Decisions of The Comptroller General of the United States

VOLUME 59 Pages 569 to 636

JULY 1980

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300115100

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1981

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.50 (single copy) ; subscription price : $17.00 a year ; $21.25 for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

GENERAL COUNSEL

Milton J. Socolar

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

TABLE OF DECISION NUMBERS

Cite Decisions as 59 Comp. Gen.—.

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

[B-196539]

Pay—Retired—Survivor Benefit Plan—Coverage Charges—Coverage Termination on First Day of Month—Proration Authority

Where a retired member is participating in the Survivor Benefit Plan (SBP) and his elected spouse coverage is to be terminated because the eligible spouse beneficiary died on the first day of the month, so long as the eligible spouse beneficiary was in being at the first moment of the first day of the month full reduction of retired pay or retainer pay for spouse coverage is required for that month. Charges for that month may be made on a pro rata basis only if regulations providing for such a change are issued under 10 U.S.C. 1455. 57 Comp. Gen. 847 (1978), modified.

Pay—Retired—Survivor Benefit Plan—Coverage Charges—Commencement Date—Retirement on Day Other Than First of Month

Active duty service members are usually retired effective the first day of a month. If they participate in the SBP, the computed costs of coverage are assessed at the monthly rate for the whole retirement month. If an active duty member is placed in a retired or retainer pay status effective on a day other than the first of a month and participates in the SBP, charge for coverage begins the first day of the month beginning after retirement unless a regulation is issued pursuant to 10 U.S.C. 1455 providing for pro rata charge for part of a monthly coverage. 57 Comp. Gen. 847, modified.

Matter of: Staff Sergeant Robert E. Wix, FMCR, and Master Sergeant Richard V. Johnson, FMCR, July 1, 1980:

This decision involves several questions concerning the proper method of effecting reduction in retainer pay for Survivor Benefit Plan (SBP) participation by Staff Sergeant Robert E. Wix, FMCR, 242-48-6487, and Master Sergeant Richard V. Johnson, FMCR, 218-28-8348, in response to a request from the Disbursing Officer, Marine Corps Finance Center. The matter has been assigned Control Number DO-MC-1333 by the Department of Defense Military Pay and Allowance Committee.

In summary we hold that charges for SBP must be for a full month unless a regulation providing for pro rata monthly charges based in days of coverage is issued pursuant to 10 U.S.C. 1455. Further, in the absence of a regulation when a member's last day of duty before retirement is other than the last day of the month no charge is made for the partial month in retired status.

Sergeant Wix's Case

Sergeant Wix was transferred to the Fleet Marine Corps Reserve on October 31, 1974, and enrolled in the SBP, providing an annuity for his wife, Peggy, and a dependent child, based on the full amount of his monthly retainer pay. Reduction of that pay for coverage charges was initiated effective November 1, 1974.

On August 3, 1979, Sergeant Wix informed the Finance Center that his wife had died on March 1, 1978, at approximately 5 p.m.

It is stated that pursuant to the amendment to the Survivor Benefit Plan as contained in the act of October 14, 1976, Public Law 94–496, and our decision 57 Comp. Gen. 847 (1978), the monthly charges for spouse coverage from April 1, 1978, forward were refunded to Sergeant Wix. Also, the cost of child coverage was recomputed on the basis of child only coverage beginning April 1, 1978, with the increased cost of that coverage deducted retroactively to the same date.

The disbursing officer expresses doubt as to the correctness of that action, indicating that Sergeant Wix may be entitled to a refund for spouse coverage for March 1978. This is based upon certain language contained in decision 57 Comp. Gen. 847, which apparently has been viewed as establishing the first day of the month as the date for determining the eligibility of a potential beneficiary. While the disbursing officer recognizes that Mrs. Wix was an eligible spouse beneficiary until the moment of her death, he suggests that since she did not live for the whole day, she should not be considered an eligible spouse beneficiary for cost charge purposes for March 1978.

The facts of the Wix case appear to be similar to those involved in the situation described regarding question a., of 57 Comp. Gen. 847. In that case we construed the language of 10 U.S.C. 1452(a) which states that the reduction in retired or retainer pay shall not be applicable "during any month in which there is no eligible spouse beneficiary." As to that part of that decision which relates to assessment of coverage charges on the event of loss of a previously elected and otherwise eligible spouse beneficiary, we said, in part, at page 850, that:

> Charges for SBP coverage are assessed on a monthly basis and for the whole month, there being no legal authority for subdividing a month. It is our view that the existence of an elected beneficiary on the first day of that month governs the coverage costs to be charged for the whole month. Thus, if a member had initially elected spouse coverage, so long as he had an eligible spouse beneficiary on the first day of a month, then for SBP coverage charge purposes, the full reduction in retired pay for that coverage would be required for that month.

The fact that an eligible spouse beneficiary dies on the first day of a month would not alter the basic conclusion in that decision. The eligible spouse beneficiary was in existence in that month and charges for coverage should be assessed. Therefore, in answer to the questions presented in the Wix case, so long as the spouse is an "eligible spouse beneficiary" in being at the first moment of the first day of any month, spouse coverage costs will be charged for that entire month.

We would like to take this opportunity to clarify the meaning of the decision in 57 Comp. Gen. 847 as it relates to charges for full months. That decision was necessarily predicated on the wording of the statutory provisions involved since no regulations had been issued under the authority of 10 U.S.C. 1455 establishing a means of computing charges for coverage for only part of a month. The language

in that decision, however, should not be viewed as precluding the issuance of regulations under the authority of section 1455 which would make specific provision for a pro rata charge when the eligible spouse beneficiary becomes ineligible by death or divorce other than on the last day of a month. 57 Comp. Gen. 847 is modified accordingly.

Sergeant Johnson's Case

Sergeant Johnson was transferred to the Fleet Marine Corps Reserve on August 10, 1979, effective the next day. His election into the SBP was on a reduced base amount of $300 for his spouse, Setsuko, and a dependent child. The SBP cost reduction from his monthly retainer pay was initiated effective August 11, 1979, on a pro rata basis for the days remaining in August 1979, and then monthly thereafter at the appropriate monthly rate.

Doubt as to the correctness of that method of charging is expressed, also due to certain of the language in 57 Comp. Gen. 847, which states that SBP coverage costs are to be assessed on a monthly basis.

If the charge for SBP may not be prorated for part of a month, the Marine Corps asks whether full charge or no charge should be made for the month of retirement when members retired on other than the last day of the month. The Marine Corps also asks whether the response to the above would be the same if Master Sergeant Johnson died on an intermittent day of the month in which he retired. Finally, if pro rata charge is not authorized, the Marine Corps wants to know if they must collect additional charges or refund excess charges retroactively for the first month in which a member was retired or transferred to the Marine Corps Reserve if such retirement or transfer occurred on other than the first day of a month.

As it relates to reduction in retainer pay in the case of Sergeant Johnson, 10 U.S.C. 1452(a) provides in part:

> (a) * * * retainer pay of a person to whom section 1448 of this title applies * * * who has a spouse and a dependent child * * * shall be reduced each month * * * by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense.

In the Wix case above, we held that charges when coverage is terminating should be on a monthly basis, unless regulations issued under 10 U.S.C. 1455 provide for a pro rata charge. Language relating to charges for coverage under SBP generally is also in terms of a monthly charge. Based on the terms of the statute, we see no reason to apply a different rule with respect to charging for SBP coverage which begins in the middle of a month, and hold that such charges should be on a monthly basis unless otherwise specified in a controlling regulation.

As to whether full charge or no charge should be made for that part of a month, it is observed that subsection (a) of 10 U.S.C. 1448 provides, in part, that SBP coverage commences when members become eligible to receive retired or retainer pay. However, subsection (d) of the same section provides that if a member dies while serving on active duty, SBP benefits will be paid to his qualified surviving spouse if he was eligible to receive retired or retainer pay at that time. Compare 55 Comp. Gen. 854 (1976). Further, it is to be noted such coverage is cost free. See 54 Comp. Gen. 709 (1975). Thus, charging the full monthly charge for the first month would result in payment for a period already covered by SBP without charge.

It is also noted that not charging for the part of a month when coverage begins would be balanced to some extent by the full monthly charge which is assessed when an eligible spouse beneficiary becomes ineligible through divorce or death.

Finally, rule 2, Table 9–4–2 of the Department of Defense, Military Retired Pay Manual, DOD Manual 1340.12–M, September 5, 1979, indicates that when a member retires and has a spouse and children or children only the effective date of the charge against retired pay will be the first day of the month following the date of retirement. Although this Manual was not published at the time Sergeant Johnson retired and although it is not clear whether this provision of the Manual is intended to be an implementing regulation, that provision does show the interpretation placed on existing law by the Department of Defense.

Accordingly, we hold that, in the absence of a regulation issued under 10 U.S.C. 1455 authorizing pro rata charge when a member's last day of duty prior to retirement is on a day other than the last day of a month, no SBP deduction should be made from the retired or retainer pay the member receives for the partial month. The answer would, of course, be the same if Sergeant Johnson had died during the month in which he retired.

The third question is whether the Marine Corps must refund to members who have been charged on a pro rata basis for the first partial month of retirement. Although the proper basis for charging for SBP for part of a month has not been entirely clear and although no controlling regulation has been issued, we have held that charges should be on a whole month basis in the absence of a regulation to the contrary. Therefore, any claim for refund of a pro rata charge for the initial part month coverage should be allowed.

[B-197016]

Bids—Discarding All Bids—Reinstatement—Cancellation of Invitation Unjustified

When agency determines that it has "misinterpreted" order canceling all solicitations pending market analysis and survey of needs, solicitation should be reinstated.

Bids—Discarding All Bids—Acceptance After Rejection

Rule that offer, once rejected, cannot subsequently be accepted does not apply when low bidder resubmits bid and extends acceptance period at Government's request.

Bids—Invitation For Bids—Cancellation—Erroneous—Revival of Expired Bids—Original Bids Returned to Bidders

Bids which have expired because solicitation was canceled generally may be revived upon reinstatement. However, when original bids have been returned to bidders, propriety of revival depends on whether, under facts of particular case, integrity of competitive system has been compromised.

Matter of: Baker Manufacturing Company, Inc.; Joerns Furniture Company; Carsons of High Point, North Carolina, July 1, 1980:

Three furniture manufacturers, Baker Manufacturing Company, Joerns Furniture Co., and Carsons of High Point, North Carolina, protest the award of indefinite quantity, Federal Supply Schedule contracts for household furniture by the General Services Administration (GSA). Since each firm alleges that the same action by GSA—reviving and accepting bids after returning them to bidders during a moratorium on furniture purchases—compromised the integrity of the competitive bidding system, we are issuing a single decision on the matter.

We find that the record supports GSA's determination that, in this particular case, the abstract of bids, together with the resubmitted original bids, provided an adequate basis for award. We therefore are denying the protests; a detailed analysis follows.

The solicitation in question, No. FCFH-P2-5198-A, was issued August 22, 1979, with an amended closing date of September 28, 1979. The items sought (beds, dressers, mirrors, desks, bookcases, tables and chairs, sofas, and wardrobes) were divided into five groups, with awards to be made in the aggregate by group for each of three geographic areas.

On October 9, 1979—after opening but before award—the Administrator of General Services ordered that all current solicitations for all classes of furniture be canceled, stating that proper inventory management required that GSA analyze the market to determine both agency needs and the alternatives available to meet those needs. He directed the Federal Supply Service to go back to all customer agencies and

require them to revalidate their needs "in the context of what is available nationwide through the Government's excess channels."

Responding to this order, on October 25, 1979, GSA informed all offerors that no awards would be made under the solicitation in question pending a market analysis and a review of current and future needs. GSA's letter stated:

> * * * We cannot predict the effect of these actions on the Government's requirements. However, you will be afforded an opportunity to resubmit your offer should the procurement be deemed essential to the Government. Accordingly, your offer is rejected pursuant to Federal Procurement Regulations (FPR) § 1-2.404-1(a) and is being returned.

Subsequent to this, GSA determined that it had "misinterpreted" the order of October 9, 1979. In a series of internal memorandums, it reinterpreted the order as not preventing processing of advertised schedule solicitations such as this one. GSA's rationale was that since procuring agencies placed orders directly with schedule contractors and paid directly for items ordered, agency heads would, in effect, be revalidating their underlying needs before doing so.

GSA therefore reinstated the canceled solicitation and, on November 30, 1979, asked nine bidders who were in line for awards to resubmit the originals and duplicates of their bids. Eight firms, including Baker and Joerns, returned their bids and agreed to extend acceptance periods. At the same time, Baker, which had bid on two groups of furniture, sought to reduce its prices for several items in the group on which it was not the apparent low bidder. Joerns, the incumbent contractor for one group, offered to reduce bid prices by 6 percent across the board.

Both firms appear to have protested to our Office when it became clear that GSA would not accept any modifications of original bid prices under the reinstated solicitation. (Baker also sought to increase its prices on a different reinstated solicitation, not at issue here.)

In February 1980, Baker sought but was denied a temporary restraining order by the U.S. District Court for the District of Columbia in Civil Action No. 80-0403. This would have prevented GSA from authorizing work or expending funds under the protested contracts, which had been awarded on February 11, 1980. Before the time set for a hearing on its motion for a preliminary injunction, however, Baker withdrew and requested our opinion.

The main thrust of Baker's protest is that GSA has compromised the integrity of the competitive system. Joerns and Carsons (not an apparent low bidder but one which argues that it may have been eligible for award due to "qualification problems" with other bidders) have stated essentially the same grounds for protest. Since Baker's submission is most detailed, we will respond to it; our decision also applies to the protests of Joerns and Carsons.

Baker argues that because GSA's original cancellation was *proper*, the solicitation could not have been reinstated. Such action, Baker maintains, is possible only when (1) the original cancellation was *improper*, and (2) the contracting officer abused his or her discretion [italic in original]. In addition, Baker argues, GSA is required to show that reinstatement of the canceled solicitation would promote the integrity of the competitive system and would not prejudice other bidders. None of the above criteria is met. Baker concludes, and the possibility of tampering is so great that GSA should be directed to terminate the contracts and either readvertise or negotiate with all original bidders.

Baker further argues that GSA's return of the bids effectively nullified them, and that the request for resubmission was a negotiation, in which all qualified bidders were entitled to participate. Restricting submissions to those "thought to be low on the basis of second-hand evidence," Baker maintains, was illegal and unfair.

In this regard, Baker alleges that bids were not read aloud at opening, that the originals were not available for inspection at that time, and that copies were left in the bid room with "access to all." Baker also alleges that prices were recorded "some days" after opening, under conditions which made it impossible to establish their accuracy, and that for 30 days thereafter, the original bids were in the possession of bidders, each of whom was in a position "to make any self-serving adjustments he chose and to see that such adjustments appeared on both copies."

For these reasons, Baker concludes, GSA's abstract of bids was not an adequate basis for award. Moreover, according to Baker, the abstract did not reflect volume discounts which several bidders offered, may have contained errors in prices, and did not indicate whether the original bid was signed or whether an amendment was acknowledged, both elements of responsiveness.

GSA, on the other hand, argues that revival of the bids was proper, and that conditions for resubmission were carefully controlled. In addition, GSA states, the abstract of bids was prepared according to regulations, contained all information necessary to determine the low, eligible bidders, and remained in the custody and control of the agency from the time original bids were returned to bidders until they were resubmitted. Thus, GSA concludes, the abstract provided an adequate basis for evaluation and award under the original solicitation.

The initial question for our Office is whether the canceled solicitation can be reinstated. In *Spickard Enterprises, Inc.*, 54 Comp. Gen. 145 (1974), 74–2 CPD 121, we reviewed an "erroneous, albeit honest" decision to cancel which had been made because none of the bidders eligible for award had submitted bids within the funding limitations for the project. At the time of the cancellation, the contracting officer

was not aware that the head of the agency could obtain additional funds by requesting their transfer from other projects. We recommended reinstatement when the agency, after readvertising, determined that enough money could be transferred under exisitng authority to permit award to the original low, eligible bidder.

We stated in *Spickard* that rejection of all bids after they had been opened tended to discourage competition, and that cancellation was inappropriate when an otherwise proper award under the original solicitation would serve the actual needs of the Government. It was our view that no "cogent and compelling reason" existed after the additional funds became available "to allow the cancellation to stand." See also *Berlitz School of Languages*, B–184296, November 28, 1975, 75–2 CPD 350.

We believe that the instant case is analogous, since the cancellation was based on a "misinterpretation" of the GSA Administrator's order, *i.e.*, it was an "erroneous, albeit honest" decision at the time the cancellation was made. Thus, we believe reinstatement was appropriate.

Baker also argues that an offer, once rejected, cannot subsequently be accepted, citing *Minneapolis & St. Louis Railway Company* v. *Columbus Rolling Mill*, 119 U.S. 149 (1886). We believe *Minneapolis* is inapposite. In that case, the party rejecting the bid thereafter sought to accept the rejected offer without the consent of the offeror. Here the low bidders have consented to the revival of the original bids, and in our view they may be accepted. *See* 19 Comp. Gen. 356 (1939). Thus, as a general rule, bids which have expired because a solicitation was canceled may properly be revived and accepted upon the solicitation's reinstatement. *Suburban Industrial Maintenance Company*, B–188179, June 28, 1977, 77–1 CPD 459, *modified on other grounds*, November 29, 1977, 77–2 CPD 418.

Whether bids which have been returned to the original bidders can be revived, however, is a different question, and one of first impression with our Office. There are no applicable statutes or regulations, and we are not aware of any case law on this subject. Its resolution, we believe, depends upon whether, as Baker asserts, the integrity of the competitive bidding system has been compromised.

For the most part, Baker's allegations provide no basis to challenge award to the low bidders under the original solicitation. The Federal Procurement Regulations (FPR) § 1–2.402(a) (1964 ed.) provides that all bids shall be:

> * * * publicly opened and, when practicable, read aloud to the persons present, and be recorded. If it is impracticable to read the entire bid, as where many items are involved, the total amount bid shall be read, if feasible. * * *

In a procurement such as this one, with five groups under which different items were to be delivered to different areas, reading all bids aloud may very well have been impracticable.

FPR § 1–2.402(c) further provides that if duplicate copies are not available for public inspection, original bids may be examined, but only under the immediate supervision of a Government official. Thus, the unavailability of originals for inspection, and the leaving of duplicates in the bid room for this purpose, appear to have been in accord with, rather than contrary to, regulation.

We have no reason to believe that the abstract did not accurately reflect prices bid. The GSA procurement agent who prepared it has submitted an affidavit stating that the abstract of bids was retained by GSA and not released to the public at any time, and concludes:

> When bids were returned, I compared the original copies to the original abstract. With respect to any group for which any returned bid was apparent-low, no changes whatsoever had been made or proposed.

The abstract does show volume discounts; however, the solicitation specifically states that these were not to be evaluated for purposes of award. Baker has not pointed out any errors in recording of prices or any discrepancies between an abstract prepared by a commercial recording company at bid opening, which Baker offered in evidence to the court and our Office, and the official one, prepared by GSA after opening.

With regard to the question of responsiveness, it is true, as Baker alleges, that the abstract of bids does not reflect such essential information as whether a bid was signed. This is a question of fact, and after the original bids were returned to bidders, the only means of proving it would have been for Baker to continue its court suit and to question bidders under oath. Since the complaint was withdrawn, however, we are forced to decide the issue without benefit of such testimony. We therefore view the bid abstract as the best evidence available at this time upon which to base a judgment as to the responsiveness of the low bidders.

We note that the abstract of bids includes exceptions and conditions imposed by bidders. Joerns, for example, submitted bid prices for three zones in Group I, but stated that it would not accept award of Zone 2 or 3 alone. Carsons, bidding on Group III, stated that if it was not low in the aggregate for Zone I, its prices for certain items in that zone should be reduced by $2 each, and if it was not low in the aggregate following this first reduction, the same items should be reduced by an additional $2. Baker offered similar reductions for aggregate Group IV which were clearly noted on the abstract.

In our opinion, it is unlikely that the contracting officer, preparing the abstract noting how bidders had qualified their bids, would have overlooked material omissions such as an unsigned bid. We also emphasize that under the provisions of FPR § 1–2.402(c), *supra*, copies of the bids were available for public inspection after bid opening, and no contemporaneous allegations of the nonresponsiveness of any

of the bids were made either to this Office or the agency. Thus, while the possibility exists that one or more of the low bidders may have omitted material requirements from their bids, we consider the probability of that having occurred under the circumstances as being very remote. Compare *L.V. Anderson and Sons, Inc.*, B-189835, September 30, 1977, 77-2 CPD 249, in which we held that a hand-delivered bid, received late due to Government mishandling, could not be accepted after having been opened, then returned to the protester, because *no* record of the contents of the bid had been made prior to its return.

Finally, failure to acknowledge the single amendment to the solicitation, which Baker also argues was not shown by the abstract, could be waived, since it (1) extended the opening date, (2) set aside a second group of furniture for award to small businesses, and (3) corrected one obvious typographical error; awareness of these changes would have been apparent from the bids themselves. See *Arrowhead Linen Service*, B-194496, January 17, 1980, 80-1 CPD 54; *Che II Commercial Company*, B-195017, October 15, 1979, 79-2 CPD 254.

We therefore conclude that under the specific facts of this case, no adequate basis exists to disturb the awards.

The protests are denied

[B-197037]

Compensation — Overtime — Fractional Hours — Rounding Off Authority — Irregular, Unscheduled Overtime

General Accounting Office has no legal objection to proposal of Director, Office of Personnel Management, to provide for regulation, under its authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of "rounding up" and "rounding down" to nearest quarter hour (or fractions less than a quarter of hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code.

Matter of: "Rounding up" and "rounding down" odd minutes of of irregular unscheduled overtime, July 1, 1980:

The Director of the Office of Personnel Management, by letter dated November 29, 1979, has requested an opinion of this Office in regard to the following proposed action on the part of the Office of Personnel Management (OPM):

> * * * we are considering providing by regulation, under our authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of "rounding up" and "rounding down" to the nearest quarter hour (or fractions less than a quarter of an hour, i.e., 10 minutes, 6 minutes, etc.) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code. * * *

More specifically, the Director's request is framed against the following interpretive reasoning and background information:

> In administering the overtime provisions of the Fair Labor Standards Act (FLSA), we have encountered a problem regarding the crediting of fractional hours of overtime work. Many agencies have asked us to explore the possibility,

under our regulatory authority under sections 5504, 5548, and 6101 of title 5, United States Code, to provide for "rounding up" or "rounding down" fractional hours of irregular, unscheduled overtime work to the full fraction being used to account for the overtime work. While this practice is permissible under the FLSA, it may be interpreted to be inconsistent with the long-standing principle under title 5, United States Code, that overtime work must actually be performed to be compensable. See 55 Comp. Gen. 629; 46 Comp. Gen. 217; 45 Comp. Gen. 710; 42 Comp. Gen. 195.

As indicated in the Director's letter, decisions of this Office addressing compensable hours of work for purposes of an overtime entitlement under 5 U.S.C. § 5542 have generally required the performance of actual work. The general rule applicable to both classified and wage board employees is that since the authority for payment of overtime compensation contemplates the actual performance of duty, an employee may not be compensated for overtime work when he does not actually perform work during the overtime period. 42 Comp. Gen. 195 (1962); 45 *id.* 710 (1966); 46 *id.* 217 (1966); and 55 *id.* 629 (1976).

While we believe the continued general validity and applicability of this rule is necessary for the determination of the overtime entitlement under 5 U.S.C. § 5542, we do not believe that this rule requires the rejection of the "rounding up" odd minutes of irregular unscheduled overtime concept proposed here by OPM. We have recognized that there are instances and authorities which permit the payment of overtime compensation where no actual work was performed. An example of this is where an employee has been denied overtime work in violation of a mandatory provision in a negotiated labor-management agreement. In this type of case we have held that the employee may receive backpay for the overtime work not performed. 54 Comp. Gen. 1071 (1975); 55 *id.* 405 (1975); and 55 *id.* 629 (1976). Thus, we believe that the "rounding up" odd minutes of irregular unscheduled overtime proposal under consideration here—while it may involve small payments for overtime which has not been performed—is not legally inconsistent or otherwise invalid on that basis alone.

We turn now to practical considerations touching the desirability of the OPM proposal. The Director's letter states the following:

In the private sector, the practice of "rounding up" or "rounding down" odd minutes of irregular, unscheduled overtime work is a common one. This practice has been permitted under the FLSA by the Department of Labor (DOL). As stated in a DOL Interpreative Bulletin at 29 C.F.R. 785.48(b):

"It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employee's starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."

The Congress mandated that the FLSA be administered in the Federal sector "in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sections of the economy." (See H. Rept. 93-973, March 15, 1974, p. 28.) Given this mandate, we believe it would be reasonable to allow agencies the use of this accounting method under

the FLSA. This would simplify administration and would also help to insure that employees are protected from abuse of the *de minimis* concept. (Under this concept, agencies may disregard insignificant amounts of irregular, unscheduled overtime as *de minimis*, if the total time disregarded in a workweek does not exceed the fraction being used for crediting overtime work. The *de minimis* concept does not apply to regularly scheduled overtime work. See attachment 2 to FPM Letter 551–6.) Under the "rounding" system, the odd minutes of irregular, unscheduled overtime work disregarded by "rounding down" under the *de minimis* concept would, over a period of time, presumably be balanced by the odd minutes gained from "rounding up" whenever more than half of the fractional unit is worked. Therefore, we believe it to be in the best interest of agencies and employees to allow the agencies to use this method of crediting irregular, unscheduled overtime work when appropriate. (Of course, agencies would still have the option of using the other methods provided in FPM Letter 551–6.)

However, there would be no point in allowing the use of this method under the FLSA, if it is not also permissible for overtime computations under title 5, United States Code. Obviously, a situation in which overtime would be credited differently under each law would create an administrative burden which would be far in excess of any value derived from the method.

We have in the past experienced varying degrees of difficulty in formulating and applying the *de minimis* rule to diverse factual circumstances. Generally our recent decisions reflect the position of this Office that preshift and postshift activities that might be regarded as work, but which do not involve a substantial measure of time and effort, are *de minimis*, and may not serve as a basis for the payment of regular overtime compensation. *William C. Hughes, Jr.*, B–192831, April 17, 1979. Thus in *Arthur L. Butler*, B–190803, February 9, 1978, we denied overtime compensation for preshift and postshift duties of 2 minutes daily. In that case we noted that the rule expressed by the Court of Claims in *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972) was that the net daily overtime must be 10 minutes or more in order to qualify as compensable working time, and such a requirement has been uniformly applied in decisions of this Office. See also 53 Comp. Gen. 489 (1974).

The *de minimis* concept was adopted by the Court of Claims and this Office as a means of simplifying the administrative burden of computing small amounts of irregular overtime. At that time there were no administrative regulations on the subject. The Office of Personnel Management has the authority to prescribe regulations necessary for the administration of the overtime statutes. 5 U.S.C. §§ 5504, 5548, 6101 (1976). We believe that its authority includes the authority to regulate the computation of small amounts of irregular unscheduled overtime, even if that means departing from the *de minimis* concept heretofore adopted by the Court of Claims and this Office.

In view of the above, we have no objection to the Office of Personnel Management's proposal to provide by regulation, that an agency may institute the practice of "rounding up" and "rounding down" to the nearest quarter hour (or fractions less than a quarter of an hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code.

[B-198171]

Military Personnel — Dependents — Education — Procedure to Obtain

Employee of Department of Army stationed in Korea who entered into a private arrangement with a private school for education of his daughter may not be reimbursed for the costs he incurred prior to Department of Defense's (DOD) contractual arrangement with the school. Authority for DOD providing for the schooling of dependents of employees stationed overseas, provisions in annual DOD appropriation acts, expressly provides that appropriations therefor are for expenditure in accordance with 10 U.S.C. 7204. That provision contemplates that needed arrangements for schooling are to be made by the Department concerned and that a parent has no authority to obligate the Government by a private agreement.

Matter of: Otis F. Savage—Claim for Education Expenses, July 2, 1980:

This action is in response to an appeal by Mr. Otis F. Savage, an employee of the Department of the Army, of the disallowance by the Claims Division of his claim for reimbursement for the expenses he incurred for the education of his daughter during the period February 14, 1977, to November 29, 1977. These expenses were incurred while his daughter resided with him at his overseas post of duty in the Republic of Korea (Korea). Upon review, we sustain the disallowance of his claim.

The record shows that on February 10, 1977, Mr. Savage's wife and daughter arrived at his overseas duty station in Korea pursuant to travel orders issued on January 10, 1977.

On February 14, 1977, Mr. Savage enrolled his daughter in the second grade at the Korea Christian Academy (Academy) which was apparently the only English speaking school in the area where he was stationed. He incurred total expenses in the amount of $1,312.50 for the fees and tuitions for his daughter's education at the Academy for the period February 14, 1977, to June 15, 1977, and from August 29, 1977, through November 29, 1977.

On September 29, 1977, Mr. Savage wrote to the Supervising Principal, Korea, Department of Defense (DOD) Schools, to request financial assistance in providing his daughter's education. He advised the supervising principal that the nearest American dependent school was approximately 100 miles from his post of duty and that the only English speaking school available was the Academy. On October 26, 1977, the Executive Assistant, DOD Dependent Schools-Pacific, District I Office, advised the Supervising Principal, Korea, that Mr. Savage's request was approved. Accordingly, the Department of Defense contracted with the Academy to pay his dependent daughter's tuition in return for the educational services to be provided. The contract covered the period from November 30, 1977, through the end of the school year, approximately June 15, 1978.

Mr. Savage claims reimbursement in the amount of $1,312.50 for

the registration fee and tuition charges he paid for his daughter's schooling at the Academy for the period prior to the effective date of the DOD's contractual agreement with the Academy.

By Certificate of Settlement dated November 6, 1979, the Claims Division disallowed the claim on the basis that there is no authority for a parent to obligate the Government to pay tuition through a personal agreement or arrangement with a private school.

We note that 5 U.S.C. 5924 provides, in pertinent part, that cost-of-living allowances may be granted to an employee in a foreign area including an education allowance not to exceed the cost of obtaining such kindergarten, elementary and secondary educational services as are ordinarily provided without charge by public schools in the United States. However, Department of Defense Instruction No. 1418.1 para. III F provides that such education allowance which is governed by Section 270 of the Department of State Standardized Regulations (Government Civilians, Foreign Areas) will not be paid within the Department of Defense. See also para. III F of Appendix B to Chapter 592 of the Department of the Army's Civilian Personnel Regulations. Accordingly, as an employee of DOD, Mr. Savage would not be entitled to the payment of an education allowance under 5 U.S.C. 5924.

The authority for providing the schooling for dependents of military and civilian personnel of the Department of Defense is contained in the annual appropriation acts for the Department of Defense. Section 707 of the Department of Defense Appropriation Act, 1977, Public Law 94–419, 90 Stat. 1279, 1291 (1976), provided in pertinent part as follows:

> Appropriations for the Department of Defense for the current fiscal year shall be available * * * for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, as authorized for the Navy by section 7204 of title 10, United States Code, in an amount not exceeding $248,000,000. when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents.

For the 1978 fiscal year, a similar provision for the schooling of dependents of DOD personnel was set forth at section 807 of the DOD Appropriation Act, 1978, Public Law 95–111, 91 Stat. 886, 899–900 (1977).

Section 13 of the act of August 2, 1946, Public Law 604, 60 Stat. 854 which, as amended, is now set forth at 10 U.S.C. 7204 and provides in pertinent part that the Secretary of the Navy may contribute, out of funds specifically appropriated for the purpose, to the support of schools in any locality where a naval activity is located if he finds the schools available in the locality are inadequate for the welfare of dependents of civilian officers and employees of the Navy.

Department of Defense Instruction (DODI) No. 1342.4, November 14, 1957, provides in pertinent part that tuition may be paid for the education of dependents of Department of Defense personnel at schools which charge tuition or fees in foreign areas when daily commuting distance to a Service-operated school is unreasonable or traffic hazards or other conditions would involve undue hardships for the children concerned if they were required to attend a Service-operated school.

As set forth above, the appropriations available for the education of dependents of DOD personnel stationed in foreign countries are for expenditure under the procedures required by 10 U.S.C. 7204. Our Office has held that section 13 of the Act of August 2, 1946, which, as amended, is now set forth at 10 U.S.C. 7204, contemplates that the arrangements for any additional school facilities needed for dependents of Navy personnel stationed overseas are to be made by the Department after an appropriate administrative determination has been made of the need thereof. 33 Comp. Gen. 399 (1954). Under appropriation act language similar arrangements are to be made for personnel of the other Military Departments. That decision holds that a parent has no authority by private agreement with a school to obligate the Government to pay his child's tuition notwithstanding subsequent administrative approval of the private transaction.

In this regard Army Regulation (AR) 37-107, section 9-27b, provides, in part, as follows:

> No payments will be made to service members in localities without adequate schools who * * * personally incur tuition charges for their dependents in private schools.

Thus, there is no authority for the Government to reimburse Mr. Savage for the cost of the schooling his daughter received as the result of his personal arrangement with the Academy in view of the law's requirement that such arrangements be made by the appropriate agency officials.

Accordingly, the disallowance of his claim by our Claims Division is sustained.

[B-194401]

Compensation — Wage Board Employees — Prevailing Rate Employees — Overtime — Rate — Double Basic Hourly Rate

In 1967, Corps of Engineers, North Pacific Division, and Columbia Power Trades Council, representing wage board employees at hydro-electric power plants negotiated a double overtime provision in their agreement. Double overtime was stopped by agency following our decision in 57 Comp. Gen. 259, February 3, 1978. In light of section 704 of Civil Service Reform Act which overruled our decision, and although wages are not negotiated, provision for double overtime is preserved by section 9(b) of Public Law 92-392. This decision is modified (extended) by 60 Comp. Gen.——(B-180010.07, Nov. 7, 1980).

Matter of: Corps of Engineers, North Pacific Division—Overtime for Power Plant Employees, July 3, 1980:

Is double overtime pay authorized for wage board employees of the U.S. Army Corps of Engineers who are covered by the special Pacific Northwest Regional Power Rate Schedule? This question is presented by Mr. R. Loschialpo, Chief, Office of Personnel, Office of the Chief of Engineers, Department of the Army.

For the reasons stated below, we conclude that double overtime is authorized for the wage board employees of the Army Corps of Engineers who are covered by the special Pacific Northwest Regional Power Rate Schedule.

The letter requesting a decision from the Corps of Engineers provides us with the following background information. On January 30, 1956, the Army-Air Force Wage Board (now the Department of Defense Wage Fixing Authority) authorized all wage board employees at hydro-electric power plants operated by the Corps of Engineers, North Pacific Division, to be paid in accordance with the provisions of the special Pacific Northwest Regional Power Rate Schedule. The schedule was based on the wage rates and pay practices of the electric power industry in the area. Among other things, the schedule provided for an overtime rate of double time (twice the base hourly rate) for hours worked in excess of 40 hours per week and on holidays. When the first contract with the Columbia Power Trades Council, the union representing the employees, was approved on February 10, 1967, it included a provision stating that overtime would be paid at twice the applicable rate of compensation.

On August 19, 1972, Public Law 92-392, 86 Stat. 564, amended subchapter IV of chapter 53 of title 5, United States Code, to establish a statutory system for fixing and adjusting the rates of pay for prevailing rate employees. Section 9(b) of that law, 5 U.S.C. § 5343 note, provides in substance that the amendments shall not be construed to affect the provisions of contracts in effect on the date of enactment pertaining to wages and other employment benefits for prevailing rate employees and resulting from negotiations between agencies and employee organizations. Section 9(b) also preserves the right to negotiate for the renewal, extension or modification of such contract provisions.

On February 3, 1978, in *Department of the Interior*, 57 Comp. Gen. 259, we held that payment of overtime to employees covered by section 9(b) in excess of one and a half times their basic rates was precluded by 5 U.S.C. § 5544, notwithstanding the fact that their negotiated contracts contained provisions for double overtime. In view of this decision, the DOD Wage Fixing Authority on April 13, 1978, directed that the payment of double overtime previously authorized for Corps of Engineers employees be terminated.

However, because this decision overturned practices of long stand-

ing and to cushion its impact, we issued another decision on June 23, 1978, 57 Comp. Gen. 575, which stayed the implementation of the holding in 57 Comp. Gen. 259 until the end of the second session of the 96th Congress to give interested parties an opportunity to obtain statutory authority to negotiate double overtime.

On October 13, 1978, statutory authority to negotiate double overtime for section 9(b) employees was enacted in section 704(b) of the Civil Service Reform Act of 1978, Public Law 95–454, 92 Stat. 1218, which provided that overtime could continue to be negotiated for such employees without regard to 5 U.S.C. § 5544.

In enacting section 704, the Congress made it clear that it was overruling our *Department of the Interior* decision and that it was providing "specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy." Conference Report (to accompany S. 2640), House Report No. 95–1717, October 5, 1978, p. 159.

In light of the enactment of section 704, we reconsidered our February 3, 1978 decision regarding overtime pay in *Department of the Interior*, B–189782, January 5, 1979, 58 Comp. Gen. 198. Since section 704(b)(B) specifically provides that the pay and pay practices of employees covered by section 9(b) of Public Law No. 92–392 shall be negotiated without regard to subchapter V of chapter 55, title 5, United States Code (which contains section 5544 pertaining to overtime pay for prevailing rate employees), we overruled our decision of February 3, 1978, insofar as it had invalidated overtime contract provisions of Interior's prevailing rate employees.

The DOD Wage Fixing Authority, however, has not rescinded its order prohibiting double overtime and, as a consequence, these Corps of Engineers employees are the only employees working in the Pacific Northwest Region at hydro-electric power plants who are not being paid double overtime.

The Corps of Engineers believes that section 704 of the Civil Service Reform Act was intended to include employees covered by the Pacific Northwest Power Rate Schedule in order to keep uniformity in the region and to continue a practice of 22 years which accords with practices of the electric power industry. Accordingly, the Corps of Engineers urges us to rule that double overtime is authorized for these employees.

Section 9(b) provided essentially for the preservation of the wage and benefit provisions contained in negotiated employment contracts covering Government prevailing rate employees. Prevailing rate employees of both the Department of the Interior and the Corps of Engineers were then covered by contracts calling for the payment of double

overtime. The Department of the Interior's double overtime provisions were negotiated; the Corps of Engineers' contracts provided for double overtime on the basis of administrative wage determinations using prevailing practice as a guide.

In our earlier decisions we concluded that despite the double overtime contract provisions and the provisions of section 9(b), Department of the Interior employees and Corps employees by extension were not entitled to be paid double overtime. Those decisions were premised upon the lack of authority to have negotiated double overtime contract provisions in the first instance. The Congress, in enacting section 704 of the Civil Service Reform Act of 1978, overrode that interpretation.

In light of the Congressional action making clear that prevailing rate employee wage and benefit contract provisions were to be preserved without regard to any question as to the authority underlying those provisions, it is our view that there is no proper basis for distinguishing Corps of Engineers' prevailing rate employees from those of the Department of the Interior so far as the issue of double overtime is concerned.

Therefore, we conclude that the wage board employees of the Corps of Engineers who are covered by the special Pacific Northwest Regional Power Rate Schedule are entitled to be paid double overtime.

A further question arises as to whether retroactive payments may be made to the Corps of Engineers employees affected by this decision since they have been paid time and a half for overtime since the implementation of the Department of Defense Wage Fixing Authority directive. In decision 57 Comp. Gen. 259 (1978), modified by 57 *id.* 575 (1978), we held that implementation by the Department of the Interior of our decision prohibiting double overtime should be delayed until Congress had time to act on the matter. There is no reason why the stay of implementation should apply to Department of the Interior employees and not to Department of Defense employees. As noted above, Congress by enacting section 704 has permitted the continued payment of double overtime under section 9(b). Therefore, we conclude that corrective payments shall be made to Corps of Engineers employees whose overtime pay was reduced pursuant to the DOD Wage Fixing Authority's directive of April 13, 1978.

[B-196569]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset

Service members, upon whose death Survivor Benefit Plan (SBP) annuities became payable to surviving spouses, in some cases are fully insured for Social Security coverage based on lifetime employment, but do not achieve that status based solely on military service. For the purpose of the reduction in the SBP

annuity required by 10 U.S.C. 1451(a), it is unnecessary that the member acquired a fully insured Social Security status based solely on military service. The setoff is to be based on that portion of the total Social Security payment attributable to the deceased member's military service. See 58 Comp. Gen. 795 (1979).

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset—Free Wage Credit Inclusion

Service members upon whose death SBP annuities became payable to surviving spouses, receive free wage credits under 42 U.S.C. 429 for military service after 1956 for the purpose of computing total Social Security payments. Therefore, for the purpose of computing the setoff required by 10 U.S.C. 1451(a), since generally those credits tend to increase Social Security payments, they must be included in the computation.

Matter of: Survivor Benefit Plan—Social Security Offset, July 8, 1980:

This action is in response to a request for advance decision from the Department of Defense Joint RSFPP/SBP Board (Item No. 79–1) on questions relating to the Social Security offset requirement of the Survivor Benefit Plan (SBP).

The first question is:

Is a Social Security offset required when the SBP annuitant is a widow(er) aged 62 if there is no entitlement to a Social Security benefit based *solely* on the retiree's military earnings, but such entitlement exists based on lifetime earnings?

The material accompanying the submission states that the meaning of the provisions of law governing the setoff from annuities because of Social Security payments (10 U.S.C. 1451(a)), seems reasonably clear. However, it is stated that when the legislative history of the provision is considered, the word "entitled" as used therein suggests a different connotation. It is theorized that the word "entitled" could imply that in order for the Social Security setoff to be operable, the person upon whose death the annuity became payable had to be fully insured for Social Security coverage purposes based solely on military service. In the absence of such full coverage, 10 U.S.C. 1451(a) could be construed to provide that a setoff would not be required.

For the reasons stated below, we disagree with that construction of the law, and therefore, the first question is answered yes.

Section 1451 of title 10, United States Code, provides in part:

(a) * * * When the widow or widower reaches age 62 * * * the monthly annuity shall be reduced by an amount equal to the amount * * * to which the widow or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon [military] service by the person concerned * * * and calculated assuming that the person concerned lived to age 65. * * *

Decision B–192117, September 24, 1979, 58 Comp. Gen. 795, involved a claim for an increase in an SBP annuity in a situation similar to that suggested by the question. After analyzing the legislative history of 10 U.S.C. 1451(a) we ruled that for the purpose of effecting the required setoff, it was not necessary that the deceased member acquire

a fully insured Social Security status based solely on his military service. Since the qualification for and the computation of Social Security payments are based on an individual's lifetime coverage, where a deceased member had nonmilitary Social Security coverage, for 10 U.S.C. 1451(a) purposes the setoff is to be based on that portion of the total Social Security payment receivable by the surviving spouse which would be attributable to the deceased member's military service. For the method of computing the amount of setoff, see 53 Comp. Gen. 733 (1974).

The second question is:

Should there be any changes made in the setoff procedures set forth in Department of Defense Directive 1332.27? If so, should they be prospective or retroactive?

The material with the submission points out that the Department of Defense Directive 1332.27 requires that the free wage credits authorized by 42 U.S.C. 429 be included in the computation of the setoff. It is stated that those credits are added to the setoff computation without regard to any civilian wages earned during the period and tend to artificially inflate the amount of the setoff. As a result, it is indicated that there would be a basis for holding that the free wage credits should not be included in the computation.

For the reasons stated below, the second question is answered no.

Under 42 U.S.C. 429 (Supp. I, 1977), individuals who earn Social Security credits as a result of military service after 1956 received additional quarterly monetary credits for Social Security payment computation purposes, without cost to them. Such additional wage credits would generally provide an additional benefit to an individual's actual Social Security payment entitlement, tending to increase that total payment. It is our view that for the purpose of computing the setoff under 10 U.S.C. 1451(a), the free wage credits generated by a deceased member's military service are an integral part of the Social Security benefit and are to be included in the computation.

[B-193261]

Contracts — Negotiation — Two-Step Procurement — First Step— Concept of Responsiveness Not Applicable — Proposals Within Competitive Range

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B-190051, Jan. 5, 1978, modified in part.

Matter of: Angstrom, Inc., July 9, 1980:

Angstrom, Inc. (Angstrom) protests the Department of the Army's (Army) decision that Angstrom's proposal under step one of a two-step procurement is nonresponsive because Angstrom failed to timely respond to an amendement effecting changes in the technical specifications.

We sustain Angstrom's protest.

On October 11, 1977, request for technical proposals (RFTP) No. DAAA22–78–B–0400, step one, was issued by the Army for a direct reading vacuum spectrometer to be used to analyze various materials used in the fabrication, processing and production of weapons to determine certain elements present and their concentrations. Several proposals were evaluated and the Army issued a step-two invitation for bids (IFB). Bids were received from Baird Corporation (Baird), Angstrom, Jarrell-Ash Division of Fisher Scientific Company (Jarrell-Ash), and one other party not involved in the present protest.

Baird filed a protest with our Office alleging that, with respect to Jarrell-Ash's technical proposal, the Army waived certain requirements of the RFTP. Baird also contended that Angstrom's technical proposal was nonresponsive since it proposed a spectrometer with 50 photomultiplier tubes and exit slits where, according to Baird's calculations, the expansion requirement in the RFTP would call for 59 phototubes.

We concluded that, because the Army intended to satisfy the Government's minimum needs by waiving certain requirements in the RFTP regarding an auxiliary readout device, step-one negotiations should be reopened. We also recommended that any uncertainties regarding the number of phototubes and slits to perform the basic analytical program as well as the number required to meet the Army's future expansion needs should be resolved by the Army during the reopened step-one negotiations. *Baird Corporation*, B–193261, June 19, 1979, 79–1 CPD 435.

Step one was reopened via amendment 0001 to the RFTP. The initial solicitation required in paragraph 3.2.2 that "the instrument shall have a capacity of not less than forty (40) exit slits and forty (40) photomultiplier tubes." Our decision had concluded that Angstrom's standard spectrometer complied with this requirement. Amendment 0001 deleted references to projected future expansion and required a "capacity of not less than fifty-five (55) exit slits and fifty-five (55) photomultiplier tubes."

Angstrom timely responded before the August 31, 1979, amended deadline with its notification of compliance. Baird acknowledged receipt of amendment 0001, but requested a clarification as to whether any of the 55 tubes not necessary to perform the basic analytical func-

tion needed to be supplied with the instrument. Jarrell-Ash achknowledged receipt of amendment 0001, but requested a clarification regarding the auxiliary readout device. The Army did not issue clarifications to these inquiries before the response date for the amendment. Rather, it issued amendment 0002 on August 31 which responded to the questions raised by Baird and Jarrell-Ash. Regarding the number of tube/slit pairs, amendment 0002 required that the 15 tube/slit pairs not required to perform the basic analytical function be provided with the system, as follows:

> The instrument shall have a capacity of not less than fifty-five (55) exit slits and fifty-five (55) photomultiplier tubes. At least forty (40) of the slits and phototubes shall be used to perform the basic analytical program specified in 3.2.1 and will be appropriately mounted and aligned as specified. Those slits and phototubes not required to perform the basic program will be provided with the system along with any required mounting fixtures, electrical connectors and wiring required for installation. * * *

The deadline for receipt of revised proposals in response to this amendment was September 14, 1979. Amendment 0002 stated that late proposals would be processed in accordance with the initial RFTP's late technical proposal clause.

Baird and Jarrell-Ash acknowledged amendment 0002 in a timely manner. Angstrom's compliance response dated September 7 was not mailed until September 10. The Army did not receive the response until September 17. Angstrom was notified by the Army that its late response would not be considered.

Technical evaluators determined that Angstrom's equipment met the technical requirements of the RFTP without considering the late response to amendment 0002. Amendment 0003 was issued and effected changes in the RFTP unrelated to the number of tube/slit pairs. All three offerors acknowledged amendment 0003 in a timely manner. Angstrom's response included a copy of its late response to amendment 0002. The three parties were invited to submit bids under step two and bid as follows: Angstrom $144,209, Baird $197,368 and Jarrell-Ash $205,275. Angstrom's price was lower than its bid in the prior step-two IFB.

Baird filed a protest with the Army claiming Angstrom's proposal was nonresponsive to paragraph 3.2.2 because its standard vacuum spectrometer had a maximum capacity of only 50 phototubes and exit slits.

Spurred by Baird's protest the contracting officer had the technical evaluators again review Angstrom's proposal for technical acceptability. The reevaluation concluded that Angstrom's original proposal included 40 tube/slit pairs and complied with amendment 0001 in proposing an instrument with a 55-tube/slit pair capacity. But because the late response to amendment 0002 could not be considered, it could not be determined whether Angstrom would comply with the requirement of that amendment. The contracting officer concluded that

amendment 0002 effected a significant change in the specifications requiring a timely statement of compliance by Angstrom for technical acceptability and, lacking such a statement "which was necessary for a determination of responsiveness," Angstrom's proposal should not have been considered for award under step two.

Although Angstrom contends that its late response to amendment 0002 should have been considered in determining whether Angstrom was eligible to proceed to step two of the procurement for various reasons, it is clear that the late proposal clause precluded any such consideration. A late response to an amendment, or to one of a series of amendments, will not be accepted as timely even though the negotiations have not been concluded. See *Techniarts*, B–189246, August 31, 1977, 77–2 CPD 167.

Angstrom contends that the statement of compliance with amendment 0002 sent with its response to amendment 0003 should have been considered in the step-one evaluations since the Army had the response before step-one negotiations ended on the closing date for amendment 0003 and before a determination of technical acceptability had been made.

Angstrom relies on the spirit and purpose of the two-step formal advertising procedures as stated in *Baird Corporation*, B–193261, *supra:*

> We have recognized that the two-step formal advertising procedure combines the benefits of competitive advertising with the flexibility of negotiation. *See* 50 Comp. Gen. 346 (1970). The first-step procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held and revised proposals may be submitted. * * *

The Army and Baird contend that Angstrom's late response to amendment 0002, included with the response to amendment 0003, cannot be considered under any circumstances; 52 Comp. Gen. 726 (1973) is cited for the proposition that late proposals under step one should be treated in strict accordance with the terms of the solicitation. It is further contended that, since amendment 0002 effected a substantial change in the RFTP requirements, Angstrom's failure to timely submit a statement of compliance rendered the entire proposal "nonresponsive" and, thus, Angstrom's proposal was erroneously included for step-two participation.

Our Office has held that the first step of two-step formal advertising, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures whereby, through discussion and changes, a technical proposal is found to be acceptable. 50 Comp. Gen. 346 (1970). In this light, the reliance of 52 Comp. Gen. 726 is misplaced. The primary focus of that decision involved the late receipt of *initial* technical proposals. The negotiation process cannot cure this type of defect since an agency has no viable proposal on which to negotiate. Once a pro-

posal has been timely submitted, the failure to timely acknowledge an amendment is another matter.

The real issue here is whether Angstrom's failure to acknowledge the amendment was a proper basis to exclude that firm from the competition and the ongoing negotiations during step one. As we indicated in *Techniarts*, *supra*, the late response to an amendment did not necessarily exclude an offeror from the competition. We held that, since the agency contemplated further negotiations with the other offerors, the agency should conduct further negotiations with the late responding offeror if, without considering the late response, the proposal was within the competitive range.

The Army and Baird rely on our decisions in *Wapora, Inc.*, B–190045, February 1, 1978, 78–1 CPD 94, and *La Barge, Inc.*, B–190051, January 5, 1978, 78–1 CPD 7, for the proposition that Angstrom's failure to timely respond to a substantive amendment to the RFTP, in accordance with the late proposal clause in the solicitation, is cause to reject the entire proposal.

In *Wapora*, the protester failed to respond to an amendment changing the terms and conditions of the contract. But unlike the present protest, this change was effected through a final amendment issued after the submission of best and final offers. No further negotiations were to be conducted after the closing date for this final amendment. In the present protest, further negotiations were in fact conducted via amendment 0003, thereby giving the offerors a chance to modify their proposals further.

In *La Barge*, a late response to an amendment adding a line item, a digital data converter, rendered the entire proposal late and unacceptable because no timely proposal had ever been submitted for the totality of the line items for which a single contract would be awarded. Because the amendment added a line item, the untimely response was regarded as an untimely submission of an initial proposal. While, as a general principle this holding is sound, the decision is modified to the extent it is inconsistent with what follows.

The qualifying nature of the two-step procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 53 Comp. Gen. 47 (1973); *Baird Corporation*, *supra*. Admittedly, the failure to acknowledge amendment 0002 resulted in a proposal deviating from the amended specifications, but the requirement of amendment 0002 that the 15 tube/slit pairs be furnished does not go to the very heart of the technical proposal. See *Paragon Mechanical Company; Arnold M. Diamond*, B–188816, November 23, 1977, 77–2 CPD 396. The requirement does not impose on Angstrom's equipment anything new in the way of design or technical requirements, nor does it basically change the proposal as submitted. Rather, it

merely clarified one part of a long list of detailed specifications for the item solicited, an initial proposal and amendment acknowledgment for which had been timely submitted by Angstrom. As Angstrom characterizes the net result of the amendment 0002 change, the Army "could receive a large bag of spare parts which may or may not be used at some point in the future."

Because the negotiations were reopened by the issuance of amendment 0003, to comport with the mandate for broadening competition during step one, Angstrom should have been allowed specifically to amend its initial proposal in order to cure the lack of amendment 0002 acknowledgment. We note that the Army notified Angstrom of its deficiency and that Angstrom did submit a statement that it would comply with the requirements of amendment 0002, but this was ignored by the Army. Instead, the Army determined that Angstrom's proposal was unacceptable under Defense Acquisition Regulation (DAR) section 2–503.1(e) (1976 ed.).

In our opinion, the Army failed to recognize the negotiation nature of step one and has relied on inappropriate concepts of responsiveness in this case, which are inconsistent with the regulations as reflected in the RFTP, as amended. DAR § 2–503.1(e) provides, in part:

> (e) Technical evaluation of the proposals shall be based upon the criteria contained in the request for technical proposals * * *. The proposals, as submitted, shall be categorized as:
> (i) acceptable;
> (ii) reasonably susceptible of being made acceptable by additional information *clarifying or supplementing, but not basically changing* the proposal as submitted; or
> (iii) in all other cases, unacceptable.
> Any proposal which modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals shall be considered nonresponsive and categorized as unacceptable. If the contracting officer determines that there are sufficient proposals in category (i) above to assure adequate price competition under step two *and* that further time, effort and delay to make additional proposals acceptable and thereby increase competition would not be in the the best interest of the Government, he *may* proceed directly with step two. Otherwise, the contracting officer shall request bidders under proposals in category (ii) above to submit additional information, setting forth to the extent practicable the nature of the deficiencies in the proposal as submitted or the nature of the additional information required. The contracting officer may also arrange discussions for this purpose. * * * [Italic supplied.]

The regulation clearly indicates that discussion making proposals acceptable is not precluded by the existence of other already acceptable proposals. Also, in order to proceed to step two without further negotiation, the contracting officer must determine that it would not be worthwhile to attempt to make a deficient proposal acceptable. In addition, the RFTP and regulations (DAR § 2–503.1(a)(vii)) provide that step two bids will be solicited on technical proposals determined to be acceptable, "either initially or as a result of discussion."

This Office has held that an agency should make reasonable efforts to bring step one proposals to acceptable status. *Mainline Carpet Specialists, Inc.*, B–192534, May 8, 1979, 79–1 CPD 315; *Costal Mobile*

and Modular Corporation, B–183664, July 15, 1975, 75–2 CPD 39. We recognize that an agency has great discretion in classifying a proposal as technically unacceptable, and this Office will not overturn such a decision unless clearly unreasonable. *METIS Corporation*, 54 Comp. Gen. 612 (1975), 75–1 CPD 44. However, we are constrained to find that the Army's classification of Angstrom's proposal as unacceptable because of nonresponsiveness, and thus not for step-two consideration, were clearly unreasonable.

Keeping in mind that step one is similar to negotiation, it is fundamental that the rigid rules of bid responsiveness do not apply. *TM Systems, Inc.*, 56 Comp. Gen. 300 (1977), 77–1 CPD 61. "Responsiveness" is ordinarily considered to be a subject for negotiation, *DPF Inc.*, B–180292, June 5, 1974, 74–1 CPD 303, rather than a conclusion precluding negotiation. In this vein, we see no difference between a timely nonresponsive initial proposal and a proposal nonresponsive due to failure to acknowledge an amendment. We view the regulation reference to responsiveness to clearly refer to technically unacceptable proposals. As mentioned above the real issue is whether a proposal should be included in the competitive range or competition. *Self-Powered Lighting, Ltd.*, 59 Comp. Gen. 298 (1980), 80–1 CPD 195.

In cases involving regular negotiated procurements and the similar first step of a two-step procurement, we have held that major proposal defects or failure to comply with a material requirement which could easily be cured through discussion or which do not call for extensive revision do not preclude further participation in the competition. See *Self-Powered Lighting, Ltd., supra; Guardian Electric Manufacturing Company*, 58 Comp. Gen. 119 (1978), 78–2 CPD 376. Recently, we questioned the wisdom of not conducting discussions with an offeror which submitted a competitive initial proposal but failed to acknowledge a material amendment. *Galaxy Aircraft Company, Inc.*, B–194356, May 28, 1980, 80–1 CPD 364.

The Army's sole basis for excluding Angstrom from step two was the protester's failure to state that the 15 tube/slit pairs for future expansion would be provided with the system. We hold that this defect had little impact on the overall technical acceptability of the proposal and could easily have been cured through negotiation. The Army, relying on the inapposite concept of responsiveness, has made no affirmative showing that attempts to cure the deficiency would not have been in the best interests of the Government. *See* DAR § 2–503.1. Rather, we hold that the Army's failure to conduct negotiations affirmatively in this case was not in the Government's best interest. The effort and delay to have made Angstrom's proposal acceptable would have been negligible at most. Indeed, the Army implicitly recognizes this. All it required in response to amendment 0002 was the simple phrase "Para. 3.2.2.—We comply." Additionally, the equipment was not urgently

needed since no award has yet been made in this several-year-old procurement, and qualifying Angstrom's proposal would have increased the number of competitors.

Since Angstrom on its own initiative accomplished what the agency should have by eventually acknowledging amendment 0002 and did submit a bid before its exclusion from step two, we recommend that the Army award the contract to Angstrom.

By letter of today, we are advising the Secretary of the Army of our recommendation.

The protest is sustained.

[B–194948]

Pay—After Expiration of Enlistment—Confinement, etc., Periods—Release—Prior to Setting Aside of Conviction—Rate Payable for Unused Leave Lump Payment

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharges, even though he was not returned to a duty status. 59 Comp. Gen. 12, modified (amplified).

Matter of: Mr. David G. Saulter, July 9, 1980:

This action is in response to a letter dated December 7, 1979, from the Assistant Secretary of Defense (Comptroller) seeking resolution of an additional question in connection with our decision B–194948, October 4, 1979 (59 Comp. Gen. 12), rendered in the case of Mr. David G. Saulter, a former member of the United States Marine Corps. The question involves the proper rate of basic pay to be used for the purpose of computing a lump-sum leave payment to Mr. Saulter and has been assigned Committee Action No. 548 by the Department of Defense Military Pay and Allowance Committee.

The facts in Mr. Saulter's case are as follows. The member was tried by General court-martial, and on August 22, 1975, was sentenced to forfeit all unpaid pay and allowances, be reduced in grade to E–1, be confined at hard labor for 2 years and receive a bad conduct discharge upon completion of the 2-year confinement period. While serving in confinement the member's enlistment expired. Additionally, he applied for and was granted parole from confinement on December 10, 1976, pending completion of appellate review of his case. The parole period was terminated on August 20, 1977, the date his period of confinement would have ended had he remained in prison. Since appellate

review of his case was not yet completed, he was immediately placed in an indefinite excess leave status. In September 1978, his conviction and sentence were set aside and all rights, privileges and property of which he had been deprived were restored to him. In December 1978, he was honorably discharged from the service without having been returned to a duty status.

The basic questions asked in the original submission involved the extent of the period for which pay and allowances would accrue. In the October 4, 1979 decision, we concluded that Mr. Saulter was entitled to pay and allowances until August 20, 1977, and leave accrued through the same date, not to exceed 60 days.

The Committee Action indicates that because of the wording of that conclusion, there is some uncertainty as to the rate of basic pay which should be used to compute the lump-sum leave payment due in the case. Apparently, our response is view as suggesting that the rate of basic pay to be used in computing that payment would be the rate in effect on August 20, 1977. The Committee Action expresses doubt as to the propriety of such a conclusion and takes the position that under the provisions of 37 U.S.C. 501(b)(1), since no payment would be due until the member's date of discharge, that payment should be computed on the rates in effect on that date. For the reasons stated below we concur in the view of the Committee. The decision of October 7, 1979, should not be read as requiring computation of the lump-sum leave payment or rates other than those in effect on the date of discharge.

Section 501 of title 37, United States Code, provides in part in subsection (b)(1):

> (b)(1) A member of the * * * Marine Corps * * * who has accrued leave to his credit at the time of his discharge, is entitled to be paid * * * for such leave on the basis of the basic pay to which he was entitled on the date of discharge.

Similar language was contained in section 4 of Armed Forces Leave Act of 1946, 60 Stat. 964, as amended by the act of August 4, 1947, 61 Stat. 748, the predecessor of 37 U.S.C. 501.

In 35 Comp. Gen. 666 (1956), we considered a case involving an enlisted Navy member on active duty who was convicted by special court-martial confined for 4 months and whose obligated active service period expired before he was confined. Upon release from confinement, he was immediately placed in an inactive duty status in the United States Naval Reserve. At that time he still had unused leave to his credit which was not forfeited under his court-martial sentence. After he was released to an inactive duty status, he had no rate of pay upon which payment for leave could be computed. After analyzing the then current provisions of law, we stated:

> * * * The term "discharge," as used in such provisions includes release from active duty, and unquestionably there is a rate of pay applicable to the grade

held by an enlisted reservist even though the reservist may be in a nonpay status. Thus, even though this reservist was not retained [on active duty] after the expiration of his ordered tour of active duty for the performance of duty * * * he is entitled to be compensated for his unused leave * * *.

In 44 Comp. Gen. 403 (1965), we considered a situation involving a member on active duty who was placed in a furlough status. That furlough status carried with it entitlement to half pay. His discharge was effected while he was in a furlough status without having been returned to active duty. On the question as to the rate to be used for his lump-sum leave payment, we ruled that the payment was to be based on the full pay in effect on the date of his discharge. See also 37 Comp. Gen. 228 (1957).

It is evident from these situations that payment for any unused leave still to the credit of a member on the date of separation or discharge is to be computed on the basis of the rate of pay applicable on that date. Compare *Bell* v. *United States*, 366 U.S. 393 (1961).

In summary of Mr. Saulter's case, we have previously said that an individual whose conviction by court-martial is set aside or overturned on appeal is entitled to pay, even after the expiration of his enlistment, until the day he is discharged. Those cases, however, involved individuals who were in confinement or serving actively until the day of discharge. Here Mr. Saulter had not only passed the date on which his enlistment expired, but he had also served his period of confinement (including parole) and had been placed on excess leave. The only reason he was not separated at the end of his parole time was because he could not be given the adjudged Bad Conduct Discharge until his appeal to the Military Court of Appeals had been decided. During this period (from the last day of parole to discharge) he was without military obligation and in an agreed-upon non-pay status. In the circumstances, as concluded in the prior decision, he was not entitled to pay and allowances to the date of discharge but only to the date he was released from parole.

However, under the decisions cited herein, his lump-sum leave payment became due at the time of his discharge based upon the rates of pay for his grade then in effect. The decision of October 7, 1979, 59 Comp. Gen. 12, is amplified accordingly.

[B–198134]

Disbursing Officers—Liability—Electronic Funds Transfer Program—Erroneous Payments to Bank, etc. Accounts—Recovery—Limitation on Bank's, etc. Liability

Treasury Department regulations 31 CFR Part 210 governing recurring payments made through the electronic funds transfer program directly to recipients' bank accounts, generally limits liability of financial organization to Government for payments by disbursing officer after entitlement ceased because

of death or incapacity of recipient to amount of payments within 45 days after death or incapacity. Government and disbursing officer are adequately protected inasmuch as agency can recover remainder of erroneous payment from person who withdrew funds from the account. Where recovery is unsuccessful, disbursing officer can seek relief of liability from this Office under 31 U.S.C. 82a–2.

Matter of: Military Disbursing Office Liability for Recurring Payments After Death or Incapacity of Recipient, July 11, 1980:

The Principal Deputy Assistant Secretary of Defense (Comptroller) has requested a decision concerning disbursing officer liability under 31 U.S.C. § 82b for checks indorsed for a deceased payee under Treasury Department regulations, "Federal Recurring Payments Through Financial Organizations by Means Other than by Check," 31 CFR Part 210. Disbursing officers are liable for the full amount of improper payments made under the recurring payments system. However, this Office may grant relief if we find that the officers were not personally negligent and could not, with reasonable diligence, have determined that the payments were improper, and the department has diligently pursued collection action.

The problem may be illustrated with a hypothetical example. A retired member of the military service is receiving retirement pay in the form of monthly checks. He wants his monthly retirement pay deposited directly into a joint checking account that he maintains with his wife. Hence he completes a Standard Authorization Form, has the bank execute its part of the form, and forwards it to the Finance Center. Under this authorization, his future monthly retirement pay is deposited directly into his joint account. He subsequently dies, terminating his entitlement to pay, but the bank and the Finance Center are not notified of the death. Consequently his regular monthly pay continues to be deposited in the joint account although such payments are now improper. The wife continues to expend the funds in the account for two years until the Finance Center learns of the member's death and terminates the payments.

The bank's liability for such payments is limited by the provisions of 31 C.F.R. § 210.9, which reads as follows:

(a) When, because of the death or legal incapacity of a recipient or the death of a beneficiary, one or more credit payments should have been returned to the Government, a financial organization shall be accountable to the Government for the total amount of any such credit payments: *Provided, however,* That if:

(1) Such amount, or any part thereof is not available in the recipient's account; and

(2) The financial organization did not have, at the time of the deposit and withdrawal, knowledge of the recipient's death or legal incapacity, or the beneficiary's death, and

(3) The financial organization has made every practicable administrative effort to recover the amount which is not available in the recipient's account;

The financial organization shall be accountable only for:

(i) The amount available in the recipient's account and the amount recovered by it, plus

(ii) The amount not recovered by it, or an amount equal to the credit payments received by it within 45 days after the death or legal incapacity of the recipient or the death of the beneficiary, whichever is the lesser amount.

(b) A financial organization shall be deemed to have knowledge of the death or legal incapacity of a recipient or the death of a beneficiary when such information is brought to the attention of an individual in the financial organization who handles credit payments, or when such information would have been brought to such individual's attention if the financial organization had exercised due diligence. The financial organization will be considered to have exercised due diligence only if it maintains procedures for immediately communicating such information to the appropriate individuals, and complies with such procedures.

Generally, under this regulation (leaving aside amounts which it recovers or which remain in the account,) the bank will be liable for any payments received within 45 days after the event terminating the payee's entitlement (or the balance due to the Government, whichever is less) where the bank had no knowledge of the event and has followed appropriate procedures in handling the matter. (The bank may be liable for the full amount if it has not satisfied the loss with funds available in the recipient's account and, failing that, has not made "every practicable administrative effort" to recover the improper payments.)

The Department of Treasury has agreed, in effect, by contract, that a participating financial organization will be liable for recurring payments made after the death or legal incapacity of a recipient only under the conditions cited above. 31 C.F.R. § 210.7(a). It is doubtful that these organizations would elect to participate in the fund transfer program, inasmuch as participation is voluntary, without at least some limitation on their liability.

The limitation of the financial organizations liability does not affect the liability of a disbursing officer for the entire amount of the improper payment. The limitation means that the agency may seek recovery from the financial organization only for the portion of the amount improperly paid for which it is liable under the provisions of the above-quoted regulation. The remainder of the amount improperly paid must be recovered from whomever ultimately received the improper payment, by withdrawing funds from the account after improper payments were made. If the financial organization cannot recover the full amount and the agency has exhausted collection procedures and has been unable to eliminate the deficiency, the disbursing officer may be relieved of liability for the deficiency pursuant to 31 U.S.C. § 82a–2. The disbursing officer must show, and this Office must agree, that the improper payments were not the result of bad faith or lack of due care on his part (and a diligent effort must have been made by the agency to recoup the erroneous payments). Specifically, the disbursing officer would have to show, in the case of payments after a retired member's death, that he did not know and in the exercise of reasonable care could not have known that the member was dead.

Upon such showings, this Office may grant relief. See for example our report: New Methods Needed for Checking Payments Made by Computers, FGMSD 76-82, November 7, 1977.

In sum, the Treasury regulations are a reasonable exercise of discretion. Although they limit the financial organization's liability, they do not limit the Government's ability to collect from whomever ultimately received the improper payments. Moreover, the regulations do not affect the disbursing officer's liability or his right to relief.

[B-195651]

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—"Ham" Radio Equipment—Disconnection and Reinstallation

Transferred employee claims miscellaneous expenses for taking down and reinstalling "ham" radio antenna and hooking up icemaker and dishwasher. Employee is entitled to be reimbursed these expenses under para. 2-3.1b(1) of the Federal Travel Regulations which specifies reimbursement of fees for disconnecting and connecting appliances and equipment. Employee may not be reimbursed for replacing certain incidental parts needed to reinstall antenna.

Matter of: Larry A. Clendinen, July 14, 1980:

The question is whether a transferred employee may be reimbursed the actual costs of disassembling and reinstalling a "ham" operator's shortwave radio antenna and hooking up a dishwasher and icemaker incident to a permanent change of duty station. As will be expained, the employee may be reimbursed his actual costs except for certain incidental replacement parts used in reinstalling the antenna.

The question was submitted for an advance decision by Marie A. Bell, Authorized Certifying Officer, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., and concerns the claim of Larry A. Clendinen, an employee of the Bureau of Alcohol, Tobacco and Firearms.

Mr. Clendinen was transferred from San Diego, California, to Dayton, Ohio, and claimed miscellaneous expenses in connection with the transfer. The miscellaneous expenses were $135 to take down a ham radio antenna, $420.28 to reinstall the ham radio antenna, and $47.50 to install a dishwasher and icemaker.

The agency reviewed the claimed miscellaneous expenses and determined that the expenses for the antenna were not reimbursable. The agency based its denial on the Federal Travel Regulations (FTR), paras. 2-3.1b and 2-3.1c(13) (FPMR 101-7, May 1973). Specifically, the agency ruled that para. 2-3.1b precluded payment because the expense was not one "common to living quarters" nor "inherent in relocation of place of residence" while para. 2-3.1c(13) precluded pay-

ment because the cost was incurred "in connection with structural alteration to accommodate equipment."

Rather than consider the other claimed expenses, the agency gave the claimant a $200 allowance for miscellaneous expenses under FTR, para. 2–3.3a(2). This paragraph specifies that employees with immediate family who are authorized miscellaneous expenses shall be paid $200 or 2 weeks' base pay whichever is less.

The claimant has filed a reclaim voucher seeking the disallowed $402.78 under FTR, para. 2–3.3b which allows an agency to pay in excess of the $200 limit in para. 2–3.3a(2) if the employee satisfactorily explains the costs and provides paid bills or similar evidence. Basically, the explanation of the employee as to why he should be reimbursed his costs is that the use of the radio equipment of the type he has is today so widespread as to be common to households in the United States and therefore costs associated with disconnecting and connecting the equipment are expressly allowed under FTR, para. 2–3.1b(1). Also, he states that there was no structural alteration and therefore the agency's reliance on FTR, para. 2–3.1c(13) was misplaced.

The expenses of taking down and reinstalling the ham radio antenna are reimbursable. This conclusion is consistent with our decision in *Henry L. Dupray*, B–191724, March 29, 1979, wherein we allowed the expenses of dismantling and installing a transferred employee's swimming pool under the authority of para. 2–3.1b of the FTR. Mr. Clendinen, however, may not be reimbursed for certain incidental replacement parts of the antenna which he purchased because they were not salvageable when the antenna was taken down (e.g., chimney straps and wire connectors), FTR, paras. 2–3.3c (5) and (13); see *Henry L. Dupray*, B–191724, March 29, 1979. Therefore, the claimant is entitled to the $135 for taking down the antenna and $305.18 ($420.28 less $115.10 for the replacement parts) for reinstalling it.

In reaching the above conclusion, we are cognizant of the fact that the agency determined the expenses of the antenna unreimbursable because they were not common to living quarters nor inherent in relocation of residence and they involved structural changes. We believe, however, that the agency standard for assessing commonness to living quarters was too strict. As discussed, we have held swimming pools to constitute items of equipment for which miscellaneous expenses may be reimbursed, and we consider ham radio equipment to be of a similar nature in terms of its incidence within ordinary households. Furthermore, we have previously allowed reimbursement of the expenses of hooking up an antenna (B–174542, February 25, 1972) and modifying a ham radio license for transferred employees (B–163107, May 18, 1973). Those decisions tacitly recognized that

antenna expenses and ham radio expenses are not uncommon to living quarters and are inherent in relocation of a residence in which the resident is a ham operator. Finally, while the antenna may have been attached to the residences, taking it down and reinstalling it does not appear to have involved structural changes to the residences themselves.

Regarding the $47.50 expense for labor involved in hooking up the dishwasher and icemaker, this is reimbursable. *Irwin Kaplan*, B-190815, March 27, 1978 (dishwasher); compare *Walter V. Smith*, B-186435, February 23, 1979 (icemaker).

Accordingly, Mr. Clendinen is entitled to receive miscellaneous expenses of $487.68 less the $200 he has already received.

[B-194770]

Appropriations — Treasury Department — Bureau of Alcohol, Tobacco, and Firearms — Obligation of Funds for Strip Stamp Services

Regardless of whether Bureau of Alcohol, Tobacco and Firearms (ATF) places order for strip stamps with Bureau of Engraving pursuant to either 31 U.S.C. 686 or 26 U.S.C. 6801, it may obligate annual appropriations at the end of the fiscal year only to the extent stamps are printed, in process or a contract has been entered into by the Bureau with a third party to provide the stamps to ATF. 31 U.S.C. 686-1, 34 Comp. Gen. 708 (1955). However, we would not object to ATF's automatically obligating its next fiscal year's appropriation to cover the remainder of the order based on information provided by the Bureau on the extent to which it has filled the particular order as of the close of the fiscal year.

Matter of: Bureau of Alcohol, Tobacco, and Firearms, Obligating Funds for Strip Stamps, July 15, 1980:

This is in response to a request for an advance decision from Glen A. McDonald, Certifying Officer, Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury, asking whether ATF may obligate annual appropriations at the end of the fiscal year to the extent that orders placed with the Bureau of Engraving (Bureau) for strip stamps prior to the end of the fiscal year are either printed or in process. Further, he asks whether the unfilled portion of the order (that is, not printed or in process) can automatically be charged to the next fiscal year appropriation without an additional order being placed. For the reasons stated below, our answer is yes to both of these questions.

Strip stamps which come in various colors and sizes evidence the determination of the Federal excise tax on liquors or indicate compliance with Federal laws on containers of distilled spirits. The stamps are attached to the container in such a way that they are broken (thus voiding them) upon opening the containers.

The strip stamps are provided free of charge to private parties who

order them through ATF field offices. These orders are then forwarded to ATF headquarters in Washington for processing. Requisitions are then placed with the Bureau of Engraving sufficient to fill the outstanding orders. The Bureau prints the stamps and ships them to the private individuals initially ordering them. Within three weeks of the close of the month, the Bureau bills ATF its costs and is reimbursed by ATF from appropriated funds made available for this purpose. ATF obligates funds on the last day of the month to cover all orders placed during the month.

In the absence of any other authority, section 601 of the Economy Act of 1932, as amended (31 U.S.C. § 686), authorizes inter- or intra-agency orders for work, services, supplies, materials or equipment (work) and reimbursement to the performing agency of its actual cost in providing the requisitioned work. However, inter- or intra-agency orders under 31 U.S.C. § 686 which are chargeable to the requesting agency's appropriations available for one fiscal year only or for some other limited period of time are required by 31 U.S.C. § 686–1 to be deobligated at the expiration of the apropriation's period of availability for obligation, to the extent that the performing agency has not performed the work. (This does not apply in those few instances when the performing agency is not required to do the work in-house. If the performing agency is authorized to contract for the work on behalf of the requesting agency, and has actually entered into such a contract, the funds remain obligated until the work has been completed in order to pay the contractor.) 55 Comp. Gen. 1497 (1976); 39 *id.* 317 (1959); 31 *id.* 83 (1951).

The rule is the same even when inter- or intra-agency orders are voluntarily placed pursuant to some authority other than 31 U.S.C. § 686. They constitute obligations only to the extent the performing agency has completed the work or contracts have been awarded to fill the order. 34 Comp. Gen. 705, 708 (1955). However, when inter- or intra-agency orders are required by law or statutory regulation to be placed with a particular agency, then the order constitutes an obligation when placed, and there is no requirement to deobligate at the end of the period of availability for unfilled portions of the order. 35 Comp. Gen. 3, 5 (1955).

Mr. McDonald states in its submission that ATF places orders for strip stamps pursuant to 31 U.S.C. § 686. However, he also states that ATF is required by law to place orders for strip stamps with the Bureau. We were informally advised by an official of ATF that the provision thought to require orders be placed with the Bureau is 26 U.S.C. § 6801, which provides:

(b) Preparation and distribution of regulations, forms, stamps and dies.—The Secretary shall prepare and distribute all the instructions, regulations, di-

rections, forms, blanks, and stamps; and shall provide proper and sufficient adhesive stamps and other stamps or dies for expressing and denoting the several stamp taxes; except that stamps required by or prescribed pursuant to the provisions of section 5205 or section 5235 may be prepared and distributed by persons authorized by the Secretary, under such controls for the protection of the revenue as shall be deemed necessary.

Prior to 1976, the language of this section was the same except that it omitted the "except" clause. The purpose in adding this clause is set out in the report of the Senate Finance Committee accompanying the 1976 amendment which states:

II. GENERAL STATEMENT

A. Evidence of Tax Payment on Distilled Spirits Containers

Present law

* * * Present law (sec. 6801) restricts the preparation and distribution of the strip stamps to the Treasury Department. The stamps are now made by the Bureau of Engraving and Printing.

Reasons for change

Recent developments in the technology of bottle and container closures indicates that it may become simpler for distillers and less costly to the Federal Government in the future to use devices other than paper stamps as evidence of payment of the excise tax on distilled spirits. For example, the evidence of this tax payment might be printed on a metallic strip used to form the closure on a bottle; this strip also would be broken and thereby voided when the bottle is opened. The printed costs to be borne by the parties who are authorized to print such stamps.

* * * * * * *

In order to permit the Treasury Department to take advantage of modern technology, and to reduce its manufacturing and administrative costs, the committee has approved this bill, which authorizes the use of "other devices" as well as tax stamps and which, with safeguards, authorizes the Treasury to have such devices prepared and distributed by private parties. S. Rep. No. 94-1319, 2-3 (1976).

Accordingly, since 1976 the Treasury Department has been specifically authorized to contract for the production and distribution of strip stamps by private non-Government concerns. We have been informally advised that Treasury is currently studying the feasibility of having strip stamps produced and distributed by private concerns, just as other devices authorized by 26 U.S.C. § 6801 are produced and distributed. See 27 C.F.R. §§ 19.663 and 19.664 appearing in 44 Fed. Reg. 71678 (December 11, 1979).

While ATF still procures its strip stamps from the Bureau of Engraving, it is not legally required to do so. Thus any order placed pursuant to 26 U.S.C. § 6801 may be considered as voluntary for the purpose of recording obligations. Consequently, whether the orders are placed pursuant to 31 U.S.C. § 686 or 26 U.S.C. § 6801, the effect on obligations would be the same. The annual appropriation used to pay for strip stamps would have to be deobligated at the end of the fiscal year to the extent that any order remains unfilled (that is, stamps not printed or in process) on the last day of the fiscal year.

We have no objection to ATF's automatically obligating its appropriation to cover the remainder of the order, based on information provided by the Bureau on the extent to which it has filled the particular order as of the close of the fiscal year. Since the need for the strip stamps continues, we see no point in requiring that ATF submit an additional order for the unfinished portion of work begun in one fiscal year and completed in another.

[B-197368]

Mileage—Carpool Arrangement—Effect—Temporary Duty Near Headquarters—Travel Expense Reimbursement—Cost—Comparison Basis

Employee who frequently performs temporary duty near his headquarters claims mileage for travel between residence and temporary duty station. Agency regulations require deduction of normal commuting expenses from such mileage claims, but regulations do not provide guidance on computing expenses incurred in use of carpool. In absence of agency regulations, employee's normal commuting expenses should be determined on weekly basis and be divided by five to determine daily expense.

Subsistence—Per Diem—Fractional Days—Absence From Headquarters Less Than 24 Hours—Travel Time/Distance Comparison—Agency Authority

Employee claims per diem for travel to nearby temporary duty station where travel time exceeds 10 hours. Social Security Administration (SSA) denied claims since SSA regulation precludes per diem except where travel exceeds employee's normal travel time or distance of normal commute to permanent duty station. SSA regulation falls within discretion set forth in Federal Travel Regulations and Health, Education, and Welfare travel regulations and is consistent with our decisions. See *Buker and Sandusky*, B-185195, May 28, 1976.

Matter of: Howard M. Feuer—Claims for mileage and per diem while on temporary duty near headquarters, July 15, 1980:

This decision is in response to a request from S. Ronald Luiso, Director, Division of Accounting, Fiscal and Budgeting Services, Region II, Department of Health, Education, and Welfare (HEW), for a decision on the claims of Mr. Howard M. Feuer, an Area Director of the Social Security Administration (SSA), for mileage and per diem incident to his performing temporary duty near his headquarters. The issues are whether Mr. Feuer is entitled to per diem where such temporary duty does not require overnight lodging away from his residence and how his mileage claims may be properly computed.

MILEAGE

The agency report states that in his function as an Area Director, Mr. Feuer is frequently required to visit various SSA offices near his

permanent duty station. Under agency travel regulations, an employee who repeatedly performs such travel may be reimbursed for allowable expenses which are in excess of his normal commuting expenses. Mr. Feuer commutes to his permanent duty station by carpool, and the certifying officer, in the absence of regulations concering the use of carpools, has determined Mr. Feuer's normal commuting expenses by means of a "constructive cost concept". Under this method, the agency took the round-trip mileage between Mr. Feuer's residence and permanent duty station (76), divided it by two since Mr. Feuer carpools with another individual (38), and multiplied that figure by the mileage rate for use of privately owned vehicles (17 cents and later 18 and one-half cents per mile) to determine his normal commuting expenses ($6.46 or $7.03 per day). This figure was then deducted from Mr. Feuer's claims for mileage between his residence and the various temporary duty stations.

Mr. Feuer disputes this computation by arguing that on Monday, Wednesday, and Friday he has no commuting expenses to his permanent duty station since the other carpool member drives and pays for all tolls and expenses. Therefore, Mr. Feuer claims full reimbursement for temporary duty travel on Monday, Wednesday, or Friday without deduction for his normal commuting expenses and no reimbursement for temporary duty travel on Tuesday or Thursday, the day Mr. Feuer normally drives the carpool to the permanent duty station.

The agency questions, in the absence of regulations involving the use of carpools in determining normal commuting costs, what method of computation should be used:

1. Constructive cost concept;
2. Mr. Feuer's method; or
3. Difference in mileage to temporary duty station and mileage to permanent duty station.

It is well established that employees must place themselves at their regular places of work and return to their residences at their own expense. 32 Comp. Gen. 235 (1952). Our decisions have also held that when an employee is assigned to a nearby temporary duty post he may be reimbursed his full travel expenses or only that amount which exceeds his normal commuting expense to his permanent duty station. 36 Comp. Gen. 795 (1957); 32 *id.* 235, *supra*. The determination to limit reimbursement for travel to a temporary duty station is within the discretion of the employing agency with due consideration given to the interests of both the Government and the employee, and it is not within the jurisdiction of our Office to question the decision of the agency to so limit travel reimbursement. See *Brian E. Charnick*, B–184175, June 8, 1979 , and August 5, 1975; and B–164189, June 25, 1968.

Under the provisions of the HEW Travel Manual, para. 5–50–30B, approving officials may limit reimbursement for repeated travel from home to a temporary duty station to those expenses in excess of normal commuting costs. The same policy is set forth in the SSA Administrative Directives System Guide (N.Y. ORC. F: 240–11, July 15, 1978). In the examples set forth in the SSA regulation, an employee who has the same commuting expense each day will have his travel reimbursement determined on a daily basis, but there is no guidance set forth in these regulations to determine the normal commuting expenses of an employee using a carpool.

In *William A. Gates*, B–188862, November 23, 1977, a decision cited by the agency as limiting Mr. Feuer's reimbursement, we considered the claim of an employee for mileage for reporting to a nearby temporary duty station. We held in *Gates* that under Department of Transportation (DOT) regulations normal commuting costs could be deducted from the employee's mileage claims only on those days that he reported to his headquarters office at some time during the day and not on days when he reported to the temporary duty station only. In this case Mr. Gates computed his claim on the basis of his total mileage for the 4-week period minus the miles he ordinarily would have driven as a member of a carpool during the same period (normally drove once per week, 35 miles round trip).

The applicable DOT regulation in the *Gates* case used mileage for comparison purposes. Implied in our decision is that the weekly figures used by Mr. Gates would be reduced to a daily figure in order to apply it to only those days in which he visited the headquarters office. In view of our decision in *Gates* and the examples cited in the SSA regulations, which compute normal commuting expenses on a daily basis, we believe Mr. Feuer's normal commuting costs should be computed on a daily basis.

The methods proposed by the agency, constructive cost (total mileage divided by two) or mileage comparison (distance to temporary site less distance to headquarters) do not adequately reflect Mr. Feuer's true commuting costs in his carpool arrangement. On the other hand, Mr. Feuer's proposal (full claims Monday, Wednesday, or Friday, no claims Tuesday or Thursday) would not necessarily reflect an offset of normal commuting costs depending upon which day of the week he was required to perform temporary duty. In the absence of agency regulations, we conclude that Mr. Feuer's daily normal commuting costs should be computed on the basis of his total weekly costs divided by 5 (weekly mileage as driver in carpool, times applicable mileage rate, plus tolls, divided by 5). The resulting figure would be deducted from Mr. Feuer's mileage claims for temporary duty travel, regardless of which day of the week Mr. Feuer performed temporary duty.

Mr. Feuer's claim for temporary duty travel should be recomputed consistent with the above discussion and not on the basis of the three proposals set forth by the certifying officer.

At this time we do not intend to establish "precise guidelines" on the use of carpools as suggested by the agency in this case. Other agencies may have adopted different policies (in *Gates* DOT compared distances traveled rather than commuting costs) and, as noted earlier, the payment of travel expenses to nearby temporary duty stations is a matter for agency discretion. As pointed out by SSA, the use of carpools has recently increased, and where agencies decide to deduct normal commuting costs or mileage from claims for temporary duty travel, those agencies should determine through internal regulation how carpools should be treated.

PER DIEM

Mr. Feuer also claims per diem in connection with travel on these temporary assignment where the period of travel is more than 10 hours but does not require overnight lodging. Under HEW regulations para. 6–10–20, the approving official may reduce per diem rates to provide the employee with reimbursement for reasonable expenses and not allow windfall profits. The SSA regulations further limits reimbursement to situations where the time in travel status exceeds 10 hours and: (1) the time spent in travel exceeds the employee's normal commute; or (2) the round trip distance traveled between the residence and temporary duty station exceeds the employee's normal round trip commute to his permanent duty station.

The agency denied Mr. Feuer's claim for per diem since his time spent in travel did not exceed his normal commuting time (11 hours) or the distance traveled to the temporary duty station did not exceed the distance to his permanent duty station. Mr. Feuer questions the authority of SSA to set a policy different from that of HEW and place a restriction on an employee's time in travel status of other than 10 hours.

Under the provisions of the Federal Travel Regulations (FTR), para. 1–7.6d, an employee may not be allowed per diem when the travel period is 10 hours or less during the same calendar day except for certain situations where the travel begins before 6 a.m. or ends after 8 p.m. Our Office has held that this provision does not require payment of per diem for travel of 24 hours or less but merely precludes payment for travel of 10 hours or less except for certain situations. See *Buker and Sandusky*, B–185195, May 28, 1976, and decisions cited therein.

As we held in *Buker and Sandusky, supra*, it is within the discretion of the employing agency to authorize or approve per diem or deny it where the travel involves only short distances outside the duty station area. In the present case SSA chose to so limit reimbursement or per diem to certain situations, and since such action falls within the discretion set forth in the FTR's and HEW's regulations and is consistent with our decisions, we find no legal objection to this policy. Accordingly, we conclude that Mr. Feuer's claims for per diem were properly denied.

[B-195352]

Travel Expenses—Actual Expenses—Reimbursement Basis—Lodging—Prepaid Rent Forfeiture—Temporary Duty Period Shortened

Employees whose 40-day temporary duty assignments were unexpectedly cut short after 2 days by orders to return to their permanent duty station may be reimbursed for total amount of unrefundable prepaid rent if agency determines employees acted reasonably in securing lodging for the extended period. Unrefundable rent was incurred pursuant and prior to cancellation of travel orders. Reimbursement therefor is allowable as a travel expense to the same extent as it would have been allowed if the orders had not been cancelled. *Texas C. Ching*, B-188924, June 15, 1977, and similar cases will no longer be followed. This decision is modified (extended) by 60 Comp. Gen. —— (B-198460, Oct. 28, 1980).

Matter of: Raymond G. Snodgrass and John C. VanRonk—Lodging Expenses—Curtailed Temporary Duty, July 17, 1980:

At issue is the entitlement of Raymond G. Snodgrass and John C. VanRonk to reimbursement of an unrefunded portion of rent they forfeited when their temporary duty assignments were cut short by orders to return to their official duty station.

This action is in response to a request for an advance decision from the Central Disbursing Officer, Regional Financial Services Department, Naval Supply Center, Oakland, California, forwarded here by indorsement of July 5, 1979, from the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 79-21).

Mr. Snodgrass and Mr. VanRonk, civilian employees of the Department of the Navy employed at the Mare Island Naval Shipyard, were directed to perform temporary duty at the Long Beach Naval Shipyard from January 22, 1979, to March 2, 1979, or until their assignment was completed. They were required to work at Mare Island until January 22. Therefore, they traveled on January 24 and reported to their temporary duty site on January 24 without any change in their orders. Both employees rented apartments for the period of January 24, 1979, to February 28, 1979, and paid the total rent and required security deposits in advance. However, they were recalled to their official duty station and returned there on January 26. Therefore, they

spent only about 2 days at Long Beach. The apartment management held Mr. Snodgrass and Mr. VanRonk liable for the rent attributable to the period from the beginning of their leases to the date the apartments were rented to other tenants, which amounted to $307.06 for Mr. Snodgrass and $223.06 for Mr. VanRonk. Both employees obtained a refund for the balance of the rental period and for the security deposits.

The Disbursing Officer requested an advance decision due to an apparent inconsistency in our decisions concerning reimbursement of unrefundable prepaid lodging expenses forfeited when an employee's temporary duty is unexpectedly shortened. In 51 Comp. Gen. 12 (1971), cited by Mr. Snodgrass and Mr. VanRonk as the basis for their request for reimbursement, a Naval Officer, who was assigned to temporary duty for 4 days, rented a hotel room since there were no facilities at the temporary duty station. In connection with the rental of the room the officer was required to make an advance payment of $9. He was at the temporary duty station for only 6½ hours when he was recalled to his official duty station. He requested reimbursement of the advance charge since he was unable to obtain a refund. Although payment of per diem was precluded because the officer was absent from his official duty station for less than 10 hours, we allowed reimbursement of the advance charge as an administrative cost since his return to his permanent duty station was occasioned by official need for his services.

By contrast, in *Texas C. Ching*, B–188924, June 15, 1977, although we also held that a civilian employee whose temporary duty was unexpectedly cut short could be reimbursed the unrefunded rent for a lodging he leased on a monthly basis, we stated that reimbursement was to be made by dividing the total rent paid by the total number of days of actual occupancy, so long as the individual daily expenditures calculated on that basis did not exceed the maximum authorized per diem for those days.

In light of these cases, the Disbursing Officer questions whether Mr. Snodgrass and Mr. VanRonk may be reimbursed the total amount of unrefunded rent or whether they may be reimbursed only the prorated amount for the period of time they were at their temporary duty station.

We hold that the employees may be reimbursed the total amount of the unrefunded rent for periods after they vacated the apartments. Our reasoning is as follows.

In 51 Comp. Gen. 12, *supra*, we allowed reimbursement of the advance hotel charge even though the member was not entitled to per diem since he reasonably and necessarily incurred the expense pur-

suant to orders and was required to return to his permanent station for official duty. In similar cases involving cancellation of permanent changes of station, we have held that expenses, incurred pursuant to orders and before notification of cancellation, were allowable provided they would have been reimbursable if the transfers had been consummated. B–174051, December 8, 1971; *William E. Weir*, B–189900, January 3, 1978, and cases cited therein. However, despite the similarity of the facts in the transfer cases to those in the temporary duty cases when lodgings are rented for the period of anticipated temporary duty, we have in the latter permitted only a proration of the lodging costs over the period of actual temporary duty. *Ching*, *supra*.

Upon review, we believe the result in the two types of cases should be the same since similar statutes and regulations are involved. In each case the employee has incurred an expense pursuant to orders. In each the employee cannot be reimbursed in the manner contemplated by his orders since the orders were cancelled for the benefit of the Government.

Furthermore, Federal Travel Regulations (FPMR 101–7), paragraph 1–1.3a (May 1973), requires an employee to exercise the same care in incurring expenses while traveling an official business a a prudent person would when traveling on personal business. In addition, FTR paragraph 1–7.3d require an agency to reduce per diem for extended stays when travelers are able to secure lodgings and meals at lower costs. We have held, in *Willard R. Gillette*, B–183341, May 13, 1975, that the Government is entitled to the benefits of reduced lodgings costs resulting from rental of quarters for an extended period.

Accordingly, we hold that when an employee has acted reasonably in incurring allowable lodging expenses pursuant to temporary duty travel orders before they have been cancelled for the benefit of the Government and is unable to obtain a refund, reimbursement of the expenses should be allowed to him as a travel expense to the same extent that they would have been if the orders had not been cancelled. The proration method used in *Ching* and similar cases will no longer be followed.

The determination of whether the employee has acted reasonably in obtaining the accommodations is the responsibility of the agency. Included in this determination should be a consideration of whether the employee sought to obtain a refund of the prepaid rent or otherwise took steps to minimize the costs once the temporary duty was cancelled.

In the instant case the employees were ordered to perform temporary duty for about 40 days away from their permanent duty station. In view of the relatively long period of temporary duty they rented

apartments on a monthly basis. We believe that the record before us reflects that the two employees acted reasonably in securing lodgings and minimizing the amount of the unrefundable cost for the extended periods, and the vouchers may be paid to reimburse the employees on an actual expense basis as applicable for the days the apartments were occupied and for any unrefunded costs not covered by those payments, if otherwise proper.

[B-194158, B-194900]

Travel Expenses — Temporary Duty — Rental of Apartment — Security Deposit Forfeiture — Deposit Reimbursement — Travel Cancelled

Employee of the Internal Revenue Service, who was scheduled for an extended temporary duty assignment, made a nonrefundable $150 deposit to lease an apartment. Subsequently the assignment was cancelled, and the deposit was forfeited through no fault of the employee. Employees may be reimbursed reasonable deposits made in anticipation of ordered travel when travel is cancelled and deposits are forfeited. Overrules B-194900, Sept. 14, 1979. This decision was later modified (amplified) by B-198699, Oct. 6, 1980.

Matter of: Chris C. Rainey and Sidney A. Morse, July 18, 1980:

By a letter of February 13, 1979, Elizabeth A. Allen, an authorized certifying officer with the Internal Revenue Service, requested an advance decision on the reclaim voucher of Chris C. Rainey for reimbursement of a forfeited rent deposit in the amount of $150.

Mr. Rainey, an employee of the Internal Revenue Service whose duty station is Lafayette, Louisiana, was selected to teach a tax auditor course in New Orleans, Louisiana, from November 27 to December 22, 1978. He was scheduled to report to New Orleans on November 6, 1978, to begin preparation for the course. His reporting instructions, dated October 18, 1978, advised that no reservations had been made for out-of-town instructors. On October 19, 1978, he made arrangements to rent an apartment for the period November 5 through December 21, 1978, at $345 per month. On October 23, 1978, he deposited $150 to guarantee the apartment. Subsequently the training assignment was cancelled, and he forfeited the deposit.

Mr. Rainey was sent to New Orleans on an unrelated matter from November 7 until November 9, 1978, and secured hotel lodging for the nights of November 7 and 8. The agency disallowed Mr. Rainey's claim for the $150 apartment deposit which he claimed on the voucher for that travel. However, the Accounting Unit suggested that he should have stayed in the apartment on November 7 and 8. Mr. Rainey pointed out in filing his reclaim voucher that the cost of that course of action would have been more than the cost of his staying in a hotel

in that it would have required paying a full month's rent of $345 ($150 deposit + $195) for two nights lodging.

Reimbursement of the forfeited deposit is unrelated to Mr. Rainey's subsequent trip to New Orleans and should be considered separately. He has been reimbursed for that trip and no expenses from that trip are at issue here.

Regarding the forfeited rent deposit the effect of the Federal Travel Regulations (FPMR 101–7, May 1973) at paragraphs 1–1.3a and 1–7.3 is to encourage the use of lodgings at reduced rates for extended assignment. Mr. Rainey acted judiciously in securing lodging accommodations at a reduced rate. A motel or hotel room rented on a daily basis would have cost substantially more than the apartment he intended to occupy.

Generally an individual employee is responsible for reserving and paying for his lodging out of his travel allowance. When he does not enter a travel status because a planned assignment is cancelled, he normally incurs no expenses. Mr. Rainey's situation is one of those occasions where expenses are incurred without travel being performed.

It is well established that in similar situations when the Government is a party to the agreement (a Government official acting in his official capacity makes the hotel, motel, or other reservation), the forfeited room charge or deposit may be paid by the Government. See 41 Comp. Gen. 780 (1962); 51 *id.* 453 (1972); B–192767, May 3, 1979. However, those decisions as well as B–181266, December 5, 1974, contain language to the effect that if an employee who is reimbursed on a per diem basis made the reservations, he could not be reimbursed the forfeited deposit. However, that conclusion is not consistent with the conclusion reached in 48 Comp. Gen. 75 (1968). In discussing a Department of Defense proposal to issue regulations we held that regulations could be issued permitting reimbursement of forfeited deposits on an actual expense basis if the expense was incurred in anticipation of travel under valid travel orders which were cancelled prior to the commencement of travel. We are aware of no regulations which have been issued under that decision. However, in *Matter of Sidney A. Morse*, B–194900, September 14, 1979, a contrary rule was applied and some other decisions have failed to recognize the authority contained therein and have restated the prior rule in contexts where it was not controlling.

Upon further evaluation we have determined that the rule stated in 48 Comp. Gen. 75 regarding reimbursement of forfeited deposits was correct and should be affirmed. Our conclusion in that regard is not based upon a new provision of law but upon a reevaluation of existing law in light of actual circumstances encountered by Government travelers. Thus, it is our view that reimbursable travel costs

may include forfeited deposits. While the issuance of regulations providing for payment of these costs and prescribing conditions would be useful, regulations are not required to permit reimbursement. Accordingly, we hold that when an employee or member of the uniformed services in reasonable expectation of ordered travel reserves a room for which he must pay a deposit and forfeits that deposit because his official travel is cancelled, the Government will reimburse reasonable costs incurred. Similarly, in a decision issued today, B–195352, we held that if an employee or member rents accommodations for a period of time incident to long-term temporary duty but is required to leave the temporary duty site early because of a change in orders and is unable to obtain a refund of an appropriate part of the rent paid the Government will reimburse the employee for rent covering the period when the quarters were not occupied due to a change in orders, provided that the employees acted reasonably in renting the room in the circumstances involved.

Accordingly, the reclaim voucher of Mr. Rainey in the amount of $150 may be certified for payment, if otherwise proper. The decision in *Morse*, *supra*, is overruled and instructions will be issued to permit payment of the forfeited deposit in that case.

[B–197935]

Bids—Responsiveness—Responsiveness *v.* Bidder Responsibility—Small Business Concerns—Subcontracting Plan Requirement

Neither pertinent statute nor solicitation clause implementing statute indicates that failure to submit small business subcontracting plan will result in rejection of bid as nonresponsive. Article and statute only require bidder selected for award to submit plan. Therefore, matter relates to responsibility, not responsiveness, despite other solicitation statement that plan must be submited wih bid.

Matter of: Devcon Systems Corporation, July 18, 1980:

Devcon Systems Corporation (Devcon) protests any award to the Ansul Company (Ansul), under invitation for bid Nos. LGM–9–7558B1 and 7558/1 issued by the Department of Transportation, Federal Aviation Administration (DOT). The solicitation was for the design, delivery, and installation of a fire protection system at 20 air route traffic control centers. No award has been made.

We find that the protest has no merit.

Article XII, "Small Business and Small Disadvantaged Business Subcontracting Plan (Advertised)," was incorporated into the solicitation by amendment No. 3 which explicitly provided that the plan required by Article XII "*MUST* be submitted with the bid." Seven bids were received. Ansul was the low bidder and Devcon second low. Although Ansul acknowledged amendment No. 3, the bid did not include a small business subcontracting plan. The president of Devcon

immediately advised the agency representative that Ansul's bid was nonresponsive for failure to include a small business subcontracting plan. Devcon then protested Ansul's bid as being nonresponsive to the requirements of amendment No. 3 to our Office. Subsequently, Ansul submitted a small business subcontracting plan to the contracting agency. DOT informs us that this plan was considered acceptable and that Ansul has been determined to be a responsible bidder.

Devcon contends that amendment No. 3 identified bid opening as the time limits prescribed by the contracting agency for bidders to submit a small business subcontracting plan and that Ansul's failure to submit a plan by bid opening rendered Ansul's bid ineligible for award under the terms of Article XII. In this regard, Devcon refers to subsection (c) of Article XII, which states:

> (c) The bidder understands that:
>
> • • • • • • •
>
> (2) If it does not submit a subcontracting plan within the time limits prescribed by the contracting agency, it will be ineligible to be awarded the contract.

Since amendment No. 3 emphasized that bidders had to submit a small business subcontracting plan with their bids, Devcon argues that Ansul's failure to do so constituted a failure to comply with the requirements of the solicitation, thereby making Ansul's bid nonresponsive.

Devcon also asserts that the legislative history of Public Law 95–507, October 24, 1978, 92 Stat. 1757 (15 U.S. Code 683), which in part, required the submission of subcontracting plans, demonstrates that Federal agencies were to determine from bids whether the bidder intended to meet the requirement for having a small business subcontracting plan. Devcon points out that Article XII implements the act. Devcon refers to 1978 U.S. Code Cong. & Ad. News p. 3872, which states that the purpose of establishing criteria at the outset of each formally advertised procurement is to insure that each bidder knows what subcontracting goals must be met if the bidder wishes to compete for the contract.

DOT takes the position that the submission of a small business subcontracting plan is a matter of responsibility, rather than responsiveness. DOT avers that neither the act nor Article XII specifies that submission of a small business subcontracting plan is a matter of responsiveness because only a bidder selected for award need submit a plan and such bidder can be determined only after opening. Moreover, the implementation of the plan relates to responsibility. In support, DOT refers to the following provisions of the act and Article XII.

Section 211(5)(A)(iv) of the act (15 U.S.C. 637) provides that in every advertised procurement exceeding a given value the solicitation "shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a sub-

contracting plan * * *." Paragraph (5)(B) of section 211 states in part:

> If, within the time limit prescribed in regulations of the Federal agency concerned, *the bidder selected to be awarded the contract* fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. * * * [Italic supplied.]

Article XII of the solicitation provides:

> (a) The offeror represents that it is aware:
> (1) Of the subcontracting plan requirement in this provision and, *if selected for award*, it will submit within the time specified by the contracting officer, a subcontracting plan that will afford the maximum practicable opportunity to participate in the performance of the contract to small and small disadvantaged business concerns * * *
>
> * * * * * * *
>
> (b) If the contracting officer believes that the subcontracting plan submitted pursuant to this Section does not reflect the best effort by the bidder to award subcontracts to small and small disadvantaged firms to the fullest extent consistent with the efficient performance of the contract, he shall notify the agency's director of the Office of Small and Disadvantaged Utilization who shall in turn notify the Small Business Administration and request a review of the plan pursuant to section 8(d)(10)(11) of the Small Business Act. *Such request for an SBA review shall not delay award of the contract.* * * *
>
> (c) The bidder understands that:
>
> * * * * * * *
>
> (3) Prior compliance of the bidder with other such subcontracting plans under previous contracts will be considered by the contracting officer in determining the *responsibility* of the offeror for award of the contract. [Italic supplied.]

DOT further notes that on October 29, 1979, the Office of Federal Procurement Policy requested comments on proposed changes to supplement the Federal Procurement Regulations (FPR) and the Defense Acquisition Regulation already implementing section 211 of the act. *See* 44 Fed. Reg. 62093 (1979). This proposed guidance was the basis for DOT's Article XII. Final Office of Federal Procurement Policy regulatory guidance superseding in its entirety previous regulatory guidance was issued by policy letter 80–2 on April 29, 1980, with an effective date of June 1, 1980. *See* 45 Fed. Reg. 31028 (1980). Policy letter 80–2 states that the FPR shall be amended to conform with the regulatory policy contained in that letter. DOT states that this final regulatory guidance has not materially changed the wording of Article XII.

Ansul asserts that the mere fact that amendment No. 3 called for the small business subcontracting plan to be submitted with the bid did not convert a clear responsibility requirement into a matter of responsiveness. Ansul cites our prior decisions wherein we held that even in cases where bidders were warned that failure to conform to a request for information may result in a rejection of their bids, the

information, if called for to determine the responsibility of the bidder rather than the responsiveness of the bid, may be changed or provided subsequent to bid opening without prejudice to the contracting agency's consideration of the bid. *See* 39 Comp. Gen. 655, 658 (1960); *id.* 881, 883 (1960); 41 *id.* 106, 108 (1961).

As to the legislative history of the act, Ansul claims that Devcon has cited passages that refer to the contracting agency's setting of subcontracting criteria at the time the solicitation is issued and that the cited passages do not refer to the submission of the actual plans. Rather, Ansul contends that the legislative history of the act is clear that the contracting agency is without authority to require bidders to submit small business subcontracting plans with their bids. In support of this contention, Ansul points out that the Conference Report on the legislation states that under the Senate bill, only the low bidder on a formally advertised procurement is required to submit a subcontracting plan. The Conference Report then notes that the conference adopted the Senate provision for formally advertised procurements. House Conference Report No. 95–1714, 95th Cong., 2nd sess. (1978). Thus, Ansul emphasizes that the Congress rejected the House bill which required all bidders on formally advertised procurements to submit summary plans for small business subcontracting.

There is a definite distinction between matters related to bid responsiveness and those concerned with bidder responsibility. "Responsibility" as used in Federal procurement refers to a bidder's ability or capacity to perform all of the contract requirements within the limitations prescribed in the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide the product in total conformance with the material terms and specifications of the solicitation. See *J. Baranello and Sons*, 58 Comp. Gen. 509 (1979), 79–1 CPD 322. The determination of responsiveness must be made from the bid documents as of the time of bid opening. *Werner-Herbison-Padgett*, B–195956, January 23, 1980, 8–1 CPD 66. Requirements bearing on the responsibility of a bidder may be met after bid opening. *Starline, Incorporated*, 55 Comp. Gen. 1160 (1976), 76–1 CPD 365.

We find nothing in the act or Article XII which indicates that failure to comply with its terms will result in a rejection of a bid as nonresponsive. Devcon has cited several of our decisions involving affirmative action programs which explicitly hold that a bidder's failure to commit itself prior to bid opening to the minimum affirmative action requirements of the solicitation requires rejection of the bid. See *Armor Elevator Company, Inc.*, B–190193, December 12, 1977,

77-2 CPD 457; *Regional Construction Company, Inc.*, B-189073, October 7, 1977, 77-2 CPD 277. However, the decisions cited by Devcon involved solicitations issued under regulatory provisions which specifically required that bidders include particular individual goals as affirmative action commitments. Here, neither the act nor Article XII required bidders to be locked into a small business subcontracting plan at the time of bid submission. Rather, only the bidder selected by the Federal procuring agency for award of the particular contract was required to submit a small business subcontracting plan. Even then, under Article XII, award could be made despite the fact that the submitted plan is deficient. Although amendment No. 3 explicitly stated that bidders had to submit small business subcontracting plans with their bids, bidders were not required to identify or to commit themselves to particular small businesses or small disadvantaged businesses. *Cf. Donald W. Close Co. and others*, 58 Comp. Gen. 297 (1979), 79-1 CPD 134. A matter relating to bidder responsibility cannot be treated as one of responsiveness merely because of a statement to that effect in the solicitation. See *Thermal Control, Inc.*, B-190906, March 30, 1978, 78-1 CPD 252. Also, Ansul acknowledged the amendment and thereby was bound to comply with the requirements of Article XII.

DOT asserts that our decision in 39 Comp. Gen. 247 (1959) is on its facts very close to those here. We agree. In that case, the solicitation contained advice that bidders furnish with bids certain information concerning subcontractors; however, the solicitation also contained a provision which required the same information to be submitted after award at the request of the contracting officer. We stated:

> Where designated information is by the terms of the invitation required to be submitted with the bid, the inference arises that such information is regarded by the Government as material so that the failure to accompany the bid with such information requires that the bid be rejected. To that extent, the language of the invitation may be regarded as somewhat misleading. On the other hand, we believe that invitations, like contracts, should be so interpreted as to give meaning to each part. As indicated above, to give the provision in question the meaning you urge would render paragraph GC-6 meaningless. For that reason and since such interpretation would be inconsistent with cited regulatory provisions, we do not feel justified in disturbing the award as made. * * * 39 Comp. Gen. *supra*, 249-250.

Similarly, to give the language of amendment No. 3 requiring the submission of a small business plan with the bid the interpretation advanced by Devcon would, in our opinion, unreasonably render Article XII meaningless as well as be inconsistent with the clear language of the act. In our view, the solicitation reasonably conveyed the "responsibility" nature of the plan. See *Starline, Incorporated, supra.*

The protest is denied.

[B-193813]

Officers and Employees—Training—Transportation and/or Per Diem—Cost Comparison Requirement

Where agency is sending employees on training assignments, before agency decides to pay for the transportation of employee's dependents and household goods, cost comparisons, on individual basis, are required by 5 U.S.C. 4109 and the applicable agency regulations. In this case since proper cost comparisons were not made prior to issuing orders authorizing payment for transportation of employee's dependents and household goods, such orders were not competent and may be retroactively modified to implement Grievance Examiner's recommendations to allow payment of per diem. In each of these cases a cost comparison showed that per diem would have been less costly, but apparently actual, as opposed to projected, transportation costs were less than per diem.

Matter of: Ms. Lynn C. Willis *et al.*—Training—Per Diem, July 22, 1980:

We have been asked to decide whether the Department of the Army may implement a Grievance Examiner's "Findings and Recommendations," calling for the retroactive modification of travel orders to permit payment of per diem during a long-term training assignment, instead of shipment of household goods and transportation of dependents to the training location. For the reasons set forth below the "Findings and Recommendations" may be implemented.

On about September 1, 1976, nine Army employees began a 15-week training course at the U.S. Army Management Engineering and Training Activity (AMETA) at Rock Island Arsenal, Rock Island, Illinois. These nine employees had just been accepted as Automatic Data Processing (ADP) Career Field Interns within the U.S. Army Materiel Development and Readiness Command (DARCOM). All nine employees were either career or career-conditional Federal employees, holding appointments at the grade GS-5 level. Under the terms of the agreement signed by each employee, upon entrance into the ADP Career Field Intern program, after completing the training each intern would be assigned to a permanent duty location where he or she would work in the ADP field, and each intern would become eligible for non-competitive promotions to grades GS-7 and GS-9 after stated intervals.

Of the nine interns involved here, two, Mr. Kenneth Nienkamp and Ms. Deborah Kieffer, were to return to their original duty station following the training assignment. Six of the interns, Mr. Fred Smith, Ms. Lynn C. Willis, Ms. Mary Mitchell, Mr. Joseph Page, Mr. John Fetrow, and Ms. Deborah Williams, were to be assigned to a new duty station at the completion of the training assignment, and the location of that duty station was known prior to the beginning

of the training course. One intern, Mr. Robert Hawks, was to be assigned to a new duty station, but its location was not known at the time the training began.

From the record it appears that prior to the assignment of this "class" of interns (identified in the record as AMETA Class #22), DARCOM decided that the interns would only be authorized transportation of their household goods and immediate family, not per diem. The circumstances surrounding this decision will be discussed below. The members of AMETA Class #22 were given as little as 1 day's notice of the fact that they would not receive per diem while attending the training program.

The nine individuals involved jointly took the steps necessary to initiate a grievance. They pursued their grievance through all the required stages resulting in the "Report of Findings and Recommendations" filed by Mr. Joseph C. Klein, the assigned Grievance Examiner. Mr. Klein recommended that Mr. Nienkamp, Ms. Kieffer, Ms. Willis, Mr. Fetrow, and Mr. Hawks be granted per diem for the period of training instead of transportation of household goods and dependents as originally authorized. He recommended that the remaining four individuals' entitlements remain as originally authorized.

This matter was submitted to us by the Assistant Secretary of the Army, Manpower and Reserve Affairs, because of language contained in the syllabus of our decision 34 Comp. Gen. 355 (1955), to the effect that claims for travel expenses which are based on retroactive modification of travel orders should be submitted to this Office. The submission raises the question of whether orders authorizing movement of an employee's family and household goods to a training location may be amended even after transportation to the training site has begun on the basis that cost comparisons justifying such transportation in lieu of paying per diem as required by law and regulation were not made.

The authority for paying expenses of training is found in 5 U.S.C. § 4109 (1976), which provides in pertinent part that the head of an agency may authorize payment of the necessary costs of travel and per diem to persons undergoing training. The cost of transportation of immediate family, household goods and personal effects, packing, crating, temporarily storing, draying, and unpacking are authorized to be paid but only "* * * when the estimated costs of transportation and related services are less than the estimated aggregate per diem payments for the period of training. * * *"

We have held that under this discretionary authority it is up to the head of the agency to determine what part, if any, of the training ex-

penses will be paid. *Matter of Raymond F. Moss*, B–180599, November 14, 1974. We have recognized that agencies may in fact require employees to pay some of the indirect costs of training. *Matter of Thomas B. Cox*, B–187213, October 1, 1976.

Although the discretionary authority of agency heads allows them to pay or reimburse less than the full cost of training, under section 4109(a)(2)(B), they may pay for the transportation of an employee's family and household goods only if the estimated cost of that transportation is less than the aggregate cost of per diem for the period of training.

Before DARCOM decided to pay only for the transportation of the employee's dependents and household goods for AMETA Class #22, they performed cost comparisons on the basis of average costs not specifically related to each individual case. The Grievance Examiner requested advice from the Office of the Chief, Civilian Personnel, Field Operations Agency, Headquarters, Department of the Army, as to the proper method of doing the cost comparisons. In a second endorsement to that letter, the Examiner was advised that "[c]ost comparisons must be performed on an individual case by case basis and not on estimated generalized averages." We agree with that advice and concur with the Examiner's Finding that DARCOM did not comply with the mandate that individualized cost comparisons be done before employees may be paid or reimbursed for the transportation of their dependents and household goods while on training assignments. The Examiner's recommendation that five of the nine interns be granted per diem for the period of training is predicated on his determination that in each of those five cases the projected costs for transportation of dependents and household effects exceed the projected costs of per diem. Apparently, although the projected transportation costs exceeded projected per diem, actual transportation costs incurred by the employees were not equal to per diem.

While, as a general rule, travel orders may not be retroactively modified to either increase or decrease the rights and/or benefits due employees, this rule applies only to competent orders. Where orders are clearly in conflict with a law or regulation they may be modified to make them consistent with the applicable law or regulation. *Matter of Charles O. Doughtery*, B–188106, March 3, 1977, and B–151457, May 23, 1963.

While we would not normally question a travel order authorizing transportation of dependents and household goods in connection with a training assignment, here, as a result of the immediate objections of

the employees involved, it has been demonstrated that the authorization of such transportation was not properly included in certain travel orders. In the circumstances the orders are invalid to the extent that they restrict the employees concerned to reimbursement of these transportation costs instead of per diem which would otherwise have been paid. Therefore, we will not object to payment on a per diem basis to those employees whom the Grievance Examiner found were entitled to per diem instead of the costs of transportation of dependents and household goods. Our answer in that regard is the same even if the employee concerned has been paid this cost of transportation of dependents and household goods. Such employee may be paid the difference between the transportation cost paid and the allowable per diem.

Regarding the temporary storage cost incurred by Ms. Willis, since it was known in advance of her training assignment that she was to be transferred to St. Louis, she may be reimbursed for those expenses incident to that permanent change of station in accordance with our decision B–161795, June 29, 1967.

[B–198981]

Travel Expenses — Temporary Duty — Rental of Apartment — Broker's Fee to Locate

Employees of Department of Housing and Urban Development's Chicago Regional Accounting Office assigned to temporary duty at New York Regional Office for 6 months for training purposes may be reimbursed under Federal Travel Regulations para. 1–9.1d for brokers' fees charged for locating rental housing if fees are necessary and sum of fees and rent is less than cost of hotel rooms for same period.

Matter of: Lengthy temporary duty assignments—reimbursement of brokers' fees to obtain rental housing, July 22, 1980:

This is in response to a request from the Department of Housing and Urban Development (HUD) for an advance decision as to whether certain employes of HUD, on temporary duty for about 6 months in New York City, for training purposes, may be reimbursed for brokers' fees charged for locating rental housing.

The employees, assigned from HUD's Chicago Regional Accounting Office to the New York Regional Office for training, have been attempting to rent apartments in order to reduce the cost of lodging during their temporary duty assignments which began May 18, 1980, and are expected to last approximately 6 months. The HUD reports

that the employees have had difficulty locating suitable apartments without the services of a broker. The brokers' fees are negotiable and range in amount between 1 and 2 months' rent. HUD has informed us that even including the brokers' fees, payment of the usual apartment rents will be less costly than rental of hotel rooms during the same period.

The HUD has asked for our decision in this matter because it has found no specific authority in the Federal Travel Regulations or in prior Comptroller General decisions for payment of brokers' fee in these circumstances. We believe that there is authority for reimbursement of the brokers' fees if certain criteria are met.

Although we have never decided a case involving brokers' fees charged for locating a rental apartment in connection with temporary duty, we have decided cases involving fees paid by transferred employees to secure rental housing at their new permanent duty stations. See B–169335, May 22, 1970, and B–177395, March 27, 1973. While B–169335 involved a fee the employee was required to pay for housing in Wiesbaden, Germany, B–177395 involved brokers' fees the employees paid in order to locate housing when they were transferred to New York City. The type of fee in B–177395 was apparently the same type of fee as that in the present case. In those cases we held that since the payment of such fees was an established practice, they could be reimbursed as a part of the miscellaneous expenses allowance paid to transferred employees.

We see no reason why brokers' fees may not be paid to employees on extended temporary duty assignments under the authority of paragraph 1–9.1d of the Federal Travel Regulations (FTR) (FPMR 101–7 (May 1973)). That regulation, which is among those governing reimbursement of miscellaneous expenses to employees traveling on official business, provides as follows:

> d. *Other expenses.* Miscellaneous expenditures not enumerated herein, when necessarily incurred by the traveler in connection with the transaction of official business, shall be allowed when approved.

The HUD employees are acting properly in their attempt to reduce their lodgings costs since paragraph 1–1.3a of the FTR requires an employee to exercise the same care in incurring expenses while traveling on official business as a prudent person would when traveling on personal business. In addition, FTR paragraph 1–7.3d requires an agency to reduce per diem for extended stays when travelers are able to secure lodgings and meals at lower costs. Furthermore, we have

held, in *Willard R. Gillette*, B–183341, May 13, 1975, that the Government is entitled to the benefits of reduced lodgings costs from rental of quarters for an extended period.

Accordingly, the HUD may reimburse its employees for brokers' fees under FTR paragraph 1–1.9d, if they can show it was necessary to incur those expenses to obtain lower cost lodgings and if the sum of the brokers' fees and the rental cost is less than what they would have incurred for hotel rooms during the same period.

[B–199060]

Courts—Judgments, Decrees, etc.—*Res Judicata*—Correction of Military Records Subsequent to Judgment

Air Force member who successfully sues in Federal District Court for reinstatement to active duty and damages may not recover on an administrative claim for backpay in excess of $10,000 jurisdictional limitation of district court under 28 U.S.C. 1346(a)(2). Since claim filed concerns same parties and issues, including amount of damages as decided by district court, doctrine of *res judicata* precludes consideration of this claim.

Matter of: Captain John H. VanderMolen, USAFR, July 22, 1980:

The question in this case is whether a claimant who successfully sues the Government in United States District Court for backpay may then file an administrative claim and receive the amounts of backpay in excess of the $10,000 jurisdictional limitation of the court under 28 U.S.C. § 1346(a)(2) (1976). As will be explained, the claim may not be paid.

The question is submitted for an advance decision by Ernest E. Heuer, Chief, Accounting and Finance Division, Directorate of Resource Management, Headquarters Air Force Accounting and Finance Center, and concerns the claim of Captain John H. VanderMolen, USAFR.

The following recitation of the facts of this case will only deal with those relevant to a resolution of the question raised. We note, however, that the factual background leading up to the suit by Captain VanderMolen can be found in *VanderMolen* v. *Stetson*, 571 F. 2d 617 (D.C. Cir. 1977).

Captain VanderMolen brought suit in the United States District Court claiming his February 19, 1971 discharge from the Air Force was illegal and he sought reinstatement to active duty and damages. Since the claimant's alleged period of wrongful discharge constituted

a potential claim in excess of $10,000, Captain VanderMolen waived recovery in excess of this amount. He did so because the district court's jurisdiction is limited to considering claims of this type against the Government which do not exceed $10,000. 28 U.S.C. § 1346(a)(2).

After the District Court for the District of Columbia granted the Government's motion for summary judgment and dismissed the claimant's case, the Court of Appeals for the District of Columbia reversed this decision. The Court of Appeals ruled that his discharge was illegal and that he was entitled to backpay in accordance with law not to exceed $9,999.99. Additionally, the court remanded the case to the trial court to determine if the Air Force's cancellation of the claimant's scheduled promotion to captain was supportable. *VanderMolen* v. *Stetson*, 571 F. 2d 617, 627–628 (D.C. Cir. 1977).

On the basis of the trial court's action, the Air Force corrected the member's records to reflect constructive active duty as a lieutenant from February 20, 1971, to April 18, 1972, and as a captain from April 19, 1972, to May 24, 1978, the date he was released from active duty.

According to the Air Force, for this period Captain VanderMolen was entitled to active duty pay and allowances of $123,833.58 less civilian earnings of $59,203.78 and Veterans' Administration benefits of $5,975.88. He received $9,999.99 on the basis of the court judgment as well as $1,000.71 in adjustments to his accrued leave settlement. The Air Force encloses a voucher for the balance on the basis of an administrative claim filed by Captain VanderMolen; however, they question whether the claim may be paid in view of the claimant's waiver of recovery in excess of $10,000.

In our decision B–157414, April 26, 1978, we discussed in detail the effect of a Federal District Court judgment in a classification suit specifying a backpay award to Federal employees which potentially exceeded $10,000. We ruled that the court litigation constituted a full and final resolution of the issues including the Government's liability to the claimants. Therefore, as explained in 47 Comp. Gen. 573 (1968), the doctrine of *res judicata* precluded us from considering a case involving the same parties and issues as were before the court. See also 53 Comp. Gen. 813 (1974).

Accordingly, since Captain VanderMolen has chosen to have the Federal District Court fully adjudicate the issues involved in his claim against the Government, we may not consider his claim for additional amounts he believes due arising out of the same facts and for the same period covered by the court's judgment.

Additionally, the Air Force raises certain questions regarding the barring acts' (31 U.S.C. § 71a) effect on this claim. Since the claim is not for allowance, we shall not answer these questions. We do, however, feel constrained to comment on one further issue.

The Air Force awarded backpay from the date of wrongful discharge, February 20, 1971, until May 24, 1978. We have informally verified the date of the court order with a member of the Air Force Judge Advocate Corps and have been informed that the district court issued its judgment on May 3, 1978. Therefore, the court judgment covers the period from February 20, 1971, to May 3, 1978, and for this period the award to Captain VanderMolen is limited to $10,000.

For the period after judgment from May 4, 1978, to his discharge on May 28, 1978, Captain VanderMolen's back-pay should be computed in accordance with law, and he is entitled to receive the amount due him, if any.

[B-195731]

Transportation—Household Effects—Military Personnel—Emergency, etc. Conditions—Training Assignment Extention—Change of Local Residence

Under the statutory authority of 37 U.S.C. 406(e) (1976), Volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy incident to that extension of his assignment.

Military Personnel—Training Duty Station—Involuntary Extension at Same Station—Change of Local Residence—Transportation Allowances

Neither 37 U.S.C. 406(e) nor any other provision of statutory law contains authority which would permit the amendment of Volume 1, Joint Travel Regulations, to allow the drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters.

Matter of: Transportation Allowances—Service Member's Change of Residence Incident to Extension of Assignment, July 28, 1980:

This action is in response to a request for a decision submitted by the Assistant Secretary of the Army (Manpower and Reserve Affairs) on the question of whether the provisions of 37 U.S.C. 406(e) (1976) will permit the amendment of Volume 1, Joint Travel Regulations, to

allow for the drayage of household goods from one residence to another in situations where a service member is assigned to a permanent duty station for the purpose of participating in a training program, and his assignment at that duty station is involuntarily extended when he completes the period of training. Within certain limitations the regulations may be so amended.

In the submission it is said that a member of a uniformed service is occasionally given a limited duty assignment to attend a training program for a period in excess of 20 weeks, which is too long to qualify as a temporary duty assignment but too short for long-term relocation. In such circumstances, it is said, the service member concerned may acquire short-term rental accommodations convenient for the assignment. In unusual instances, the member is not reassigned to a different duty station at another location upon the completion of the training program; instead, he is given orders extending his assignment for several additional years at the same duty station where he participated in the training program. When this occurs, it is said, the member may find it either necessary or desirable to change his place of residence in the vicinity of the duty station. However, the Joint Travel Regulations do not currently authorize the move to be accomplished at Government expense, since no permanent change of duty stations is involved, and consequently the member must personally bear the costs of moving his household goods to his new residence.

A case in point is described in the submission to illustrate the problem. It is indicated that in 1978 an officer was assigned to a 1-year training assignment at the Pentagon to participate in a program of the Air Force Institute of Technology. He rented a small condominium apartment under a 1-year lease in the Washington, D.C. area in contemplation of his reassignment to another location after he completed the training program. However, upon completing the 1-year program in 1979 he was not reassigned to a different duty station, but was instead given orders for a 4-year controlled tour of duty at the Pentagon. He was unable to extend the lease on the condominium apartment he had rented except on a limited short-term basis because of the owner's plans to reoccupy or sell the unit, and it is indicated that for this reason he was required to move to another residence in the Washington, D.C. area. It is suggested that the necessary movement of household effects to the new residence results in an unreasonable financial hardship on the officer due to circumstances beyond his con-

trol. It is also suggested that even if the officer had not been compelled to move because of the loss of his lease or other circumstances beyond his control he might reasonably in any event have wanted to move to bigger or more desirable living quarters as a matter of personal preference or convenience.

In the submission it is noted that the statutory provisions of 37 U.S.C. 406(e) authorize the drayage of household goods from one residence to another in "unusual" circumstances when orders directing a change of station have not been issued. It is said that extensions of duty by reassignment from training to permanent duty without change of station, such as the one in the case described, occur infrequently and generally because of special abilities or outstanding performance of duty by the member concerned. Thus, a question has arisen as to whether the circumstances may be considered "unusual" in the sense of 37 U.S.C. 406(e), and whether Volume 1 of the Joint Travel Regulations may therefore be amended to allow payment of the member's expenses of packing and drayage for the relocation of his household effects to another residence if he finds it to be either necessary or desirable to move to new living quarters when his assignment at a permanent duty station is extended upon his completion of a training program there.

Section 406 of title 37, United States Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation of household effects, including packing, crating, drayage, temporary storage and unpacking. As an exception to the orders requirement, subsection (e) of section 406 authorizes the movement of household effects without regard to the issuance of orders directing a change of station "under unusual or emergency circumstances, including those in which * * * the member is serving on permanent duty outside the United States * * *." Administrative directives issued under the statutory authority of 37 U.S.C. 406 are contained in Volume 1 of the Joint Travel Regulations.

Involuntary extension of a service member's tour of duty at a duty station outside the United States was viewed by our Office in 51 Comp. Gen. 17 (1971) as a circumstance of an "unusual" nature within the contemplation of 37 U.S.C. 406(e) since it was the usual practice to rotate such members back to the United States. The specific situation considered in that decision involved an officer whose tour of duty at Ottawa, Canada, had been involuntarily extended, and who was then required to change his residence at Ottawa because he was unable to

obtain a concurrent extension of the lease on the house he was renting at the time.

On the basis of our decision in 51 Comp. Gen. 17, *supra*, paragraph M8311 was added to Volume 1 of the Joint Travel Regulations by change number 225 to those regulations, dated October 1, 1971. Paragraph M8311 currently provides as follows:

M8311 DRAYAGE AND STORAGE INCIDENT TO INVOLUNTARY EXTENSION OF TOUR OF DUTY

A member is entitled to any necessary drayage and storage of household goods without regard to prescribed weight allowance, when the tour of duty at a location outside the United States is involuntarily extended and the member is required for reasons beyond control, such as refusal of landlord to renew lease agreement, to change residences on the local economy. The member is entitled to:

1. drayage of household goods to other local economy quarters;
2. nontemporary storage of household goods (included necessary packing, crating, and drayage to the nontemporary storage facility) until a date not later than the effective date of subsequent permanent change-of-station orders;
3. drayage from nontemporary storage, including necessary unpacking and uncrating, when, during the extended tour, the member relocates to other local economy quarters.

That paragraph pertains only to a service member stationed outside the United States. The statutory provisions of 37 U.S.C. 406(e) authorize the movement of a member's household effects without regard to issuance of permanent change-of-station orders in unusual circumstances "including" those in which the member is stationed "outside the United States," but that statutory language does not thereby necessarily limit or restrict the aplication of the law to situations arising solely outside the United States. Hence, we have held that 37 U.S.C. 406(e) also authorizes the drayage of a member's household effects in "unusual" circumstances arising at duty stations within the United States as well. See 52 Comp. Gen. 769, 772 (1973).

There does not appear to be any compelling reason to make a distinction between service members stationed outside or inside the United States in situations of this nature involving the involuntary and unusual extension of a duty assignment. Since it is indicated that it is, *in fact*, "unusual" for members to be given involuntary extensions of assignments at training sites in the United States, it is our view that Volume 1 of the Joint Travel Regulations may properly be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy.

However, we reaffirm our longstanding view that the term "unusual or emergency circumstances" as used in 37 U.S.C. 406(e) refers to conditions of a general nature *incident to military operations or military needs*, and not to conditions or needs of a personal nature. See 38 Comp. Gen. 28 (1958); 45 *id.* 159 (1965); 45 *id.* 208 (1965); 49 *id.* 821 (1970); and 57 *id.* 266 (1978). Hence, it remains our view that the Joint Travel Regulations may not properly be amended to authorize drayage of a member's household effects to a new residence when his assignment at his permanent duty station is extended if that extension is voluntary, or if the change of residence is merely a matter of personal convenience, preference, or desire. Compare 52 Comp. Gen. 293 (1972). Thus, if a service member is permanently reassigned to a new duty station to participate in a training program, and his assignment at that duty station is extended upon his completion of the training program, drayage of his household effects to another residence at the time of the extension could not properly be authorized simply on the basis of his personal desire to move to bigger or better living quarters. Rather, drayage could properly be authorized by regulation only if the member's assignment is involuntarily extended, and he is compelled by necessity to move to another residence incident to the extension of his assignment.

In conclusion, Volume 1 of the Joint Travel Regulations may be amended to authorize a service member any necessary drayage and storage of household goods when his tour of duty at a location in the United States is involuntarily extended upon his completion of a training program at that location, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy. However, the regulations may not be amended to authorize drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters.

The question presented in the submission is answered accordingly.

[B–198194]

Transportation—Requests—Issuance, Use, etc.—Fraudulent Use—Carrier's Entitlement to Payment

Common carrier, which, without negligence and in good faith, honors Government transportation request (GTR) regular on its face although fraudulent, is entitled to payment for services rendered.

Transportation—Requests—Issuance, Use, etc.—Fraudulent Use—Traveler Identification—"Due Care" Standard

Common carriers honoring GTR are required only to exercise due care to establish identity of traveler as party to whom GTR was issued.

Matter of: Civil Aeronautics Board, July 28, 1980:

The Comptroller of the Civil Aeronautics Board (CAB) requests an advance decision concerning the propriety of paying claims of various airlines for travel services furnished pursuant to unauthorized and illegal use of Government transportation requests (GTR).

The report of the CAB shows that an employee of the CAB, occupying the position of "Voucher Examiner," apparently misappropriated a large number of GTRs. These GTRs were used by the employee for personal travel or were given or sold to third parties for personal travel mostly by several different airlines. The CAB has paid $6,134.74 in claims for airline travel on the fraudulent GTRs. The remaining claims aggregating $32,113.60 are being held in abeyance pending the decision of our Office.

The CAB has requested a decision by the Comptroller General answering the following questions: First, have the carriers a claim against the Government for services rendered pursuant to unauthorized GTRs?; and, second, if not, does the Government have a claim against the carriers for $6,134.74 of charges paid on such unauthorized GTR travel?

Our Office has repeatedly held that a carrier, which, in good faith and without negligence, has furnished transportation on request or by other contractual arrangements, is entitled to payment, although the transportation was unauthorized, and that the underlying pecuniary liability for the unauthorized use will be the responsibility of the Government if the forgery is untraceable, the custodians are free of liability, and the carrier has exercised the acceptable degree of procedural safeguard. 4 Comp. Gen. 630 (1925); 14 *id.* 631 (1935); 21 *id.* 559 (1941); 25 *id.* 360 (1945); B–190576, February 10, 1978; Cf. 48 Comp. Gen. 773, 774 (1969).

In 25 Comp. Dec. 811 (1919), it was held that "The agents of transportation companies cannot be acquainted with the officers and employees of the Government, and a request if in proper form and apparently good upon its face, without erasure or alteration, may be honored accordingly, thus involving the Government in the payment for the services indicated thereon."

The CAB refers to the provisions formerly published in Title 5 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies and now published by the General Services Administration (GSA) in 41 C.F.R. part 101, which places on a carrier an obligation to require the traveler to establish his identity as the traveler or party authorized to receive the ticket. The CAB interprets this requirement as "meaning carrier's are supposed to ask for a travel authorization and a Federal ID card before accepting a GTR * * *."

Section 101–41.208–1, upon which CAB bases its contention, provides:

> GTR's shall be completely filled out and properly signed by the issuing officer so as to be valid for presentation to obtain transportation services and/or accommodations. Carrier agents shall not honor GTR's which are incomplete or unsigned or which show erasures or alterations not validated by the initials of the issuing officer. Carriers shall require the person presenting a *valid* GTR to establish his identity as the traveler or party authorized to receive the ticket, exchange order, refund slip, or other transportation document. In the absence of satisfactory identification, the GTR shall not be honored. [Italic supplied.]

In accordance with the regulation for honoring GTRs the reverse side of the GTR only states—"Carriers shall not honor requests showing erasures or alterations not validated by initials of the issuing officer." A valid GTR is defined in the first part of that provision as a GTR which is completely filled out and "properly signed by the issuing officer." In the present instance none of the GTRs were properly signed by an issuing officer. Therefore, while apparently valid on their face, none of the GTRs were valid within the terms of the regulation and the further provisions of the same regulation, expressly limited to the presentation of a valid GTR, do not, by the express terms, apply here. We do not believe, however, that the result would be any different.

"Satisfactory identification" is not defined in the regulations. The CAB would limit "satisfactory identification" to a travel authorization *and* a Federal identification card.

Section 101–41.203–1 of the governing regulations requires that all transportation services must be procured with GTRs except as expressly exempted either in the regulations or in writing by the General Accounting Office or the Administrator of GSA. While use of a GTR is limited to official business, 49 Comp. Gen. 578, 580 (1970), it is not limited to Government employees. A–9895, December 12, 1925; 16 Comp. Gen. 1036 (1937); 19 *id.* 976 (1940); 25 *id.* 268 (1945). Consequently, the traveler very well might not have a Federal identification card.

Also while ordinarily a travel authorization will be issued in advance of the performance of travel, the Federal Travel Regulations in section 1–1.4 provides "*Ordinarily*, an authorization shall be issued prior to the incurrence of the expenses" [italic supplied], recognizing that not infrequently Government agents in the field will need to perform Government travel prior to the issuance of a written travel authorization.

The history of the identification requirements of GTRs shows that since the establishment of the GTR system it has always been the rule, insisted upon alike by the transportation companies and the Government, that the request must be signed by some responsible officer as well as receipted by the traveler to whom the transportation was furnished. A–14235, May 16, 1928. Our Office has issued regulations which addressed various problems and circumstances concerning identification of the traveler using GTRs. Thus, from 1926 to 1946 an official identification card was required. See GAO General Regulations No. 46, 5 Comp. Gen. 1056 (1926). The requirement for an official identification card was rescinded by General Regulations No. 108, 26 Comp. Gen. 978, 982 (1946). This was superseded by General Regulation No. 123, 34 Comp. Gen. 782, 787 (1955), which introduced the requirement for "satisfactory identification," carried forward in the GSA regulation, 41 C.F.R. 101–41.208–1, quoted above.

Prior to General Regulation 46 ticket agents might accept any suitable official means of identification. Thus, when General Regulation 46 and the prescription of and requirement for an official identification card was rescinded carriers were once again required only to exercise due care to establish the identity of the traveler by a suitable means of identification as the party to whom the GTR was issued. What constitutes due care may vary with the cirumstances. The record does not show what, if any, identification was required by the involved carriers.

Section 101–41.208 of title 41 of the Code of Federal Regulations furnishes information and guidance to common carriers for the validation of GTRs and identification of travelers. We understand that carriers of the airline industry have issued instructions (Standard Practice for handling GTRs) to its agents for compliance with these GSA regulations. Since the record contains no evidence to the contrary, it is reasonable to assume that the carriers' agents fully complied

with their instructions and with the GSA regulations in accepting and honoring the involved GTRs. See 31A C.J.S. Evidence § 134 (1964).

All of the GTRs submitted to our Office bear an apparently official stamp of the CAB, Finance Division, B-18, and address in the "bill to" space on the GTR. All but one were apparently issued by an issuing officer other than the traveler. They were issued for service by a named carrier, with specified routing and in all but one instance with the specified service. They were therefore complete and valid on their face. The carriers were therefore entitled to payment for the services rendered even though the GTRs were fraudulently issued.

GTR No. D7906128, American Airlines, was apparently signed by the same party both as issuing officer and as traveler. Since only a Government employee would be authorized to sign in both capacities the carrier should ordinarily have required an official identification card and refused to honor the GTR in the absence of a Government identification or satisfactory explanation for the absence of such an identification together with other satisfactory identification.

GTR No. D3620786, United Airlines, did not have the type of service entered on the copy of the GTR in our file. Section 101-41.208-1 of the GSA regulations quoted above requires that GTRs be completely filled out and provides that "carrier agents shall not honor GTRs which are incomplete * * * or which show erasures or alterations not validated by the initials by the issuing officer." Since GTR No. D3620786 does not show the type of service required it is incomplete on its face and should not have been honored by the airline. Accordingly, the carrier would not ordinarily be entitled to payment for this transportation service in the absence of a satisfactory explanation for the failure to show the service required.

GTR No. D362180 was originally made out for transportation on Eastern Airlines which was struck out and Trans World Airlines substituted. The change is not initialed by the issuing officer as provided in the regulations. A change in service is also required to be explained on a reverse of the GTR. A copy of the reverse of the subject GTR was not furnished with the record. On the basis of the present record, therefore, payment should not be made for the service on this GTR.

Accordingly, in answer to the first question, the carriers do have valid claims against the Government for unauthorized GTR travel, with the exception of the three GTRs discussed above and the answer to the second question is that the Government does not have a claim against the carriers for the $6,134.74 already paid.

[B-197439]

Small Business Administration—Investment Companies—Authority To Invest In—Minority Enterprise Small Business Investment Companies (MESBICs)—Leveraging Propriety—Non-Private Fund Matching

The Small Business Administration (SBA) does not have authority to "leverage against" (partially match) funds invested by the Federal Railroad Administration in minority enterprise smal business investment companies (MESBICs) because, generally, SBA may only leverage against investments made by private sources in MESBICs.

Matter of: Authority of SBA to Leverage Against Minority Business Resource Center Investments in Minority Enterprise Small Business Companies, July 29, 1980:

During a review of a Federal Railroad Administration program by the General Accounting Office (see GAO Report CED-80-55, Feb. 1, 1980), a question arose concerning the Small Business Administration's (SBA's) practice of partially matching investments of other Federal agencies in minority enterprise small business investment companies (MESBICs). SBA's matching is accomplished through a process known as "leveraging." Leveraging means investing in MESBICs (or other small business investment companies) through the purchase or guarantee of debentures, or through the purchase of preferred securities. 13 C.F.R. § 107.3.

SBA sometimes bases its investments in MESBICs on the amount of Federal funds invested by other agencies—*i.e.*, it leverages against (partially matches) investments made by other Federal agencies. One of the agencies that invests Federal funds in MESBICs is the Minority Business Resource Center, established within the Federal Railroad Administration pursuant to 49 U.S.C. § 1657a. The Minority Business Resource Center is authorized to invest money (called venture capital) to enable minority businessmen to take advantage of business opportunities related to maintenance and improvement of railroads. 49 U.S.C. § 1657a(c)(6). The Center has been investing in MESBICs based on this authority, and SBA has agreed to leverage against (partially match) these investments.

The question is whether SBA has authority to leverage against investment by Federal agencies. We think not, unless a statute specifically authorizes it in particular cases.

The law that authorizes SBA to leverage investments in MESBICs only authorizes leveraging against private money. Section 303(c)(2)(iii) of the Small Business Act, as amended, 15 U.S.C. § 683(c)(2)

(iii), authorizes SBA to purchase or guarantee debentures in MESBICs, provided:

> * * * the amount of debentures purchased or guaranteed and outstanding at any one time pursuant to this paragraph (2) from a company having combined *private* paid-in capital and paid-in surplus of less than $500,000 shall not exceed 300 per centum of its combined *private* paid-in capital and paid-in surplus less the amount of preferred securities outstanding under paragraph (1) of this subsection, nor from a company having combined private paid-in capital and paid-in surplus of $500,000 or more, 400 per centum of its combined *private* paid-in capital and paid-in surplus less the amount of such preferred securities. [Italic supplied.]

Since the Minority Business Resource Center is clearly a Federal entity, its contributions to MESBICs are not private capital or surplus and the above quoted provision does not authorize SBA to leverage against them. We are aware of nothing in the law or legislative history that suggests otherwise.

According to a letter from SBA's General Counsel, 13 C.F.R. § 107.101(d)(2), quoted below, authorizes SBA to leverage against the Center's investments in MESBICs:

> Nonprivate funds for licensees. (i) A Licensee [MESBIC] may include nonprivate funds (*e.g.*, funds granted under Title VII of the Community Services Act of 1974, as amended) in its Private Capital for purposes of sections 302(a), 303(c) and 306 of the Act: Provided, however, That the minimum capital of $150,000 ($500,000 on or after October 1, 1979) specified by section 302(a)(1) of the Act may not include nonprivate funds and that for Leverage purposes nonprivate funds will be included in Private Capital only to the extent that private funds totaling at least ten percent of the nonprivate funds are also included.

"Nonprivate funds" are defined in the regulations as including funds derived from the Federal Government. See 13 C.F.R. § 107.101(d)(2)(ii), which provides:

> (ii) For purposes of this paragraph (d)(2), "nonprivate funds" shall mean funds obtained, directly or indirectly, from another agency or department of the Federal Government or from any State or subdivision thereof, except as limited by Public Law 92-512 (commonly known as the General Revenue Sharing Act) and regulations of the Treasury Department, 31 CFR Part 51.

The regulation thus specifically allows Federal funds to be included as "private" funds in determining SBA's investment. The Small Business Act, however, provides no basis for treating Federal funds as "private" funds for leveraging purposes. Accordingly, the legal authority for such a result must be found elsewhere. The Community Services Act, cited in the above SBA regulation, does specifically authorize money invested in MESBICs to be considered private money. See 42 U.S.C. § 2985a(a)(1) (1976). By the same token, the inclusion of this specific authority in the Community Services Act, which was added in 1975, tends to confirm that Federal funds cannot generally be considered to be private for purposes of SBA leveraging. Absent a provision like 42 U.S.C. § 2985(a)(1), therefore, we see no legal basis for SBA to leverage against Federal funds invested in MESBICs.

U.S. GOVERNMENT PRINTING OFFICE : 1981 O - 338-607