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[B-189782]

Compensation—Wage Board Employees—Prevailing Rate Employees—Entitlement to Negotiate Wages—Compliance With Law and Regulations Requirement

Section 9(b) of Public Law 92-392, August 19, 1972, 5 U.S. Code 5343 note, governing prevailing rate employees, exempts certain wage setting provisions of certain bargaining agreements from the operation of that law. However, section 9(b) does not exempt agreement provisions from the operation of other laws or provide independent authorization for agreement provisions requiring expenditure of appropriated funds not authorized by any law.

Compensation—Wage Board Employees—Prevailing Rate Employees—Overtime—Meal Periods—Work-Free

Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work.

Compensation—Wage Board Employees—Prevailing Rate Employees—Overtime—Meal Periods—Delayed or Preempted

Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on top of overtime" which is not authorized by 5 U.S.C. 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Hence, it may not be paid.

Compensation—Wage Board Employees—Prevailing Rate Employees—Overtime—Rate—One and One-Half Times Basic Hourly Rate

Department of Interior questions whether it may pay prevailing rate employees, who negotiate their wages, overtime compensation at rates more than one and one-half of the basic hourly rate. Although computation provision (1) of 5 U.S.C. 5544(a) states that overtime pay is to be computed at "not less than" one and one-half the basic hourly rate, computation provisions (2) and (3) of 5 U.S.C. 5544(a) state that overtime pay is to be computed at one and one-half the basic hourly rate. Since provisions (2) and (3) were enacted by statute amending original statute enacting provision (1), 5 U.S.C. 5544 is construed as establishing the overtime pay rate at one and one-half the basic rate and a greater figure may not be used.

In the matter of the Department of Interior—overtime pay for prevailing rate employees who negotiate their wages, February 3, 1978:

This action involves a request from the Honorable Richard R. Hite, Assistant Secretary, United States Department of the Interior, for an

advance decision on the legality of certain pay provisions that have been negotiated or proposed for hourly paid employees whose wages have been established through collective bargaining pursuant to section 9(b) of Public Law 92–392, August 19, 1972, 5 U.S.C § 5343 note. Employee organizations including the American Federation of Government Employees (AFGE), the International Brotherhood of Electrical Workers (IBEW), and the National Federation of Federal Employees (NFFE) have submitted legal briefs in this case setting forth their respective views on the issues raised by Interior.

The Department of the Interior has requested this Office to rule on the legality of collective bargaining provisions that require:

(1) overtime compensation to apply to time spent on meals during or attributable to such overtime and during which meal period no substantial official duties are performed or, alternatively, where the overtime work precluded consumption of a meal until the completion of the work when the employee was released from duty but paid for the 30-minute meal time that should have been taken;

(2) a higher rate of pay than the basic rate or in addition to overtime pay where a scheduled meal period during or attributable to overtime hours is either delayed or missed when management determines the exigencies of work require an uninterrupted continuation of operations; or

(3) the payment for overtime work to be at rates more than time and one-half of the basic rate of pay.

We shall discuss each of these issues seriatum. However, at the outset, it is essential that we put the exclusionary provisions of section 9(b) of Public Law 92–392 in proper perspective. That section reads in pertinent part as follows:

> (b) The amendments made by this Act shall not be construed to—
> (1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, on any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;
> (2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or
> (3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.

The legislative history of section 9(b) contained in H.R. Rept. No. 339, 92d Cong., 1st Sess. 22 (1971) is set forth below:

Savings clause for existing agreements

Section 9(b)(1) of the bill, with the committee amendment, provides that the amendments made by the Act shall not be construed to abrogate, modify, or otherwise affect the provisions of any existing contract pertaining to the wages, conditions of employment, and other employment benefits of Government employees, which contract resulted from negotiations between agencies and employee organizations. Paragraph (2) of section 9(b) states that the provisions of any contract in effect on the date of enactment of the Act may be renewed, extended, modified or improved through negotiation after the enactment date of the Act. Paragraph (3) of section 9(b) provides that the Act shall not affect any existing agreement between agencies and employee organizations regarding the various items which are negotiable, nor shall the Act preclude the inclusion of new items in connection with the renegotiation of any contract.

The provisions of section 9(b) are directed at those groups of Federal employees whose wages and other terms or benefits of employment are fixed in accordance with contracts resulting from negotiations between their agencies and employee organizations. * * * It is not this committee's intent to affect, in any way, the status of such contracts or to impair the authority of the parties concerned to renegotiate existing contracts or enter into new agreements. However, the prevailing rate employees who are now covered by such contracts will be subject to the provisions of this Act when such contracts expire and are not renewed or replaced by new contracts.

Certain of the employee organizations have contended that section 9(b) must be construed as meaning that the amendments made by Public Law 92–392 shall not affect any collective bargaining agreement provisions negotiated by Federal prevailing rate employees with their agencies that were in effect on the date of enactment of the Public Law. The employee organizations point out that agreement provisions covering such issues as overtime pay for meal periods were in effect at the time Public Law 92–392 was enacted into law and hence may be legally continued so long as the parties continue to include such provisions in their bargaining agreement. We do not disagree with the position advanced by the employee organizations, assuming *a priori* that the provisions of such agreements were and continue to be legally proper. However, the legislative history indicates that section 9(b) was designed to preserve only those provisions that were properly negotiable in the first instance. Thus, section 9(b) would not operate to cure a provision that was contrary to law and regulations when negotiated.

It is clear that agreement provisions, excluded from operation of the provisions of Public Law 92–392 by section 9(b) of that law, need not conform to the requirements of the provisions of Public Law 92–392. On the other hand, it is equally clear that agreement provisions concerning matters governed by other laws must be consistent with these other laws, notwithstanding the fact that other provisions of the agreement are covered by section 9(b). Similarly, we do not construe section 9(b) as providing independent authority for agreement provisions that involve the expenditure of appropriated funds not authorized by any other law. *Amell* v. *United States*, 182 Ct. Cl. 604 (1968).

We turn now to the issue of whether an agency has authority to pay overtime compensation to prevailing rate employees, who negotiate their wages pursuant to section 9(b) of Public Law 92-392, for meal periods during or attributable to overtime duty when no substantial duties are performed during the meal periods, or alternatively where a meal period was preempted by overtime work and the employees are paid for an additional 30 minutes after they are released from duty.

Overtime pay for prevailing rate employees, whether or not they are covered by a section 9(b) agreement, is governed by 5 U.S.C. § 5544, which provides in part as follows:

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

A careful reading of the provisions of the above-quoted statute indicates that, with the exception of certain specified situations, overtime compensation is authorized only for periods of work as opposed to periods of duty. Moreover, the above-quoted statute has been construed on several occasions by the Court of Claims as precluding overtime pay for meal periods unless substantial duties are performed during such meal periods. For example, in *Ayres* v. *United States*, 186 Ct. Cl. 350, 355 (1968), the Court held that:

Wage board employees are not entitled to be paid for periods set aside for eating purposes, provided that this noncompensated time meets the standard succinctly stated in *Bantom* v. *United States*, 165 Ct. Cl. 312, 320 (1964), *cert. denied*, 379 U.S. 890, as follows:

* * * [A]n employee is not entitled under the Federal Employees Pay Act to compensation for time set aside for eating, even where the employee is on a duty status and such time is, therefore, subject to possible interruption. Compensation is available only if it is shown that substantial official duties were performed during that period. * * *

See also *Bennett* v. *United States*, 194 Ct. Cl. 889 (1971); *Armstrong* v. *United States*, 144 Ct. Cl. 659 (1959); and B–166304, April 7, 1969.

We therefore hold that agencies have no authority to pay overtime compensation for employee meal periods unless such employees perform substantial duties during the meal periods. Similarly, agencies have no authority to pay overtime compensation to employees after they have been released from duty, notwithstanding the fact that a scheduled meal period was preempted by work for which the employees received compensation.

Next, we shall address the issue of whether agencies have authority to pay employees, who negotiate their wages under section 9(b) of Public Law 92–392, a higher rate of pay than the normal basic rate during overtime hours where a scheduled meal period during or attributable to overtime hours is either delayed or preempted, when management determines the exigencies of work require an uninterrupted continuation of operations.

In a sample agreement provision provided by Interior, this added increment of overtime compensation is referred to as penalty pay presumably to penalize the employer for delaying employee meals. In this connection, one of the purposes of overtime compensation is to discourage the employer from unnecessarily requiring overtime work while providing the employee with an incentive to tolerate the added inconvenience. *Kelly* v. *United States*, 119 Ct. Cl. 197, 211 (1951), affirmed 342 U.S. 193 (1952). Hence, the penalty pay is in effect a special type of overtime or "overtime on top of overtime." As stated above, the authority for prevailing rate employee overtime compensation, regardless of whether they are covered by a section 9(b) agreement, is contained in 5 U.S.C. § 5544, *supra*. That statute does not authorize added increments of overtime compensation for any purpose. In this connection, it has been held that an act which is contrary to the plain implication of a statute is unlawful, although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Therefore, authorization of an added increment of overtime compensation for delayed or preempted meal periods may not be implied from the provisions of the statute. Hence, agencies have no authority to make such payments.

We deal next with the issue of whether an agency may pay prevailing rate employees who negotiate their wages pursuant to section 9(b) of Public Law 92–392 overtime compensation at rates more than time and one-half of their basic rates of pay.

The statutory provision governing the rate of overtime compensation for prevailing rate employees is contained in 5 U.S.C. § 5544(a) and states that the overtime hourly rate of pay is to be computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

The labor organizations and Interior argue that the term "not less than" contained in (1) provides discretionary authority for agency heads to establish overtime pay rates at more than one and one-half the basic hourly rate for prevailing rate employees whose pay is fixed on a basis other than an annual or monthly basis.

We do not agree with this contention. The above-quoted statutory provisions must be read as a whole. When read in this manner it is clear that the purpose of these provisions is to establish formulae for computing overtime pay for prevailing rate employees paid at different intervals. The obvious intention of Congress was to fix a single overtime pay rate of time and one-half for all prevailing rate employees notwithstanding the intervals in which they were paid.

Computation provision (1) of 5 U.S.C. § 5544(a) was originally enacted into law as section 23 of the Independent Offices Appropriation Act, 1935 (Act of March 28, 1934, chapter 102, 48 Stat. 509, 522). The United States Supreme Court analyzed the legislative history of section 23 in *United States* v. *Townsley*, 323 U.S. 557 (1945). There the Court construed the provisions of section 23 as requiring overtime pay "* * * at one and one-half straight time pay for the extra hours worked," and not at a rate of "not less than" one and one-half straight time pay. *United States* v. *Townsley*, 323 U.S. 557, 565–6, *supra*.

Moreover, if there remained any doubt as to the meaning of the overtime rate established by section 23, those doubts were resolved when Congress amended section 23 by enacting section 203 of the Federal Employees Pay Act of 1945 (chapter 212, 59 Stat. 295, 297) which was subsequently codified as computation provisions (2) and (3) of 5 U.S.C. § 5544(a) as follows:

Sec. 203. Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 (U.S.C., 1940 edition, title 5, sec. 673c). The rate of compensation for each hour of overtime employment of any such employee shall be computed as follows:

(a) If the basic rate of compensation of the employee is fixed on an annual basis, divide such basic rate of compensation by two thousand and eighty and multiply the quotient by one and one-half; and

(b) If the basic rate of compensation of the employee is fixed on a monthly basis, multiply such basic rate of compensation by twelve to derive a basic annual rate of compensation, divide such basic annual rate of compensation by two thousand and eighty, and multiply the quotient by one and one-half.

In the above provisions Congress construed section 23 as establishing the overtime pay rate for prevailing rate employees at one and one-half the basic hourly rate and did not provide agency heads with discretion to establish a higher rate.

Accordingly, we hold that there is no authority under 5 U.S.C. § 5544 to establish overtime pay rates at a figure greater than one and one-half the basic hourly pay rate for prevailing rate employees.

As a result of our holding in this decision, it appears that Interior has made erroneous overpayments of overtime pay to certain employees for: (1) meal periods during which no substantial duties were performed; (2) short periods of time after employees were released from work to compensate such employees for preempted meal periods; (3) short periods of time when meal periods were delayed or preempted during overtime work where employees were already receiving overtime pay; and (4) overtime pay for prevailing rate employees at rates greater than one and one-half their basic hourly rates of pay. Under the provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951–953, 4 C.F.R. Part 104, and 4 GAO Manual § 55.3 regarding the termination of collection action, we hold that Interior may forego collection action on the aforementioned overpayments that have been made or that are made during the additional period permitted below. We base our holding on the belief that administrative costs of identifying and collecting overpayments would be excessive, the possibility of collections from former employees is doubtful, and all of the overpayments would be eligible for and likely receive favorable waiver consideration under 5 U.S.C. § 5584. *See* B–181467, July 29, 1976.

Although the contract provisions here involved have been negotiated over a long period, this decision is the first one stating such provisions are illegal. In view thereof and in order to cushion the impact of this decision, the Department of the Interior is hereby authorized to delay its implementation until the earliest expiration date of each agreement which contains any provision inconsistent with this decision or a period of 3 years, whichever occurs first.

It may well be that the Bureau of Reclamation is in need of and should consider requesting special legislative authority to pay overtime compensation to prevailing rate employees in excess of that permited under 5 U.S.C. § 5544 in order to remain competitive in the labor market. We note that Bonneville Power Administration (BPA) found itself in such a situation shortly after it was organized in 1937. It experienced problems in recruiting and retaining skilled employees because it lacked authority to make many premium pay payments that had become standard practice among private sector utilities. In 1945, BPA petitioned Congress to grant it extraordinary authority to

enable it to successfully compete within the utility industry in the Pacific Northwest. Congress responded by enacting H.R. 2690, Public Law 201, 79th Cong., 1st Sess. (1945), 59 Stat. 546, 16 U.S.C. 832a, which among other things empowered the Administrator, BPA, to fix the compensation of laborers, mechanics and workmen employed by the BPA "* * * without regard to the Classification Act of 1923, as amended, and any other laws, rules or regulations relating to the payment of employees of the United States * * *." Hence, since 1945, BPA has been vested with authority necessary to provide its hourly rate employees with compensation consistent with that paid by private sector utilities in its area of operation even when such compensation would not have been authorized under the general Federal statutes governing employee compensation. *Abell* v. *United States*, 207 Ct. Cl. 207 (1975).

[B–190340]

Transportation—Dependents—Military Personnel—Vessel and Port Changes—Same Port

When a member of the uniformed services is assigned on a permanent change of station to sea duty and the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e). 43 Comp. Gen. 639, modified.

In the matter of transportation allowances incident to sea duty, February 8, 1978:

This action is in response to a letter dated May 27, 1977, from the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting a decision as to whether Volume 1 of the Joint Travel Regulations (1 JTR) may be amended to authorize the movement of member's dependents and baggage and household effects under the unusual or emergency circumstances addressed in 37 U.S.C. 406(e) (1970) in the circumstances described. The request was forwarded to this Office by the Per Diem, Travel and Transportation Allowance Committee (PD TA TAC Control Number 77–15).

The primary issue in this case is whether an assignment to certain "unusually arduous" sea duty may be considered as an assignment to serve under "unusual circumstances" as provided for in 37 U.S.C. 406(e), and thus entitle the member to transportation of dependents and household goods to a designated location at Government expense even though the home port of the member's ship remains unchanged or is the same as his previous shore station. An affirmative answer

would also permit travel and transportation from the designated location to the member's new duty station or the home port of his ship when he is reassigned to duty not involving such arduous circumstances.

The submission cites our decision B–185099, June 1, 1976, in which the long held position of this Office was followed that no authority exists under present law which would permit transportation of dependents and household goods at Government expense incident to a member's permanent change of station (PCS) where the member was transferred from sea duty to shore duty with the home port and home yard of the vessel being at the same location as the shore duty station. *See also* 43 Comp. Gen. 639 (1964) to the same effect concerning a transfer from sea duty to sea duty without a change of home port or yard. The basis for that rule is that generally under 37 U.S.C. 406 the entitlement to transportation of household goods and dependents is limited to the distance between the old and the new duty station, and in such a case there is no change in duty station for purposes of such transportation. 37 U.S.C. 411(d) (1970) and 1 JTR, Appendix J (permanent station).

The submission indicates that it is not contested that, except for the types of cases discussed in 45 Comp. Gen. 159 (1965), there is nothing "unusual or emergent" concerning normal duty with afloat units which would purport to authorize movement of dependents for distances greater than between the former duty station and the home port of the vessel. However, because of the nature of some current missions of ships of the Navy which are described as involving unusually arduous duty in that the ships are deployed away from the home port for the majority of the time, it is asked, in effect, whether upon assignment to such duty the member may be considered assigned to sea duty under the unusual circumstances addressed in 37 U.S.C. 406(e), and thus entitle the member to transportation of dependents and household goods to a designated location at Government expense. In this regard it is proposed to amend 1 JTR to—

* * * authorize the transportation of dependent and household goods to the places authorized in par. M7005–2 and 3 whenever a member is assigned by permanent change of station orders for a period contemplated to be for 2 years or more with an afloat unit specified in writing by the Secretary of the Service concerned, or his designated representative, as involving unusually arduous duty and the projected absences of the unit from its assigned home port are for more than 50% of the time. Further relocation of dependents in such cases will not be authorized until the member is again assigned by permanent change of station orders to an unrestricted station or to an afloat unit not also specified as unusually arduous duty involving absences from the home port for more than 50% of the time. Movement in these cases would be authorized even though the home port of the specified afloat unit and the new station or the home port of the new ship or unit is located at the same place.

Section 406(e) of title 37, United States Code, provides that when orders directing a PCS for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage and household effects, the Secretaries concerned may authorize the movement of the dependents, baggage and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, in cases involving unusual or emergency circumstances including those in which the member is serving on permanent duty at stations outside the United States, in Hawaii or Alaska, or on sea duty.

Section 406(e) was derived without substantive change from section 303(c) of the Career Compensation Act of 1949, ch. 681, 63 Stat. 814. While the emphasis of the statutory provision is upon the advance return of dependents from overseas, the legislative history of the law also indicates an intent to provide authority for movement of dependents and household effects between points in the United States incident to unusual or emergency situations when the member is on sea duty. In S. Rept. No. 733, on H.R. 5007, 81st Cong., 1st Sess. (which became the Career Compensation Act of 1949), on page 22, the Senate Committee on Armed Services, referring to section 303(c) stated in pertinent part as follows:

> This subsection also includes provisions for the transportation of dependents even though there is involved no change of station in order that dependents may travel at Government expense *between points in the United States* where the service member is on sea duty or on duty outside the United States at a post of duty where dependents are not permitted to accompany him. * * * [Italic supplied.]

Reportedly, because of the nature of the mission of certain Navy vessels, members assigned thereto are required to be separated from their families for long periods of time and, while the vessel may not be deployed for a full year, its deployment from the home port is such that it is absent for long periods totaling more than 50 percent of the time. In such circumstances the members assigned to such units would be in a situation similar to that described in 45 Comp. Gen. 159, 162, *supra*, wherein we stated:

> Normally, a member assigned to a vessel will desire to have his dependents reside at or near the home port or home yard to which his ship will return at frequent or regular intervals. In the case, however, of a vessel which is scheduled to be away from its home port or home yard for prolonged periods there would appear to be no reason for dependents to maintain a residence at the home port or home yard. In such a situation the home port or home yard is no longer serving its purpose. * * *

In that case we authorized amendment of the regulations to authorize transportation of dependents and household effects to a designated location when the member was assigned to certain ships and staffs deployed away from their home ports and yards for at least a year to

areas where dependents were not permitted. While the situation in this case is not as pronounced as that in 45 Comp. Gen. 159, reportedly deployment of vessels for a majority of the time that a member is assigned for duty has presented serious morale problems for the members and their dependents in certain situations where they do not have friends or relatives at the home port. Also, apparently it is different from the ordinary sort of duty assignment most members of the services receive.

Therefore, it is our view that the arduous sort of duty assignments described in the submission may be regarded as falling within the unusual circumstances contemplated by 37 U.S.C. 406(e). In that connection we note that 43 Comp. Gen. 639, *supra*, involved a situation in which the member was transferred from sea duty during which he was scheduled to be away from the home port or home yard "the major portion of the sea duty assignment," to a tour of sea duty during which he would return to the home port or home yard at frequent or regular intervals. We were asked whether regulations could be issued to permit transportation at Government expense of the member's dependents and household goods to a designated location in connection with the first assignment and to the home port in connection with the second assignment. We concluded that the issuance of such regulations was not authorized. To the extent that the factual situation contemplated in that submission was similar to the facts given in this case, 43 Comp. Gen. 639, *supra*, is modified.

For the reasons stated we believe that the Secretary has authority to amend the regulations along the lines proposed. However, we believe the regulations as amended should include a requirement that deployment of the vessel must be for long periods of time in order for the duty to be determined arduous and thus unusual under 37 U.S.C. 406(e). Such a requirement would be for the purpose of preventing such determinations when vessels are deployed for short periods allowing the members attached thereto to return to the home port frequently. We are particularly concerned that such restriction be incorporated in the regulations in view of the fact that deployment must be for only "more than 50 percent of the time." Without involvement of extended periods of deployment the assignment to sea duty would not be considered unusual in terms of 37 U.S.C. 406(e).

As indicated in the proposed amendment, the authorization of dependent travel and household goods transportation to a designated location upon assignment to a tour of duty covered by that paragraph also involves such travel and transportation from the designated location when such assignment is terminated and the member is assigned to duty not involving the type of duty contemplated therein.

[B-186857]

Appropriations—Availability—Attorney Fees—Defending Traffic Offenses Cases

Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility.

In the matter of attorney's fees in traffic offense cases, February 9, 1978:

This is in response to a request for an advance decision by the Fiscal Officer, Bureau of Alcohol, Tobacco and Firearms (ATF) of the Department of the Treasury as to whether ATF has the authority to reimburse an employee for legal fees incurred for representation by private counsel in Ponce, Puerto Rico.

On February 3, 1976, Mr. Luiz A. Irizarry, an ATF employee, was involved in an automobile accident while on official business. He was driving a Government vehicle for the purpose of investigating an application for a permit as a wholesale liquor dealer. Both he and the other driver were cited for a violation of the local traffic code. He appeared before a judge who signed the charges prepared by the police officer and was told to appear at the District Court of Ponce on March 11, 1976, for trial. He was advised that he was required to have counsel present at the trial.

As an ATF employee, Mr. Irizarry was governed by paragraph 46j of ATF Order 2002.1 (May 21, 1975), which provides in part:

> As a plea of guilty in traffic court may be introduced in evidence in a civil action it is imperative that all ATF employees obtain legal counsel if they are cited for a traffic violation while in the performance of official business resulting in an accident, before entering such a plea in court. * * * In no case should an ATF employee plead guilty to a traffic violation charge resulting in an accident without advice and counsel of a representative of the Chief Counsel's or Regional Counsel's office.

Complying with that order, Mr. Irizarry did consult ATF Regional Counsel who felt it would be in the best interest of the Government for him to be represented by Government attorneys.

ATF requested the Department of Justice to provide its employee with legal representation. On February 25, 1976, the Acting Chief, Torts Section, of Justice's Civil Division, sent a telegram to the United States Attorney in San Juan, Puerto Rico, asking whether his office could provide representation. By telephone the U.S. Attorney told ATF that his heavy case load would not permit the detail of an attorney for the purpose of representing Mr. Irizarry. Subsequently, by

letter of March 23, 1976, the U.S. Attorney advised ATF's Regional Counsel that his office "will give legal assistance to your agents in Puerto Rico, case load permitting it, in all criminal action against them that may arise from their activities and within the scope of their employment that could" make the United States liable in a civil action.

Having been told that no legal representation could be provided Mr. Irizarry by the Department of Justice, ATF Regional Counsel requested permission from the Supreme Court of Puerto Rico to allow a member of his legal staff to provide the representation. In reply, he was advised that lawyers who are not members of the Puerto Rican bar must be able to speak Spanish fluently or be associated with an attorney who speaks Spanish fluently. No one in the Regional Counsel's office was able to meet this requirement and as a result, Mr. Irizarry had to retain private counsel. Mr. Irizarry acknowledges that at that time he was advised that it was unlikely that the Government would pay his attorney's fee.

The traffic violation charges against Mr. Irizarry were dismissed at the trial. His attorney has presented him with a bill for $300 and he asks that the Government pay it on his behalf.

We are not aware of any authority by which ATF may use its appropriations to pay for any fine imposed by a court on a Government employee for a traffic offense committeed by him while in the performance of, but not as a part of, his official duties. Such fine (or a forfeiture of collateral) is imposed on the employee personally and payment thereof is his personal responsibility. *See* 31 Comp. Gen. 246 (1952). While the Department of Justice may authorize and pay for the employment of a private attorney to defend an employee in a criminal action if it determines that the employee was acting wihin the scope of his employment, such authorization was not granted in the instant case. Further, if such authorization had been granted, only Justice Department appropriations, and not ATF appropriations, would be available for the payment of the attorney's fees.

Accordingly, it is our view that the ATF may not use its appropriations to pay Mr. Irizarry's attorney's fees.

[B–190060]

Contracts—Specifications—"Award Amount" (Fee)—Mess Attendant Services

Use of "award amount" (fee) provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose.

Contracts—Protests—Allegations—Not Supported By Record

Protest based on allegations of statutory and regulatory violations, without meaningful explanation as to why or how the violations exist, is without merit.

Bids—Invitation For Bids—Pricing Structure—Risk

The fact that invitation for bids (IFB) pricing structure places risk on the bidder does not render IFB improper, since bidders are expected to take risks into account in formulating their bids.

Contracts—Mess Attendant Services—Status of Contract

Contract for mess attendant services is not a personal services contract since there is no direct Federal supervision of contractor personnel.

Contracts—Experimental—Evaluaion of Results—Cost Consideration

Where experimental contract structure may result in award that does not represent lowest total cost to the Government, it is recommended that agency fully consider this aspect of "experiment" when evaluating results achieved.

In the matter of Palmetto Enterprises, February 10, 1978:

Palmetto Enterprises (Palmetto) protests the award of a contract for mess attendant services for the San Diego Naval Station under invitation for bids (IFB) N00123–77–13–1526 issued by the Naval Regional Procurement Office, Long Beach, California. Protester has alleged a long list of statutory and regulatory (Armed Services Procurement Regulation (ASPR)) violations in connection with the solicitation, with the thrust of the protest being the asserted undue risk placed on bidders because of the pricing and evaluation format of the IFB and the use of what the protester perceives as a personal services contract.

The structure of the IFB is novel for an advertised procurement—it contains "award amount" provisions borrowed from cost-plus-award-fee type contracts with attendant award determination features; it provides a fixed-price "service rate" which includes direct labor costs, profit, overhead and G&A; it provides for reimbursement at that rate based on actual labor hours incurred up to a specified maximum for various levels of service, but requires the contractor to provide any additional labor without reimbursement if necessary to meet the levels of service required by the specification; and it permits the bidder to bid only the "service rate," without varying the specified hours (manning level) upon which bids will be evaluated, i.e., the bid "price" is to be evaluated on the basis of the bidder's specified service rate multiplied by the Government's designated maximum manning level with award to be made to the low, responsive, responsible bidder.

The contracting officer states the IFB structure is experimental and explains its use as follows:

Competitive procurement of [mess attendant] services has historically been extremely difficult. This difficulty arises largely from the fact that the contracts can be performed with an absolute minimum of capitalization. The lack of a direct requirement for a specified number of man-hours and the almost negligible administrative costs for the contract effort have combined to encourage gross underbidding by at least some bidders in almost every competitive procurement for these services. Such circumstances open issues of bidder responsibility and mistakes in bid. Resolution of a multiplicity of such questions in time to permit award so as to ensure the vitally required continuity of services is an extremely difficult problem which has been faced with frequency.

After award of the contract, a second set of conflicting goals asserts itself. The contractor, being in a fixed-price environment, will most naturally attempt to perform the required services with a barely sufficient minimum of personnel.

The Navy's managers of messes, however, are under strong and continuing pressure to upgrade the quality of the messes, in terms of the quality of the food and its presentation, the service rendered to the personnel eating at the mess, and the overall attractiveness of the facility. These pressures arise from considerations both of sanitation and morale of Navy personnel. The importance of mess operations to the Navy's ability to recruit and retain its personnel is recognized in an annual series of awards * * * given for superior messes, ashore and afloat. The awards are highly coveted by all Commands, and competition for them is keen. Such conflicts between the efforts of the contractor to minimize services and the desires of the mess management to expand services leads directly to claims action. The claims themselves, based as they frequently are on "additional manhours" required * * * are burdensome to evaluate and settle, since there are seldom any baseline data which permit a determination as to the number of manhours originally to be provided. Such claims are also often motivated and magnified by the desire of the contractor to "get well" from his originally too-low bid.

From extensive experience with attempting to resolve both procurement and administrative difficulties in mess attendant contracting, personnel of the Naval Regional Procurement Office, Long Beach, undertook the design of an alternative approach to these efforts. The goals of the new approach are.

(1) to eliminate "underbidding"
(2) to reward higher productivity
(3) to provide a definitive basis for award
(4) to encourage and reward higher quality service

The contracting officer also states that:

The pricing structure of –1526 addresses the deficiencies inherent in normal mess services contract formats by eliminating the incentive to underbid (and "recover" by subsequently underperforming), and by providing direct financial inducements to provide superior service. Furthermore, the structure does not penalize efficiency.

* * * normal mess services contracting structures are fixed-price, based upon estimated meal-counts, and providing (typically) for price adjustments whenever the actual number of meals served during a month falls outside parameters set forth in the contract. In order to permit management flexibility and to obtain the potential benefits of higher productivity, such contracts contain no direct statement of man-hours to be used in the performance of the effort. Each bidder is required to submit a manning chart for purposes of assisting in the determination of responsibility, but such charts have no impact on the contractual requirements.

By contrast, the pricing structure of —1526 sets forth a number of manhours ("authorized maximum manhours") for three levels of meals. The bidder offers a "service rate" price, which determines the bid evaluation price. The "service rate" is the basis for all compensation under the contract * * * [including] any additional risk amount the bidder wishes to include against the contingency that the "authorized maximum manhours" are insufficient for performance at the required levels.

The IFB establishes an annual total of 116,000 manhours as the "authorized maximum manhours." Under the contract, and barring a change in Government requirements, a contractor would not be reimbursed for any hours actually incurred above the level of hours established in the IFB for the quantity of meals served during any given month. The IFB also provides for $38,545 as a maximum "award amount" which can be earned by the contractor, establishes criteria upon which the award amount will be based, provides for the use of "performance reports" to be evaluated by a "Performance Evaluation Board," whose recommendation will be considered by the Commanding Officer in determining the "award amount," and provides that the determination by the Commanding Officer in this regard shall be final, and not subject to the "Disputes" clause of the contract.

We find the protester's allegations to be without merit. For example, the protester complains that:

> The solicitation calls for the provision of data from which the contracting officer will "evaluate" the bid for "responsiveness." This procedure in reality is a two step [procurement which] does not contain objective bid evaluation criteria in violation of ASPR 2-201 section D(i), 1-705.4, and 1-903.

The only "data" which the IFB requires are proposed manning charts for the purpose of assisting the contracting officer in "making an affirmative determination of responsibility." The manning charts do not become part of the contract and do not limit the contractor's obligation to provide services sufficient to satisfy specification requirements. The requirement to provide information to assist in the determination of responsibility does not convert an ordinary IFB into a two-step procurement, since the "data" does not constitute a proposal requiring specified evaluation criteria, as in a two-step procurement. *See* ASPR 2-503.1. ASPR 1-705.4 deals with the certificate of competency procedure in connection with a nonresponsibility determination regarding a small business; ASPR 1-903 concerns minimum standards for responsible prospective contractors. We fail to see in what regard those regulatory provisions have been violated by the invitation. Moreover, ASPR 1-201 section (D)(i) concerns evaluation factors for award. Inasmuch as the invitation provides for award to the low responsible bidder we do not understand how that provision has been violated.

Another contention of the protester is that:

> The use of an award fee of a subjective nature is not authorized for use with an advertised firm fixed-price contract and as such is in violation of ASPR 3-404.4 and 3-404.3.

Protester is correct in noting that the "award amount" provisions in the IFB are not authorized for use in an advertised procurement. In this regard, however, the record shows that the contracting agency sought and obtained a one-time ASPR deviation pursuant to ASPR

1–109.2 to proceed with the instant solicitation in order to "test an innovative new approach to contracting for mess attendant services." Moreover, the cited portions of the regulation which are alleged to have been violated deal with types of negotiated fixed-price contracts, i.e., those with economic price adjustment provisions in the case of ASPR 3–404.3, and fixed-price incentive contracts in the case of ASPR 3–404.4, and are not opposite to this solicitation. We therefore find no merit to this contention.

The protester next contends:

> The contract also provides for an unlawful reduction in the contract price based on a reduction of hours furnished and as such is a violation of ASPR 2–407.4.

ASPR 2–407.4 concerns the evaluation of bids when the solicitation or bids contain economic price adjustment clauses. Since no such provisions are contained in the invitation, the relevance of the cited ASPR provision to the proposed contract escapes us. Moreover, as explained above, the contract is not one for a total fixed price—only the hourly "service rate" is fixed by the bidder, and payment is to be made on the basis of the actual number of direct labor hours expended in the performance of the contract (up to the stated maximum) at that hourly rate. The evaluated price based on the Government's estimated maximum quantity of manhours is not the contract price, and therefore, we do not perceive an "unlawful reduction in the contract price" as contended by Palmetto.

Other protest allegations are similar—they are merely allegations of statutory and regulatory violations without meaningful explanation as to why or how the violations exist. For example, Palmetto claims that by removing the "award amount" determination from the application of the "Disputes" clause, the Federal courts have somehow been deprived of their jurisdiction. We do not believe it necessary to address these other points raised by the protester.

With regard to the question of risk, protester in effect makes the point that the recovery of overhead and G & A, some of which is fixed and not subject to direct labor fluctuation, and the ability to earn a profit, are wholly a function of the number of direct labor hours expended in the performance of the contract; that the number of hours to be worked are not wholly within a contractor's control, being dependent on the number of meals served; and that the "ceilings" (maximum levels of service for which contractor can be reimbursed) are established by the Government, not the bidder.

It is clear that there is a certain amount of risk associated with the type of contract here involved, that risk being that reimbursement at the service rate may be insufficient to cover overhead and profit, depending upon the total labor hours which are provided (and for

which reimbursement is allowed) under the contract. This risk is magnified by the IFB statement that bidders who "believe that the Government's estimate of manhours is high and they can consistently maintain a high level of 'Responsiveness' and 'Quality of Work' with a lower number of manhours may reflect this confidence *by bidding a lower 'Service Rate' which will result in a lower total bid for purposes of bid evaluation.*" [Italic supplied.] Obviously, the lower the Service Rate, the higher the risk that overhead and profit will not be covered by the contract payments.

The presence of such risk, however, does not render the solicitation improper. Some risk is inherent in most types of contracts, and bidders are expected to allow for that risk in computing their bids. Here, it is anticipated that bidders, when determining their bids, will take into account both the possibility that reimbursable hours under the contract might well vary from the Government estimate (ceiling) and the possibility of receiving part or all of the amount set aside for the award fee. This is not contrary to any statute or regulation of which we are aware.

The protester also asserts that the IFB represents an attempt by the Navy to obtain a personal services contract under the guise of a contract for nonpersonal services.

Personal services contracts are those in which there exists an employer-employee relationship between the Government and the contractor's employees. We have held that the generally accepted test of Federal employment includes three requirements: (1) performance of a Federal function; (2) appointment or employment by a Federal officer; and (3) supervision and direction by a Federal employee. *See* 44 Comp. Gen. 761 (1965). While it is true that the operation of the Navy mess is a Federal function, the proposed contract does not give any Federal officer control over the employment of the contractor's employees, except to the extent that those employees are subject to medical examination to assure compliance with sanitation standards, that they receive security approval and identification from the Security Officer before access to the facility is permitted, and that they be removed from work for the "carrying aboard" of alcoholic beverages on Government premises. There are no provisions of the proposed contract which can reasonably be viewed as authorizing supervision of the contractor's employees by a Federal employee. We therefore do not find any basis to conclude that this is a procurement for personal services.

Since we find no merit to the protester's contentions, the protest is denied.

We are concerned, however, over one aspect of this solicitation. As indicated above, the contractor will only be reimbursed for the actual

direct labor expended, and thus if it provides less hours for the same level of service it will receive less payment (except for the potential award fee which *may* be earned). Since all bidders would be employing essentially the same labor pool upon winning the award, and because labor costs would be essentially identical, a contractor would be required to provide the maximum hours available in order to maximize recovery of indirect costs and earn a profit for his services, as no saving can result in the direct labor cost from which the contractor could benefit. Thus, if a bidder believed it could serve the requisite number of meals with 100,000 hours, rather than the 116,000 hours specified by the Government, in order to derive any benefit through good, efficient and perhaps more costly management practices, it would probably have to bid a higher hourly "service rate" charge since it would only be paid for the 100,000 hours actually incurred. Accordingly, under this solicitation a bid offering a higher "service rate," might well represent lower total cost to the Government than a bid offering a lower service rate because of the lesser number of direct labor hours that would be ultimately incurred under the former. As a result an award based solely on the "service rate" might not result in the lowest cost to the Government as required by 10 U.S.C. 2305(b). *See* 36 Comp. Gen. 380 (1956). We are recommending to the Secretary of the Navy that this aspect of the "experiment" be fully considered in the evaluation of the results achieved by use of this method of procurement.

[B-190270]

Joint Ventures—Bids—Multiple—Bidding as Subcontractor And as Member of Joint Venture

Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations.

Contracts — Awards — Small Business Concerns — Self-Certification — Status Protest

GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business.

In the matter of Southern Maryland General Contractors, Inc., February 13, 1978:

Southern Maryland General Contractors, Inc. (SMGC) has protested award of a contract by the Chesapeake Division, Naval Facili-

ties Engineering Command, under invitation for bids (IFB) No. N62477-74-B-0333. The solicitation covered the second increment in construction of a facility for disposal of aged and unstable solid missile propellant at the Naval Ordnance Station, Indian Head, Maryland.

Award has been made to Mech-Con Corporation and Heller Electric Company, Inc. (Mech-Con/Heller), a joint venture bidding $4,258,643. SMGC, the second-low bidder at $4,338,000, protested to our Office before award on two grounds. First, SMGC believed the joint venture had misrepresented itself as a small business because the combined annual receipts of the two firms for the preceding fiscal years exceeded the $5 million limit contained in the standard form (SF) 19-B definition of a small business.

Second, SMGC alleged Heller had improperly attempted to influence prices of its competitors by bidding both as a member of the joint venture and as an electrical subcontractor, without disclosing this fact to other bidders. Immediately before bid opening, Heller quoted prices to SMGC and other general contractors which were "substantially higher" than the actual competitive price for the electrical work in question. SMGC contended this could only have been for the purpose of attempting to cause those contractors, who lacked time to recalculate costs for electrical work included in their bids, to submit total bids higher than that of the joint venture. Accordingly, SMGC concluded that Heller's bidding constituted a "communication * * * for the purpose of restricting competition," and violated the certification of Independent Price Determination contained in SF 19-B.

The Navy, considering whether to make award while the protest was pending, disregarded SMGC's first objection because the procurement had not been set aside for small business. As for the second, the presidents of Mech-Con and Heller each submitted affidavits to the Navy stating that they had entered into the joint venture at the suggestion of their mutual surety in order to increase Mech-Con's bonding capacity, not with the intent that Heller should treat Mech-Con more favorably than other bidders to whom it quoted prices. Heller's president further affirmed that the firm had quoted the same price ($585,000) for electrical work to Mech-Con and to two other general contractors with whom it had previously done business, but had quoted higher prices ($670,000 and $605,000) to SMGC and another general contractor with whom it was less familiar, due to added contingency factors.

The Navy determined that Heller had not violated its certification of Independent Price Determination and found that delays in re-

solving SMGC's protest would have a substantial adverse effect upon both the project and the environment (completion of the proposed facility would permit disposal of 6.5 tons daily of waste propellent then being open-burned). It therefore awarded the contract to the Mech-Con/Heller joint venture on September 30, 1977.

During a conference at our Office, the parties agreed that it is common practice in the construction industry for subcontractors to submit last-minute quotes and for general contractors to arrive at their final prices immediately before bid opening. SMGC acknowledged that Heller's quote for electrical work (which SMGC states was $690,000) had no effect upon its total bid price; SMGC does its own electrical work and, using its own $400,000 estimate, had already telephoned a final bid to its on-site representative when the Heller quote was received. Two other general contractors have stated that they did not change their bids in response to the last-minute quotes from Heller.

Thus, since neither the Government nor other bidders have been prejudiced, the issue for our consideration is whether Heller's conduct constituted an *attempt* to restrict competition or otherwise violated the certification of Independent Price Determination. The certification is prescribed by Armed Services Procurement Regulation (ASPR) § 7-2003.1 (1976 ed.), and stated in pertinent part:

> (a) By submission of this bid, each bidder certifies, and in the case of a joint bid each party thereto certifies as to his own organization, that in connection with this procurement:
> (1) The prices in this bid have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
> (2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, in the case of a bid, or prior to award, in the case of a proposal, directly or indirectly to any other bidder or to any competitor; and
> (3) No attempt has been made or will be made by the bidder to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition.

In 51 Comp. Gen. 403 (1972), our Office held that a suspicion that a subcontractor's quote for mechanical work was intentionally high, so that the subcontractor could incorporate a realistic lower bid for the same work into its price as a prime contractor, constituted a legitimate business reason for submission of multiple bids by affiliated firms. Although counsel for the protester cites that decision in support of the proposition that one firm bidding both as a subcontractor and as a "secret" general contractor restricts competition, we have interpreted the case merely as recognizing that the practice exists and may be countered. *Grimaldi Plumbing and Heating Co., Inc.*, B-183642, May 20, 1975, 75-1 CPD 307.

In support of its argument that Heller's conduct was illegal, counsel for the protester also cites *Premier Electrical Construction Co.* v. *Miller-Davis Co.*, 422 F. 2d 1132 (7th Cir. 1970). In that case, the court found a *per se* violation of the Sherman Anti-Trust Act in an agreement between a general contractor and an electrical subcontractor in which the general contractor promised that, if successful, it would award the electrical work to the subcontractor in return for that firm's submitting inflated bids to the general contractor's competitors. The case is distinguishable in that the electrical subcontractor, as plaintiff in a concurrent suit, admitted its part in the conspiracy and argued that the general contractor's subsequent failure to award it the electrical work constituted a breach of contract. In the instant case, Mech-Con and Heller have denied any intent to conspire, and there is no actual evidence of collusion.

In still another case in which collusion was alleged, two prospective contractors bid apparently high prices on single groups of items and, at the same time, bid on all groups as a joint venture. We stated:

> * * * We are not aware of any rule of law which would prohibit submission of separate bids by a joint venture and members thereof individually, nor can we conclude that such action is necessarily evidence of collusion, especially where, as here, full disclosure of their relationship and their agreement is made and there is no evidence that the arrangement tended to stifle competition. *See Hyer* v. *Richmond Traction Company*, 168 U.S. 471 (1897).
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> * * * * * * *
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> We recognize that submission of the high bids by each of the joint venturers on groups IV and V did result in making the aggregate price of any combination of bids for the five items higher than the bid of the joint venturers on the five items. However, we cannot conclude from the record that this was deliberately and knowingly done to accomplish this purpose. * * * Therefore, we cannot say that the apparently high prices submitted by the individual members of the joint venture on groups IV and V were unreasonable or evidenced any collusion between them. B–146182, June 30, 1961.

While the instant case involves a subcontractor as joint venturer, we believe the same rationale applies. In this regard we note that the president of SMGC and another of the general contractors to whom Heller quoted prices as an electrical subcontractor submitted affidavits to our Office expressing the belief that Heller attempted to influence their bid prices. The presidents of Mech-Con and Heller submitted affidavits denying any such intent. We do not believe that the affidavits submitted by SMGC and the other general contractor provide a sufficient basis to conclude that the award to the joint venture was improper. If the protester has additional evidence of collusion or false certification of Independent Price Determination, it should be submitted to the Navy for possible forwarding to the Department of Justice under ASPR §§ 1–111 and 1–115(f) (1976 ed.). *See G&B Chemicals, Incorporated*, B–179966, February 15, 1974, 74–1 CPD 76.

With regard to the size status of the Mech-Con/Heller joint venture, we note that our Office does not review questions of a bidder's small business size status. *Walco-Power Service, Inc.*, B–190128, September 29, 1977, 77–2 CPD 246. In any event, the procurement in question was not set aside for small business.

Accordingly, the protest is denied.

[B–189221]

Subsistence—Per Diem—Rates—Increases—Administrative Implementation

Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91–114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distiniguished.

In the matter of Larry Burstein *et al.*—per diem—statutory increase in maximum rate, February 14, 1978:

By letter dated May 27, 1977, and received in the General Accounting Office on May 31, 1977, Mr. Edwin J. Fost, Chief, Accounting Section, Drug Enforcement Administration (DEA), Department of Justice, requests a decision as to whether the 6-year statute of limitations, 31 U.S.C. 71a, bars the claims of Messrs. Larry Burstein, Thomas H. Chown, Jerel P. Ferguson, and Patrick J. Shea for additional per diem incident to temporary duty for training in November and December 1969. Documents were also submitted relating to a similar claim of Mr. Arthur C. Wilson and it is indicated that additional claims are anticipated.

These employees, whose permanent duty stations were located in various parts of the United States, were sent to the Washington, D.C., area for 12 weeks of training, beginning in September and ending in December 1969. Their travel authorizations specified a per diem rate of $16 per day, which at the time of issuance was the maximum allowable under the governing statute, 5 U.S.C. 5702(a), and section 6.2b(1) of the implementing Standardized Government Travel Regulations (SGTR), Bureau of the Budget Circular No. A–7, as revised January 28, 1965, effective March 1, 1965.

Effective November 10, 1969, section 5702(a) was amended by Public Law 91–114, 83 Stat. 190, which increased the maximum rate allowable to $25 per day, and section 6.2b(1) of the SGTR was similarly

amended, effective the same date, by Transmittal Memorandum No. 9, Bureau of the Budget Circular No. A–7, revised. It is the contention of these claimants that this statutory increase in the maximum rate automatically and mandatorily increased their per diem entitlement to $25 effective November 10, 1969. They further contend that filing their claims with DEA within 6 years satisfied the requirements of the statute of limitation. None of these claims had been received in the General Accounting Office prior to the receipt of DEA's submission on May 31, 1977.

While the record is not entirely clear in the case of Mr. Burstein, it appears that he claimed $25 per day for 25¾ days from November 10 to December 5, 1969, on his original travel voucher, dated December 9, 1969, but was allowed only $16 per day. On July 26, 1976, he reclaimed for this period the difference between the two rates, $9 per day, for 26 days, a total of $234. This claim has not been paid because DEA determined it was barred by 31 U.S.C. 71a.

Mr. Chown claimed an additional $9 per day for 40 days, November 10 to December 19, 1969, or $360 dollars on December 23, 1969. This was disallowed by memorandum dated March 17, 1970, because "The new per diem rate of $25 per day does not apply." On February 9, 1976, Mr. Chown reclaimed the $360 and this amount was paid on May 3, 1976, because DEA construed a Comptroller General's decision as holding that the new maximum per diem rate authorized by the Act of November 10, 1969, Public Law 91–114, 83 Stat. 190, superseded the rate authorized by the outstanding travel authorizations here involved. Subsequently, DEA concluded that Mr. Chown's claim was barred by 31 U.S.C. 71a and action to effect recovery of the amount paid is pending.

Mr. Ferguson claimed an additional $9 per day for 39 days, November 10 to December 19, 1969, or $351 on his original travel voucher in December 1969 which was disallowed. He reclaimed the $351 on January 22, 1976, and this amount was paid on April 26, 1976, for the same reason that Mr. Chown's claim was paid. DEA later determined that Mr. Ferguson's claim was also barred by 31 U.S.C. 71a and action to effect recovery of the amount paid is pending.

Mr. Shea claimed $25 per day for 25¾ days from November 10 to December 5, 1969, on his original travel voucher submitted in December 1969, but was allowed only $16 per day. On July 22, 1976, he reclaimed for this period the difference between the two rates, $9 per day, for 26 days, a total of $234. This claim was determined by DEA to be barred by 31 U.S.C. 71a and disallowed. Mr. Shea again submitted his claim on January 24, 1977, but it has not been paid.

Mr. Wilson claimed $25 per day for 26 days from November 10 to December 5, 1969, on his original travel vouchers, dated December

10, 1969, but was allowed only $16 per day. On November 23, 1976, he reclaimed the difference between the two rates, $9 per day, for the 26 days, a total of $234. This claim has not been paid because DEA determined it was barred by 31 U.S.C. 71a.

Under 31 U.S.C. 71a as amended, effective July 2, 1975, by Public Law 93–604, approved January 2, 1975, 88 Stat. 1965, claims cognizable by the General Accounting Office are forever barred unless they are received in the General Accounting Office within 6 years after the date they first accrue. It is well established that filing such claims with the administrative agency out of whose activities they arose does not satisfy the requirements of this statute. 53 Comp. Gen. 148, 155 (1973); 42 *id.* 337, 339 (1963); 32 *id.* 267 (1952). Messrs. Ferguson's and Chown's claims for additional per diem for duty performed in November and December of 1969 were paid by DEA in April and May of 1976, more than 6 years after the date they accrued. Since they had not been filed with this Office within the requisite 6-year period they were barred at that time and hence were erroneously paid by DEA.Therefore, the pending action to recover the $351 and $360 amounts improperly paid to Messrs. Ferguson and Chown is correct. Likewise, the claims of Messrs. Burstein, Shea, and Wilson were not filed with the General Accounting Office within 6 years after the date they first accrued and those claims are also barred and were properly denied by DEA.

In the interest of clarification, it is appropriate to point out that the claims of these five individuals would not be payable even if they were not barred by 31 U.S.C. 71a. A per diem increase authorized by statute is not automatic but requires administrative action before a higher rate is effective and there is no authority for retroactively increasing specific rates authorized by travel orders issued prior to the date of the statute. 55 Comp. Gen. 179, 181 (1975); 49 *id.* 493, 494 (1970); 35 *id.* 148 (1955); 28 *id.* 732 (1949).

In the instant case the travel authorizations prescribed a fixed per diem rate of $16 with no provision for adjustment and no administrative action was taken to authorize any increase when the maximum allowable rate was raised to $25 on November 10, 1969, by Public Law 91–114 and the amendment to the SGTR. Indeed, a contrary intent on the part of DEA is indicated by the initial disallowance of these claims and a statement in a memorandum to one of these employees that the new $25 rate did not apply. Most important, neither the law nor the amendment to the regulations made the new rate mandatory. They merely prescribed a new maximum—not in excess of $25—and continued the responsibility and discretion of the administrative agencies to authorize such per diem allowances as they deem justified by the circumstances, within this limitation. See Trans-

mittal Memorandum No. 9, *supra*. Therefore, there is no authority for paying these employees per diem in excess of $16 for the period November 10, 1969, through the end of the temporary duty for training here involved. Consequently their claims would not be payable even if they were not barred by the statute of limitations. Moreover there is no authority to waive the amounts improperly paid to Messrs. Chown and Ferguson since per diem is a travel allowance which is expressly excluded from the coverage of the waiver statute, 5 U.S.C. 5584. *Matter of James B. Corey*, B–189170, July 5, 1977.

We have been informally advised that the decision upon which DEA relied to pay the claims of Messrs. Chown and Ferguson is *Matter of David Martin*, B–184789, October 30, 1975, which follows the holding in 55 Comp. Gen. 179, *supra* (B–184344, August 28, 1975). However, these cases are distinguishable from the instant case. They involved a more recent amendment to 5 U.S.C. 5702(a), effective May 19, 1975, by Public Law 94–22, 89 Stat. 84, which increased the maximum allowable per diem rate to $35, and the implementing amendment to sections 1–7.2 and 1–7.3c of the Federal Travel Regulations, FPMR 101–7, May 1973 (which superseded the SGTR) by FPMR Temporary Regulation A–11, effective May 19, 1975. In these cases per diem in excess of the amount specified in the travel orders (average cost of lodgings plus $10 or $12, not to exceed $25) was allowed because the regulations, as amended, made it mandatory that per diem be fixed at the average cost of lodgings plus $14, not to exceed $33, and, unlike the situation in the instant case, left agencies no discretion in the matter unless an appropriate official determined in writing that the lodgings–plus method was inappropriate.

Also distinguishable from the instant case, but perhaps more to the point, is 49 Comp. Gen. 493, *supra*, which involved the application of the November 10, 1969, increase in the maximum allowable rate of per diem from $16 to $25 to employees of the Defense Contract Audit Agency. However, per diem for these employees was governed by paragraph C8101–2 of Volume 2 of the Joint Travel Regulations (JTR) which further implement the SGTR as applicable to civilian employees of the Department of Defense (DOD). Their travel orders authorized per diem "in accordance with the JTR"—not at a fixed rate as in the instant case. Consequently, when the JTRs were amended, effective November 10, 1969, to prescribe a mandatory rate of $25, with certain exceptions not here applicable, these employees were allowed that rate on and after that date. The increase did not occur automatically upon the amendment of the law or the SGTR, or by virtue of any retroactive amendment of travel orders. It resulted from the administrative action by DOD changing its internal governing regulations.

In accordance with the foregoing, the claims of Messrs. Burstein, Chown, Ferguson, Shea and Wilson for additional per diem are disallowed and amounts improperly paid to Messrs. Crown and Ferguson that remain outstanding should be collected.

[B–188408]

Contracts—Modification—Change Orders—Within Scope of Contract

Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirements, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters.

In the matter of the American Air Filter Company, Inc., February 16, 1978:

This protest filed by American Air Filter Co., Inc. (AAF) essentially raises two issues. The first is whether the Defense Logistics Agency (DLA) awarded a contract to the Davy Compressor Company (Davey) with the intention of later changing the contract requirements. The second is whether the supplemental agreement between DLA and Davey which modified the contract was outside the scope of the original contract. In view of our decision on the second question, we need not consider the first.

On October 25, 1976, in accordance with a purchase request from the Air Force, DLA awarded Davey Contract No. DSA700–77–C–8013, to supply, over a 3-year period, a base quantity of 2,400 and an option quantity not to exceed 2,400 portable heaters (Heaters, Engine and Shelter, Ground Portable, type H–1, Class I in accordance with Military Specification MIL–H–4607B, as amended). Specification MIL–H–4607B, as originally incorporated in the contract, called for a heater using a gasoline engine as the prime mover and gasoline as the fuel for the heater's combustor.

The Air Force states that after award of the contract to Davey it became aware of commercially available diesel engines suitable for use with the heater. The Air Force then commenced negotiations with Davey to supply diesel engined and fired heaters, rather than the ones specified under the contract. On August 25, 1977, Davey and DLA entered into a supplemental agreement to require the diesel engine.

AAF argues that the modification so materially altered the original contract that under the applicable statutes and regulations a new competition was required.

We have consistently held that contract modifications, whether they be unilaterally ordered by the Government or agreed upon by the contracting parties and incorporated into a supplemental agreement, are primarily the responsibility of the contracting agency. However, we have also held that if the contract as changed is materially different from the contract for which competition was held, the contract should be terminated and the new requirement competed, unless a noncompetitive procurement is justifiable. *See* 50 Comp. Gen. 540 (1971).

It is not always easy to determine whether a changed contract is materially different from the competed contract. However, the decisions of the Court of Claims relating to cardinal changes offer some guidance. (While a cardinal change results from the unilateral action of the Government and the change in this case resulted from the mutual agreement of the parties, the Court of Claims decisions are useful here, since they provide the standards for determining whether the changed contract is essentially the same as the original.) For example, in *Air-A-Plane Corporation* v. *United States*, 408 F. 2d 1030 (1969), the court stated:

> The basic standard, as the court has put it, is whether the modified job "was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct." Conversely, there is a cardinal change if the ordered deviations "altered the nature of the thing to be constructed." [Citations omitted.] Our opinions have cautioned that the problem "is a matter of degree varying from one contract to another" and can be resolved only "by considering the totality of the change and this requires recourse to its magnitude as well as its quality." [Citations omitted.] There is no exact formula * * *. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole.
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> * * * * * * *
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> In the judicial proceedings on the problem of cardinal change, the standards should be those already established by the court * * *. In applying these criteria, the parties should offer evidence on and the commissioner should find (so far as practicable) the number of changes, the number of parts of the smoke generator, the parts changed and those left unchanged, the effect of the changes on the unchanged parts, the character of the changes, the timing of the changes, and the extent of the engineering, research, and development plaintiff had to do.

Thus, the question before us is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different.

AAF states that a diesel powered and fired heater, in contrast to a gasoline powered and fired heater, has never been built. AAF maintains this alone sufficiently demonstrates that a drastic change has been made to the original contract. AAF states this change will affect not only the engine, but also the heat exchanger and the combustor. (The engine, also called the prime mover, powers the heater; the combustor is the chamber in which the burning diesel fuel generates heat;

and the heat exchanger is the chamber adjacent to the combustor where the air is heated.)

Specifically, AAF points out (and Davey and DLA acknowledge) that substituting a diesel for a gasoline engine, in addition to changing the fuel and substantially increasing the heater's weight, necessitates still other changes in the specification in order to compensate for the inherent difficulty in starting diesel engines in cold weather. Thus, the original requirement that gasoline engines be manually startable had to be rescinded. Moreover, a starter, generator, voltage regulator, associated wiring and controls, engine shrouding, and, possibly, a spark igniter must be added to the heater so that the diesel engine can be used in arctic conditions.

In addition, AAF points out that the change from gasoline to diesel fuel requires the use of a substantially different heat exchanger. AAF states that because of the burning properties of diesel fuel as compared to gasoline, the heat exchanger has to be substantially larger to accommodate effectively the larger volume of air and diesel fuel which is required for diesel fuel to equal the burning efficiency of gasoline.

AAF further points out that the combustor will have to be substantially different from one burning gasoline exclusively. It is not disputed that gasoline can burn despite substantial differences in the fuel-to-air ratio, and that diesel fuel requires a nearly constant ratio. Thus, when given the wide operating range of the heater, the heater will require a sophisticated fuel control which, as yet, does not exist. Additionally, AAF notes that diesel fuel is significantly more difficult to vaporize than gasoline and that an air compressor not required on gasoline heaters will be needed on the diesel fueled heaters.

The agency's reply is simply that the contract contains performance type specifications. The agency states that some contractors, like Davey, have never produced even gasoline heaters and would be required to design and develop a heater meeting even the original contract criteria.

According to the contracting agency, although diesel engines have not been used as a prime mover before, they are commercially available items which, from an operational standpoint, are interchangeable with electric motors or gasoline engines. Moreover, Davey maintains that the electric starter components are off-the-shelf, commercially available items and the spark igniter it will use is not significantly different from that contemplated under its original gasoline engine heater.

With respect to the heat exchanger, Davey disagrees with AAF and states that it will not require a larger heat exchanger because its de-

sign allows equivalent amounts of diesel fuel and gasoline to be burned with the same volume of air.

The combustor design, according to Davey, requires no original research. Davey concedes that the fuel nozzle design is the most significant variation from the original heater, but contends that an air compressor will not be necessary for atomizing the diesel fuel for burning. In any event, Davey does not consider the nozzle redesign to be significant to the contract as a whole.

Finally, whether or not the requisite fuel control exists, Davey states that it intends to supply one that will allow the heater to meet the performance specification.

However, we think, that the comments recorded at the post-award conference of January 13–16, 1977, evidence the clear recognition of the magnitude of the change. The Government's conference minutes, in pertinent part, are as follows:

> 12. * * * Because of the very important technical changes being made, the Contractor's previous work is about wasted and there was no use to make a milestone chart before. He will now enter a new design phase and the production chart will develop as a result of new decisions.
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> * * * * * * *
>
> 15. A discussion was held regarding delivery dates for all CLIN's [contract line items] under the contract. All of the original dates are no longer realistic or valid. The deliveries will be re-established and re-formed * * *.
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> * * * * * * *
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> 37. As a direct result of the major technical changes incorporated into the units, the FAT [First Article Test] and production units will be delayed substantially * * *.
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> * * * * * * *
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> 41. The technical changes will have a significant impact on price * * *. The contractor furnished * * * [an estimate] * * * of about $900–$1,000 a unit.

While the Government maintains that the parties to the conference were speaking in generalities and that the above statements are not dispositive of the question, we believe these minutes clearly demonstrate that both Davey and the Government believed the proposed changes to the contract would significantly alter the original contract. The minutes clearly state that "Davey's previous work is about wasted," "the original [delivery] dates are no longer realistic," the technical changes are "major" and the "impact on price [is] significant."

We also note that the contract originally required delivery of the initial quantity within 300 days of date of award. The contract was modified approximately 10 months after award and the time for delivering the initial quantity was extended to 300 days from the date of the modification.

With regard to the contract price, the contract modification provides that the price for the heaters will be increased from $2,366.00 to $3,069.96 per unit, which is an increase of approximately 29 percent.

Thus, the modification to the contract to require a diesel powered and fired heater necessitated, *inter alia*, the following changes:

1. The substitution of a diesel engine for a gasoline engine.
2. A substantial increase in the weight of the heater.
3. The addition of an electrical starting aystem.
4. The design of a new fuel control.
5. The redesigning of the combustor nozzle.
6. The alteration of various performance characteristics.
7. An increase in the unit price by approximately 29 percent.
8. The approximate doubling of the delivery time.

It is our view that the magnitude of the technical changes, and their overall impact on the price and delivery provisions compels the conclusion that the contract, as modified, is so different from the contract for which competition was held, that the Government should have solicited new proposals for its modified requirement.

In reaching our conclusion, we considered *Keco Industries, Inc.* v. *United States*, 364 F. 2d 838 (Ct. Cl. 1966), which was cited by the agency. There, the court held that a change order converting 100 gasoline to 100 electric driven refrigeration units was not outside the contract. The contractor had been awarded four contracts to produce 270 refrigeration units of which 170 were to be electric driven and 100 gasoline driven. The only differences in the four contracts were in the price and specifications for the 100 gasoline driven units. The evidence there established the only significant difference resulting from the change was in the power units and the overall dimensions of the two types of refrigerators but most basic parts were the same. In denying Keco's breach of contract claim, the court noted the contractor was geared to production of electric driven units and had not produced any gasoline driven units. We find it significant that in this case the original contract called only for the production of gasoline engines and did not contemplate the production of diesel engines. Thus, we think the court's finding that the change in *Keco* did not constitute a breach of contract is not controlling under the circumstances here.

Accordingly, we recommend that DLA consider the practicability of terminating the contract for the convenience of the Government and competitively soliciting its requirements for diesel heaters. In this connection, should DLA determine that it would not be advantageous to the Government to terminate the existing contract, we request that DLA report to us the basis of its decision.

As this decision contains a recommendation for corrective action, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). This statute requires written statements

by the agency involved to the House and Senate Committees on Appropriations, the House Committee on Government Operations and the Senate Committee on Governmental Affairs concerning the actions taken with respect to our recommendation.

[B-189913]

Contracts—Awards—Small Business Concerns—Size—Eligibility Determination Date

Since Small Business Administration (SBA), as a matter of policy, now requires that to be eligible for award of small business set-asides, firm must be small business concern both at time for submission of bids or initial proposals and time for award, General Accounting Office will no longer review question of good faith of bidder or offeror self-certification as small business where SBA determines that firm was large on date for submission of initial proposals, even though firm might be small at date of award and might have self-certified in good faith at time for submission of initial proposals.

In the matter of CADCOM, Inc., February 16, 1978:

The Naval Regional Procurement Office (NRPO) issued request for proposals (RFP) No. N00600-76-R-5009 on October 19, 1975, for engineering services in support of advance design projects at the Naval Ship Research and Development Center. The solicitation was a 100-percent small business set-aside.

CADCOM, Inc. (CADCOM), ManTech of New Jersey Corporation (ManTech), and other offerors submitted proposals on November 6, 1975, the due date for submission of initial proposals. Offerors were required to certify that they were small businesses at that time. After lengthy negotiations and final evaluation of proposals, NRPO announced on June 28, 1977, that CADCOM was the successful offeror.

ManTech filed a timely size status protest against CADCOM with the Small Business Administration (SBA). On August 11, 1977, the Philadelphia Regional Office of SBA issued a decision holding that CADCOM was "* * * other than a small business concern for this solicitation." This holding was based upon SBA's finding that CADCOM was involved in a joint venture for this procurement with Operations Research, Inc. (ORI), a firm that SBA found was other than a small business. SBA chose November 6, 1975, the date for submission of initial proposals, as the date for making the size status determination.

CADCOM filed a protest with our Office on August 17, 1977, and appealed the SBA Regional Office decision to the SBA Size Appeals Board (Board) on August 22, 1977. In its initial letter of protest, and a supplemental letter of September 1, 1977, CADCOM argued

that it satisfied the requirements of Armed Services Procurement Regulation (ASPR) § 1–703(b) (1976 ed.), which provides, in pertinent part, that:

> The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he had, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers.

CADCOM contended that it had certified in good faith as a small business on the due date for submission of offers, that it is presently a small business, and is therefore eligible for award notwithstanding the SBA Regional Office determination. Award has been withheld by NRPO pending our resolution of the matter.

Because of the SBA determination that CADCOM was not a small business for this procurement, and because SBA is vested with the authority to make conclusive size status determinations, pursuant to 15 U.S.C. § 637(b)(6) (1970), we asked CADCOM to address the issue of GAO's jurisdiction over this case.

CADCOM initially adressed the question of GAO jurisdiction in its letter to our Office of September 19, 1977. Basically, CADCOM argued that while SBA is empowered to make conclusive determinations of size status, it may not decide the question of whether a firm is eligible for award under a particular procurement—that only GAO may make such a determination. In this regard, CADCOM stated:

> The issue properly posed by this protest is, assuming *arguendo*, that CADCOM was not a small business in November, 1975 (as the Philadelphia SBA decided) but that CADCOM is now a small business concern, is CADCOM *eligible* for award under the subject procurement?

CADCOM stated the specific question to be decided by GAO as "* * * whether CADCOM was in a position as of the date of submission of initial proposals to represent itself as a small business." CADCOM cited a number of our decisions in which we considered the effect of the reasonableness and good faith of erroneous small business self-certifications on awards of contracts. E.g., *Propper International, Inc., et al.*, 55 Comp. Gen. 1188 (1976), 76–1 CPD 400; *Capital Fur, Inc.*, B–187810, April 6, 1977, 77–1 CPD 237.

On October 21, 1977, the Board, in Findings and Decision No. 1091, denied CADCOM's appeal of the Regional Office determination based on a number of findings and conclusions, several of which are relevant to the issue of our jurisdiction in this case.

CADCOM argued before the Board that, pursuant to ASPR § 1–703(b), the two relevant times for determining size status in negotiated procurements are (1) the due date for best and final offers, rather than the date for initial proposals, and (2) the date of award.

The Board concluded, as follows:

> In negotiated procurements, the Board should determine size as of the deadline for submission of initial offers. There may not be any offers submitted after the initial one. Therefore, to base the size determination on the best and final offer could set an illusory and unenforceable standard. Such a rule would encourage large concerns to bid in the hopes that they can change their size status to comply by the time for submission of best and final offers.
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> The deadline for submission of offers in a negotiated procurement is analogous to the bid opening date in an advertised procurement. In fact, ASPR § 1.703(b) fixes them as the determinative dates for purposes of representation of size status. It provides in part that a bidder or offeror must have "in good faith represented himself as small business prior to opening of bids or closing date for submission of offers. * * *"
>
> A concern represents itself to be a small business at the time of submission of its offer. Any rule which does not determine size status as of that date would encourage misrepresentation of size status at that time. Furthermore, it would allow the Contracting Officer to consider in the negotiation process the offers of concerns who were other than small. This would divert attention from concerns who had accurately represented their size status at the time of submission of initial offers, to their detriment.

With regard to size status as of the date of award, CADCOM argued that, pursuant to ASPR § 1–703(b), the controlling point in time for a size determination is the time of award and if a firm is determined to be small on that date it is eligible for award if the self-certification was *in good faith* on the date for submission of proposals even if SBA later determines that it was not in fact small on that date.

The Board disagreed with CADCOM's reading of ASPR § 1–703 (b). According to the Board, the phrase in ASPR § 1–703(b) regarding the award date as the controlling point in time for size status determinations is "* * * applicable for the purpose of the contracting officer in the absence of a determination by SBA, applicable to that procurement, that the concern is other than small." Additionally, the Board concluded that a good faith self-certification of size status is no longer effective once the SBA determines that the firm is not small for the purposes of the subject procurement.

The Board stated that it had held many times that to qualify for purposes of a small business set-aside, a concern must be small at bid opening (or presumably the date for initial proposals in negotiated procurements) as well as award. In support of this view the Board provided this rationale:

> A concern represents itself to be a small business at the time of submission of its bid or offer. It is logical that the concern be held to the accuracy of that representation at that time and not a later date. Any rule which does not determine size status as of that date would encourage misrepresentation of size status at that time in the hopes that the concern's size status would not be protested and that its size status could be changed by the date of award. If not protested, the contracting officer would be considering offers or bids of concerns who were other than small. This would divert attention from concerns who had accurately represented their size status at the time of submission of offers or bids, to their detriment.
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> If protested in a timely fashion, the protest is referred to SBA for a size determination. Normally at that time the contract has not been awarded. Thus, for practical as well as other reasons, SBA must take as the determinative date

for size purposes, the date of bid opening. Of course if the concern is small as of bid opening but it is claimed that the concern's size status became other than small subsequently, but prior to award, SBA would also look at the size status of the concern at such time.

In conclusion, the Board stated that since CADCOM was other than small as of the date for submission of initial proposals, it was other than small for the purpose of this procurement and thus ineligible for award, and any subsequent change in size status is irrelevant. Therefore, the issue of CADCOM's size at the date of award need not be considered.

The Board stated further that:

> Once SBA has made a size determination, it is, as Section 8(b)(6) of the Act [15 U.S.C. § 637(b)(6)] states, "conclusive" on "Offices of government having procurement or lending powers * * *." Thus any additional consideration of size status affecting procurement offices would appear to violate the requirement that the SBA determination be "conclusive."

Following the Board's reading of ASPR § 1–703(b), once the SBA determines a firm is not small for purposes of the procurement (even though based on status as of the date of bid opening or submission of initial proposals), the determination is conclusive unless overturned by SBA, the question of whether the firm's self-certification was in good faith becomes irrelevant, and consequently there would be nothing left for GAO to consider concerning size status and eligibility for award. Since acceptance of this view would preclude our review of the instant case, we allowed CADCOM and other interested parties to further address the question of our jurisdiction over this matter.

CADCOM, in a letter of December 20, 1977, disputes the Board's interpretation of ASPR § 1–703(b), and urges us to consider the issue of good faith self-certification and eligibility for award. CADCOM contends that the contracting officer determines eligibility for award based on (1) the SBA's view of a challenged concern's size status as of the date of award and (2) the contracting officer's view as to whether the challenged firm certified its smal business size status in good faith on the date initial offers were submitted. CADCOM contends that the plain language of ASPR § 1–703(b), the "legislative history" of the provision, and GAO decisions in the area require SBA to determine size status as of the date of award. If SBA funds the challenged firm to be small at the date of award but large as of the date for submission of offers, then the contracting officer determines the concern's eligibility for award by determining if the self-certification was in good faith. GAO may review this determination CADCOM argues.

In discussing the "legislative history" of ASPR § 1–703(b), CADCOM recognized that the language of the provision was drafted in response to two GAO decisions, 40 Comp. Gen. 550 (1961), and B–143630, October 13, 1960. According to CADCOM, these two decisions show that the controlling point in time for a size status deter-

mination is the date of award, and that a bidder who is small at that time is eligible for award *if* self-certification was in good faith.

We do not disagree with this reading of the decisions. However, an examination of policies in effect at that time and the context in which these cases were decided may clarify the purpose behind the language added to ASPR § 1–703(b) in response to the decisions.

The ASPR Committee, on April 26, 1961, reported on the status of ASPR Case 61–52 "Determination of Small Business Concerns." The report reads in pertinent part, as follows:

1. Case 61–52.—*Determination of Status of Small Business Concerns.* The Committee considered a memorandum from the Director of Small Business Policy, OASD (I & L), dated 18 Apr 61, raising the question of when, during the procurement process, the size formula contained in the SBA's size standards apply; i.e.,
(i) at the time the self-certification of the contractor is made, or
(ii) at the time [of] award of the contract.
Representatives of the Small Business Administration Liaison Office and the Assistant Director for Small Business Policy, OASD (I & L), were present for the discussion of this matter. After discussion, the Committee concluded that the Regulation, which states that the contracting officer shall accept at face value "* * * (ii) a statement by the bidder or offeror that it is a small business concern * * * " provides a basis for prima-facie evidence upon receipt of self-certification that the concern is a small business which should be relied on unless there is a protest received prior to award. If such a protest is received, or if the contracting officer has other evidence to question the size certification, the size as determined at the time of award governs. *In this respect, it was noted that this is the current practice of the three military departments. The Committee concluded that this practice should be retained and that no change in the Regulation in this respect is needed.* [Italic supplied.]

It appears from this excerpt that it was the practice of military contracting officers to accept self-certifications as prima facie evidence of size until there was some reason to question size. If there was such a question, the practice of the SBA, apparently, was to determine size status as of the time of award. This is one possible system for insuring that procurements set aside for small businesses are in fact awarded to bona fide small businesses, but not the only system, or necessarily the best one.

Our two decisions, then, recognized these policies. In addition, they recognized and addressed a problem inherent in this system—the possibility that a concern that certified as a small business prior to bid opening or submission of proposals would be challenged and found to have been small at the award date, but large at the time it self-certified. To make award to concerns in this situation could easily encourage abuse of the self-certification procedure by large concerns certifying as small in the hope that their size would not be questioned, or that they could become small before award if it appeared that they would receive award.

In 40 Comp. Gen. 550, *supra*, at 553, 554, we voiced this concern as follows:

* * * The self-certification procedure was designed to simplify and expedite size determinations and procurement processes. It was hoped that 95 to 99 per-

cent of the cases would be handled under that procedure. Unless the submission of bids under a 100-percent small-business set-aside can be restricted solely to those who, in good faith, can certify in their bids that they are small business, no useful purpose would be served by requiring, in every instance, self-certification on size status. If bidders who, prior to bid opening, cannot in good faith certify themselves as small business may be permitted to delay contract awards in order to allow time to make application to the Small Business Administration for a small business certificate on the basis that their status may have changed sufficiently in the interim—between bid opening and award—so as to qualify as small business, the effectiveness of small business set-aside procedure would be seriously impaired. Usually a bidder himself is in a very good position to know his size and knowing this, if he cannot in honesty represent himself as a small business, the interests of orderly and timely procurement require that his bid be rejected as nonresponsive.

In that decision, and thereafter, we required that to be eligible for award a challenged bidder must not only be small at the award date, but must have certified (or been able to certify) in good faith that it was small prior to bid opening. This requirement then was incorporated into ASPR § 1-703(b) in 1962, when the following language was added:

The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has in good faith represented himself as a small business prior to the opening of bids or closing date for submission of offers (see § 2.405(b) of this chapter with respect to minor informalities and irregularities in bids). 27 Fed. Reg. 1685-7 (1962).

The test of good faith in this context has been one of a high degree of prudence and care. See 51 Comp. Gen. 595 (1972). Additionally, we have held that:

* * * *where a bidder's change in status before award from large business to small business after a good faith self-certification is brought about by the bidder's affirmative acts, we have held that such a bidder may not be considered as a small business concern for purposes of a set-aside award because to do so would give the bidder an option after bids are opened of determining whether it would be in his best interest to take action, or not to take action, to become eligible for award.* See 41 Comp. Gen. 47 (1961). [Italic supplied.] 49 Comp. Gen. 1, 3 (1969).

So, while conceivably there might have been many factual circumstances where a bidder was large at bid opening, but small at award and therefore potentially eligible for award, our standards severely limited these circumstances to protect the integrity of the self-certification procedure.

At some point the SBA apparently decided—as a means to protect the integrity of the self-certification procedure and insure awards of set-aside procurements to bona fide small business concerns—to require concerns whose size status is challenged to be small on both the award date and the date for bid opening or submission of proposals. Consequently, the SBA began making size status determinations of challenged firms on the date for bid opening or submission of proposals, as in this case. In a letter of December 30, 1977, to us concerning our jurisdiction over this case the SBA stated:

Upon receiving a timely protest, SBA will not rule a concern to be eligible for award as a small business concern unless it is small at bid opening as well as date of award. There are numerous prior decisions of the Size Appeals Board to this effect cited in the Digest of the Decisions of the Size Appeals Board at XIV-A.

In *Sentinel Protective Services, Inc.*, 56 Comp. Gen. 1018 (1977), 77-2 CPD 248, an SBA Regional Office had determined that a challenged firm was a small business. When this was appealed, however, the Board determined that the concern was large. A disappointed bidder protested to our Office that the challenged firm had not self-certified in good faith. We declined to consider the issue of good faith, and instead asked SBA why varying results had been reached at the Regional and Board levels. In its response, SBA stated, in part:

The difficulty in our Columbus District Office decision probably arose out of the distinction between size status at the time of bid opening and size status at the time of award. Although the general position of the Size Appeals Board is that the concern in question must be small at both of the relevant times, a field office might fail to consider appropriately size status at time of bid opening.

We then recognized SBA's change in policy when we stated:

In view of the fact that, under Armed Services Procurement Regulation (ASPR) § 1-703(d)(3), award may be made on the basis of the small business size status determination of the SBA District office, it is essential to the integrity of the small business size self-certification procedure that SBA insure consistent application of the existing standards based on a thorough review of all the relevant information available. *Consequently, we are recommending to the SBA that it take appropriate action, including amendment of its regulations, to insure that all SBA District offices are aware that, to be eligible for award as a small business, the prospective contractor must be small both at the time of bid opening and at the time of award, based on the standard applicable at the time of award. Cf.* 42 Comp. Gen. 219 (1962). [Italic supplied.]

The SBA, by letter of October 20, 1977, responded to our recommendation, stating, in part:

We fully agree with your suggestion that the SBA field office decision should have included the status of the firm's size at the time of bid opening. The rule pertaining to a finding as to the small business size status of a firm both at the time of bid opening and time of award has been in effect in a procedural manner in this Agency for several years. This rule has been included in the Digest of Decisions of the SBA Size Appeals Board, copies of which have been made available to our field offices.

We intend to issue a memorandum to each of our Regional and District Directors in which we shall specifically direct their attention to the current Agency policy that, for purpose of Government set-aside procurements, the size of a firm must be determined as of the date of bid opening and date of award, if the latter is known at that time.

Also, we plan to review our policy in this regard. One of the options in this review will be to specify in our Regulations the time or times at which a concern must meet the applicable size standard in order to qualify as a small business concern for purposes of Government set-aside procurements.

CADCOM disputes our result in *Sentinel*, claiming that the variance in the SBA Regional and Board determinations was caused by inadequate and erroneous investigation on the part of the Regional Office and confusion on the part of the Board regarding the proper date for making the size determination, rather than from the Regional

Office's failure to consider size status as of bid opening. Additionally, regarding our recognition of SBA's change in policy, CADCOM states that:

> * * * the second sentence of the Comptroller General's disputed statement in *Sentinel* seemingly ignores the plain meaning of ASPR 1-703(b) and appears to give credence to the SBA's erroneous interpretation of that provision. CADCOM has demonstrated in its submissions to your office the legal error in SBA's position. The subject protest provides the proper opportunity for the Comptroller General to clarify his position on the controlling date for size determination purposes and the effect of an offeror's good faith self-certification of small business size status.

While we do not necessarily disagree with CADCOM's interpretation of ASPR § 1-703(b), we do not feel that the existence of that provision *per se* requires us to refuse to recognize the change in SBA's policies discussed above. As CADCOM has shown, the relevant language of that provision was drafted to reflect our decisions. As discussed above, these decisions recognized the then current policy of SBA to determine challenged size status as of award date, and represented an attempt to limit the potential abuse of the self-certification procedure inherent in that policy.

By now requiring that, to be eligible for award of small business set-asides, a firm be small both at bid opening or the date for submission of proposals and the date of award, SBA has eliminated both the basis and the need for our review of the good faith of the self-certification of a challenged firm. It is our opinion that the "practical" reasons for this policy advanced by the Board in Findings and Decision No. 1091 are an adequate justification for the policy change.

While we recognize that, as CADCOM asserts, ASPR has the force and effect of law, we also recognize that, as the agency primarily responsible for effectuating the policies of Congress as expressed in the Small Business Act, 15 U.S.C. § 631 *et seq.* (1970), the views of the SBA as expressed in formal decisions of the Board must be given great weight. See, e.g., *Begley* v. *Mathews*, 544 F. 2d 1345 (6th Cir. 1976). In this situation, we have a conflict between language in an ASPR provision drafted in response to GAO decisions aimed at eliminating a problem inherent in the previous SBA policy and Board decisions expressing current SBA policy which handles that very problem. In these circumstances, we feel that the conflict must be resolved in favor of SBA's current policy.

Therefore, we affirm our decision in *Sentinel* regarding the appropriate time for size status determinations in formally advertised procurements. Further, SBA is designated by law to define within general standards what constitutes a small business (15 U.S.C. § 632) and to determine which firms are small (15 U.S.C. § 637(b)(6)). Accordingly, it is proper to apply SBA's policy that to be eligible for award of a negotiated small business set-aside a concern must be small both

at the time for award and the time for submission of initial proposals. Consequently, GAO will no longer review the question of the good faith of a bidder or offeror's self-certification of small business size status.

In the present case, SBA has determined that CADCOM was not a small business at the time for submission of initial proposals, and this determination is conclusive, pursuant to 15 U.S.C. § 637(b), and will not be reviewed by our Office.

By letter of today to the Administrator, SBA, we are recommending that appropriate action be taken as soon as possible to definitize and disseminate the Administration's current policy to the cognizant regulatory authorities over Government procurement.

Accordingly, the protest is dismissed.

[B-131105]

Vouchers and Invoices—Travel—Administrative Correction of Errors—Limitation on Amount Correctible

Agencies may administratively correct travel vouchers with underclaims not exceeding $30. Overclaims in any amount may be administratively reduced. 36 Comp. Gen. 769 and B-131105, May 23, 1973, modified.

In the matter of the modification of limit on administrative correction of travel voucher underclaims and overclaims, February 17, 1978:

This responds to the request of Assistant Commissioner (Administration) Joseph T. Davis for our opinion on the acceptability of the Internal Revenue Service administrative regulation covering underclaims on travel vouchers. The provision, which is in the Voucher Examination Handbook, reads as follows:

If the amount on a travel voucher is an underclaim less than $50.00, show correction on the face of the travel voucher. Schedule it for payment in the corrected amount, and send the submitter a letter explaining the correction.

The above provision allows an examiner to correct underclaims less than $50 on travel vouchers without requiring the return to and resubmission of the voucher by the claimant.

The Assistant Commissioner states that compensation for employees preparing and examining vouchers, and the number of vouchers processed, have increased greatly since we sanctioned the $10 limit in 36 Comp. Gen. 769 (1957). Additionally, he notes that it does not seem wise utilization of limited resources to devote administrative effort to returning and reprocessing vouchers containing errors under $50 at a time when many vouchers of considerably higher value should be receiving maximum attention.

The administrative adjustment upward and consequent payment of a claim in excess of the amount claimed would defeat the very purpose of the requirement that the claimant certify that the claim is correct and just, and that payment thereon has not been received, and might, in some cases, preclude the Government from invoking criminal penalties for false claims. 22 Comp. Gen. 304 (1942); 9 *id.* 251 (1929). For this reason, our decisions prior to 36 Comp. Gen. 769, *supra*, generally followed the established rule that administrative or accounting officers or employees may not increase the amount of the voucher, representing a claim against the Government, which has been certified as correct by the claimant. *Id.*

In 36 Comp. Gen. 769, *supra*, we recognized that the strict application of this rule to claims by employees and Government creditors involving minor errors of computation or extension in the stating of a voucher might result in an increase in administrative costs and the production of many small claims for the additional amount due. Therefore, in furtherance of our policy of continuously reviewing our practices and procedures with the view of developing improvements in the fiscal transactions of the Government, we sanctioned the administrative adjustment upward or downward of any claim involving such errors in amounts not exceeding $10, without amendment of the claim by the claimant.

Subsequently, by letter to the Administrator of the Veterans Administration (B–131105, May 23, 1973), we authorized an increase in the limitation to $20, with the understanding that such authority be strictly limited to minor errors in computation or extension on vouchers clearly claiming for the proper quantity of supplies or services at the proper unit price or prices.

While we are not prepared, at this time, to increase the tolerance level to $50, we would have no objection to change the limitation on unilateral *increases* in vouchers showing underclaims up to $30, with the same proviso included in B–131105, May 23, 1973, *supra*. However, corrections involving *reductions* of overclaims may be made in any amount.

[B–173815]

Foreign Differentials And Overseas Allowances—Post Differentials—Computation

Agency for International Development properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned

to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552.

In the matter of Frank H. Denton—computation of post differential payments, February 23, 1978:

By letter dated July 14, 1977, the Agency for International Development (AID) has requested a decision concerning the proper method of computation of the post differential allowance authorized under 5 U.S.C. 5925 (1976).

By decision of April 22, 1977, the Foreign Service Grievance Board determined that AID had erroneously applied the statute and pertinent regulations in computing the post differential payable to Frank H. Denton, the grieving employee, and ordered AID to pay him an additional $247.25. AID has agreed to comply with the award by the Grievance Board, reserving, however, the right to request a refund if the Comptroller General should rule that the method of computation directed by the Board is improper. This Office has, therefore, been asked for a ruling on the legality of the decision of the Foreign Service Grievance Board with respect to the computation of post differential allowance and for our recommendation as to whether AID should alter its established method of computation.

Payment of a post differential to employees outside the continental United States is authorized by 5 U.S.C. 5925 (1976):

§ *5925. Post differentials*

A post differential may be granted on the basis of conditions of environment which differ substantially from conditions of environment in the continental United States and warrant additional pay as a recruitment and retention incentive. A post differential may be granted to an employee officially stationed in the United States who is on extended detail in a foreign area. A post differential may not exceed 25 percent of the rate of basic pay. Pub. L. 89-554, Sept. 6, 1966. 80 Stat. 512.

Under this section, the Secretary of State has authorized a post differential of 10, 15, 20 or 25 percent, as appropriate, for specific posts of assignment abroad. The governing regulations, chapter 500 of the Standardized Regulations (Government Civilians, Foreign Areas), at section 552 provide that payments of post differential shall be limited as follows:

552 Ceiling on Payments

Notwithstanding the rate of differential prescribed for the differential post, if the country indicated in column 1, section 920, as applicable to the employee's post has a chief of mission position classified pursuant to 22 U.S.C. 866, the per annum post differential rate at which payment is made shall be reduced, if necessary, so that the combined per annum post differential and basic compensation (Sec. 040k) or post differential and salary (Sec. 040 1) authorized for the employee, does not exceed an amount which is one hundred dollars less than the per annum salary authorized for the chief of mission position. [Italic supplied.]

Chiefs of Missions are not entitled to post differential payments.

In implementing the aggregate pay limitation of section 552, the present practice of the State Department and AID is to first establish an annual amount $100 less than the salary rate of the chief of the particular mission, and then divide that annual amount by 2,080 to arrive at an hourly rate. The hourly rate is multiplied by 80 hours to establish a biweekly limitation on the aggregate amount payable on a biweekly basis to employees assigned to that mission.

This method of computation was approved by the Comptroller General in B–173815, August 29, 1973. In that case, the employee claimed an additional $1,317.67 in post differential payments for 3 years, based on his contention that the section 552 limitation should be applied on a purely annual basis whereby the employee would receive post differential payments at the full percentage rate authorized for the particular post until the last month of the calendar year when his pay would be adjusted over the final pay periods of that year to assure that the sum of his basic pay and post differential payments did not exceed an amount totaling $100 less than the annual salary of the Chief of Mission. Contrary to the general practice throughout AID and State Department, a component of AID in Guatemala City had been making payments of post differential on this basis. In denying the employee's claim and sustaining the method of computation used by State Department and AID, we held:

> Because of the inconsistency of practice of some payroll units in the method of computing the pay of certain officers and employees, this Office issued a memorandum to the heads of departments and independent establishments, B–50870, November 17, 1958, in which they were instructed that the proper method of computing the pay of an officer or employee is to divide the annual basic rate of pay by 2080, counting any fraction of a cent as the next higher cent in order to derive an hourly rate. The hourly rate is then multiplied by 80 to derive a biweekly rate.
>
> The memorandum further instructed that this method is also to be applied: "* * * in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates."
>
> "In a recent decision we had the occasion to reaffirm the instructions of this memorandum. See B–177694, March 7, 1973, copy herewith.
>
> "Under the circumstances as related heretofore, we find that the method of computation of basic pay and post differential allowances under section 552 by the Regional Office in Guatemala City was incorrect and that the practice in the Department of State and AID was in accordance with our instructions of November 17, 1958."

Mr. Denton, the grievant whose situation is the subject of the present award by the Foreign Service Grievance Board, received post differential payments in 1974 under the method of computation approved in B–173815, *supra*, which totaled $247.25 less than he would have received had computation of his post differential entitlement been made on the basis once used by AID's Guatemala City office and held to be improper in that same decision.

The $247.25 discrepancy resulted in part from the fact that Mr.

Denton returned to the United States for home leave and for stateside duty from June to September of 1974, during which period he did not receive post differential pay. For the first 20 pay periods of 1974, Mr. Denton received a biweekly base salary of $1,190.40. During pay periods that he was in Kabul, Afghanistan, he received the full 20 percent post differential authorized for that post of assignment, amounting to $238.08 per pay period. Beginning with the 21st pay period of 1974, he received a step increase raising his biweekly salary to $1,256. However, by virtue of the biweekly basis upon which AID calcuates the limitation imposed by section 552, his post differential payments were simultaneously reduced to $201.75, an amount equal to 16.06 percent of his increased based salary. Thus, for the six final pay periods of 1974, the grievant received reduced payments of post differential despite his salary increase.

Mr. Denton objected to that reduction because he could have received the full 20 percent differential throughout the entire year without having his base pay and post differential payments for the year aggregate more than $100 less than the $38,000 per annum salary authorized for the chief of that mission. However, if he had instead remained in Kabul and received post differential payments throughout all of 1974, the reduction of his differential rate from 20 to 16.06 percent would have been necessary to assure that his salary and post differential payments for the entire year did not exceed the ceiling.

The issues considered by the Foreign Service Grievance Board included the grievant's objection to the particular method by which AID applies the limitation on post differential imposed by section 552. In considering that issue, the Board specifically addressed the fact that AID's method of computation had been reviewed and approved in B–173815, *supra*. It noted the statement in that decision that the process of converting the ceiling established by section 552 into biweekly rates is a "derivative" of the statutory method for converting the annual rate of basic pay to hourly, daily, weekly or biweekly rates provided by 5 U.S.C. 5504(b), and that this "derivative" method is consistent with the Comptroller General's memorandum to Heads of Departments and Independent Establishments, B–50870, November 17, 1958, instructing them to apply the same method.

> * * * in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates.

The Board then noted that 5 U.S.C. 5504(b) does not itself purport to deal with other than the conversion of basic pay from an annual rate to an hourly, daily, weekly or biweekly rate when such a conversion is necessary in order to compute the employee's pay and that the

term "basic pay" does not include allowances such as post differential.

Finding that the practice of converting compensation other than basic pay from an annual to a biweekly rate cannot be traced to 5 U.S.C. 5504(b), the Board concluded that AID's reliance on the Comptroller General's memorandum of November 17, 1958, as authority for its "derivative" method of applying the ceiling of section 552 is misplaced:

> Where, then, does the Agency derive its authority to convert Mr. Denton's post differential allowance to a bi-weekly allowance rate reduced proportionally to a level which, if paid to the grievant throughout the 52 administrative work-weeks of the year, would meet the $100-less-per-year rule of Section 552? The apparent answer is that it finds such authority in the last sentence of the Comptroller General's November 17, 1958 memorandum (B–50870) to agency heads which stated that 5 U.S.C. 5504(b)'s method for converting "basic pay" from an annual rate to basic hourly, daily, weekly or bi-weekly rates "is to be applied in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates."
>
> In the Board's judgment, the Agency's reliance on the quoted statement is misplaced. In the absence of Section 552's annual ceiling provision, grievant Denton's post differential rate would constitute "additional compensation based upon a percentage of . . . (his) basic compensation rate(s)." But the very purpose of Section 552 is to displace the percentage-of-basic-compensation rate with a rate tied to the Chief of Mission's annual salary rate. Whatever the merits of converting allowances or other forms of "non-basic" compensation which are based upon a percentage of the employee's basic pay, the Board sees no basis in the CG's B–50870 memo for applying such a conversion to allowances which are not so based, particularly where, as here, the result is to deprive the employee of a portion of the allowance to which he is otherwise entitled. To the extent that the Comptroller General's letter (B–173815) of August 29, 1973, may be deemed to support a different result on the different facts of the case there before him, the Board respectfully suggests that this question be reexamined by the Comptroller General in the light of the facts of this case.

The Foreign Service Grievance Board concluded in favor of the grievant as follows:

> * * * The principles involved are simple: an employee is entitled to the full post differential rate, subject to Section 552's limitation which, by its terms, is to be applied on an annual basis. In Mr. Denton's case, this means that since his post differential allowance plus salary for the year 1974 were well below the $37,900 ceiling imposed by the Chief of Mission's salary, Denton was entitled to receive the full 20% post differential rate during pay periods 21 through 25. His claim for the payment of an additional $247.25 is sustained.

After reviewing our prior rulings and examining the decision of the Foreign Service Grievance Board, we conclude that the Board erred in sustaining the grievant's claim for an additional post differential allowance of $247.25. For the reasons stated below, AID properly computed the grievant's allowance under its regulations and he is not entitled to the additional payment ordered by the Board.

The source of our disagreement with the Board is the specific language of section 552 of the Standardized Regulations which requires that "the per annum post differential rate at which payment is made shall be reduced" so that the combined per annum post differential

and basic compensation or post differential and salary authorized does not exceed an amount which is $100 less than the per annum salary authority for the Chief of Mission position. In light of the specific directive that the ceiling be implemented by reducing the per annum post differential rate at which payment is made, we fail to understand the basis for the Board's conclusion that section 552 displaces the percentage of basic compensation rate of determining post differential with a rate that is not based on a percentage of basic compensation. In our opinion section 552 clearly contemplates a reduction in the percentage rate of basic pay otherwise authorized for payment of post differential to a lower percentage rate. While that reduced percentage rate is related to the per annum salary of the Chief of Mission, it is nonetheless a rate equal to a percentage of the employee's basic compensation rate. As such it falls squarely within the instruction contained in the Comptroller General's memorandum B–50870, *supra*, that the method of computing basic pay adopted by 5 U.S.C. 5504(b) be applied as well in the "computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates."

With respect to the State Department's authority to adopt a ceiling on post differential payments that reduces the percentage rate of post differential otherwise authorized, we note that 5 U.S.C. 5925 specifies only that post differential may not exceed 25 percent of the rate of basic pay. By Executive order the Secretary of State is delegated authority to prescribe regulations implementing section 5925. It is clearly within his authority to prescribe rates of post differential insofar as they do not exceed that 25 percent maximum. While the general scheme of post differential payments adopted by the Secretary of State provides for payments at the rates of 10, 15, 20 or 25 percent, there is nothing to preclude the Secretary's adoption of a scheme providing for payments of altogether different or lesser rates. Section 552 is a proper exercise of the Secretary's authority to prescribe different or lesser rates. Moreover, the method followed by AID in computing the reduced rate is consistent with our decisions and we believe that those decisions remain valid.

As previously noted, the Secretary of State is not precluded from imposing a ceiling on post differential payments to be applied on purely an annual basis. The Grievance Board makes the following recommendations with respect to administration of such ceiling:

> In theory, the Agency might apply the full post differential allowance for most of the year and then terminate the allowance completely near the end of the year, when the employee's cumulative allowance payments, taken together with his projected basic compensation or salary for the year, have reached the ceiling amount of $100 less than the Chief of Mission's annual salary. Alternatively, it would appear permissible and, perhaps, administratively convenient to start by doing what the Agency did here—i.e., pro-rating the employee's per

annum post differential rate, as reduced by Section 552, and paying him at a reduced, pro-rated bi-weekly rate throughout the year—*provided*, that near the end of the year it adds up the employee's total post differential and basic salary payments to determine whether or not he is within the $100-less-per-year limit and adjusts his remaining post differential allowances accordingly.

We make no recommendation as to whether State Department's regulations should be revised to provide for administration of the ceiling in the manner suggested by the Grievance Board. However, we note that such a revision would significantly complicate payment procedures and would result in employees at the same grade and step levels receiving different amounts of post differential depending on any of a number of factors, the most significant being the extent of the particular employee's presence at the differential post during any particular year.

For the reasons stated above, we find that the Foreign Service Grievance Board's determination that AID is without authority to use the "derivative" method of computing the ceiling imposed by section 552 to be in error and, further, find that its award of $247.25 to the grievant is contrary to governing law and regulations. Amounts paid to the grievant in satisfaction of that award should be recovered.

[B–189540]

Pay—Active Duty—Reservists—Injured In Line Of Duty—Requirement For Pay Entitlement

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(2) because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 40 Comp. Gen. 664, modified.

National Guard—Death or Injury—While On Training Duty—Illness Beyond Termination Date

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in-line-of-duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204.

Pay—Active Duty—Reservists—Injury or Death—During Hospitalization

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of

duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204.

Military Personnel—Reservists—Status—During Hospitalization, etc.

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a casual relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status.

In the matter of DOD Military Pay and Allowance Committee Submission No. SS–A–1272, February 23, 1978:

This action is in response to a letter dated June 30, 1977, with enclosures, from the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting an advance decision on several questions concerning the application of the provisions of title 10, United States Code, governing disability retirements or separations (10 U.S.C. 1201–1206) of enlisted members of the Army Reserve and Army National Guard performing active duty training. The request has been assigned Secretarial Submission No. SS–A–1272 by the Department of Defense Military Pay and Allowance Committee.

The submission states that paragraph 15 of Army Regulation (AR) 135–200 (change 2, June 25, 1965) provided that a member who incurred a disease or injury while on active duty for training may, with his consent, remain in a patient status after the date indicated in his orders for expiration of his active duty for training. The indicated purpose was to enable the member to receive authorized medical care (AR 40–3) and, if indicated, physical disability processing (AR 635–40). The member's orders directing active duty, and which were self-terminating, were not amended to extend the expiration date of those active duty orders, but the member, if otherwise qualified, was entitled to receive pay and allowances until released from medical care, or separated or retired due to physical disability. In this regard, the submission correctly recognizes that the period after completion of the period of active duty stated in the orders is not considered active military service and neither leave nor active duty retirement points accrue during that time. See 37 Comp. Gen. 403 (1957) and 54 *id.* 33 (1974).

The submission states further that in those cases where a member's active duty training orders specify a period of more than 30 days

and he incurs a disability from either injury or disease and is referred for disability processing under AR 635–40, he would be entitled to the benefits provided under 10 U.S.C. 1201–1203. If, however, his active duty training orders specified a period of 30 days or less, his case would be processed under AR 635–40 only if his disability is the result of injury. In that case, he would be entitled to the benefits provided in 10 U.S.C. 1204–1206.

The submission goes on to state that an interim change to paragraph 15 of AR 135–200, was promulgated on December 21, 1976. The pertinent portion of that change is as follows:

a. *General.* A member on any type of ADT/FTTD [active duty/full-time training duty] under self-terminating orders, including AT [annual training], who is sick in the hospital, receiving follow-up care immediately after a period of hospitalization, has sustained an acute, grave illness/injury or other deterioration of physical condition rendering the member unfit for further duty, or in need of or undergoing treatment for class 4 or 5 dental defects (AR 40–3), may only be considered for retention past the ADT/FTTD release date when continuous hospitalization is required and/or physical disability processing is required or has been initiated. DA STL MO (AGUZ–RPP–PR) Message 211449Z Dec. 76.

It is also stated that in the past no amendatory orders were issued when a disabled member was placed in a patient status. However, the regulation as amended by the interim change provides that such orders will be issued and the active duty for training period will be extended to the anticipated date of recovery established by the medical facility commander.

The submission goes on to state that the members most affected by this change in the regulations would be those performing annual training for 30 days or less (usually 15 days), since an amendment of orders in such cases may carry the member beyond 30 days. If so, it is speculated that it may change their active duty status from the 30 days or less category, to a status of active duty for more than 30 days and if such a member is later found to be unfit because of permanent disability, make him eligible for retirement benefits under 10 U.S.C. 1201, rather than retirement benefits under 10 U.S.C. 1204. It is suggested that while it appears that a change in status would not alter entitlements accruing because of a disability incurred prior to the date his orders were extended, the problem arises where, after the member's orders are amended and while he is a patient, he incurs a disability as a result of disease which is only covered for retirement purposes under 10 U.S.C. 1201. Doubt is expressed as to whether such conclusion is valid.

Based on the foregoing, the following questions are presented for resolution:

1. An individual sustains an injury which qualifies him under 10 U.S.C. 1204 for disability retirement, and while hospitalized, is further disabled because of a heart attack.

a. If the heart attack occurred after amending orders were issued, but before the expiration date of the self-terminating orders, may the disability resulting from the heart attack be considered under 10 U.S.C. 1201 for benefits?

b. If the answer to *a* is no, if the heart attack was incurred after the expiration date of the self-executing orders, may it then be considered under 10 U.S.C. 1201?

2. An individual hospitalized under appropriate circumstances because of disease and, thus, not qualified for benefits under 10 U.S.C. 1204, while hospitalized incurs a different disease or is injured and because of the new condition is determinted to be unfit because of physical disability.

a. If the date of inception of the second condition is after issuance of amending orders but prior to the expiration date of the self-terminating orders, may the case be considered under 10 U.S.C. 1201?

b. If the answer to *a* is no, may the case be considered under 10 U.S.C. 1201 if the date of inception is after the expiration date of the self-terminating orders?

3. If the answers to all of the above are no, may an injury sustained by the individual while a patient and in the hospital environment, after issuance of amending orders, be considered as proximate result of performing active duty for purpose of establishing benefits under 10 U.S.C. 1204?

The submission states that each of the individuals described in the foregoing questions is on active duty under self-terminating orders which specify a period of duty of 30 days or less; the orders are amended solely for the purpose of hospitalization, and because of the amendment to his orders, the member's active duty time totals more than 30 days.

Members of the Army National Guard, like members of the Army Reserve who are called or ordered into Federal service, are ordered to that duty as a Reserve of the Army (10 U.S.C. 3497) and are subject to the laws and regulations governing the Army (10 U.S.C. 3499). Further, under the provisions of 10 U.S.C. 3687, each of these members:

* * * is entitled to the pensions and other compensation provided by law or regulation for a member of the Regular Army of corresponding grade and length of service, whenever—

(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty, from injury while so employed.

With regard to medical and hospital benefits for such members, 10 U.S.C. 3721 provides in pertinent part:

§ 3721. *Members of Army, other than Regular Army.*

A member of the Army, other than of the Regular Army, is entitled to the hospital benefits provided by law or regulation for a member of the Regular Army of corresponding grade and length of service, whenever—

(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed.

Under 10 U.S.C. 3722 a Reserve may be hospitalized if he contracts a disease in line of duty while on active duty in time of peace. That section also provides for pay and allowances during hospitalization for up to a total of 6 months.

Regarding disability pay and allowance entitlements, 37 U.S.C. 204(g) provides in part:

(g) A member of the Army or the Air Force (other than of the Regular Army or the Regular Air Force) is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever—

(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed.

In 41 Comp. Gen. 706, 708 (1962), we stated:

* * * it is our view that under the provisions of 10 U.S.C. 3687, an Army reservist who is injured while employed on active duty for any period of time, or who is disabled from disease while so employed for the requisite period, is entitled to continue in receipt of active duty pay and allowances while hospitalized and while awaiting action on his retirement proceedings if such proceedings are instituted. *Such section, however, does not provide that a reservist shall be considered in active military service while in receipt of such benefits* * * *. [Italic supplied.]

See also in this connection, B–153332, March 16, 1964; 50 Comp. Gen. 99 (1970); and 54 *id.* 33, *supra.*

In 40 Comp. Gen. 664 (1961) we considered the propriety of issuing orders extending active duty to members on limited periods of active duty for training. Two categories of members were specifically treated—those on active duty for training for a period of not less than 3 months and not more than 6 months under 50 U.S.C 1013(c) (1958), and those on active duty for training for less than 90 days under other provisions of law. In that case, while noting that under 10 U.S.C. 3687 (with respect to Army members), in most cases, members could be retained in a pay status during hospitalization without the issuance of orders extending their active duty, we held that if otherwise proper such members could be retained on active duty after their self-terminating orders would otherwise expire for the period necessary to determine whether they were eligible for retirement or payment of disability retirement pay because of such disability, or to complete necessary physical disability processing. In that connection it was noted that members serving under 50 U.S.C. 1013(c) could not be retained on active duty beyond 6 months, due to the restrictive language in that section. However, in that case we did not specifically consider the effect of such extension of orders as related to members on active duty for training for less than 30 days.

In the case of members whose active duty for training is for more than 30 days the extension of active duty, rather than carrying the member in a disability pay status under 10 U.S.C. 3687 and similar provisions of law applicable to services other than the Army, entitles the member to certain additional benefits, e.g., accumulation of leave, time credit for retirement purposes, additional benefits for dependents.

If a member's original tour of active duty for training is for less than 30 days an extension of his active duty to cover a period of more than 30 days would also permit the member to qualify under more liberal provisions of law with respect to disability retirement. As indicated in the submission such action could result in full retirement benefits based upon disease incurred while on active duty if it is determined that the disease was not due to the member's own misconduct. If the Army is permitted to extend periods of active duty under the regulation amendment in question, the intent of Congress to distinguish between members on active duty for less than 30 days and those on active duty for more than 30 days would be defeated because the service could place members who incurred disease during a short period of active duty on active duty for more than 30 days in any case in which the disease required hospitalization for an extended period or the member was being considered for disability retirement. Such a result is not authorized by law.

Therefore, we must conclude that members who contract a disease or are injured while on active duty for less than 30 days may not have their active duty extended for the period of hospitalization or consideration for retirement and that any actions taken to effect such active duty will not be viewed as placing the member on active duty for more than 30 days for purposes of entitling them to benefits of retirement under 10 U.S.C. 1201–1203 or other benefits which flow from active duty status. Such members, for hospitalization and continued pay benefits, must rely upon the provisions of 10 U.S.C. 3687, 3721 and 3722 (as applicable to the Army) as they relate to members on active duty for less than 30 days. The decision 40 Comp. Gen. 664, *supra*, is modified to the extent inconsistent herewith.

Accordingly, questions 1a, 1b, 2a and 2b are answered in the negative.

With regard to the foregoing, we also add that, to the extent that the benefits listed on pages 3 and 4 of the before-cited AR 135–200 interim change message would not inure to a member called or ordered to active duty for 30 days or less but for the proposed amendment to orders retaining him in an active duty status solely for hospitalization purposes, they may not now be allowed.

In view of our conclusions with respect to questions 1 and 2, in answering question 3 we must distinguish between cases in which the original condition for which the member was hosiptalized resulted from a disease and those in which it resulted from an injury. We must also distinguish between cases in which the injury suffered while hospitalized occurred before and those in which it occurred after the termination date of the member's ordered period of active duty.

The provisions governing permanent disability retirement of members serving on active duty for 30 days or less are contained in 10 U.S.C. 1204, which provides in part:

> Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability resulting from an injury, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that—
>
> * * * * * * *
>
> (2) the disability is the proximate result of performing active duty or inactive-duty training;
> (3) the disability is not the result of the member's intentional misconduct or willful neglect * * *

In order for a disability to be the basis for retirement under those provisions, it must be as a result of injury and, as determined by the Secretary concerned, must be the proximate result of the performance of active duty and not due to the member's misconduct. Thus, where a member suffers injury while in a patient status in a hospital while still in an active duty status under his original orders, and the appropriate administrative determination is made, a disability as a result of such injury would properly be the basis for 10 U.S.C. 1204 consideration, even though the member may have been initially hospitalized for disease under 10 U.S.C. 3722.

With regard to in-hospital injuries which occur after a member's less than 30-day period of duty terminates, the facts of the individual case would be for consideration. This is so because we do not believe that such injuries may be considered the proximate result of performing active duty simply because the hospitalization commenced while the member was on active duty and at the time the injury occurred was receiving hospitalization, pay and allowances under the provisions of law discussed above. If it can be determined that the original injury or disease which was incurred during a period of active duty covered by the original orders was the direct cause of the later injury, a proximate cause relationship with the active duty injury or disease might be found. However, in the absence of a specific situation involving such facts, we feel that the question cannot be properly considered. If such a situation does arise, we believe it should be submitted for our consideration.

[B-188770]

Post Exchanges, Ship Stores, etc.—Commissary Store Operations—Surcharge on Sales of Goods—Authorized by Statute

Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO).

Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled.

In the matter of Fortec Constructors—reconsideration, February 24, 1978:

Fortec Constructors (Fortec) requests reconsideration of our decision of April 14, 1977, in which we declined to consider its protest of the award of a contract under request for proposals (RFP) No. DACA21-77-R-0080 issued by the U.S. Army Corps of Engineers (Corps), Savannah District.

The RFP solicited proposals for the design and construction of a commissary at Fort Stewart, Georgia. Upon receipt of advice from the Corps that nonappropriated commissary surcharge funds were involved in this procurement, we dismissed the protest because this Office does not settle nonappropriated fund accounts.

Fortec asserts that our dismissal was inappropriate because in fact the funds involved are appropriated. In addition to several arguments made in support of that proposition, Fortec cites *United States Biscuit Company of America* v. *Wirtz*, 359 F. 2d 206 (D.C. Cir. 1966), which held that the revolving fund used for commissary purchases which is replenished by money received for goods sold to the military consumer is "in effect, an on-going appropriation."

In reconsidering this matter, we solicited the views of the Department of Defense (DOD) and the Corps of Engineers and have carefully considered the responses received from those agencies as well as appropriate legislative history and prior decisions of this Office and the courts. We conclude that commissary surcharge funds are appropriated funds and subject to the settlement authority of this Office under 31 U.S.C. § 71 and § 74 (1970).

BACKGROUND

A customer purchasing an item in the commissary pays the cost of the item, which is deposited to a stock fund which purchased the item for resale, plus an additional percentage charge (the surcharge). The amount of the surcharge is established pursuant to DOD regulations. The surcharge is deposited into a trust revolving fund account.

In the instant situation, the account identified as the source of the funds to be utilized was "Surcharge Collections, Sales of Commissary Stores, Army." Funds from this account were transferred by the Troop Support Agency, the requiring activity, to the Corps, which established an individual account referred to as a "P6700" account. A "P6700" account is a revolving reimbursable account which is main-

tained in connection with construction projects managed by the Corps for various commands and activities. The contractor is paid from the "P6700" account.

DISCUSSION

The commissary surcharge is based on a recurring general provision contained in annual DOD Appropriation Acts since 1952, e.g., section 714 of the Department of Defense Appropriation Act of 1977, Public Law 94–419, § 714, 90 Stat. 1293 (September 22, 1976). The general provision prohibits the use of DOD appropriations to support certain commissary store operations unless such appropriations are reimbursed for the expense of such operations by increasing the sales price of the items sold in the stores to furnish sufficient revenue to make such reimbursements. Section 714 provides in pertinent part:

> No appropriation contained in this Act shall be available in connection with the operation of commissary stores of the agencies of the Department of Defense for the cost of purchase (including commercial transportation in the United States to the place of sale but excluding all transportation outside the United States) and maintenance of operating equipment and supplies, and for the actual or estimated cost of utilities as may be furnished by the Government and of shrinkage, spoilage, and pilferage of merchandise under the control of such commissary stores, except as authorized under regulations promulgated by the Secretaries of the military departments concerned with the approval of the Secretary of Defense, which regulations shall provide for reimbursement therefor to the appropriations concerned and, *notwithstanding any other provision of law, shall provide for the adjustment of the sales prices in such commissary stores to the extent necessary to furnish sufficient gross revenue from sale of commissary stores to make such reimbursement:* * * * [Italic supplied.]

In 1974 Congress expanded the purposes for which a commissary surcharge could be imposed by enacting section 2685 of title 10, United States Code, which authorizes an adjustment of or increase in the surcharge for commissary construction as follows:

> (a) * * * the Secretary of a military department * * * may, for the purposes of this section, provide for an adjustment of, or surcharge on, sales prices of goods and services sold in commissary store facilities.
> (b) The Secretary of a military department * * * may use the proceeds from the adjustments or surcharges authorized by subsection (a) to acquire, construct, convert, expand, install, or otherwise improve commissary store facilities at defense installations within the United States * * *.

We have consistently regarded a statute which authorizes the collection and credit of fees to a particular fund and which makes the fund available for specified expenditures as constituting a continuing appropriation. 50 Comp. Gen. 323 (1970); 35 *id.* 615 (1956). For example, in the latter cited case, involving the status of fees collected by Federal Credit Unions and deposited to a revolving fund for administrative and supervisory expenses pursuant to the Federal Credit Union Act, 12 U.S.C. § 1755 (1970), we stated that:

> The statutory authorization that the fees be credited to a special fund and the making of such fund available for expenditure * * * for the administrative and supervisory costs incident to the carrying out of [the Act] constitutes a continuing appropriation of such fees from the Treasury without further action by

the Congress. * * * [S]uch funds, nevertheless, represent appropriated funds and in the absence of an express provision in the statute to the contrary, they are subject to the various restrictions and limitations on the uses of appropriated moneys. 35 Comp. Gen. at 618.

Similarly, as stated earlier, the court in *United States Biscuit Company of America* v. *Wirtz*, *supra*, regarded the statutorily authorized commissary stock fund as an ongoing appropriation.

DOD's position, however, is that the commissary surcharge fund should not be categorized as appropriated. In this regard, DOD points out that these decisions deal with revolving funds while the surcharge fund here at issue is merely a "temporary accumulation" and is not a true revolving fund. According to DOD:

A revolving fund is generally defined as a fund established to finance a continuing cycle of business type operations through amounts received by the fund. (See definitions in Budgetary Definitions by the Comptroller General of the United States, November 1975.) The commissary surcharge funds are merely used to reimburse appropriated funds for expenses incurred on behalf of commissary customers. They are not used to finance a continuing cycle of operations; nor do they finance on-going operations thus perpetuating the fund. Commissary operations are financed by Department of Defense appropriations. As expenses are incurred for certain of these operations they are required to be reimbursed by the commissary customers. The commissary surcharge is the vehicle by which the reimbursement is made by the customer to the appropriation incurring the expense on his behalf. The commissary surcharge is unique. In each of the decisions cited above the fund under consideration was a fund *explicitly* provided for by statute. There is no comparable statute with respect to the commissary surcharge. Section 628 and its successor provisions, and section 2685 merely provide for a charge on commisary sales for specified purposes; they do not explicitly provide for the establishment of a fund.

DOD further relies on the legislative history of 10 U.S.C. § 2685, which, according to DOD, "indicates that Congress considered that the funds generated by the surcharge were nonappropriated funds." In this regard, the conference report stated:

Section 610 of the Senate bill (Section 611 of Conference bill) was added by the Senate. It is designed to amend existing law to permit the adjustment of and the use of the surcharges on commissary sales for the construction, acquisition and improvements to the commissary stores, which are now paid for out of appropriated funds. H.R. Rep. No. 93–1545, 93d Cong., 2d Sess. 40 (1974).

In addition, the Senate Report referred to "measures to increase the use of commissary surcharge money or other nonappropriated funds for the construction of commissary facilities." S. Rept. No. 93–1136, 93 Cong., 2d Sess. 6 (1974).

We do not find this language persuasive in support of DOD's position. Although the language is susceptible to the reading urged by DOD, we think, in view of the previously established law as to what constitutes appropriated funds, that the Congress referred to these surcharge monies as nonappropriated funds because such monies did not come out of the general funds. (The Corps in this case has made the same assumption, i.e., that any monies not contained in an annual appropriation were "nonappropriated".) Of course, regardless of the language used in the legislative history, what the Congress actually

did was to authorize an increase in the surcharge in order to generate funds for a new purpose—commissary construction. Without this authorization, no commissary receipts, regardless of the Treasury account or fund they were placed in for accounting purposes, could be used for construction. As recognized by DOD:

> Once monies are covered into the Treasury *regardless of the nomenclature that may be applied to the account in which they are deposited,* they are bound by the constitutional inhibition that "No money shall be drawn from the Treasury but in consequence of appropriations made by law." [Italic supplied.] H.R. Rep. No. 73-1414, 73d Cong., 2d Sess. 12 (1934).

Thus, it is clear that by authorizing imposition and use of the surcharge, the Congress "appropriated" the surcharge monies for commissary construction.

With regard to the distinction drawn by DOD between actual revolving funds and the commissary surcharge funds, we point out that revolving fund accounts are only one of several different kinds of "Federal Fund Accounts" in which "the Government credits receipts which it collects, owns, and uses solely for its purposes." Comptroller General, *Terms Used in the Budgetary Process*, p. 15 (July 1977). The surcharge fund account seems to meet the definition of one kind of Federal Fund Accounts known as Special Fund Receipt Accounts: "accounts credited with receipts from specific sources that are earmarked by law for a specific purpose." *Terms*, *id.*, p. 15. We are aware of no reason why a statute authorizing the imposition and collection of specific charges, as well as the use to be made of the funds collected, must also specifically create a fund into which the funds collected are to be deposited, in order for the funds thus authorized to be regarded as appropriated. So long as funds are deposited into a special fund account for a specified purpose as authorized by statute, they must be considered a continuing appropriation within the ambit of our decision in 35 Comp. Gen. 615 (1956).

DOD also asserts that *United Biscuit* is inapposite to this situation because the case only addresses commissary stock funds and not the status of the commissary surcharge fund. We believe this is a distinction without a difference. The designation "stock fund" and the designation "surcharge funds" are accounting labels. The funds for each are derived from sales to military customers, are deposited in the Treasury where they are assigned Federal symbols, and may only be disbursed for specified purposes in accordance with Congressional authorizations. In light of our prior decisions and the rationale of the *United Biscuit* decision, we believe that the "surcharge fund" is an appropriated fund.

Accordingly, to the extent that our prior decisions held that commissary surcharge funds were nonappropriated, and that this Office would not consider protests involving procurement financed with such

funds, they are expressly overruled. See *Data Terminal Systems*, B-187606, February 2, 1977, 77-1 CPD 85; *Data Terminal Systems—Request for Reconsideration*, B-187606, June 7, 1977, 77-1 CPD 400; *Fortec Constructors*, B-188770, April 14, 1977, 77-1 CPD 260. In view of our holding, we will consider Fortec's protest in accordance with our Bid Protest Procedures upon timely receipt of a detailed statement of Fortec's grounds of protest.

[B-66927]

Energy—Energy Policy and Conservation Act—Strategic Petroleum Reserve Program—Time Limitation on Authority—Leases Extending Beyond—Propriety

The Energy Policy and Conservation Act establishes the Strategic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States.

Energy—Energy Policy and Conservation Act—Strategic Petroleum Reserve Program—Leases—Limitations on Expenditures—Rent and Improvements

40 U.S. Code 278a (1970) (section 322, Economy Act of 1932), prohibits paying more than 35 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual rent. However, the Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. General Accounting Office will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved.

In the matter of the Strategic Petroleum Reserve Program, February 28, 1978:

The decision is in response to a letter from the Administrator, Federal Energy Administration (FEA), requesting our opinion on several questions of importance to the Strategic Petroleum Reserve Program. (Since submission of these questions, the functions of the Administrator which gave rise to these questions have been transferred to the Secretary of Energy (section 301, Public Law 95-91, 91 Stat. 577, 42 U.S.C. 7151). References hereafter to the Department of Energy are in recognition of that transfer.)

The first question is whether the FEA (now the Department), prior to July 1, 1985, may enter into lease or other contractual arrangements, the terms of which extend beyond June 30, 1985. The question arises because of section 531 of the Energy Policy and Conservation Act, Public Law 94-163, 89 Stat. 965, 42 U.S.C. § 6401 (Supp. V, 1975), which provides, with exceptions not relevant, that:

* * * all authority under any provision of title I * * * of this chapter [which includes the Strategic Petroleum Reserve Program] * * * shall expire at midnight, June 30, 1985 * * *.

Section 159(f) of the Energy Policy and Conservation Act, 42 U.S.C. § 6239 (Supp. V, 1975), provides in pertinent part that, in order to implement the Strategic Petroleum Reserve Plan, and for certain other purposes, the Administrator may:

(B) acquire by purchase, condemnation, or otherwise, land or interests in land for the location of storage and related facilities;
(C) construct, purchase, lease, or otherwise acquire storage and related facilities;
(D) use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part:

* * * * * * *

(F) store petroleum products in storage facilities owned and controlled by the United States or in storage facilities owned by others if such facilities are subject to audit by the United States;
(G) execute any contracts necessary to carry out the provisions of such Strategic Petroleum Reserve Plan, Early Storage Reserve Plan, proposal or amendment * * *.

According to the Administrator—

"No-year" funds have been appropriated and are available for these purposes [*i.e.* for the Strategic Petroleum Reserve Program]. *See* Public Law 94-303, 90 Stat. 607 (1976); Public Law 94-373, 90 Stat, 1059 (1976).
It is anticipated that a substantial portion of the petroleum to be purchased for the Strategic Petroleum Reserve will be stored underground, in salt-leached caverns and in mines. The FEA has commenced the acquisition of sites, some of which are now in use by owners or lessees, for such storage.
It may be concluded by the FEA, in certain instances, that it would be in the interests of the Government, for financial and other reasons, to lease, or contract for storage at sites, rather than purchase or condemn a fee simple title therein. However, discussions with owners and lesses of some candidate sites indicate a reluctance on their part to lease or sublease their property to the FEA, or contract for storage services, on terms of less than ten to twenty years, and from the Government's standpoint it might be disadvantageous to store oil under a more costly contract of short duration. Consequently, the FEA deems it important, in order to accomplish the objectives of the Strategic Petroleum Reserve program at a minimum cost to the Federal Government, that the FEA have the ability to enter into agreements with site owners or lessees, entailing lease or other contractual obligations of not less than ten to twenty years.

In view of the broad authority given him to acquire land in fee, which would include a fee simple, an interest without limitation or condition, the Administrator contends that it would be incongruous to conclude that he may not enter into a lease extending beyond the expiration date of the program. He contends further that:

* * * it also would be illogical to hold that the expiration of a statutory authority to acquire storage facilities by lease or other contract has the effect, *ipso facto*, of terminating contracts of the Federal Government, in the absence of any express statutory limitation on the lease and contract authority granted by Congress. Indeed, § 531 of the Energy Policy and Conservation Act itself provides that the expiration of authority under Title I thereof "shall not affect * * * any action * * * based upon any act committed prior to midnight, June 30, 1985." And it also seems pertinent that, pursuant to 1 U.S.C. § 109:
"The expiration of a temporary statute shall not have the effect to release any * * * liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability."

As execution of an agreement extending beyond June 30, 1985, would be an "act committed" before the expiration of authority under Title I, and since such an act would give rise to an obligation under a temporary statute extending beyond expiration of that statute, the Congress must have intended, in passing the Energy Policy and Conservation Act, that the FEA would have the authority to enter into valid lease or other contractual agreements extending beyond June 30, 1985.

The Administrator clearly has independent authority to enter into rental agreements, pursuant to section 159(f) of the Act and the terms of such agreements are not limited by fiscal year, since "no year" funds have been appropriated.

We agree that a lease for a term of years, which is otherwise proper, does not terminate, *ipso facto*, because of the expiration of the statutory authority for the program under which the lease is entered into. However, the question is not whether a lease extending beyond June 30, 1985, would terminate by operation of law on that date, but whether a lease of that duration may be entered into at all.

A basis for entering into long-term leases is suggested in general terms by the Administrator. He says that:

It may be concluded by the FEA, in certain instances, that it would be in the interest of the Government, for financial and other reasons, to lease, or contract for storage at sites, rather than purchase or condemn a fee simple title therein. However, discussions with owners and leasees of some candidate sites indicate a reluctance on their part to lease or sublease their property to the FEA, or contract for storage services, on terms of less than ten to twenty years * * *.

If the Department concludes that there are financial or other reasons why a long-term lease would be in the best interests of the United States and would be necessary to carry out the SPR Program, then in our view the Department may enter into a lease extending beyond the termination date of the Program. The fact that the leases would not expire until after the Program authority ceases is not dispositive. The Government would also be left, after June 30, 1985, with property interests not needed for the Program if storage sites where purchased or condemned.

Of course the agency cannot enter into an agreement having the effect of obligating funds beyond their period of availability. However, as the Administrator points out, no-year funds have been appropriated for acquisition of storage space for the SPR Program.

The next questions pertain to the application of section 322 of the Economy Act of 1932, 40 U.S.C. § 278a (1970), to the leasing of sites for oil storage in the Strategic Petroleum Reserve and, more generally, to the restriction on expenditure of appropriated funds for permanent improvements to private property. Section 322 provides in pertinent part:

* * * [N]o appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government nor for alternations, improvements, and repairs of the rented premises in excess of 25 per centum of the amount of the rent for the first year of the rental term * * *.

The Administrator asks whether the 15 percent limitation is applicable to the leasing of sites for oil storage in the Program, and if so, how it is to be applied. He points out that land would be acquired, not for the incidental buildings or structures which may be on the land, but for subsurface formations suitable for petroleum storage. He suggests that, under the circumstances, the 15 percent limitation should not be applied:

> The fair market value of the rented premises is determinable by appraisal. But it is unclear what portion of this amount properly is attributable to the "building" component of the rented premises. * * * Indeed, application of the statute to this situation is so awkward that one must wonder whether it was intended to apply in circumstances such as are pertinent here.

With regard to the 25 percent limitation of section 322, the Administrator says that it would—

> * * * if applicable, constitute a serious obstacle to the leasing and subsequent Government alteration or improvement of storage facilities for the Strategic Petroleum Reserve program, and would tend to confine the lease option to a lease or sublease of property on which the necessary alterations or improvements are made by the owner or lessee. While some of the caverns and mines which the FEA presently contemplates utilizing for storage purposes are in existence, they have not yet been rendered suitable to receive oil for the Reserve, and substantial alterations may be necessary in order to make them suitable; other caverns and mines might have to be created. All storage facilities will require development of crude oil injection and withdrawal systems, including pumps, pipelines and dock facilities.

The Administrator cites our decision, 38 Comp. Gen. 143 (1958), as standing for the proposition that the 25 percent limitation does not apply to "unimproved lands." He asks in this regard whether real property consisting mainly of mines or "leached" caverns is unimproved, for purposes of section 322. As a corollary to this question, he asks, if the property is considered to be unimproved—

> * * * does it become "improved" simply because of the incidental presence thereon of buildings or other structures which generally are unrelated functionally to the use for which the property is to be leased?

More generally, the Administrator refers to the rule that appropriated funds ordinarily may not be used for improvements to private property unless specifically authorized by law. 38 Comp. Gen. 143, 145 (1958). He asks:

> If § 322 is inapplicable to the leasing of caverns and mines for the Strategic Petroleum Reserve program, is the FEA's authority * * * to lease real property and "construct" thereon storage and related facilities, and to "execute any contracts necessary to carry out" the program, authority to do this without regard to limitations on the use of available appropriations for rental payments or construction costs?

As a general rule, appropriated funds may not be used to make permanent improvements to private property without specific statutory authority. Section 322 of the Economy Act represents a limited exception to that rule; agencies without other statutory authority to make permanent improvements to leased private property may do so to a limited extent by virtue of section 322.

However, the Department's authority in this regard differs significantly from the leasing authority, given many other Federal agencies, which we have held insufficient, without more, to exempt them from the section 322 requirements. The statutory leasing authority granted to the Department is for the sole purpose of creating and maintaining a Strategic Petroleum Reserve, of the size and within the time stipulated by law. In contrast, the kind of leasing authority which we have considered subject to the Economy Act limitations is to carry out the general purposes of the agency, rather than, as in this case, to accomplish a specific goal mandated by statute.

More specifically, the Department has authority, under the Act, in order to implement the Strategic Petroleum Reserve Plan which it must submit to the Congress, to acquire land or interests in land, including leaseholds, for the location of storage facilities, and to construct storage facilities. Sections 159(f)(4) (B) and (C), quoted *supra*. Taken together, these authorities allow the Department to construct storage facilities on leased property as well as property owned by the Government itself.

In addition, some degree of congressional control over expenditures by the Department to carry out the SPR Program is present in that the Strategic Petroleum Reserve Plan required to be submitted to the Congress and to contain information concerning contemplated costs, may be disapproved by the Congress. If the Congress takes no action, the SPR Plan may go into effect after 45 calendar days of continuous session have passed. Sections 159 (a), (b); 551. The Plan must include estimates of the cost of storage facilities. Section 154(c)(7).

Under these circumstances, the agency having been given specific authority to construct storage facilities on leased property and the Congress having provided a mechanism for reviewing the plans for meeting the goals of the Program, we would not be required to object to expenditures either for alterations, improvements, or repairs, necessary to adapt leased properties to the accomplishment of the SPR Plan which exceed 25 percent of the first year's rent or for payments of rent exceeding 15 percent of the fair market value of the property (assuming funds are otherwise available), provided that the sites to be acquired by lease and the associated costs are identified in congressionally approved amendments to the SPR Plan.

With regard to the additional question raised by the Administrator, whether real property consisting mainly of leached caverns or mines is "unimproved," and therefore not subject to the section 322 limitations, no general principle can be set forth. We would have to consider each rented site on a case by case basis. However, since we have concluded that expenditures for construction on leased property which have been, in effect, approved by the Congress as an element of the SPR Plan are not subject to the limitations of section 322, it is not now necessary to pursue this question.