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[B-192093]

Payments—Advance—Subscriptions to Newspapers, Periodicals, etc.—Microfilm, etc.—Rental—Authority

Advance payment authority for subscriptions to newspapers, periodicals and other publications contained in 31 U.S.C. 530a and 530b extends to *rental* of microfilm library.

In the matter of advance payment for lease/rental of microfilm library to Information Handling Services, July 3, 1978:

By letter of March 9, 1978, the Accounting & Finance Officer, Laughlin Air Force Base, requested a decision concerning the propriety of certifying for advance payment an invoice from Information Handling Services (IHS), Englewood, Colorado, for an annual lease/rental of a microfilm library. Doubt is expressed as to the validity of advance payment because there is no actual sale of the microfilm, since title to it is retained by IHS. Our decision is requested as to whether under 31 U.S.C. § 530a (1970), permitting advance payments for "subscriptions or other charges for * * * publications," the rental/leasing of a microfilm library is a "subscription or other charge" for which advance payments may be made to IHS.

The act of July 20, 1961, Public Law 87–91, 75 Stat. 211 (1970), amended 31 U.S.C. § 530a (1970) to extend its coverage to subscriptions "or other charges." The purpose of the amendment was to provide uniform authority for all agencies of the Government to make advance payments for any publications for official use and not just those which come within the technically narrow category of "subscriptions." See H.R. Rept. No. 560, 87th Cong., 1st Sess. 1 (1961). In view of the act as amended, it is only necessary for the purposes of this decision to determine whether the lease/rental of the microfilm library constitutes a "subscription or other charge" within the meaning of the act.

A further review of the amendment's legislative history reveals the additional purposes of "eliminating the added costs of premium charges" and allowing "greater flexibility in the procurement of materials needed to maintain an adequate library service." H.R. Rept. No. 560, 87th Cong., 1st Sess. 2 (1961). In this regard, it should be noted that under the instant contract, failure to make advance payment results in a 5-percent surcharge. Moreover, this appears to be the prevailing practice today.

In 41 Comp. Gen. 211 (1961), where our Office recognized microfilm products as constituting "publications" for which advance payments can be made (later affirmed by Congress in the addition to the act of § 530b, December 22, 1974, Public Law 93–534, 88 Stat. 1731), we re-

ferred to publications *sold* on a subscription basis. We do not, however, view this decision as necessarily limiting the application of 31 U.S.C. § 530a (1970) to publications which are purchased outright. In the absence of statutory language or legislative intent to the contrary, we find no meaningful difference between the purchase and rental of publications needed by the Government. Accordingly, we conclude that the rental/leasing of a microfilm library for official Government use is within the purview of 31 U.S.C. § 530a (1970).

The invoice submitted is returned and may be certified for payment if otherwise correct.

[B–145455]

Transportation—Rates—Special Agreements—Special *v.* Tariff Rates

Government under container agreement cannot apply contract rates to some containers in a shipment and tariff rates to others to obtain lowest transportation costs; under terms of that agreement Government must apply either contract or tariff rates to all containers in shipment to obtain lowest available transportation cost. See 10 U.S.C. 2631 (1976) and case cited.

In the matter of Puerto Rico Marine Management, Inc., July 7, 1978:

Puerto Rico Marine Management, Inc. (PRMMI), in its letters of January 10 and 11, 1978, requests that the Comptroller General of the United States review the General Services Administration's (GSA) action in deducting $12,580.43 for alleged transportation overcharges from monies otherwise due its principal, the Puerto Rico Maritime Shipping Authority (PRMSA).

GSA has the authority to make such deductions under the provisions of Section 201(1) of the General Accounting Office Act of 1974, Public Law No. 93–604, 88 Stat. 1959, approved January 2, 1975, 49 U.S.C. 66(a) (Supp. V, 1975), and its derivative regulations, 42 Fed. Reg. 36689 (1977). A deduction action constitutes a settlement within the meaning of Section 201(3) of the Act, 49 U.S.C. 66(b) (Supp. V, 1975), and 4 C.F.R. 53.1(b)(1) and 53.2 (1977). Therefore, PRMMI's correspondence of January 10 and 11, 1978, is in substantial compliance with the requirement of 4 C.F.R. 53.3 and 53.4 (1977) for establishing a carrier's right to the Comptroller General's review of a GSA settlement.

GSA reports that its action was taken on a number of containerized shipments of various commodities transported between October 1, 1974, and June 8, 1975, under "Contract No. CA1870," a contract for the common carriage of containerized Department of Defense cargo from the Atlantic and Gulf Coasts to Puerto Rico at agreed upon

rates. The parties to this contract were the Military Sealift Command (MSC) and PRMSA who negotiated the agreement pursuant to the authority of 10 U.S.C. 2304(a)(17) (1970) and 49 U.S.C. 65 (1970).

Contract No. CA1870 establishes three rate categories on commodities—General Cargo, NOS; Refrigerated Cargo, NOS; and Vehicles—which, when contrasted with the carrier's published tariff rates on commodities in the three rate categories, should provide both lower administrative costs and lower overall transportation costs for the Government. This objective is achieved on each shipment by applying the three rate categories to containers in the appropriate commodity group rather than by applying the appropriate tariff rate to each specific container. And although it is recognized that in certain instances there may be tariff rates for some containers in a shipment which are lower than the one in the appropriate rate category, it is also recognized that the tariff rates on other containers in that shipment may be higher than the rate in the appropriate rate category. The three rate categories, therefore, are intended to take this into consideration with the result that the cost of transporting the entire shipment under the contract rates should be less than the total cost of transporting each container in the shipment under its appropriate tariff rate.

In the instant case, GSA has applied on specific containers the rates found in contract No. CA1870 when advantageous to the Government, but has then applied on other containers PRMSA's tariff rates—published in PRMSA Tariff No. 1—when those rates proved more favorable to the Government than the contract rates. Thus, by examining each shipment container by container and applying the lower of the two rates, GSA determined that there had been overcharges and in the absence of voluntary refund initiated the deduction action.

GSA supports this procedure on the grounds that the Government is entitled to the lowest published tariff rate applicable to its shipments and that the Government's agents are not authorized to contract for higher rates for similar services. Moreover, GSA notes that under Article I:2(e) of contract No. CA1870 the Government has the option to obtain transportation under the carrier's published tariffs provided that the goods to be carried are tendered in accordance with the tariff's terms and conditions and under a Government Bill of Lading (GBL). GSA maintains, therefore, that despite the fact that MSC never prepared GBL's for the shipments in question, the Government has satisfied the Article I:2(e) bill of lading requirement since sufficient information is supplied through the various shipping records and since it is the carrier who is charged by law to issue bills of lading and not the shipper. Consequently, GSA contends that MSC has complied

with Article I:2(e) so that the appropriate tariff rates may be applied to the shipments in question.

In reply, PRMMI rejects GSA's position and maintains that the contract rates were negotiated with the clear recognition that lower tariff rates existed on certain commodities, but that in light of the overall mix of cargo the military ships to Puerto Rico, the contract rates would provide lower transportation costs overall. As a result, PRMMI contends that the Government may not apply the contract rates only when they favor the Government and the tariff rates at all other times, but must apply the contract in its entirety or not at all.

The question presented then is whether these containerized shipments of mixed commodities are being transported in circumstances under which the Government is free to apply either the contract or tariff rates to each container, depending on which is lower for the specific container, or whether each shipment must be rated as a whole either under the contract or under the commercial tariffs but not partially under both.

The general rule is that the Government, as other shippers, is entitled to the lowest published tariff rate applicable to its shipments, and the Government's agents are not authorized to contract for higher rates for similar services. *Great Northern Ry.* v. *United States*, 170 Ct. Cl. 188, 194 (1965); *U.S. Lines Operations, Inc.* v. *United States*, 99 Ct. Cl. 744 (1943), *cert. denied*, 321 U.S. 775 (1944); *Missouri Pacific R.R.* v. *United States*, 71 Ct. Cl. 650 (1931); *Illinois Central R.R.* v. *United States*, 58 Ct. Cl. 182 (1923); 35 Comp. Gen. 681 (1956). However, we have also recognized the value of agreements such as contract No. CA1870 which helps relieve the Government's overall administrative burden and transportation costs by providing rates for shipments of mixed freight that are lower than the tariff rates when applied to the shipment as a whole. B–154967, December 21, 1964. Therefore, even though on a particular shipment the use of contract rates such as those provided in contract No. CA1870 sometimes results in occasional instances of containerized commodities being rated at rates higher than those available under the commercial tariffs, if a broad view of the effect the contract rates have on the Government's total costs is taken then it becomes clear that a properly negotiated agreement, fairly applied to the type of mixed shipment contemplated by the negotiators, will result overall in lower transportation costs to the Government.

From the record presented, it appears that GSA has not taken a broad view of contract No. CA1870's full impact on the Government's transportation costs. Rather, GSA has focused on those instances when the contract rates are to the Government's disadvantage, but has failed

to appreciate the overall advantage to the Government when the contract rates are applied to the shipment as a whole.

GSA is correct in stating that the carrier and not the shipper is responsible for issuing an appropriate bill of lading. See 46 U.S.C. 193 (1970). However, it seems that the confusion here is over what actually is the bill of lading and what does it encompass.

GSA apparently has determined that in light of the carrier's responsibility to issue an appropriate bill of lading, the cargo manifests and other shipping documents constitute the bills of lading for the shipments in question and that as a result each container moved under a separate bill of lading. This position allowed GSA to apply either the contract rates or the tariff rates, depending on which was lower, to each container in a shipment. As mentioned above, GSA supports such action under both the general rule that the Government is entitled to the lowest published tariff rate available and because Article I:2(e) of the contract also provides a basis for the Government to apply the tariff rather than the contract rates.

In our opinion, however, GSA cannot apply the tariff rates in the manner that it has. Contrary to the GSA position, it is our belief that the cargo manifests and other shipping documents relevant to a particular shipment cannot be broken down into separate bills of lading for each container. It is our view that these shipping documents cover one complete transaction—a contract of carriage—and thus constitute only one bill of lading. The terms of the contract of carriage are either established by contract No. CA1870 together with the shipping order and other pertinent shipping documents (see Article I:2(a) of the contract) or established by those same shipping documents acting as the bill of lading along with the applicable published tariffs. See 55 Comp. Gen. 958, 960 (1976). Therefore, the Government is required to apply either the contract rates or the tariff rates to all the containers in a specific shipment as determined by the contract of carriage. It cannot blend these two sets of rates selectively to the detriment of the carrier's interests as has been the case here. To do so would be a breach of the contract of carriage.

In support of our position, we rely upon the definition of shipment found in Rule No. 270 of PRMSA Tariff No. 1, which provides:

DEFINITION OF SHIPMENT

Except as otherwise provided, a shipment is defined as that quantity of freight received from one shipper at one point of origin, at one place at one time on one bill of lading or shipping document for delivery to one consignee at one point of destination.

Despite the fact that a number of containers are involved in each of the shipments or contracts of carriage in question, it is clear that

in each case there is a quantity of freight received in the continental United States from the Government as shipper to be transported to one point of destination, Puerto Rico. (Under both contract and tariff additional containers may be loaded on board at other ports en route to the destination.) Although no GBL's were issued, the various shipping documents contain sufficient information as to shipper, consignee, name of vessel, date of sailing, and so on, to comply with Rule No. 170 of PRMSA Tariff No. 1, setting out the requirements for bills of lading. See *Canadian General Electric* v. *Les Armateurs*, 1976 AMC 915, 921. Therefore, each quantity of freight covered by the shipping documents required by contract CA1870 was in effect transported from the United States to Puerto Rico under one bill of lading and was therefore one shipment as defined by Rule No. 270 of PRMSA Tariff No. 1.

As GSA notes, the Government does have the option under Article I:2(e) of the contract of obtaining transportation under the published tariff rates if certain requirements are met. Specifically, Article I:2(e) provides:

> Nothing in this Agreement shall be construed as restricting competition in any manner or as precluding the Government from obtaining transportation from the Carrier on the routes covered herein under the published tariffs of the Carrier that are available to the public, provided goods to be so carried shall be tendered in accordance with the terms and conditions of those tariffs and for carriage under a standard form of Government Bill of Lading. The Carrier shall upon request and payment of a reasonable charge provide the Contracting Officer with a copy of each of his published tariffs and any revision thereof for the routes covered herein.

Since we have concluded that the various shipping documents comply with PRMSA Tariff No. 1's bill of lading requirements, we also conclude that GSA is correct in maintaining that the Article I:2(e) requirements have been met so that the Government may apply the appropriate tariff rates if determined to be lower than the contract rates. However, if the tariff rates are applied, they must be used for each container in the shipment or contract of carriage and not selectively as GSA has done.

We emphasize that GSA must use the tariff rates if it determines that those rates rather than the contract rates result in the lower transporation cost. See the 1904 Cargo Preference Act, as amended, 10 U.S.C. 2631 (1976); *United States Lines Company* v. *United States*, 223 F. Supp. 838 (S.D.N.Y. 1963), affirmed, 324 F.2d 97 (2nd Cir. 1963). However, in determining the lower transportation cost, GSA must use the applicable contract or tariff rates on all containers in the shipment.

Because of the repeal of section 6 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 846 (1970), which had permitted the use of prefer-

ential rates for the Government, the holding in this decision is confined to the facts presented.

Action should be taken by GSA consistent with this decision.

[B-190779]

Compensation—Wage Board Employees—Increases—Retroactive—Union Agreements

Retroactive wage adjustments for Federal wage board employees which are not based upon a Government "wage survey," but rather on negotiations and arbitration under a 1959 basic bargaining agreement, are not governed by 5 U.S.C. 5344 as added by section 1(a) of Public Law 92-392, section 9(b) of that law preserving to such employees their bargained for and agreed to rights under that basic bargaining agreement.

In the matter of Chester G. Christenson, *et al.*—retroactive wage increase, July 7, 1978:

This action is in response to a letter from Ms. Manzanares, Authorized Certifying Officer, Bureau of Reclamation, United States Department of the Interior, requesting an advance decision. The question involves the legality of paying retroactive salary for work performed by and lump-sum leave payments to wage-board employees who were retired or separated from service prior to the date a retroactive wage increase was put into effect based on an arbitration decision.

The submission states that the circumstances which led up to the request for decision are that on June 15, 1976, negotiations began for wage increases of wage-board employees at the Hungry Horse Project, Hungry Horse, Montana. On June 25, 1976, negotiations reached an impasse and eventually went to arbitration with the hearing held on October 20, 1976. By action dated February 10, 1977, the Arbitrator recommended a specific wage increase to be effective June 26, 1976. On March 1, 1977, the Commissioner of Reclamation approved that pay adjustment, but to be effective from July 4, 1976, since the date recommended by the Arbitrator fell during a pay period.

In the meantime, four wage-board employees left their employment at the project. Two were retired (Chester G. Christenson, February 15, 1977, and Donald L. Renken, August 27, 1976) and two were separated (William Purdy, September 11, 1976, and James Sheehan, August 27, 1976). Apparently, based on a finding that they were not employed on the date the wage increase was ordered into effect (March 1, 1977), none of them received the retroactive increase.

The submission indicates that in September 1977, Mr. Christenson filed a claim with the agency in the amount of $141.44, representing

additional compensation believed due for his lump-sum leave to reflect the retroactive rate increase. By letter dated September 25, 1977, that claim was denied under the provisions of Federal Personnel Manual Supplement 990–2, 550–21, Subchapter S2 and our decision, 54 Comp. Gen. 655 (1975).

By letter dated October 19, 1977, the International Brotherhood of Electrical Workers, Local 768, served notice to the project superintendent at Hungry Horse of their intention to file a formal grievance on behalf of the before-mentioned former employees. The submission indicates that it is the union's view that refusal to pay the retroactive pay is a discriminatory practice. Apparently it is their contention that a retroactive arbitration award should be treated as though the terms of the award were in fact put into effect on the date specified and all subsequent pay transactions would be made according to those terms.

The view is expressed in the submission that the before-cited decision of this Office prohibits the retroactive pay for the aggrieved employees, that is, unless a retroactive pay adjustment based on an arbitration decision is not subject to the limitations of 5 U.S.C. § 5344 and our decision.

Section 5344 of title 5, United States Code (Supp. II, 1972), as added by section 1(a) of Public Law 92–392, August 19, 1972, 86 Stat. 568, provides:

> (a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays, and Sundays, following the date the wage survey is ordered to be made.
>
> (b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—
>
> (1) the individual is in the service of the Government * * * on the date of the issuance of the order granting the increase; or
>
> (2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for service performed during the period.

In 54 Comp. Gen. 655, *supra*, we held that retroactive adjustments of wages of wage-board employees which adjustment is based on a Government wage survey are governed by 5 U.S.C. § 5344 which places limitations on the entitlement to such adjustments. We held therein that an employee who retires or dies during a period covered by a retroactive wage adjustment is entitled to such increases for services actually performed but that he may not receive such adjustment for any lump-sum leave payment received. Other employees are not entitled to such retroactive increase unless they were "in the service of the Government" on the day the wage increase is ordered into effect.

We do not view the before-quoted Code provisions or the decision construing those provisions as controlling the cases in the submission.

Section 9(b) of Public Law 92–392, *supra* (5 U.S.C. 5343 note), provides that:

> (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, or 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 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 requirement of such contract with a new contract, after such date.

According to the material submitted with the request, the basic bargaining agreement under which the June 1976 negotiation for wage increases began was entered into in 1959. The basic agreement which became effective at that time called for negotiated rates of pay and established that such rates would be based on "work of a similar nature performed under similar circumstances prevailing in various geographic areas in and contiguous to the Project." Additionally, the bargaining agreement authorized the establishment of a joint fact finding committee regarding determination of what those rates of pay should be, as opposed to requiring acceptance of a Government wage survey.

Since there was no "wage survey" involved, it is our view that 5 U.S.C. § 5344 and the limitations imposed therein on receipt of retroactive pay would not be a barrier in the cases indicated in the submission. In this connection, we find nothing in FPM Supplement 990–2, 550–21, subchapter S2, which would prohibit the lump-sum leave payments from being computed at the increase rate.

Accordingly, the named former employees are entitled to receive the retroactive wage adjustment, if otherwise correct.

[B–95136]

Real Property—Acquisition—Condemnation Proceedings—Propriety of Initiating—Economy Act Restrictions—Lease Ceiling Applicability

The Economy Act, 40 U.S.C. 278a, which prohibits the Government from entering into a lease wherein the annual rental to be paid exceeds 15 percent of the fair market value of the property, precludes the initiation of condemnation proceedings under the Declaration of Taking Act, 40 U.S.C. 258a, when agency believes condemnation award would exceed 15 percent limitation.

In the matter of Economy Act application to condemnation proceedings, July 12, 1978:

The Administrator of General Services requests our opinion on the application of section 322 of the Economy Act of June 30, 1932, 40 U.S.C. 278a (1970), to condemnation proceedings. The Administrator believes that the Act is not applicable. The Department of Justice, which is responsible for instituting and litigating condemnation matters, takes a contrary view.

The question arises out of the need of the General Services Administration (GSA) for continued occupancy of approximately 73,104 square feet in the Ford Building, 555 West 57th Street, New York, New York, for assignment to the Drug Enforcement Administration (DEA). A 5-year lease for the space expired on January 31, 1978, and since that date occupancy has continued with agreement of the owner on a month-to-month basis, not to exceed 6 months under the same terms as included in the expired lease. A dispute has arisen between the contracting officer and the landlord concerning the fair rental value of the space. GSA states that "no viable alternative to continued occupancy exists," and has proposed that a 10-year leasehold interest be acquired by eminent domain pursuant to the Declaration of Taking Act, 40 U.S.C. 258a *et seq.* (1970).

Under that Act, the Government files a declaration of taking and deposits into the Registry of the court the sum of money estimated to be just compensation for the interest taken. The Government acquires title when the declaration is filed and is irrevocably committed to pay the judicially fixed compensation eventually awarded. Thus, in practical terms, what is actually being paid, regardless of whether the lease is acquired on a voluntary or involuntary basis, is an amount which represents rent, and as such is subject to the ceiling imposed by the Economy Act.

Section 3 of the Declaration of Taking Act, 40 U.S.C. 258c, provides:

> Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

This section clearly prohibits an agency from initiating proceedings under 40 U.S.C. 258a when it anticipates that the condemnation award will exceed any Congressionally imposed limits on the funds available to acquire the interest being condemned. *See* H.R. Rept. 2086, 71st Cong., 3rd Sess. 2 and 74 Cong. Rec. 778 (1931). Accordingly, condemnation proceedings may not be initiated under the Declaration of Taking Act unless GSA believes that the resultant award will not exceed any applicable statutory limitation.

Section 322 of the Economy Act provides in part:

> Hereafter no 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 * * *.

GSA's estimate of the fair rental value of the space to be leased in the Ford Building exceeds fifteen percent of the fair market value of the leased space, and thus there is no question that a voluntary lease of the premises at the GSA estimated fair rental would be prohibited by the Economy Act.

To our knowledge, the precise question of whether condemnation actions taken pursuant to the Declaration of Taking Act to acquire a leasehold interest are limited by section 322 of the Economy Act has not previously been considered. The statutory language, of course, refers only to "rent" and "rental"; there is no reference to leasehold interests to be acquired by eminent domain. Similarly, we find nothing in the legislative history of the Economy Act which indicates that the drafters specifically considered condemnation awards. *See*, *e.g.*, S. Rept. No. 756, 72d Cong., 1st Sess. 15 (1932). GSA, however, reads our prior decision holding that section 322 of the Economy Act was not applicable to condemnation proceedings instituted under section 201 of the Second War Powers Act, 1942, 56 Stat. 177, *see* 22 Comp. Gen. 1112 (1943), as applying to all leasehold condemnation actions, and points out that in any event the powers of the Administrator to acquire property by condemnation action is virtually identical to the powers given the military secretaries under the Second War Powers Act, so that the result here should be consistent with our earlier holding.

We do not find the previous decision to be controlling. Although there is some language in the case which could be construed to mean that the Economy Act only applies where a lease is entered into on a voluntary basis rather than through an involuntary taking, we think it is clear that the decision dealt only with "an involuntary taking as authorized under * * * [the] Second War Powers Act," 22 Comp. Gen. at 1115, and not with all such takings. We stated that we viewed the language of that Act, which authorized the Government to take possession of the premises immediately after filing a condemnation petition and to occupy, use, and improve the premises "*notwithstanding any other law*," as "negativ[ing] the idea it was intended to be subject to the restrictions of * * * the Economy Act." [Italic supplied.] The fact that the Administrator of GSA may have nearly identical powers to those granted by the Second War Powers Act is of no consequence here since we see nothing in the language of the Federal Property and Administrative Services Act, from which the Administrator

derives his authority, which precludes application of the Economy Act, as we did in connection with the Second War Powers Act.

Moreover, in our earlier decision, we had for consideration the question of whether a condemnation *award* following a taking could be subject to the restrictions imposed by the Economy Act; in holding that it could not, we merely recognized that the right to compensation is a constitutional right which may not be limited or modified by any statutory restriction, and that while just compensation is based on the fair value of the lease at the time of taking, such compensation may not be restricted to a payment by the United Sates of 15 percent of the fair market value. 22 Comp. Gen. at 1114–5. Here, of course, the question is not whether a judicially determined award for a taking of property can be statutorily limited, but whether an agency can resort to condemnation proceedings when it believes that the award will exceed 15 percent of the fair market value of the leased premises.

We believe that the question must be answered in the negative. One of the purposes of the Economy Act is to limit Government expenditures in connection with the rental and repair of buildings. While the Economy Act, as noted above, literally limits only rental payments and not "just compensation" for the taking by eminent domain of a leasehold interest, we note that the measure of compensation for the taking of a leasehold interest is its fair rental value. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7 (1949); *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (1st Cir. 1976); *United States* v. *883.89 Acres of Land, Etc., Sebastian Co., Ark.*, 314 F. Supp. 238 (W.D. Ark., 1970), *aff'd* 442 F. 2d 262 (8th Cir. 1971).

Our conclusion in this regard is buttressed by section 3 of the Declaration of Taking Act, which, as stated above, precludes initiation of condemnation proceedings when condemnation award is expected to exceed a Congressionally mandated spending ceiling. Obviously, the Congress, by enacting this provision, intended to make applicable to the taking procedure authorized by 40 U.S.C. 258a whatever spending limitations might exist with respect to the acquisition of an interest in real property through more conventional means. This was made clear by Congressman La Guardia, who, in explaining the purpose of the proposed section 3, stated:

> * * * section 3 * * * states that before you can avail yourself of the benefit of [the Declaration of Taking Act], a responsible agency head must certify that the land in question will not cost, even in condemnation, beyond the amount authorized by Congress. 74 Cong. Rec. 778 (1931).

Accordingly, we must conclude that Congress, in authorizing agencies of the Government to invoke the Declaration of Taking Act, intended to limit the exercise of that authority to situations where resort to the condemnation procedure would not result in the avoidance of any spending limitations imposed by the Congress. It follows that the

restrictions of section 322 of the Economy Act cannot be avoided through use of the involuntary taking procedure, and that the restrictions are applicable to the proposed taking.

Although we conclude that condemnation proceedings are subject to the provisions of section 322 of the Economy Act, the facts in this case present a particular problem. While the purpose of the Economy Act is to minimize Government spending, GSA reports that the failure of the Government to acquire the space in the Ford Building by condemnation would result in "increased Government expenditures." According to GSA, the cost of remaining in the Ford Building for the next 3 years is approximately $3,118,000. However, if relocation is necessary, GSA believes "the cost of newly acquired lease space would far exceed the cost of the space presently being occupied." GSA estimates the cost for the next 3 years to be approximately $6,000,000. Moreover, GSA states that because of high real estate taxes in New York City coupled with the decline in real estate values, it is likely that the fair rental in alternative locations would also exceed the Economy Act limitations.

Thus, we are faced with the anomalous situation where application of a statutory spending limitation will result in appreciably higher costs to the Government than if the limitation is not observed, and where there may be no way to comply with the statutory limitation if DEA is to retain space in the New York City area. We are also advised that this situation is not unusual, and that other similar circumstances exist. It thus appears that application of section 322 of the Economy Act is not always viable, and that amendment of the law to take into account these modern-day circumstances would be appropriate. In this regard, we understand that GSA is seeking remedial legislation to provide for this type of situation. We believe this matter should receive expeditious consideration.

[B–191179]

Contracts—Awards—Labor Surplus Areas—Order of Preference

Protest by bidder that as the only "certified eligible" firm under total set-aside for small business/labor surplus area concerns it is the only firm eligible for award is denied since solicitation, in accordance with recent statutory and regulatory changes, did not distinguish among categories of labor surplus area concerns.

In the matter of Brenner Metal Products Corporation, July 13, 1978:

Brenner Metal Products Corp. (Brenner) of Wallington, New Jersey, protests any award of a contract under invitation for bids (IFB) FEFP–T5–73042–A, issued by the Federal Supply Service,

General Services Administration (GSA), Washington, D.C. on November 21, 1977, for metal costumers (garment racks) to any firm other than Brenner.

Brenner, one of six firms submitting bids, was third low bidder for Items 1–8 and 10 and fourth low for Item 9. The solicitation, which contemplated a requirements-type contract, was totally set aside for small business concerns which also qualify as labor surplus area concerns. Brenner asserts that it was the only bidder responsive to the labor surplus area concern requirement as it was the only "Certified Eligible Concern" that submitted a bid.

The IFB, however, did not require a labor surplus area concern to be a "Certified Eligible Concern." Page 12 of the IFB defined a labor surplus area concern as follows:

> The term "labor surplus area concern" includes certified-eligible concerns with a first preference, certified eligible concerns with a second preference, and persistent or substantial labor surplus area concerns * * *.

The IFB did not set forth any priority as to award among the three categories of firms that may qualify as labor surplus area concerns.

This approach is consistent with the recent changes made in the Government's labor surplus area set-aside program. Section 502 of the Small Business Act amendments of 1977, Public Law 95–89, 91 Stat. 553, 562, effective August 4, 1977, amended section 15 of the Small Business Act, 15 U.S.C. 644 (1976), by, *inter alia*, adding a subsection (d) which directed that "priority shall be given to the awarding of contracts and the placement of subcontracts to concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas." Subsection (d) also mandated the use of total labor surplus area set-asides. *But see Maybank Amendment*, 57 Comp. Gen. 34 (1977), 77–2 CPD 333.

This statutory change was implemented by Defense Manpower Policy (DMP) No. 4A, effective October 27, 1977. 42 Fed. Reg. 57,457 (1977) (to be codified in 32A C.F.R. Part 134). DMP4A eliminated the priorities previously established for firms certified eligible with first and second preferences, which were used to determine priority for award on partial labor surplus area set-asides, *see* 32A C.F.R. Part 134 (1977), 29 C.F.R. 8.8 (1977), and Federal Procurement Regulations 1–1.804–2 (1964 ed. amend. 77), and merely provides that a labor surplus area firm is one that agrees to perform a substantial portion of a contract in a labor surplus area.

Accordingly, the fact that the protester is a certified eligible firm is of no consequence here since it is reported that other bidders which also qualify as labor surplus area concerns submitted bids lower than that submitted by the protester.

The protest is, therefore, denied.

[B-191786]

Bids—Prices—Item Omission

When contracting officer cannot determine, from pattern of pricing in bid as submitted, what price bidder intended for omitted item, price may not be supplied after opening.

Contracts—Specifications—Failure to Furnish Something Required—Amended Specification Notice Not Received

Fact that bidder may not have received one page of amendment, and therefore omitted price for mandatory item, does not warrant acceptance of bid with omitted price.

Bids—Mistakes—Responsiveness Determination

Mistake in bid rules may be applied only when bid is responsive and otherwise for acceptance, not to correct price omission.

Armed Services Procurement Regulation—Mobilization and Preparatory Work Clause—Special Equipment—Acquisition—Cost Allowability, etc.—Construction Contracts

Procuring agency, under Armed Services Procurement Regulation, has discretion to determine amount and kind of equipment which may be included in and paid for as mobilization and preparation cost. Arguments that Government may have to divert funds, pay interest on amounts due, or terminate before completion of contract are based on events which may or may not occur, and do not affect legality of proposed award.

Equipment — Contractor — Cost Recovery — Major Construction Contracts — Payment Method Propriety

Cost of special equipment acquired to perform major construction contract may be paid as incurred under mobilization and preparatory work clause without violating statute prohibiting advance payments. Moreover, Government's interests appear to be protected in case of termination for convenience.

In the matter of the Farrell Construction Company, July 18, 1978:

Farrell Construction Company (Farrell) protests award to any other contractor under invitation for bids (IFB) No. DACW62-78-B-0050, issued by the Nashville, Tennessee, District of the Corps of Engineers (the Corps). The solicitation, issued on March 8, 1978, with an amended opening date of April 20, 1978, was for construction of the Divide Cut, Section 2, of the Tennessee-Tombigbee Waterway.

Farrell, low bidder at $29,032,950, failed to submit a Minority Business Enterprise Subcontracting Program Plan with its bid, as called for by the IFB. In addition, Farrell omitted a price for bid item No. 2E.3, covering construction of a pipe drainage structure at location S–25E. The Corps determined that the first was a minor informality which Farrell could cure by submitting its plan after bid opening, but that failure to price all items, as specifically required by the IFB, made the bid nonresponsive.

Farrell contests the latter determination, arguing that from its pattern of pricing, the Corps should have been able to determine and supply the intended price for the missing item. In addition, Farrell has protested possible award to Harbert Construction Corporation (Harbert) and M&B Contracting Company (M&B), second- and third-low bidders at $29,199,994 and $29,963,466, respectively, on grounds that their bids are unreasonably unbalanced and award to either would be contrary to the best interests of the Government. Award has been delayed pending our decision on the protest.

The Corps report states that, as originally issued, the unit price schedule of the IFB listed 50 separate items on four pages, S–1 through S–4. Seven amendments subsequently were issued. The first and only one relevant to this protest, dated March 24, 1978, listed revised pages which the Corps wished bidders to substitute for those in the original invitation. Two new items were added to page S–1, so that there was no room for what had been the last item on that page, item 2E.3; it therefore was transferred to the top of page S–2. Page S–2 was included in the revised pages sent to bidders; however, it was not marked with an amendment number, as were those which contained substantive changes.

Farrell's failure to price item 2E.3 stems from the fact that it did not use revised page S–2 in submitting its bid. Farrell has furnished our Office with affidavits stating that, following its usual procedure, it requested three sets of the invitation, one of which was disassembled and placed in a loose leaf binder. As amendments were received, Farrell states, the old pages were removed from the binder and the revised pages substituted. According to Farrell, neither the set of Amendment 0001 which it placed in the binder nor the other two sets of this amendment, which it received but did not disturb, contained revised page S–2.

Farrell states that it prepared estimates for bid item 2E.3, the pipe drainage structure at location S–25E, and for items 2E.4 and 2E.5, pipe drainage structures at locations S–30W and S–31W. However, because its working (take off) sheets were arranged by structure, not item number, Farrell used only structure numbers in transferring items from its working sheets to the price schedule. Thus, Farrell

states, it was not aware during the process of filling out the schedule that item 2E.3 was missing.

The Corps, in determining that this inadvertent omission made Farrell's bid nonresponsive, applied the general rule set forth in 52 Comp. Gen. 604 (1973), which states that a bid is regarded as nonresponsive on its face for failure to include a price on every item as required by the IFB. Farrell, on the other hand, asserts that an exception to the rule, also set forth in that case, should apply. The exception states:

> Even though a bidder fails to submit a price for an item in a bid, that omission can be corrected if the bid, as submitted, indicates not only the probability of error but also the exact nature of the error and the amount intended. B–151332, June 27, 1963. The rationale for this exception is that where the consistency of the pricing pattern in the bidding documents establishes both the existence of the error and the bid actually intended, to hold that the bid is nonresponsive would be to convert what appears to be an obvious clerical error of omission to a matter of nonresponsiveness. B–157429, August 19, 1965.

Farrell has argued that use of the original page S–2 and omission of item 2E.3 clearly demonstrates the existence of an error, and that the amount of its intended bid for item 2E.3, $28,000, is established by its pricing pattern for items 2E.4 and 2E.5, for which it bid $28,000 each. Farrell argues that the pipe drainage structures represented by these three items vary only in minimal ways, such as size or length of culvert pipe, and that materials allocated to each are practically identical. In an attempt to confirm its pricing pattern, Farrell has submitted its work sheets for the three pipe drainage structures. Farrell argues that the other bids also show a pattern of pricing, since all but one include identical prices for items 2E.3 and 2E.4. Moreover, the Government estimates for items 2E.3 and 2E.5 are the same, Farrell points out.

Farrell alternatively argues that the omission should be handled as a mistake in bid, which could be corrected under Armed Services Procurement Regulation (ASPR) 2–406.3(2) upon a showing of clear and convincing evidence as to the mistake and Farrell's intended price. As still another alternative, Farrell suggests that the omission has only a trivial effect on price, quality, or quantity, since $28,000 is only 0.096 percent of the total bid price, and therefore may be waived under ASPR 2–405. If this alternative is accepted by our Office, Farrell states, it will undertake the contract on the basis that its bid price includes item 2E.3.

The Corps does not accept Farrell's pattern of pricing argument, stating to apply the exception, bids must be on identical items. Each pipe drainage structure here, the Corps states, requires structural excavation, back filling, dewatering, placement of bedding material, pipe culvert, and concrete, and reinforcement at a specific location.

Although the structure at location S–25E is similar to those at locations S–30W and S–31W, the Corps argues, the solicitation clearly intended that each be separately priced.

In addition, the Corps has examined Farrell's work sheets for bid items 2E.6 and 2E.8, also pipe drainage structures, and found that while Farrell showed identical requirements for the construction work (except for a variation in the quantity of sand), Farrell bid $28,000 for one and $63,000 for the other. "What factors entered into Farrell's judgment to make such a price differential cannot be determined with any certainty from the bid documents," the Corps states.

Harbert and M&B, in comments to our Office, generally support the Corps' conclusion that Farrell has not shown a pattern of pricing which would clearly indicate its intended price for item 2E.3. Harbert suggests that Farrell may have inadvertently omitted another price in the bid schedule, argues that Farrell had a duty to use reasonable care in assembling its bid, and has submitted its own work sheets and supplier quotations as evidence of the differences between the three pipe drainage structures in question.

Although a great deal of extraneous evidence has been introduced into the record, our cases require that both the error and Farrell's intended price be established from the bid itself if the very limited pattern of pricing exception is to be applied.

Both 52 Comp. Gen. 604, *supra*, and *Con-Chen Enterprises*, B–187795, October 12, 1977, 77–2 CPD 284, for example, have applied the "bid pattern" exception and allowed correction of pricing omissions in option quantities. Neither case dealt with a situation where the entire option quantity or quantities were omitted. In *Con-Chen Enterprises*, *supra*, the bidder omitted the price for the first of two option years while in 52 Comp. Gen. 604, *supra*, the bidder omitted a price for the third of four option quantities. In both cases the intent to bid on option quantities was clear from the face of the bid as prices were inserted for the last option year and the final option quantity, respectively. Also in each instance the amount of the omitted price was made absolutely plain by the prices bid on the other portions of the option quantities.

In the instant case, no options are involved, and no reasonably clear bidding pattern for the regular quantities can be established. In large-scale drawings furnished to bidders, the pipe drainage structures represented by the latter items were shown together; however, a separate profile was provided for the pipe drainage structure at location S–25E, which Farrell omitted. The drawings indicate that elevations and pipe and headwall dimensions of the three structures, while similar, are not identical. The contracting officer could not determine,

from Farrell's bid as submitted, whether Farrell regarded these variations as significant. (Farrell later stated that it added $4,000 to its estimated direct costs for each item to cover overhead, bond, and profit, then rounded off its bid prices on all three items to $28,000 each.)

Accordingly, we do not believe that Farrell's bid contains sufficient evidence of a bidding pattern to invoke the very limited exception to the rule requiring bids on all necessary items. See *Ainslie Corporation*, B-190878, May 4, 1978, 78-1 CPD 340; B-178369, July 23, 1973.

As for Farrell's failure to receive revised page S-2, in a similar case in which a bidder attempted after opening to supply a price for a mandatory item on which it had not bid, due to failure to receive an amendment on time, we stated that while the Government should make every effort to see that bidders receive timely copies of IFBs and amendments, the fact that there was a failure to do so in a particular case did not warrant the acceptance of a bid after the time fixed for opening. We stated that acceptance of a bid which is not responsive to the solicitation as amended would prejudice the rights of the Government and other bidders, who were entirely responsive, and the contracting officer would not be legally authorized to accept such a bid. 40 Comp. Gen. 126 (1960).

In the instant case, although Farrell may not have received revised page S-2, it seems to us that Farrell should have been aware of the omission. Farrell acknowledged receipt of amendment 0001, and by a careful checking of the list of revised pages therein, should have been able to determine that one was missing.

Farrell's alternative argument, that the mistake in bid procedures should be used here, also is covered in 52 Comp. Gen. 604, *supra*. We stated that to allow a bidder to correct a price omission after alleging mistake would generally grant an option to explain, after opening, whether it intended to perform or not perform the work for which the price was omitted. To extend this option would in effect be granting the bidder an opportunity to submit a new bid. Therefore, an allegation of mistake may be considered only where a bid is responsive and otherwise for acceptance. See also *Bayshore Systems Corporation*, 56 Comp. Gen. 83 (1976), 76-2 CPD 395.

Nor may the omission be waived as a minor informality under ASPR 2-405. Drawings and specifications for the pipe drainage structure at location S-25E were in such finite detail that the item should, we believe, be regarded as material, even though it represents only a small fraction of the contract price. See *General Engineering and Machine Works, Inc.*, B-190379, January 5, 1978, 78-1 CPD 9. Farrell's subsequent offer not to charge for the omitted item does not make the bid responsive. *Garamond Pridemark Press*, B-182664, February 21,

1975, 75–1 CPD 106. In view of the foregoing, we do not need to reach the issue of Farrell's failure to submit a minority subcontracting plan.

Since Farrell's bid is nonresponsive, we must consider Farrell's protest of award to either the second or third-low bidders on grounds that their bids are unbalanced. Farrell alleges that Harbert and M&B have bid unreasonably high prices for two categories of work, (1) mobilization and preparation and (2) clearing and grubbing. (It appears that Farrell regards Harbert's bid for mobilization and M&B's bid for clearing and grubbing as unbalanced.) The prices in question are as follows:

Bid Item	Govt. Estimate	Farrell	Harbert	M & B
Mob & Prep	$1, 060, 000	$650, 000	$6, 000, 000	$2, 000, 000
C & G	288, 000	2, 376, 400	2, 086, 945	4, 200, 000
Total	$1, 348, 000	$3, 026, 400	$8, 086, 945	$6, 200, 000

Harbert contests the timeliness of this basis of protest; however, the Corps states that the matter was raised with it in a timely fashion. The Corps' report to our Office, which recommended denial of Farrell's protest, therefore may be considered adverse agency action, and Farrell's protest is timely under 4 C.F.R. 20.2 (1977). In any event, the Corps has asked that we rule on the matter.

Farrell argues that award to Harbert or M&B would not be in the best interest of the Government, since these costs will be paid at the "front end" of the contract. The effect, Farrell argues, is that either bidder will be financing its performance with Government money, rather than with its own. Farrell contends that the bids should be rejected because the Government might have to divert funds from other sources to maintain liquidity of the project and might incur additional costs if, due to exhaustion of funds, interest has to be paid on amounts due. Moreover, Farrell argues, because 20 percent of Harbert's price is for mobilization, if the contract should be terminated before completion, the Government will have purchased a huge fleet of equipment for the contractor.

The Corps responds that there is no unbalancing because, if excavation costs are added to those cited by Farrell, there is virtually no difference between the prices of the three lowest bidders. Farrell takes issue with this, arguing that excavation costs will be paid over the entire term of the contract. The Corps also indicates that no funding problems are anticipated.

Harbert argues that the solicitation permits the cost of equipment, less its estimated salvage value at the end of the contract, to be included in mobilization and preparation and to be paid as documented. Harbert states that it confirmed this interpretation with the Nashville District office of the Corps both before and after submitting its bid.

Harbert explains that because the project must be completed in three successive, 6-month construction seasons, it plans to work on a 6-day, double 10-hour shift basis. Since major equipment therefore will have between 6,000 and 8,000 hours of service, Harbert states, it decided to mobilize with new equipment. Harbert estimated the difference between the purchase price for this equipment and its value at the end of the contract would be $6,352,000; preparation costs were estimated at an additional $623,000; Harbert states that it therefore bid $6 million for mobilization and preparation. Harbert argues that Farrell actually is protesting that the mobilization and preparation payment clause is an undesirable contract provision.

In analyzing unbalanced bids, our Office generally has considered whether each bid item carries its share of the cost of the work and the contractor's profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. We then attempt to determine whether award to a bidder submitting such a bid will result in the lowest ultimate cost to the Government. See *Chrysler Corporation*, B–182754, February 18, 1975, 75–1 CPD 100.

In the case of Harbert's bid, we believe the issue is not whether it is unbalanced, but whether the cost of equipment to be used in performing the contract properly may be included in and paid for as mobilization and preparation.

Section 1B of the solicitation covers Mobilization and Preparatory Work; it contains the standard clause set forth in ASPR 7–603.37. This clause, ASPR states, is to be used "in major construction contracts requiring major or special items of plant and equipment * * * which are considered to be in excess of the type, kind, and quantity presumed to be normal equipment of a contractor qualified to undertake the work." The head of the procuring activity must approve its insertion in contracts containing a separate bid item for mobilization and preparatory work. The clause, as Harbert and the Corps have indicated, permits payment of the contractor's actual expenses for plant, equipment and material if the contracting officer finds them suitable and necessary for efficient prosecution of the contract. Payments may not exceed the cost to the contractor, less estimated salvage value upon completion of the contract, as determined by the contracting officer.

The decision as to the amount and kind of equipment necessary for successful construction of the Divide Cut on the Tennessee-Tombigbee Waterway is, we believe, one of the type which ASPR has committed to the unique discretion of the procuring agency. Harbert has in effect asserted that the equipment which it intends to purchase for this contract is in excess of that which it normally possesses. The Corps has not at any time disputed this.

Farrell, in its letter of June 15, 1978, concedes that the mobilization estimate and plan of Harbert "falls within the boundaries of the mobilization payment clause." Arguments that the Government may have to divert funds, pay interest on amounts due, or terminate before completion of the contract are based on events which may or may not occur, and we do not find that the possibility of these events affects the legality of the proposed award.

M&B also argues that Harbert's bid is unbalanced, while its own is not. M&B contends that payment under the mobilization and preparatory work clause of the contract violates the prohibition against advance payments of 31 U.S.C. 529, citing *General Telephone Company of California*, 57 Comp. Gen. 89 (1977), 77-2 CPD 376. Farrell has argued that if, following payment of mobilization costs which include the purchase of special equipment, the contract were terminated for the convenience of the Government, the Government would have bought the contractor a huge fleet of equipment.

We disagree. In the *General Telephone* case, a bid on a contract to provide telephone services for a Veterans Administration hospital was rejected because it required the agency to pay, at the time of installation, a basic charge for special equipment which was being leased for the 10-year term of the contract. The contractor's capital outlay for that equipment, we held, could not be recovered before the services were rendered.

Under the facts in that case, however, the basic charge was payable whether or not service continued for the duration of the lease. The Government acquired no legal or equitable interest in the equipment to be installed, could not demand that it be relocated to another location if service were terminated at the installed location, and had no interest in its residual value. We found that under these circumstances, a substantial portion of the basic charge would not have been "actually earned" at the time the charge was made, and that only a portion of the entire capital cost of the leased equipment represented the current fiscal year's needs.

By contrast, under the mobilization and preparatory work clause of the protested solicitation, the Government's interest is protected. ASPR 7-603.37 requires documentation of actual costs as incurred, appraisal of the equipment at the site of the contract, a showing that it has been acquired free of encumbrances, and an agreement that it will not be removed from the construction site before completion and acceptance of the entire work. The contracting officer must find that the equipment is suitable and necessary for efficient prosecution of the contract, and specific limits are placed on the amounts which may be paid as mobilization and preparation costs. Moreover, in this case salvage value will be subtracted from the purchase price of the contractor's equipment.

In the event of termination, the termination clause for construction contracts, set forth in ASPR 7-602.29(b)(vi) and included in the contract in Standard Form 23, states that the contractor shall transfer title and deliver to the Government supplies and other material acquired in connection with performance of the work which has been terminated. It appears to us that title to the special equipment acquired by the contractor under the mobilization clause would come within the reach of this provision. *See also* ASPR 7-602.29(b)(ix), which states that the contractor shall "take such action as may be necessary or as the contracting officer may direct for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the Government has or may acquire an interest."

Finally, we are dealing with a major construction contract of the type in which special financing arrangements such as progress payments have always been permitted. The Government, as shown by the mobilization and preparatory work clause, recognizes that a qualified contractor may have to acquire special equipment to perform this type of contract and, by regulation, permits costs of such equipment to be paid as incurred.

For the foregoing reasons, we find that payments under this clause are not advance payments. They are not made in advance of or in excess of eligible costs incurred on the contract. Rather, we believe, they are in the nature of progress payments for construction contracts.

The other advance payment decisions of our Office cited by M&B concern payment of attorney's fees and other expenses in administrative proceedings, 56 Comp. Gen. 111 (1976); station housing allowances for military personnel, 56 Comp. Gen. 180 (1976); and the Federal share of student salaries under a college work-study program, 56 Comp. Gen. 567 (1977). We do not find them relevant to this case.

We therefore find that the cost of equipment to be used in performing the contract properly was included in Harbert's bid as a mobilization cost, and may be paid in the fiscal year incurred without violating statutory limitations. Since Farrell's bid is nonresponsive, award may be made to Harbert as the low, responsive, responsible bidder, and we need not reach the question of whether M&B's bid is unbalanced.

Accordingly, the protest is denied.

[B-191128]

Details—Compensation—Higher Grade Duties Assignment—Successive Details—Status

Employee, who was successively detailed to two higher grade positions, can only be awarded retroactive temporary promotion and backpay for details extending more than 120 days, each detail being treated as a separate and distinct personnel action.

In the matter of James F. Ford—detail to higher grade position, July 24, 1978:

This decision is rendered in response to a request for an advanced decision by Mr. Phillip M. Hudson, Jr., an authorized certifying officer, Maritime Administration, Department of Commerce, concerning the claim of Mr. James F. Ford, an agency employee, for a retroactive temporary promotion and accompanying backpay for the period from July 18, 1976, to September 15, 1976. Although Mr. Ford's claim covers only the stated period, the certifying officer states that Mr. Ford performed higher grade duties for an additional period from April 15, 1975, to July 17, 1976, and was accordingly paid backpay for this additional period.

The record shows Mr. Ford was promoted to the position of Trial Attorney grade GS–14 on March 3, 1974. On December 12, 1974, the General Counsel issued a memorandum to all employees of his office in which he stated the following:

> Effective December 16, 1974, J. Frank Ford is detailed to the Division of Legislation and Regulations * * * where he will serve as Acting Assistant General Counsel.

The Assistant General Counsel position to which Mr. Ford was detailed was classified as a grade GS–15 position. Mr. Ford remained in this "acting" capacity through July 17, 1976, at which time he was detailed to the position of Supervisory Attorney-Adviser, a grade GS–15 position, in the Division of Litigation effective July 18, 1976, with the notation that the detail was not to exceed 60 days (September 15, 1976). Mr. Ford was paid backpay for the period April 15, 1975, the 121st day after Mr. Ford's first detail began, through July 17, 1976, the last day of the first detail. The certifying officer based this determination on our decisions in *Matter of Everett Turner and David L. Caldwell*, 55 Comp. Gen. 539 (1975), and *Matter of Reconsideration of Everett Turner and David L. Caldwell*, 56 Comp. Gen. 427 (1977).

In *Turner-Caldwell*, we held that employees detailed to higher grade positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated.

Mr. Ford's second detail, immediately following his first detail, to the position of Supervisory Attorney-Adviser, at the same grade as the first detail of grade GS–15, was for the period of July 18, 1976, through September 15, 1976, a period of less than 120 days. Since *Turner-Caldwell* provided that a retroactive temporary promotion

and backpay could only be awarded for details extending more than 120 days, we cannot make such an award for this second detail, even though no break in grade GS–15 service occurred. Each of the details must be treated as a separate and distinct personnel action. Therefore, only those details which lasted more than 120 days, without counting time spent on other details, can qualify for the retroactive promotion with backpay provided by *Turner-Caldwell.*

The claim, therefore, may not be allowed.

[B–148736]

Interior Department—National Park Service—Concessions—Encumbrance of Possessory Interest

Department of the Interior may revise National Park Service (NPS) standard concession contract language to allow new park concessioners to encumber the possessory interest in the concession operation in order to provide collateral for loan used to purchase the concession operation. This practice is authorized by 16 U.S.C. 20e (1976) and would not be contrary to 16 U.S.C. 3 (1976), which provides for encumbrance of concessioner's assets to finance expansion of existing facilities. Congress made it clear in enacting 16 U.S.C. 20e that possessory interest sanctioned by that section could be encumbered for any purpose.

In the matter of National Park Service concession contract—encumbrance of possessory interest, July 25, 1978:

The Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, asks whether we agree with the Department that a proposed revision to section 13 of the National Park Service's (NPS) standard concession contract is legally permissible. The purpose of the proposed revision is to allow concessioners, particularly small business concerns, to encumber their possessory interests in concession assets in order to borrow money to purchase existing National Park Service concession operations.

The current section 13 of the standard NPS contract states in part that:

> No mortgage shall be executed, and no bonds, shares of stock, or other evidence of interest in, or indebtedness upon the assets of the Concessioner, in the area, shall be issued, except for the purposes of installing, enlarging, or improving plant and equipment, and extending facilities for accommodation of the public in the area, and then only upon approval of the Secretary. In the event of default on such a mortgage or such other indebtedness or of other assignment, transfer or encumbrance, the creditor or any assignee thereof, shall succeed to the possessory interest of the Concessioner in concessioner's improvements, but shall not thereby acquire operating rights or privileges. (Section 13).

Section 3 of title 16, United States Code (1976) authorizes the Secretary of the Interior to "grant privileges, leases, and permits for the use of land [parklands] for the accommodation of visitors in the

various parks, monuments, or other reservations" under his jurisdiction. This section includes the following proviso:

> [T]he Secretary may in his discretion, authorize such grantees [concessioners] * * * to execute mortgages and issue bonds, shares of stock, and other evidences of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments.

This language allows the encumbrance of a concessioner's assets with the Secretary's approval, for the purposes of installing, enlarging, or improving plant and equipment and of extending facilities for serving the public within the National Park System. However, the Department has found a further need to provide a new concessioner with a means to encumber the "possessory interest" in the concession he seeks to purchase in order to provide the collateral needed for loans to finance the purchase of an *existing* concession operation.

16 U.S.C. § 20e (1976) states in part:

> A concessioner who has heretofore acquired or constructed or who hereafter acquires or constructs, pursuant to a contract and with the approval of the Secretary, any structure, fixture, or improvement upon land owned by the United States within an area administered by the National Park Service shall have a possessory interest therein, *which shall consist of all incidents of ownership* except legal title, and except as hereinafter provided, which title shall be vested in the United States. * * * The said possessory interest may be assigned, transferred, encumbered, or relinquished. [Italic supplied.]

NPS has proposed the following revision of that part of section 13 of the contract quoted above:

> No mortgage shall be executed, and no bonds, shares of stock, or other evidence of interest in, or indebtedness upon, the assets of the concessioner, including this contract, in the area, shall be issued, except for the purposes of installing, enlarging or improving, plant, equipment and facilities, provided that, possessory interests, or evidences of interests therein, in addition, may be encumbered for the purposes of purchasing existing concession plant, equipment and facilities. In the event of default on such a mortgage, encumbrance, or such other indebtedness, or of other assignment, transfer, or encumbrance, the creditor or any assignee thereof, shall succeed to the interest of the Concessioner in such assets including possessory interests, but shall not thereby acquire operating rights or privileges which shall be subject to the disposition of the Secretary.

In his letter, the Acting Assistant Secretary explains the reasons for this amendment:

> The practical problem is that frequently existing concession operations are sold to new operators where no new improvements are involved but either the existing concessioner, or lenders to the new concessioner, wish to create an encumbrance in the assets of the concession, including possessory interest, for the purpose of securing loans used to purchase the operation or to guarantee payment of the purchase price. In other words, in order to secure the capital raised to purchase a concession operation, the new concessioner usually desires to encumber the possessory interests purchased, even though no new improvements are to be constructed. Over a period of years, the National Park Service has approved numerous such transactions as part of its administration of concession contracts. However, the current standard language of National Park Service concession contracts, as quoted above, is ambiguous as to whether encumbrances of possessory interests for such purposes are permissible.
>
> The National Park Service, therefore, is desirous of amending this provision, because, unless encumbrances can be created in the circumstances of purchase of concession operations described above, it becomes difficult, if not impossible,

for small businesses to raise the capital needed to purchase an existing concession operation. Limiting encumbrances to the purposes of constructing new improvements has the anomalous result of encouraging only large businesses to purchase concessions, businesses which can raise the purchase price from general assets without the necessity of security interests.

The question is whether the proposed language would be contrary to the Secretary's authority to enter into contracts under 16 U.S.C. § 3 *supra*, because the proviso to that section appears to authorize encumbrances only for expansion of concession facilities and because it does not expressly authorize encumbrance of possessory interests. We believe this language would be within the Secretary's statutory authority covering concession contracts.

In 1965, Congress passed the "Concessions Policy Act," 16 U.S.C. §§ 20–20g (1976), for the purpose of establishing concession policies in the areas administered by the NPS. After reciting the Secretary's existing authority under 16 U.S.C. § 3, the Senate Report on the bill which was the derivative source of the 1965 Act goes on to state:

> The Government now depends heavily, and must continue to depend heavily, on private entrepreneurs to provide visitors to the national park system with necessary facilities and services. Because this is so, the provisions of law just recited [16 U.S.C. § 3] need to be supplemented by a clear statement in statutory form of the authority of the Secretary of the Interior to deal with various matters in the field of concession policy such as those mentioned above. S. Rept. No. 765, 89th Cong., 1st Sess. 2 (1965).

The Report further states that:

> While legal title to the improvement will continue to be in the United States, the bill specifically recognizes that the possessory interest may be assigned, transferred, and encumbered by the concessioner. *Id.* at 3.

As the Department points out, one reason for the statutory recognition of possessory interests was to help concessioners obtain financing for construction of new concession facilities by pledging the possessory interest as collateral. The language of 16 U.S.C. § 20e clearly allows pledges of possessory interests without limitation as to purpose. Moreover, a pledge for the purpose of enabling a potential concessioner to raise capital to finance the purchase of a concession seems consistent with the purposes of the 1965 Act. The Senate Report indicates that one intention was to make loans based on pledges of possessory interest more accessible "to concessioners *and would-be concessioners*." S. Rept. No. 765, *supra*, 2. [Italic supplied.]

We agree with the Department of the Interior that "the proposed amendment to section 13 is legally acceptable, as the encumbrance of possessory interests is authorized by 16 U.S.C. § 20e without limitation * * *." 16 U.S.C. § 3 does not, in our view, preclude the encumbrance of possessory interests as authorized by 16 U.S.C. § 20e. A contract which would allow a concessioner to encumber its "possessory interest" for the purposes of acquiring existing concession facilities would conform to the policy of the 1965 Act. We have no objection to the language proposed by the Department for this purpose.

[B–139703]

Attorneys—Fees—Agency Authority to Award

The Federal Trade Commission has discretion to determine eligibility for reimbursement of costs of participation in its rulemaking proceedings, including "reasonable attorneys fees" under 15 U.S.C. 57a(h)(1) (1976). However, payment of an amount in excess of the costs actually incurred for legal services is not authorized, even though the participant utilized "house counsel" whose rate of pay is lower than prevailing rates.

In the matter of attorneys' fees—Federal Trade Commission, July 31, 1978:

The Federal Trade Commission (FTC) has requested an opinion on whether § 18(h)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(h)(1) (1976) (the Act) authorizes compensation of persons eligible for "reasonable attorneys fees" under that section in amounts equal to the reasonable value of their services even if a lower fee is actually incurred.

Section 18(h)(1) reads, in pertinent part, as follows:

> (h) Compensation for attorney fees, expert witness fees, etc., incurred by persons in rulemaking proceedings; aggregate amount payable in any fiscal year
> (1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees. expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

According to the Commission, when a person or group, meeting the above criteria for financial assistance, has outside counsel, it is compensated for the reasonable value of the attorney's services. However, when a person or group has a salary arrangement with an attorney, compensation is provided only for the pro rata portion of the attorney's salary devoted to the Commission's rulemaking activities. According to the submission—

> * * * Because eligible groups in Commission rule-making proceedings are most often public interest groups, the salaries paid to their inhouse attorneys are invariably lower than the fees charged by outside counsel.
> In order to avoid this growing inequity whereby the rate of compensation of attorneys is dependent not on the substance of their work but on the form of their organization, the Commission is considering compensating all eligible persons for reasonable attorneys' fees even if a lower fee is actually incurred.

The legislative history of the above provision indicates that the FTC was authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating in rulemaking proceedings in order "to provide to the extent possible that all affected interests be represented in rule-making proceedings so that rules adopted thereunder best serve the public interest." H.R. Rept. No.

1606, 93rd Cong., 2nd Sess. 36 (1974). The prerequisite for such compensation is a determination by the Commission that a person or group:

(1) has or represents an interest which would not otherwise be adequately represented in such proceeding, and
(2) representation of the interest is necessary for a fair determination of the proceeding taken as a whole and
(3) who but for the compensation would be unable effectively to participate in such proceeding because *such person would otherwise not be able to afford the cost of such participation. Id.* [Italic supplied.]

The legislative history of the section is silent with regard to what constitutes "reasonable attorneys fees." However, in reading the section and history, it is clear that Congress was concerned with providing compensation for "costs" to groups or persons, representing necessary interests, who would otherwise be unable to participate in rule-making proceedings. The term "cost" as used above appears to refer to the value (purchase price) of services used. Sec. 21, Office of Management and Budget Circular No. A–34, "Instruction on Budget Execution" (1978). Using that definition, it is difficult to interpret the above section as authorizing compensation over and above the cost of attorneys' fees actually incurred. However, in cases where attorneys do not have a salary arrangement with a group or person, and the amount of compensation is unknown, the Commission has broad discretion to determine what constitutes "reasonable attorneys fees" pursuant to rules prescribed by it. In such cases, assuming a person or group meets the criteria set forth in § 18(h)(1) of the Act, *supra*, the Commission has discretion to provide compensation at such rates as it determines to be reasonable under the circumstances.

Additionally, we note that none of the cases cited in the submission appear to be directly applicable here. In *Consumers Union of United States, Inc.* v. *Board of Governors of the Federal Reserve System*, 410 F. Supp. 63 (D.C. 1976), the court held that it had the authority to award attorney's fees based on the actual value of services rendered even though counsel served an organization for far less than fair market compensation. While the holding appears to lend support to the FTC's position, we think that there is a significant difference between participation in a judicial proceeding, in which an unsuccessful adversary may be required to pay the litigation costs of his opponent, including attorney's fees, and voluntary participation in an administrative proceeding, where none of the actual parties to the proceeding are charged with the costs of an intervenor. Moreover, under the FTC Act, Congress was primarily concerned with providing compensation for "costs" and not with the equalization of attorneys' fees. If Congress had intended to provide compensation at the fair market rate for all attorneys, it would have so defined the term "reasonable attorneys

fees." In section 2(a) of Senate Bill 270, which is presently before Congress, it is specifically provided that reasonable attorneys' fees be based upon prevailing market rates. However, even Senate Bill 270 is concerned with "costs of participation *incurred* by eligible persons * * *." We believe that the reasonable attorneys' fees definition is meant to be utilized when a participant has to hire an outside attorney to represent his interests. It is intended to assure that the participant will be able to obtain competent legal assistance without burdening the agency with the costs of high priced lawyers whose fees far exceed the usual market price for the services rendered.

In *National Treasury Employees Union* v. *Nixon*, 521 F.2d 317 (D.C. Cir., 1975), the court held that plaintiff was entitled to reimbursement for attorney's fees and expenses under the "common benefit" exception to the general rule barring such award. Under that exception

> Federal courts have permitted "a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorney's fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Id.* at 320.

The "common benefit" exception does not appear relevant in this case because we are concerned with the question of whether the FTC can award attorneys' fees in excess of the fee actually incurred rather than with the reimbursement of such fees from a fund or property that benefits a group.

Lastly, in the case of *Tillman* v. *Wheaton-Haven Recreation Association, Inc.*, 517 F.2d 1141 (4th Cir., 1975), the court held that when an allowance for attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services and "should not be diminished because the attorney has agreed to contribute the money, in whole or in part, to a civil rights organization whose aims have stimulated him to work voluntarily." As stated previously, the FTC Act does not define "reasonable attorneys fees" to mean reasonable value. Since the Act appears to be concerned with providing reimbursement for costs incurred in order to allow all necessary interests to participate in proceedings, we believe that the FTC is without authority to increase an attorney's compensation above the fee actually incurred. Such an increase would represent a Federal subsidy to an interest group, and the Commission may not use its appropriations for such a purpose without statutory authority. 31 U.S.C. § 628 (1970).

Accordingly, while the determination of eligibility for compensation and the definition of what constitutes "reasonable attorneys fees" are matters within the Commission's discretion, the Commission is without authority to pay an amount in excess of the expense actually incurred.

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