the first day after the death of the member, the SBP annuity is to be paid to the member's "eligible widow." For the purpose of the SBP, 10 U.S.C. 1447(3), as amended by section 1 of Public Law 94-496, October 14, 1976, 90 Stat. 2375, defines "widow" as follows:

> "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—
> (A) was married to him for at least one year immediately before his death; or
> (B) is the mother of issue by that marriage.

While members retiring after the effective date of the SBP who are married or have dependent children are automatically covered by the SBP pursuant to 10 U.S.C. 1448 unless they affirmatively elect not to be covered, that is not the case for members who were already retired on the effective date of the SBP. To be covered by the SBP an already retired member such as Sergeant Cline was required to make an affirmative election to be covered pursuant to secetion 3(b) of Public Law 92-425.

While Sergeant Cline completed an election form indicating his desire to participate in the SBP, it is clear that his intention was based on a desire to provide the annuity for Christine and not for his lawful wife, Dorothy. It is our view that the incorrect listing of a spouse's name on an SBP form by a member automatically covered by the SBP under 10 U.S.C. 1448(a) would not ordinarily be sufficient to remove the member from coverage nor would it affect the legal spouse's right to an annuity under the SBP since in such a case the listing of the spouse's name on the form is primarily for administrative convenience. However, in the case of a retired member who must make an affirmative election to participate in the SBP pursuant to section

3(b), the completion of the form is the evidence of the member's election to participate. Thus, in a case such as this in which it is clear that the member made an election to participate for the purpose of providing an annuity to an ineligible beneficiary, it is our view that the election to participate is defective and must be considered invalid.

Accordingly, since in this case Sergeant Cline's participation in the SBP was erroneous, no annuity may be paid and the voucher will be retained in this Office. The amounts deducted from his retired pay as the cost of SBP coverage should be paid to the proper beneficiary under 10 U.S.C. 2771 (1970).

[B-159779]

Time—Standard Advanced to Daylight Saving—Compensation Effect

Employees who have regularly scheduled night shifts are charged 1 hour of annual leave when they work only 7 hours on the last Sunday in April when daylight savings time begins. Alternatively, agency may, by union agreement or agency policy, permit employees to work an additional hour on that day as method of maintaining regular 8-hour shift and normal pay. Administrative leave is not a proper alternative.

In the matter of the Bureau of Engraving—night shift employees on duty when daylight savings time becomes effective, April 25, 1978:

By letter dated January 18, 1978, The Honorable William J. Beckham, Jr., Assistant Secretary (Administration), Department of the Treasury, requests our decision whether it would be permissible for the Bureau of Engraving and Printing to grant employees 1 hour of administrative leave when they are on a regularly scheduled night shift and would otherwise lose 1 hour of work and pay due to the change from standard time to daylight savings time at 2 a.m. on the last Sunday in April pursuant to 15 U.S.C. 260a(a) (1976).

The present policy of the Bureau is to charge employees 1 hour of annual leave (or, if necessary, leave without pay) when the change to daylight savings time occurs. That policy is in accord with our decision in 26 Comp. Gen. 921. (1947) which states that it is proper to permit employees to use annual leave to avoid the loss of pay and benefits. The Assistant Secretary points out that a more recent decision, 53 Comp. Gen. 292 (1973), reiterates the propriety of the prior decision regarding the charging of annual leave. That decision also holds that, under the applicable statutes and regulations, an employee may not be paid Sunday premium pay for that hour, but is entitled to

night differential for the hour of annual leave if his total paid leave for the period is less than 8 hours.

The Assistant Secretary notes that, under our decisions, the employees concerned lose 1 hour of annual leave, designed for personal use at the employees' discretion, through what is essentially an involuntary process. Also, the situation occurs every year and affects approximately 20 employees in the Bureau.

The Assistant Secretary specifically asks the following questions:

1. Is the Bureau permitted to grant administrative leave to those employees who are on scheduled duty at 2 a.m. during the change to daylight savings time?
2. If the answer to question 1 is in the negative, are the alternatives for determining just compensation limited to the charge of 1 hour of annual leave or leave without pay?

Our initial decision, 26 Comp. Gen. 921, noted that the daylight time statute involved did not affect the statutes pertaining to the hours of duty and pay of Federal employees. Therefore, it was held that employees should be paid only for the elapsed time that the employees were actually on duty. However, since that holding would result in a loss of 1 hour of pay for the employees on duty when the change to daylight savings time occurred, agencies were permitted to charge employees 1 hour of annual leave and pay them their regular compensation. Our 1973 decision, 53 Comp. Gen. 292, affirmed that rule but held that night differential should be paid for the hour of leave since the law permits such payment when employees on regularly scheduled night shifts are on paid leave for less than 8 hours in a pay period. We have examined the matter and the pertinent statutes. We find there has been no basic statutory change that affects our prior decisions. Therefore, we hold in response to question 1 that the Bureau is not permitted to grant administrative leave to employees who are on regularly scheduled duty at 2 a.m. during the change to daylight savings time.

Regarding question 2, decision 56 Comp. Gen. 858 (1977) holds that where an employee on the midnight to 8 a.m. shift was permitted to work from 8 a.m. to 9 a.m. pursuant to an agreement between the agency and a union, he was entitled to be paid Sunday premium pay for the eighth hour actually worked. The decision stated that the optional hour from 8 a.m. to 9 a.m. was part of the regularly scheduled tour of duty since it was authorized in advance as a method of maintaining the normal length of the tour of duty. Accordingly, as an alternative to annual leave (or leave without pay) an agency may, pursuant either to a union agreement or an agency policy, permit an employee who is on duty at the time daylight savings time goes into

effect to work 1 hour after the normal end of his shift on such day in order to maintain his regular 8-hour shift and normal pay.

[B-190074]

General Accounting Office—Jurisdiction—Contracts—Disputes—Board of Contract Appeals—Appeal Pending

Incumbent contractor's protest concerning ambiguities in invitation for bids (IFB) will not be considered by General Accounting Office where claims based on same issues were previously filed by incumbent contractor under identical contractual provisions as those protested and are currently pending before contract appeals board.

Personal Services—Performance Delay, etc.—Use of Military Personnel—Legality

Invitation for bids provision in mess attendant services contract allowing Government to assign military personnel to perform services where contractor fails to maintain adequate level of services does not result in illegal personal services contract.

Contracts—Specifications—Ambiguous—Evidence to the Contrary

Inclusion of typical meal preparation worksheets in IFB was clearly for informational purposes only and did not render IFB ambiguous.

In the matter of Chemical Technology, Inc., April 25, 1978:

Invitation for bids (IFB) No. N00123-77-B-1132 was issued on June 15, 1977, by the Naval Regional Procurement Office, Long Beach, California, for mess attendant services to be provided for the period October 1, 1977, through September 30, 1978, with an option for 2 additional years. The IFB established September 8, 1977, as the bid opening date.

In a mailgram dated August 23, 1977, Chemical Technology, Inc. (CTI), the incumbent contractor, advised the contracting officer that it believed there were ambiguities in the IFB and requested clarification. Specifically, the mailgram contained 25 detailed questions concerning various provisions of the solicitation. Amendment 0002 to the IFB, extending the bid opening date to September 22, 1977, and incorporating CTI's August 23, 1977 questions and the Government's answers in response thereto, was subsequently issued to clarify the solicitation. Upon receipt of this amendment, CTI, not being satisfied with certain aspects of the agency's clarification of the IFB, protested any award under the IFB to our Office, on the ground that ambiguities still existed in the solicitation. Bids were opened as scheduled, and the agency, on September 29, 1977, proceeded with award under the solicitation notwithstanding CTI's protest.

CTI's allegation that there were ambiguities in the IFB is based on its interpretation of various provisions of the solicitation. First, CTI contends that while the solicitation contains the estimated number of meals per month for the basic contract period, the monthly meal estimates for the option periods are not expressly set forth, and that, therefore, the IFB is "completely void of the estimated meals for the two option years." The Navy's position is that by the terms of the option, the basic contract period estimates are equally applicable to the option periods, subject to appropriate adjustments upon the exercise of the option to reflect any estimated increase or decrease in the monthly "meal volume."

The second alleged ambiguity asserted by CTI is based on Section F.1(b) of the specifications, which provides:

> The contractor shall provide, in addition to the specification services set forth in the Specifications for Mess Attendant Services, emergency services requested by the Food Services Officer. These requests shall be deemed to be changes within the meaning of the "Changes" clause and shall be subject to the provisions of that clause.

CTI requested from the Navy a definition of "emergency services," maintaining that additional meals served to reserve personnel on 2-week active duty for training were "emergency services" within the meaning of this section. The Navy's response was that meals served to authorized personnel, including reservists, within the volume variation provision of the solicitation, would not entitle a contractor to any equitable adjustment under the "Changes" clause. CTI considered this response as "unacceptable."

For the reason stated below, we decline to consider these two contentions of CTI concerning alleged ambiguities in the IFB, that is, the applicability of the base contract period meal estimates to the option periods and the definition of "emergency services." CTI, as the incumbent contractor, performed under the previous contract containing the identical provisions and filed several claims against the Navy for additional compensation, currently pending before the Armed Services Board of Contract Appeals (ASBCA), based on these same two issues that it is now arguing as ambiguities in this protest. We do not believe that CTI should be allowed to collaterally argue its interpretation of these provisions in two forums concurrently. The correct interpretation of these provisions, as they relate specficially to CTI, are properly a matter for the ASBCA to decide under the disputes procedure. Accordingly, these two issues will not be considered on the merits. See *Cosmos Engineer, Inc.*, B–187457, March 31, 1977, 77–1 CPD 222; *Delta Electric Construction Company*, B–182820, March 28, 1975, 75–1 CPD 188.

CTI's next contention concerns the following provisions of the specifications:

F.6. * * * Sufficient Contractor personnel will be present at all times to efficiently and expeditiously render all services required by the contract, including but not limited to serving, clearing tables and cleaning up after serving.

* * * * * * *

J. * * * (I)f the Contractor does not furnish the number of employees required to perform the services called for in this contract, the commanding officer of the activity may assign military personnel to perform the services. Such action by the Government will not relieve the Contractor of his responsibility for performance. The Contractor shall compensate the Government for the services of such military personnel as may perform work under the contract.

Based on these specifications, CTI argues as follows:

CTI believes the provisions of the solicitation set the conditions for a personal service contract wherein performance is monitored, managed, and directed by a government official.

* * * * * * *

Under the provisions of Section F.6. a declaration is made by the government that sufficient contractor personnel must be present at all times. In the Attachment A, specifications, the food service officer is granted the authority to complete a food service rating sheet which rates if adequate number of employees are present to conduct and perform the services involved with operating the mess hall. At this time when the food service officer declares that inadequate personnel are available he then proceeds to implement the authority in Section J to temporarily assign military personel to supplement the contractor efforts. Based on our experience in the predecessor contract we found frequently that the food service officer used this scheme to direct the contractor to add necessary personnel in the performance of the work. CTI believes that the structure of the solicitation and resulting contract therefore is a violation of law. * * *

In reply, the Navy argues as follows:

As pointed out by the protester, the mess attendant services contracts contain several provisions which give the Food Services Officer a degree of authority to ensure that the services rendered are at an adequate level. The need for such authority arises, of course, from the inherent characteristics of the contracted-for effort: meals must be served, and cleanliness must be maintained, on a day-to-day basis. The necessary immediacy of response makes untenable reliance solely upon written contracting officer directives to ensure adequate performance. This authority, however, does not extend to the point of converting the contract to one for personal services. The Food Services Officer has no direct authority over individual employees of the contractor. The language cited by the protester does not create a personal services relationship, but rather reflects a central concept of fixed-price mess attendant services contracting: that the contractor is responsible for providing a required level of services, regardless of the number of personnel needed.

In general, any contract which creates an employer–employee relationship between the Government and employees of a contractor violates Federal law. Criteria for recognizing personal services are set forth in Armed Services Procurement Regulation (ASPR) § 22–102.2 (1976 ed.); they include the nature of the work to be performed and the amount of supervision and control exercised by the Government. A Government contract for the performance of a service is to be ac-

complished without detailed Government control or supervision over the method by which the required result is achieved. 45 Comp. Gen. 649 (1966). In the present case, Section F.2 of the IFB requires the contractor to furnish managerial, administrative, and direct labor supervision at all times during contract performance. It is the responsibility of the contractor alone to furnish and supervise adequate personnel qualified for the work. The specification provisions cited by CTI merely give the Government enforcement powers to ensure the performance of an adequate level of services by the contractor. We do not believe that the reservation of such remedial enforcement powers by the Government under the IFB in any way constitutes the creation of an illegal employer-employee relationship between the Government and contractor personnel.

Lastly, CTI alleges an ambiguity in the solicitation concerning meal preparation. The solicitation contained the following:

Estimated number of meals per month:

2 Months @ 40,000
4 Months @ 45,000
6 Months @ 55,000

The solicitation also contained typical meal preparation worksheets showing the portions and quantities of different food items required to be prepared. CTI requested the agency to clarify which estimated monthly level of meals related to the portions and quantity shown on the meal preparation worksheets. CTI was informed that the typical meal preparation worksheets were included in the solicitation as examples only. In its report to our Office, the Navy states as follows:

> During the potential life of this contract, [meals will be served on more than 3,000 separate occasions]. It begs reason to anticipate that a significant portion of those meals could be identified and described in the solicitation. Furthermore, such descriptions would be of no real value. The specifications include sufficient detail to enable a company experienced in food services to ascertain the levels of manning required.

We agree and find no ambiguity in the solicitation in this regard. It is apparent that the limited number of meal preparation worksheets included in the IFB was for informational purposes only and it is the responsibility of the contractor to estimate and provide the necessary personnel levels for satisfactory performance.

Accordingly, the protest is denied.

[B-190663]

Contracts—Negotiation—Basic Ordering Agreements—Propriety

Agency's conducting informal competition whereby order for data base development was to be placed under one of two vendors' basic ordering agreements—where no adequate written solicitation was issued—was procedure at variance

with fundamental principles of Federal negotiated procurement, and also raises question of improper prequalification of offerers. General Accounting Office (GAO) recommends that agency review its procedures for issuing such orders and conduct any further competition in manner not inconsistent with decision. Case is also called to attention of General Services Administration for possible revision of Federal Procurement Regulations.

General Accounting Office—Decisions—Hypothetical, Academic, etc., Questions

Where GAO finds that agency's negotiated procurement procedure was fundamentally deficient—no adequate written solicitation issued—and recommends that agency review procedures before conducting any further competition, issues concerning propriety and results of benchmark tests under deficient procurement procedure are academic.

In the matter of Tymshare, Inc., April 26, 1978:

Tymshare, Inc., has protested to our Office concerning the refusal of the Federation Aviation Administration (FAA) to award it an order under its basic ordering agreement (BOA) No. DOT–0S–50255.

Background

The record indicates that pursuant to orders issued under its BOA No. DOT–0S–50252, Boeing Computer Services Company (Boeing) has been performing what is described as data base development and analysis for FAA. The work apparently involves consolidating certain FAA data requirements through the use of a data base management system software package. (In this regard, both Boeing's and Tymshare's BOA's merely provide that, pursuant to certain agreed-upon terms and conditions, FAA may place orders for "remote access computing services.")

By letter dated October 29, 1976, subsequent to an FAA benchmark of Tymshare, the protester submitted what it called an unsolicited proposal to FAA. To investigate possible cost savings, FAA decided to run benchmarks of both Boeing and Tymshare systems. They were concluded by September 1977. By letter dated October 17, 1977, FAA advised Tymshare that it had decided to retain Boeing as the time-sharing vendor to be used for data base development and analysis.

Tymshare's protest is essentially that since the 1977 benchmark showed its cost was lowest, it was and is entitled to an award. FAA, on the other hand, believes that the 1977 benchmark was poorly structured and did not reflect the costs FAA would actually incur. In its January 26, 1978, report to our Office, FAA indicates that it is continuing with Boeing as the contractor and is going to run another benchmark of Boeing and Tymshare to determine the current lowest cost for the work.

Discussion

The submissions by the protester, FAA and Boeing address various factual issues concerning the conduct of the benchmarks and the two vendors' costs. However, we believe the basic legal issue concerns the procurement methodology being used by FAA.

Federal Procurement Regulations (FPR) § 1-3.410-3(a) (1964 ed. amend. 149, June 1975) describes a BOA as an agreement which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between a procuring agency and a contractor, as well as a description of the supplies or services to be furnished when ordered and a method of determining the prices to be paid. In this regard, a BOA itself is not a contractual commitment by the Government to make any purchases. *Cf.* B-169209, June 11, 1970; FPR § 1-3.410-3(c)(2). FPR § 1-3.410-3(b) states that a BOA can be used as a means of expediting procurement where specific requirements are not known at the time the BOA is executed but it is expected that substantial requirements will result in procurements from the contractor during the term of the BOA. FPR § 1-3.410-3(c)(1) further provides that orders may be placed under a BOA only if it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation.

We note that the FPRs are silent on the subject of conducting a competitive negotiated procurement in which award is to be made by issuing an order under the successful offeror's BOA. However, the Armed Services Procurement Regulation (ASPR), though not applicable to the present procurement, does provide some guidance on this point. ASPR § 3-410.2(c) (1976 ed.) states in pertinent part:

> (1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.
>
> (2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:
>
> (i) If it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services; or
>
> (ii) If after a competitive solicitation of quotations or proposals from the maximum number of qualified sources (see 3-101), other than a solicitation accomplished by use of Standard Form 33, it is determined that the successful responsive offeror holds a basic ordering agreement, the terms of which are either identical to those of the solicitation or different in a way that could have no impact on price, quality or delivery, and if it is determined further that issuance of an order against the basic ordering agreement rather than preparation of a separate contract would not be prejudicial to the other offerors.
>
> In situations covered by (ii), the choice of firms to be solicited shall be made in accordance with normal procedures, without regard to which firms hold basic ordering agreements; firms not holding a basic ordering agreement shall not be precluded by the solicitation from proposing or quoting; and the existence of a basic ordering agreement shall not be a consideration in source selection.

See, also, 51 Comp. Gen. 755 (1972). There, pursuant to a determination and findings to negotiate a contract under 10 U.S.C. § 2304 (a)(10) (1970), a request for quotations (RFQ) for the procurement of certain parts was issued requiring that offers incorporate the terms and conditions of the offerors' current BOA's. The RFQ also established a cutoff date for submission of proposals, and set forth other requirements concerning firm unit prices, discount terms, delivery schedule, and packaging.

In the present case, while FAA developed certain benchmark criteria to be applied to Boeing's and Tymshare's systems, there is no indication in the record that the agency issued an RFQ or any type of formal written solicitation. Rather, the competition—which has now extended over a period of several years—has apparently been carried out informally, through the exchange of various letters and by meetings with the vendors. For example, by letter dated September 30, 1977, FAA advised Tymshare of both Tymshare's and Boeing's 1977 benchmark processing costs, requested written "comments" by October 7, 1977, and advised that a final decision as to which vendor would be used for the data base development work would be communicated to Tymshare by October 14, 1977. A similar letter was sent at the same time to Boeing.

The requirement for a written solicitation describing the Government's needs, setting forth the evaluation factors and their relative weights, and establishing a common cutoff date for submission of proposals is fundamental in Federal negotiated procurement. See *Complete Irrigation, Inc.*, B-187423, November 21, 1977, 77-2 CPD 387, and FPR § 1-3.802(c) (1964 ed. amend. 118, September 1973). This requirement is not only for the protection of the Government's interests but also to assure that all offerors are fully informed of the Government's needs and thus are able to compete on an equal basis. See *DPF Incorrated*, B-180292, September 12, 1974, 74-2 CPD 159; *Union Carbide Corporation*, 55 Comp. Gen. 802, 807-808 (1976), 76-1 CPD 134. Also, in a negotiated procurement the disclosure prior to award of the number, identity or relative standing of offerors is prohibited by FPR § 1-3.805-1(b) (FPR circ. 1, 2d ed., June 1964).

In view of the foregoing, we believe that FAA's conducting an informal competition for an order to be issued under one of several vendors' BOA's without the issuance of an adequate written solicitation was a procedure at variance with fundamental principles of Federal negotiated procurement. In addition, we believe there is a further question concerning prequalification of offerors if a competition of this type is limited to vendors having BOA's. In this regard, in several instances our Office has tentatively approved special agency pro-

cedures in which competition for a contract is limited to offerors which have previously entered into certain types of agreements with the agency. See *Department of Health, Education, and Welfare's use of basic ordering type agreement procedure*, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392, and *Department of Agriculture's Use of Master Agreements*, 56 Comp. Gen. 78 (1976), 76-2 CPD 390. However, absent such special circumstances, the general rule is that prequalification of offerors is an undue restriction on competition. See, generally, *D. Moody & Co., Inc., et al.*, 55 Comp. Gen. 1, 11 (1975), 75-2 CPD 1. *Cf.* also ASPR § 3-410.2(c)(2), which provides that the choice of firms to be solicited is to be made in accordance with normal procedures and without regard to which firms hold BOA's.

Conclusion

In view of the foregoing, we recommend that FAA review its procedures for the competitive issuance of orders under BOA's of this type, and that any further competition for the services in question be undertaken in a manner not inconsistent with the views stated in this decision. By letter of today we are advising the Secretary of Transportation of our recommendation.

In addition, by letter of today we are furnishing a copy of this decision to the Director, Federal Procurement Regulations Staff, General Services Administration, and recommending that consideration be given to amending the FPRs to include a provision similar to ASPR § 3-410.2(c) concerning competitive solicitations leading to an award made by means of issuing an order under a BOA.

As already indicated, we believe FAA's procurement procedures in this case were fundamentally deficient. In these circumstances the questions whether Tymshare should have been selected in October 1977 based up the benchmark results at that time or whether the agency acted properly in deciding to run another benchmark are academic, and there is no basis for our Office to recommend, as the protester urges, that it be issued an order for these services. Accordingly, the protest is denied.

[B-190724]

Bids—Mistakes—Correction—Intended Bid Price—Established in Bid

Correction of mistake in bid will be permitted where bidder's worksheets clearly show that bidder made a mathematical error in transferring subtotal for equipment and miscellaneous work from bid worksheet to final summary sheet. Questions raised concerning portions of bidder's worksheets which have no relation to type of error alleged do not preclude correction where clear and convincing evidence establishes mistake and actual bid intended.

Bids—Mistakes—Recalculation of Bid—"Rounding Off"—Corrected Price

Upon correction of mistake in bid, where bidder initially "rounded off" total bid price in submitting its bid, corrected total bid price is also subject to adjustment to reflect "rounding off."

In the matter of the Active Fire Sprinkler Corporation, April 27, 1978:

Pursuant to a mistake in bid alleged before award, Active Fire Sprinkler Corporation (Active) requests an upward correction of its bid under invitation for bids (IFB) INY77081-(INY75015) issued by the Construction Management Division, General Services Administration (GSA), New York, on August 29, 1977. By letter dated March 13, 1978, the General Counsel of GSA states that precedent "seems to leave no alternative but to allow correction here."

The IFB, as amended, which requested lump sum bids for the furnishing of all labor and materials for the installation of an automatic wet pipe sprinkler system at the United States Customs Court and Federal Office Building, New York, established September 19, 1977, as the bid opening date. On that date, eight bids were received. Active's bid was low at $1,490,000. The next low bid was $1,848,000 while the remaining bids ranged from $1,888,000 through $2,077,000. By letter dated September 20, 1977, Active alleged that it had made an error in its bid price and stated as follows:

We are hereby requesting a correction in our bid on the above referenced project.

The reason for this request is because of a mistake in transferring the amount from the equipment & miscellaneous schedule sheet to the summary bid sheet.

OUR INTENDED BID IS: (ONE MILLION SIX HUNDRED SEVENTY ONE THOUSAND SIX HUNDRED NINE DOLLARS)

Head Price Sheet Schedule	$1,361,239
Plaster Hole Sheet Schedule	81,000
Pipe Count Schedule	29,275
Equipment & Misc. Schedule	200,095
	$1,671,609

OUR MISTAKEN BID IS: (ONE MILLION FOUR HUNDRED NINETY THOUSAND DOLLARS)

Head Price Sheet Schedule	$1,361,239
Plaster Hole Sheet Schedule	81,000
Pipe Count Schedule	29,275
Equipment & Misc. Schedule	20,095
	$1,491,609
Rounded Off	$1,490,000

The mistake was made when we entered figure of $20,095.00 instead of $200,095.00.

Enclosed herein for your information are the original backup and support sheets of our intended bid.

A prior solicitation for essentially the same work, issued by GSA in June 1977, had been canceled after it was discovered that the solicitation had been improperly restrictive in the specification of certain firestopping material. GSA thereupon deleted the requirement for firestopping in the current solicitation. Active, having bid on the prior invitation, used portions of the estimates on the worksheets that it had generated in the previous solicitation as the basis for its current bid. These worksheets from the prior solicitation were also submitted by Active to the contracting officer to support its allegation of error and the bid actually intended.

After review of both sets of worksheets, including bid worksheet #5, which contained Active's estimate for equipment and miscellaneous work, the contracting officer advised Active that its request for correction was denied but that it would be allowed to withdraw its bid. Active had previously explained to the contracting officer that after subtracting the firestopping and certain additional deleted items from its estimate for the prior solicitation, the new bid estimate for the current solicitation was "within a ballpark figure" of the prior estimate. The contracting officer disputed this and made a determination disallowing correction on the basis of alleged discrepancies, after subtracting the deleted items, between the estimates for the total bid price for the remaining sprinkler work contained in the two sets of worksheets. The contracting officer also questioned why two items totalling $6,500 were included in worksheet #5 for the subject bid but not in the corresponding worksheet in the prior bid. Active immediately protested this determination by the contracting officer to our Office.

We have 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 had been made, the manner in which the error occurred, and the intended bid price. 51 Comp. Gen. 503, 505 (1972); 49 *id.* 480, 482 (1970). These same basic requirements for the correction of a bid are found in the Federal Procurement Regulations (FPR) § 1-2.406-3(a)(2) which provides:

> * * * if the evidence is clear and convincing both as to the 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.

In the present case, after consideration of the evidence submitted in support of the alleged error, we believe Active has satisfied these requirements. Bid worksheet #5, on which the equipment and miscellaneous work was estimated, consists of 16 separately priced items which together total $200,095. On the final summary sheet, it clearly appears that the total for these items was erroneously transferred as

$20,095. The adding machine tape showing the calculations arriving at the total bid price, before "rounding off," of $1,491,609, also reflects this erroneous amount of $20,095 for the equipment and miscellaneous work. With regard to the contracting officer's reasons for disallowing correction of Active's bid, we have specifically held, in a case involving this same bidder, that questions raised concerning portions of a bidder's worksheets which have little or no relation to the type of error alleged or to the part of the work affected by the error do not preclude correction where clear and convincing evidence establishes the specific mistake and the actual bid intended. *Active Fire Sprinkler Corporation*, B–187039, August 17, 1976, 76–2 CPD 168. In this case one of the alleged discrepancies concerns the omission of two items in the earlier version of worksheet #5. Active indicates that it discovered the omission of these items on the initial version of worksheet #5 and actually used the latest version, which included the two items, in calculating both bids. In any event, this alleged discrepancy is unrelated to the nature of the error claimed and only results when the current worksheets are compared to those of a prior bid. It is still clear that a simple mathematical error occurred in transferring a subtotal for equipment and miscellaneous work from bid worksheet #5 to the final summary sheet. Correction, therefore, is proper under the circumstances.

However, since Active, in its final summary sheet arrived at an initial total bid price of $1,491,609 and then "rounded off" that amount to $1,490,000, we believe the corrected amount should also be subject to adjustment to reflect this "rounding off." See *Chris Berg, Inc.* v. *United States*, 426 F. 2d 314 (Ct. Cl. 1970). Had the correct amount of $200,095 for the equipment and miscellaneous work had been totalled on the final summary sheet, it would have produced a total bid price of $1,671,609. Therefore, the bid of Active should be corrected to show a total bid price of $1,670,000 for the project.

Accordingly, Active's bid, as corrected, which will be still the lowest bid received, should be considered for award.

[B–190912]

Statutes of Limitation—Claims—Compensation—Fair Labor Standards Act

Certifying officer questions what is the statute of limitations on claims filed by Federal employees under Fair Labor Standards Act (FLSA). Although there is time limitation on "actions at law" under FLSA, there is no statutory time limitation when such claims may be filed as claims cognizable by General Accounting Office (GAO). Therefore, time limit for filing FLSA claims in GAO is 6 years. 31 U.S.C. 71a and 237.

Compensation—Overtime—Fair Labor Standards Act—Claims—Settlement Authority

Authority of GAO to consider FLSA claims of Federal employees is derived from authority to adjudicate claims (31 U.S.C. 71) and authority to render advance decisions to certifying or disbursing officers or heads of agencies on payments (31 U.S.C. 74 and 82d). Nondoubtful FLSA claims may be paid by agencies. In order to protect the interests of employees, claims over 4 years old should be forwarded to GAO for recording.

In the matter of Transportation Systems Center—statute of limitations on claims under Fair Labor Standards Act, April 27, 1978:

This action is in response to a request for an advance decision from John F. Linehan, a certifying officer with the Transportation Systems Center (Center), U.S. Department of Transportation, Cambridge, Massachusetts, dated December 7, 1977, reference DTS–833, concerning the entitlement of certain nonexempt employees of the Center to retroactive payments of overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (Supp. V, 1975).

The request from the Transportation Systems Center indicates that while the Fair Labor Standards Amendments of 1974 extended the FLSA coverage to Federal employees, effective May 1, 1974, the Center did not implement those provisions until November 20, 1977. The Center was apparently first made aware of the applicability of the FLSA to its employees when an internal audit report on payroll activities was issued on July 13, 1977. This report recommended that the provisions of the FLSA be implemented retroactive to May 1, 1974. The certifying officer questions whether retroactive payments are restricted to the 2-year statute of limitations contained in the FLSA and whether an agency may pay retroactive overtime compensation under the FLSA without having claims filed by the employees. We note that subsequent to the submission of this request for a decision, the certifying officer forwarded to our Office the claims of several current or former employees of the Transportation Systems Center for overtime compensation under the FLSA.

As noted above, the Fair Labor Standards Amendments of 1974, Public Law 93–259, approved April 8, 1974, 88 Stat. 60 (29 U.S.C. 201 note) extended the FLSA coverage to employees of the Federal Government. Since the Civil Service Commission (CSC), under 29 U.S.C. § 204(f) (Supp. V, 1975), is authorized to administer the FLSA with respect to Federal employees, we requested the CSC's views on this matter. By letter dated March 16, 1978, the General Counsel of the CSC responded to our request by first noting the provisions of the Portal-to-Portal Act at 29 U.S.C. § 255(a), which

provide that a cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages shall be forever barred unless commenced within 2 years (3 years for willful violations) after the cause of action accrued. An action is commenced within the meaning of 29 U.S.C. § 255 on the date a complaint is filed in court. 29 U.S.C. § 256. Thus, the CSC letter concludes that if the Transportation Systems Center employees are successful in suing for backpay under the FLSA, the court could grant relief no further back than 2 years (3 years for willful violations) from the date of the complaint.

The CSC letter continues, however, by stating that the question is not what statute of limitations is applicable to a judicial proceeding but rather what limitation exists on administrative determinations of FLSA entitlements. The CSC cites our decision 51 Comp. Gen. 20 (1971) in which we held that time limitations for the commencement of an "action at law" contained in the Communications Act (1 year) and the Interstate Commerce Act (2 years) do not affect the jurisdiction of our Office to consider claims against the United States cognizable by our Office under 31 U.S.C. §§ 71 and 236 under the applicable time limitation for such claims (currently 6 years) as provided in 31 U.S.C. §§ 71a and 237. By distinguishing between limitations applicable to "actions at law" and limitations applicable to administrative claims filed with our Office, the CSC concludes that the time limitation in the Portal-to-Portal Act would not apply to the authority of our Office to consider claims against the United States, and, in particular, to the FLSA claims which are at issue in this decision.

The applicable statute of limitations on claims or demands against the United States cognizable by our Office is contained in 31 U.S.C. §§ 71a and 237 (Supp. V, 1975) which provides, in pertinent part, as follows:

> (1) Every claim or demand * * * against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim * * * shall be received in said office within 6 years after the date such claim first accrued * * *.

As noted above, we have held that the time limitations for the commencement of "actions at law" do not affect the jurisdiction of our Office to consider claims against the United States and that, unless otherwise specifically provided for by statute, we are required, as a general rule, to consider any claim against the United States cognizable by our Office if it is presented within the requisite period of limitation as stated above after the date the claim first accrued. 51 Comp. Gen. 20, *supra*. See also 33 *id.* 66 (1953). In the absence of any statutory provision limiting the authority of our Office to consider the claims of nonexempt Federal employees to overtime compensation under the FLSA, we hold that the time limitation for the filing of

claims by Federal employees under the FLSA which may be considered by our Office is 6 years as provided in 31 U.S.C. §§ 71a and 237 (Supp. V, 1975).

With regard to what action should be taken on the claims received by the certifying officer in the present case, the jurisdiction of our Office with respect to the claims of Federal employees for overtime compensation under the FLSA is derived from the authority to adjudicate claims, 31 U.S.C. § 71 (1970), and the authority to render advance decisions to certifying or disbursing officers or heads of agencies on questions involving payments, 31 U.S.C. §§ 74 and 82d (1970). Therefore, we hold that where the agency has received nondoubtful claims and has determined there is a retroactive entitlement to overtime under the FLSA, the agency may make such payments to its employees provided such payments are not barred under 31 U.S.C. §§ 71a and 237. Moreover, the agencies have been instructed by CSC to make computations to determine whether nonexempt employees are entitled to overtime under the FLSA. See, for example, CSC's Federal Personnel Manual Letter No. 551–10, dated April 30, 1976, instructing agencies to recompute retroactive to May 1, 1974, traveltime which may be regarded as "hours of work" under the FLSA. If these computations show that overtime compensation is due under the FLSA, the employees may be paid without submission of claims. In order to protect the interests of employees, claims which have accrued more than 4 years ago and cannot promptly be approved and paid in full in the amount claimed should be forwarded to the Claims Division for recording.

Accordingly, action should be taken by the Transportation Systems Center consistent with the above.

[B–175031]

Attorneys—Fees—Suits Against Officers and Employees—Official Capacity

Federal meat inspector was sued by supervisor for libel and malicious defamation for certain allegations contained in letters the inspector wrote to various public officials. Claims for reimbursement of inspector's legal fees may not be allowed in the absence of determinations that acts of inspector were within scope of official duties and that representation of inspector was in interest of United States. *J. N. Hadley*, 55 Comp. Gen. 408, distinguished.

In the matter of Norman E. Guidaboni—claim for attorney's fees, April 28, 1978:

This action is in response to the claim filed by Mr. Normal E. Guidaboni, a former employee of the Department of Agriculture, for re-

imbursement of legal fees in the amount of $852.94 incurred in defending against a lawsuit filed by his supervisor.

Mr. Guidaboni was employed as an assistant circuit supervisor in the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture, in Providence, Rhode Island, when he wrote several letters during the summer of 1976 to the President of the United States, to a member of the staff of a United States Senator, and to several APHIS officials including the Administrator, Dr. F. J. Mulhern. The letters alleged improper activities with regard to the inspection of a meat packing plant in Rhode Island. In response to certain allegations contained in these letters, Mr. Guidaboni's supervisor filed suit in a state court in Rhode Island on November 30, 1976, alleging that the letters were libelous and constituted malicious defamation.

It appears that Mr. Guidaboni immediately contacted Agriculture's Office of General Counsel to seek representation in this lawsuit, but he was initially advised that such representation would not be available since Mr. Guidaboni's actions did not appear to be within the scope of his employment. Shortly thereafter, APHIS realized that Mr. Guidaboni's letter to the Administrator of APHIS, Dr. Mulhern, constituted a grievance under the provisions of APHIS Directive 460.5 and that the filing of such a grievance was within the scope of employment. Mr. Guidaboni, therefore, repeated his request for representation by mailgram dated December 15, 1976. We have been informally advised that APHIS then sought to have the plaintiff supervisor dismiss the lawsuit while at the same time the agency prepared a letter to the Department of Justice seeking representation for Mr. Guidaboni. The letter from Agriculture's Office of General to Justice dated January 11, 1977, stated that *some* of the actions by Mr. Guidaboni were within the scope of his employment by being part of a grievance filed with the Administrator of APHIS, but the letter also stated as follows:

> The agency is not willing to say that all the acts of the defendant were done within the scope of his official duties since part of the allegations relate to the letters he wrote to Senator Kennedy and President Ford.

It further appears that while Agriculture was requesting representation for him, Mr. Guidaboni obtained private counsel who transferred the suit to Federal court and attended to the dismissal of the suit in both state and Federal courts. The lawsuit was dismissed before the Department of Justice had reached a decision on whether to represent Mr. Guidaboni, and, in response to our request for a report, Assistant Attorney General Barbara A. Babcock states as follows:

The difficulty in recommending payment for Mr. Guidaboni's legal expenses, which we understand amounted to $800.00, is that Department of Justice representation was never authorized, since as stated above, the case was dismissed soon after the request was forwarded by the Department of Agriculture's Office of General Counsel. More importantly, the fact that the Office of General Counsel stated in their letter of January 11, 1977, that "[t]he agency is not willing to say that all of the acts of the defendant were done within the scope of his official duties," makes it apparent that Mr. Guidaboni would not have met one of the basic requirements for authorization of representation. The suit seems to have been based primarily on the defamatory implications of the letters written by the defendant—actions which are the ones pointed to by the agency as probably not within the line of his official duties.

Accordingly, it is the recommendation of the Department of Justice that Mr. Guidaboni is not entitled to payment for legal fees encounered in the above suit.

Our Office has long held that the hiring of an attorney is a matter between the attorney and the client, and that, absent express statutory authority, reimbursement of attorney's fees may not be allowed. See *Manzano and Marston*, 55 Comp. Gen. 1418 (1976) and decisions cited therein. However, it is the policy of the Department of Justice to represent Federal employees sued for acts taken in the performance of their official duties under the authority of 28 U.S.C. §§ 517, 518 (1970). In fact, the Department of Justice issued a policy statement in January 1977 setting forth the conditions under which Justice would represent an employee who is sued or subpoenaed in his individual capacity. 42 Fed. Reg. 5695 (1977).

The key question, as noted in the above letter from the Assistant Attorney General, is whether the acts of the defendant-employee were within the scope of his official duties. In the present case the Department of Agriculture could not state that *all* of the acts of Mr. Guidaboni were within the scope of his employment, and, therefore, the Department of Justice could not conclude that providing representation was in the interest of the United States. Under these circumstances, we know of no basis upon which to allow reimbursement for Mr. Guidaboni's legal fees.

Our decision in *J. N. Hadley*, 55 Comp. Gen. 408 (1975), is distinguishable since in that case the acts of the employee were clearly within the scope of his employment and the United States had agreed to represent the employee. In *Hadley* this representation by the United States was later withdrawn without a determination that the United States was no longer officially interested in Mr. Hadley's defense, and our Office held that reasonable legal fees were reimbursable under those circumstances.

Accordingly, the claim may not be allowed.

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