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[B-195153]

General Accounting Office — Jurisdiction — Grants-in-Aid — Grant Procurements — Foreign Government Grantee

General Accounting Office (GAO) will undertake reviews concerning propriety of contract awards by foreign governments under Agency for International Development grants. Purpose of GAO review is to determine whether there has been compliance with applicable statutory requirements, agency regulations and terms of grant agreement and advise Federal grantor agency, which has authority for administering grant, accordingly.

Contracts—Protests—Timeliness—Grant-Funded Procurements

GAO Bid Protest Procedures are not applicable to review of grant complaints; consequently, GAO will consider complaint notwithstanding possible failure to comply with timeliness standards of Bid Protest Procedures.

Contracts — Awards — Federal Aid, Grants, etc. — Competitive Bidding Procedure — Foreign Countries Using AID Funds

Agency for International Development's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded.

Bids — Acceptance Time Limitation — Extension — Responsiveness of Bid

Bidder who has offered required bid acceptance period but subsequently allows bid to expire may accept award on basis of bid submitted. If at same time bid bond expires, procuring activity is not precluded from considering and/or accepting bid.

Matter of: Neidermeyer-Martin Co., November 1, 1979:

Niedermeyer-Martin Co. (Niedermeyer) has requested our review of what it terms "the arbitrary exclusion of one of [its] * * * principal products [(Douglas fir poles)] from consideration under the [Agency for International Development's (AID) Project No. 388-0021]." The purpose of AID's Project No. 388-0021 "is to provide electricity at reasonable cost for rural employment creation and community service facilities, and for rural households, especially for the poor." The three procurements in question are financed by a loan and grant agreement, dated December 15, 1977, between the Peoples Republic of Bangladesh (Bangladesh) and the United States of America, acting through AID.

Pursuant to the project agreement, Bangladesh established a central organization, the Rural Electrification Board (Board), for the implementation of the rural electrification project. The Board "will take on the responsibilities of promoting, coordinating, financing and technically supervising a nationwide rural electric distribution network." One of its tasks was to make a determination concerning what type(s) of power pole should be used to carry out the project. It would be the Board's responsibility to draft tender documents that con-

formed to that decision. To assist the Board in its decisionmaking process the engineering and consulting firm, Commonwealth Associates, Inc. (Commonwealth), was engaged.

As a result of Commonwealth's investigation of the availability of suitable timber in Bangladesh for this project it was determined that, at least in the initial stages, importation of treated wood power poles was essential since the production capabilities of Bangladesh were questionable. Commonwealth advised the Board on the drafting of the technical specifications for wood power poles which included the type of preservative that should be utilized in treating the poles and the minimum preservative retention and penetration needed for protection in the climate and fungus exposure conditions of Bangladesh.

Eight species of trees were found to be acceptable for the procurement of the wood poles. The invitation provided that either pentachlorophenol (Penta) or chromated copper arsenate (CCA) may be used to preserve the wood poles. With respect to the preservative treatment, the invitation, under Technical Specifications, paragraph 2.5, provided:

> Poles supplied under this proposal shall be conditioned, treated, and tested in accordance with REA [U.S. Rural Electrification Administration] Specification DT–5C except as modified below.
>
> These poles shall be treated so as to assure a heavy retention of preservative. The amount of retention shall be suitable for pole use in Bangladesh where severe exposure conditions are considered to exist.
>
> The heavy treatment must result in a retention of at least 1.25 pounds of the active ingredients of penta or CCA per cubic foot in the Assay Zone as specified in Table 10 of REA Specification DT–5C for the species listed therein or in an Assay Zone of from 0.5 in. to 1.0 in. for the Bangladesh species listed in Table G–1 attached hereto and these stipulations shall be considered as minimum treatment requirements.
>
> The penetration of preservative shall be as listed in the aforementioned Table 10 except that Bangladesh species must have a penetration of one hundred (100) percent of the sapwood.

It is Niedermeyer's position that:

> Properly treated Douglas Fir poles are universally recognized, among knowledgeable technical and scientific personnel as being at least the equal of any of the species of wood poles to which the subject procurement is limited, in addition to possessing definite advantages.

Niedermeyer believes that had it been permitted to submit a bid offering Douglas fir poles, a savings of $1 million could have been realized. Essentially, Niedermeyer is arguing that the specifications for this project are restrictive, in that the Board overstates its minimum needs. Specifically, Niedermeyer contends that a specification requiring 1.25 # retention per cubic foot of wood is "100% over any normal requirement" and "increases the cost of the pole by approximately 50%." In this connection, Niedermeyer states:

> * * * even on piling that is used in the ocean, such as San Diego, San Francisco, New Orleans, Hawaii, Vietnam, Korea, and purchased by the Army, Navy, port authorities and the engineering firms which design docks, the retention is [1.00] * * * # per cubic foot of wood with creosote.

Niedermeyer, while pointing out that creosote was not an acceptable preservative for this procurement, questions the decision to not allow the preservative. In support of this Niedermeyer states:

> * * * I cannot understand why, in 1975, creosote was very acceptable in Korea and Vietnam, and 8#, 10#, 12# [(its equivalent .60#)], 15# retention was also acceptable, and now three years later they [REA] change their minds and say creosote should not be used, that only Penta and CCA are acceptable—and they doubled the retention requirements.

Niedermeyer posits that, if the retention rate was the .60 # standard required by the United States Government for severe climatic conditions and the use of creosote was permitted, more than two treating plants in the United States would have bid and competitive bidding, which was not achieved, would have been realized.

Finally, by telegram dated September 24, 1979, Niedermeyer advises that it has been informed that the apparent low bidder, Koppers Company, Inc. (Koppers), "extended validity of their bid and bid bond two days after [the] date required under [the] bid documents." Niedermeyer believes this renders the bid nonresponsive, requiring its rejection.

AID's position is threefold. First, AID questions whether GAO has jurisdiction to consider this protest since it arises pursuant to a procurement funded by an AID grant to a foreign country. In addition, AID argues that even if GAO has jurisdiction, the complaint is untimely. AID's final contention is that "the exclusion of Douglas Fir from the subject tender by the [Board] * * * of Bangladesh was not 'arbitrary and capricious,' but a reasonable and necessary action that will withstand GAO scrutiny."

An award has recently been made to Koppers.

Jurisdiction

AID believes that GAO should not assert jurisdiction over contracts awarded under AID grants by foreign governments and thus be consistent with our position concerning contracts awarded under loans to foreign governments. AID argues that GAO would be inserting itself in the area of foreign policy since such considerations are as inherent in AID grants as they are in AID loans. AID appears to be arguing that its review role is paramount here because one of its functions is assisting in the determinations concerning conditions of grants which includes establishing the terms necessary for the foreign government's compliance.

In addition, AID points out that the GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), where we decided to undertake reviews of contract awards of Federal grantees, does not appear to have contemplated grants to foreign governments. Consequently, AID con-

cludes that a foreign government should not be considered a "Federal grantee" within the meaning of the term as used in our prior decisions. Finally, AID expresses concern that since many AID projects, including the instant one, are funded by combinations of grant and loan funds, GAO could be faced with asserting jurisdiction over only a portion of the procurement, resulting in what AID believes would be an untenable position. However, we have been advised by AID that, in the instant situation, only grant funds are involved in the procurement of the wood poles.

AID's request for consistent treatment of AID grants and loans must be denied. It is our policy to decline jurisdiction concerning protests of contract awards where the funds involved are obtained through a loan from the United States Government because those awards involve neither a procurement by or for an agency of the United States nor a procurement by a grantee of the United States. *International Research Associates, Inc.*, B–192376, August 10, 1978, 78–2 CPD 113. The rationale is that the funds involved are exclusively those of the foreign government since the loan is an obligation of the foreign government to be repaid with interest. See *Allis-Chalmers Corporation*, B–188514, April 5, 1977, 77–1 CPD 235. The situation where the funds involved are obtained through a grant is different since the funds are United States funds and the foreign government has no repayment obligation. However, it is clear that the foreign government has obligations to comply with the terms and conditions of the grant agreement, agency regulations and any applicable statutory authorities.

We believe that our policy of reviewing contracts awarded under Federal grants does include grants to foreign governments. Our Public Notice provides, in pertinent part:

> * * * consistent with the statutory obligation of the General Accounting Office to investigate the receipt, disbursements, and application of public funds, we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors.

Although our Notice did not specifically mention foreign governments while mentioning State and local governments, it is clear that the Notice did not preclude our review involving grants to foreign governments. Our concern is the source of the funds used (United States Government) rather than the specific circumstances of the recipient. In such cases, our role, as set forth in the Notice and our decisions, is to determine whether there has been compliance with applicable statutory requirements, agency regulations and the terms of the grant agreement and to advise the Federal grantor agency, which has the authority for administering the grant, accordingly. See *Thomas Construction Company, Incorporated, et al.*, 55 Comp. Gen.

139 (1975), 75–2 CPD 101; *Copeland Systems, Inc.*, 55 *id.* 391 (1975), 75–2 CPD 237; *Sola Basic Industries*, B–185505, April 7, 1976, 76–1 CPD 232; and B–168759, April 15, 1970; also, see *International Commodities Export Company*, B–186822, August 23, 1977, 77–2 CPD 141, where we did not review the propriety of a contract award by a foreign government grantee under an AID grant only because, unlike here, AID did not retain certain rights of approval and there was no requirement affecting the procurement procedures to be used by the foreign government.

AID points out that although the foreign government grantee will be conducting the AID-financed procurement using the former's own contracting laws and regulations, adequate oversight is provided for by AID, the host country and Congress. However, this is not a bar to our review. The foreign government grantee receiving Federal funds takes these funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government and the specific terms of the grant agreement. We believe our review is appropriate to ascertain whether there has been compliance with the various terms and conditions and advise the Federal grantor accordingly.

Further, because of the above, it is clear that we are not inserting ourself into the area of foreign policy here. We note that we have previously reviewed complaints concerning awards of contracts under AID grants (e.g., *Sola Basic Industries Inc.*, *supra*), and loans to foreign governments (e.g., B–168809, March 17, 1970; B–165600, September 12, 1969), and neither type of situation resulted in embarrassment, as forecasted by AID, for the United States Government or the foreign government.

In this case, AID has reserved the right to review and approve the terms of the solicitation and the award selection. Further, the grant (project) agreement does contain instructions to the grantee concerning procurement procedures to be used by the grantee. For instance, the agreement provides in Annex 2, paragraph C.4:

> Any goods and services financed, in whole or in part, under the Loan and/or Grant will be procured on a fair and, to the maximum extent practicable, *on a competitive basis.* [Italic supplied.]

We note that AID regulations set forth at 22 C.F.R. Chapter II (1979), which were promulgated pursuant to the Foreign Assistance Act of 1961, Pub. L. 87–195, 75 Stat. 424 (1961) § 621, provide that "specifications shall be stated * * * in a nonrestrictive manner and in sufficient detail to permit maximum response from prospective suppliers." See 22 C.F.R. § 201.22(a)(1) (1979).

Where competitive bidding is required as a condition for receipt of a grant, we have held that certain basic principles of Federal procure-

ment law must be followed by the grantee in solicitations issued pursuant to the grant. This requires only rationality rather than compliance with technical intricacy in grantee decisions. See *Copeland Systems, Inc., supra.*

With respect to AID's final contention, concerning our role where there is a combination of grant and loan funds, which is not the situation here, it will be our policy initially to make a determination regarding the significance of the Federal grant funds in the project as a whole. If the amount is found to be significant, we will consider the complaint. See GAO Public Notice, *supra.*

Under these circumstances, we find that our review of the instant procurement or others like it to be appropriate, given the magnitude of this activity.

Timeliness

AID has raised the issue of the timeliness of Niedermeyer's request for review. AID characterizes the Niedermeyer complaint as a "protest" and requests that it be dismissed as untimely pursuant to GAO Bid Protest Procedures, 4 C.F.R. 20.2(a) (1979). However, the timeliness requirements of the Procedures are not applicable to the review of grant complaints considered pursuant to our Public Notice. Consequently, we will consider the matter.

Merits

Niedermeyer, as set forth above, is questioning the exclusion of Douglas fir and the type of preservative and retention specified in the solicitation, that is, the Board's determination of its minimum needs.

The Board and AID both adopted Commonwealth's view—exclusion of Douglas fir from the solicitation and requiring only CCA and/or Penta for preserving the wood poles. Commonwealth's view was essentially summarized in its March 22, 1979, letter as follows:

> Bangladesh is a low, humid hot tropical climate, subject to floods during the monsoons. It is a high soft rot area. The treatment specifications were written for this condition. * * *
>
> * * * * * * *
>
> When CCA treatment is to be specified in severe hazard locations such as marine exposures, the AWPA recommendations are for retentions as high as 2.5 pcf CCA.
>
> CCA and pentachlorophenol were specified for Bangladesh, because both are dissolved active preservatives in a carrier. By increasing the concentration of the preservative, the toxicity or the preservative capability can be increased without increasing the gross volume of the solution. To increase the preservative level of a creosote treatment, the gross volume of creosote must be increased. This increases the gross weight of the pole and the possibility of bleeding which could increase the shipping and handling costs and cause problems with shipping companies.
>
> Regarding the exclusion of Douglas Fir poles, it should be noted that in wood preservation, the level of treatment is dependent on the pore space in the sapwood. In general, only the sapwood can be treated. In heavy, dense woods, such as Douglas Fir, the sapwood is thin (max. 1½"). Therefore, in Douglas Fir there

is a limited space available in the wood to receive and hold the preservative. If rot should develop, in the heart wood of a Douglas Fir pole, as it has in a few cases in southeastern U.S.A., only a thin 1'' to 1½'' treated shell may remain to support the line. Poles with thicker treated sapwood (approximately 3''), retain sufficient strength to support the line.

A southeastern U.S.A. utility which specified more than the AWPA recommended 0.6 pcf, has reported that of 80 Douglas Fir poles, they installed on one line, 80% had serious internal decay in seven years. Twenty-seven and one half percent of these eighty poles were classified as failures and were replaced. They are continuing to check for additional decayed poles.

As indicated above, the purpose of our review is to determine whether the grantee has complied with the applicable statutes, regulations and grant terms which require nonrestrictive procurements assuring maximum competition in the statement of its minimum needs. In this connection, our standard of review is that we will not dispute a procuring activity's minimum needs determination unless it is clearly shown to be unreasonable. See *The Babcock & Wilcox Company*, 57 Comp. Gen. 85 (1977), 77-2 CPD 368. We acknowledge that the record contains information concerning how the Board could make use of the Douglas fir. However, the record also includes documentation showing that the solicitation's specifications (species of trees, type of preservative and retention rate) reasonably excluded the Douglas fir and represent the Board's minimum needs. Although Niedermeyer may disagree with such determination, we do not consider that Niedermeyer has shown them to be unreasonable. Therefore, we find that the AID concurrence with the Board's decision to exclude Douglas fir and require only CCA and/or Penta at the 1.25 # per cubic foot retention rate does not contravene the requirements of the AID grant agreement and regulations applicable thereto.

Consequently, Niedermeyer's contention, that competitive bidding was not achieved, is without merit. We observe here that, other than Niedermeyer, six firms responded to two of the procurements and three firms responded to the third. (Niedermeyer apparently bid on another species.)

With respect to Niedermeyer's final contention that Kopper's failure to extend its bid and bid bond as required under bid documents makes the bid nonresponsive, we disagree. We have held that a bidder who has offered the required bid acceptance period but subsequently allows his bid to expire may at his option accept an award on the basis of the bid submitted. See *Government Contractors, Inc.*, B-193548, February 26, 1979, 79-1 CPD 133. In regard to the expiration of the bid bond, it is our position that if the bid bond period expires due to the extension of the bid acceptance period, such does not preclude the procuring activity from considering and/or accepting the bid. See *Engle Acoustics & Tile, Inc.*, B-190467, January 27, 1978, 78-1 CPD 72.

[B-195184]

Contracts — Negotiation — Evaluation Factors — All Offerors Informed Requirement

Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. Request for proposals, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; General Accounting Office recommends that options not be exercised.

Contracts — Negotiation — Offers or Proposals — Preparation — Costs — Arbitrary and Capricious Government Action

Protester's claim for proposal preparation costs must be denied where it can not be shown that protester would have been awarded the contract but for the agency's action.

Matter of: Northland Anthropological Research, Inc., November 5, 1979:

Northland Anthropological Research, Inc. (NAR), protests the award of a contract for an archaeological survey of Fort Wingate pursuant to solicitation No. DAAG49-79-R-0024, issued by Tooele Army Depot, Utah. NAR's protest alleges improper Army conduct concerning the negotiation and evaluation procedures.

NAR believes that the Army never intended to award a contract to one of the small businesses responding to the small business set-aside solicitation. NAR is convinced that the Army intended from the start to award a contract to the awardee, Southern Colorado University (SCU).

To subvert the small business restriction, NAR states that the Army appears to have engaged in an elaborate subterfuge designed solely to steer the final award to SCU, the incumbent contractor. NAR requests that the award to SCU be terminated and that it be compensated for its proposal preparation costs.

I. *Background*

Fort Wingate requested that the contractor performing the survey be on the job beginning the first week in June to correspond with the Youth Conservation Corps (YCC) Program. Since SCU managed the YCC camp in 1978, Depot personnel asked for but did not receive a sole-source procurement authorization because the contracting officer concluded that previous experience alone was not a sufficient justification when competition was available; therefore, the solicitation was issued on an unrestricted basis. On April 17, 1979, the day after issuance, the Small Business Administration (SBA)

requested that the solicitation be made a 100-percent small business set-aside. This was done by amendment No. 1.

On May 1, 1979, amendment No. 2 added information concerning the criteria to be used in proposal evaluation. These criteria included prior camping, recreation, and environmental education experience of the proposed project staff and price was listed as the least important factor. The Army's evaluation scheme notified offerors that the quality of the firm's experience, management, and approach were more important relatively than price.

Initial proposals were opened on May 16 and they contained these prices:

No. 1—Wallaby Enterprises	$40,000.00
No. 2—NAR	32,432.06
No. 3—Professional Analysts	48,045.00
No. 4—SCU (nonresponsive to small business requirement)	20,000.00

The funds allotted for the project were $20,000 and additional funds were not available. Thus, the Army cancelled the solicitation and prices were not disclosed.

On May 29, 1979, it appears that SCU hired a crew chief for the survey to be in charge of YCC enrollees and to report to Fort Wingate for work on June 11, 1979; her salary would total $3,500 for approximately 11 weeks' work.

On May 30, 1979, after learning that, NAR contacted the Army to ask if an award had been made. NAR was told that no award had been made.

Sometime after the initial proposals were opened, the contracting officer contacted the SBA Denver Regional Office and explained that no award could be made exceeding $20,000 and requested advice on eliminating the small business set-aside. The Army reports that no comments were made by SBA and, due to the urgency, each company that originally submitted a proposal was contacted and asked for price quotations based on a new solicitation (No. DAAG49-79-R-0036) with the small business set-aside requirement removed.

Meanwhile, on June 4, 1979, NAR telephoned the Project Officer who said that no funds were available currently for the project and that this was the reason for the delay in making an award. NAR was also advised that its proposal was out of the competitive price range established upon initial inspection of proposals; thus, should funds become available, NAR would not be considered for the award of the contract.

On June 5, 1979, the contracting officer's representative telephoned NAR and explained that funds were now available for the project,

but that all the small businesses submitted prices in excess of the amount budgeted by Fort Wingate for the project. The contracting officer's representative requested NAR to submit its offer telephonically that same day.

Prices obtained were as follows:

No. 1—SCU	$19,735.00
No. 2—NAR	25,373.42
No. 3—Professional Analysts	31,560.00
No. 4—Wallaby Enterprise	36,000.00

Award was made to SCU and on June 11, 1979, work commenced on the archaeological survey of Fort Wingate.

II. *NAR's Argument*

From these events, NAR draws several inferences:

(1) SCU was hiring personnel for the project at a time when it could not have had any reasonable expectation that it would be awarded the contract.

(2) SCU correctly guessed the date of project initiation at a time when it was effectively barred from participation in contract negotiations.

(3) SCU began work on the archaeological survey the previous year and the date summaries from that work should have been provided to all prospective offerors.

NAR believes that the small business restriction could have been maintained and should have been maintained on this procurement, or the restriction should never have been placed at all. NAR states that if the Army wants to accept the lowest bid for these projects, it should never place a small business restriction on them.

III. *The Army's Position*

The Army reports that, about December 1978, a representative of SCU met with the commander of Fort Wingate to discuss the contract for the summer of 1979, the subject of this protest. They agreed that more staff would be necessary for the 1979 contract and, using SCU's staff pay as a guide, the commander estimated that $20,000 would be needed to perform the work.

Concerning SCU's bid on the set-aside, the Army argues that, in *Solar Resources, Inc.*, B–193264, February 9, 1979, 79–1 CPD 95, our Office has held that ineligible offerors are not prohibited from obtaining copies of a solicitation and submitting courtesy offers which contracting officers may use in determining whether small business bid prices are reasonable. Further, the Army contends—citing Defense Acquisition Regulation § 2–404.1(b)(vi) (1976 ed.) and our decisions in *Building Maintenance Specialists, Inc.*, B–186441, September 10,

1976, 76-2 CPD 233; and *Strand Aviation, Inc.*, B-194411, June 4, 1979, 79-1 CPD 389—that the decision of the contracting officer to resolicit without the small business restriction was clearly proper, because all small business bids were unreasonable and far exceeded the funds available.

The Army concludes that although the contracting officer did not issue a formal resolicitation document, all offerors were treated equally and fairly in the resolicitation cycle in view of the urgency.

IV. *Decision on Merits*

The key to SCU's success in this procurement was clearly its knowledge of the importance of price. Since SCU was the only offeror whose price was within the Army's budget, its offer was the only one to receive consideration. The circumstances of this case and the Army's report convincingly show that SCU's agreement with the commander of Fort Wingate on the size of the staff required to do the work and SCU's knowledge of its own pay scales—which it gave to the Army—provided the sole information necessary for it to win. Equally convincing from the material before us is that the other offerors had no idea what the estimate or funding limit was or that the funding limitation was so important. We believe that the RFP's disclosed evaluation scheme indicated that quality and experience were far more important than price but the fiscal realities of the situation were that the Army wanted the best survey that it could buy for not more than $20,000. Unquestionably, the other competitors, including NAR, were placed at a material competitive disadvantage. To avoid prejudice to other competitors, the Army should have disclosed the amount and importance of the Government estimate or the Army should have performed an independent analysis to arrive at the Government estimate and disclose it either to all or none.

Situations similar to this one occurred in *Willamette-Western Corporation; Pacific Towboat & Salvage Company*, 54 Comp. Gen. 375 (1974), 74-2 CPD 259; and *Sam L. Huddleston & Associates, Inc.*, 57 Comp. Gen. 489 (1978), 78-1 CPD 398. In *Williamette-Western*, the contracting agency released an advance copy of the solicitation to one competitor. As a result, the competitor gained approximate knowledge of the relative importance of evaluation factors, which was not disclosed in the solicitation actually issued. The knowledge enabled that competitor to tailor its proposal to satisfy the most important evaluation factors. Our Office concluded that the contracting agency's action resulted in prejudice to other offerors and we recommended corrective action. Similarly, in *Sam L. Huddleston & Associates, Inc.*, the contracting agency knew that one firm possessed the master plan

which contained invaluable information on project specifics but the agency took no action to ensure that all other competing firms possessed that critical information. Our Office concluded that it was the contracting agency's duty to have done so. There, it was clear that material information was not disclosed to all offerors and fundamental fairness required it to be in order that all offerors would be treated equally.

Accordingly, NAR's protest is sustained.

V. *Proposal Preparation Costs*

To recover proposal preparation costs, NAR must show that, but for the Government's arbitrary or capricious action, it would have been awarded the contract. *McCarty Corporation* v. *United States*, 499 F. 2d 633 (Ct. Cl. 1974); *United Power & Control Systems, Inc.; Department of the Navy—Reconsideration*, B-184662, December 27, 1978, 78-2 CPD 436. Without considering whether the Army action was arbitrary or capricious, we do not believe that NAR has shown that it would have been awarded the contract. It appears that NAR cannot show that it would have been able to tailor its proposal to win the competition even if it knew of the $20,000 funding limit for the contract. We cannot award proposal preparation costs on the speculation that NAR would have won the competition. Accordingly, NAR's proposal preparation cost claim is denied.

VI. *Conclusion and Recommendation*

The first term (approximately 11 weeks beginning June 11, 1979) of the contract was fully performed before the matter was ready for our consideration; however, the contract has four option periods. We recommend that the Army not exercise the options, and that the Army have a new competition to satisfy the requirement for future years.

[B-188548]

Timber Sales — Quantity Variances — Access Road Cost Recovery

Claim for unamortized road construction costs resulting from 39-percent discrepancy between estimated timber volume and actual timber volume cut is denied where: (1) record fails to establish that the Forest Service grossly disregarded applicable factors and procedures in preparing estimate; (2) there is no basis upon which to conclude that limited warranty (that road construction costs would be fully amortized) existed; and (3) volume estimate 39 percent under actual volume does not constitute gross error.

Matter of: Willamette Industries, Inc., November 8, 1979:

The Department of Agriculture, United States Forest Service, requests our decision concerning the claim of Willamette Industries, Inc. (Purchaser), for $58,004.87 to make up a deficit in road credit conversion which resulted from a 39-percent-volume underrun on the Green Mountain Timber Sale, Willamette National Forest.

The gist of the Purchaser's claim is that the underrun on the Green Mountain sale is attributable to the Forest Service's error in computing the net volume of merchantable timber. The Purchaser believes that the Forest Service, in arriving at the estimate included in the sale document, failed to "apply *any* factor for hidden defect and breakage."

The Forest Service provided the Purchaser a timber sale prospectus which showed 6,600 MBF as the estimated quantity of timber and 35 percent as the estimate of stand defect. The prospectus warned purchasers that its estimates were not estimates of the purchaser's own cost or recovery estimates and that, for this reason, the estimates were not part of the timber sale contract. Purchasers were further urged to examine the sale area and make their own cost and recovery estimates. Consistent with the warning in the prospectus the timber sale contract expressly disclaimed any warranty of the timber volume estimates.

The Purchaser reports that, prior to the sale, it conducted its own examination of the Green Mountain sale for the purpose of verifying construction costs, analyzing timber quality and volume, ascertaining log distribution, and the availability of right-of-way volume. After 2 days the Purchaser's cruiser "concluded that the actual volume on the ground was slightly less than that which the Forest Service had indicated, but certainly well within the normal deviation that a purchaser would anticipate."

On December 22, 1970, the timber was purchased. The timber sales contract set a March 31, 1975, termination date for the Green Mountain sale. The Forest Service conducted its final inspection of Green Mountain on December 10, 1974, and certified that the Purchaser had met all contract requirements.

On December 13, 1974, the Purchaser advised the Forest Service that it had logged all units of the Green Mountain sale and that it had only extracted 4,050 MBF of the estimated 6,600 MBF, an underrun of approximately 39 percent. The Purchaser had to build approximately 3 miles of logging road, the specifications of which were set out in the contract, in order to extract the timber. Under Forest Service contracts, Purchasers earn credits for the logging roads that they construct. The credits are set off against the sums owed the Forest Service for timber removed from the sale site. Here, however, the value (in credits) of the roads exceeded the value of the timber removed. The Purchaser was left with unused credits in the amount of $58,004.87 due to the underrun.

The Purchaser offers three legal contentions to support its claim: (1) the Forest Service negligently failed to use the best information available in preparing the volume estimate; (2) a limited warranty existed that the Purchaser would fully amortize the cost of road construction; and (3) the volume estimate was so far off as to constitute

gross error and justify reformation on the theory that the volume estimate was a material aspect of the contract.

In support of (1) above, the Purchaser refers to certain internal Forest Service memoranda. These memoranda indicate that some Forest Service personnel believed that the 39-percent discrepancy in this sale may have been caused by the failure to adjust the estimate for hidden defect and breakage. In addition, the Purchaser cites a January 31, 1979, affidavit of its resident forester. The forester reports that he was initially unable to ascertain from the cruise data furnished by the Forest Service the reason for the disparity between the estimated volume and the actual volume and that it was only after a 3-week examination of similar data from other sales at approximately the same time that he was able to ascertain that no allowance had been made for hidden defect and breakage. Exactly how this was accomplished is unspecified. He went on to observe that the minimum possible hidden defect and breakage factor would be 10 percent and that a 15- to 25-percent factor would be more common under the circumstances.

The Purchaser also cites a December 21, 1978, affidavit of a former Forest Service Timber Management Assistant which states that there are two possible explanations of the underrun: either (1) the Forest Service failed to make the final adjustments for hidden defect and breakage after the printout was returned to the district office; or (2) incorrect adjustments were made.

In our view, the above does not show that the Forest Service failed to include an allowance for hidden defect and breakage. There is an indication that the factor may have been included. In this regard, the sale report and appraisal—the only contemporaneous document in the record—states that a factor of 10 percent for Douglas fir was considered, an amount which the Purchaser's resident forester states is "the minimum possible hidden defect and breakage factor which should have been applied to the sale."

The Forest Service has consistently maintained that the estimate was properly prepared and that there was no known error as to this factor. The agency believes that such an underrun is not uncommon given the imprecise nature of these cruises in this type of terrain. In this regard, the Forest Service reports that wide variations occur between Willamette National Forest timber sale estimates and the amounts actually cut. For example, the following statistics are cited:

Year	Variation From Estimate
1972	35–200 percent
1973	68–130 percent
1974	38–155 percent

In view of the above, we believe that there is a factual question regarding the reason for the underrun which remains unanswered on this

record. Although there is support for the Purchaser's position, there is also support for the Forest Service position. Since we are unable to resolve this factual question, we cannot conclude that the Forest Service negligently prepared this estimate.

The Purchaser's second contention, that a limited warranty existed that the Purchaser would fully amortize the cost of road construction, is premised upon the fact that the Forest Service appraisal indicated a residual value in excess of the base rate. The Purchaser argues that:

> This meant that in order for a purchaser to get back all of the monies it had expended for road construction, 100% of the volume of Douglas Fir indicated in the contract would have to be cut, or 92% of the estimated total volume of all species. This fact amounted to a representation that the government's estimate was, at worst, no greater than 8% off, since certainly the government did not expect the purchaser to build a road with no hope of receiving all of the purchaser road credit for doing so.

We see little merit in this contention since it only serves to protect purchasers who have relied upon a timber volume estimate which the prospectus warns is not part of the contract and which the contract expressly disclaims.

In *Brawley* v. *United States*, 96 U.S. 168 (1877), the Supreme Court established three rules governing the materiality of estimates. Essentially, these rules are: Rule I, if the subject matter of the contract is identified by independent circumstances (i.e., a given lot of items within a named warehouse) and the contract contains an estimated quantity, then the subject matter and material aspect of the contract is the specific lot and the estimate is not a warranty but only "an estimate of probable amount, in reference to which good faith is all that is required of the party making it," *Brawley* v. *United States*, *supra*, at 171; Rule II, if the subject matter is only identified by the estimated quantity, that estimate is the subject matter and, consequently, a material aspect of the contract and qualifying words accompanying the contract only provide "against accidental variation," *Brawley* v. *United States*, *supra*, at 172; Rule III, if, however, the situation described in Rule II is further elaborated upon and the qualifying words are supplemented, the qualifying words as supplemented are the material aspect of the contract and the estimated quantity is no longer material. *Brawley* v. *United States*, *supra*.

The contract provides for the purchase and sale of "[a]ll live trees meeting minimum tree diameter specifications" within the sale area except those specifically designated to be left uncut prior to advertisement of sale. We believe that these provisions exemplify a Rule I situation and, consequently, the estimate is neither a material amount nor a warranty, but merely an estimate. See *Brock* v. *United States*, 84 Ct. Cl. 453 (1937); B–141780, February 1, 1961, affirmed, Septem-

ber 14, 1961; B–150846, April 9, 1963. In view of the above, so long as the estimate is made in good faith and without gross disregard of the facts, we believe it would be prejudicial to the interests of the Government to guarantee the amount of merchantable timber offered for sale either directly, through contractual warranty, or indirectly, through recognition of a limited warranty that purchasers will amortize road construction costs. Moreover, our prior cases in this area indicate that loss of ineffective unused purchaser credit due to an inability to fully amortize road construction costs is not an unknown phenomenon in the timber industry. See B–142627, August 8, 1960; B–153297, March 30, 1964. In this regard, the Forest Service points to Public Law 94–154, 16 U.S.C. § 535 (1976), which provides:

"The Secretary is authorized, under such rules and regulations as he shall prescribe, to permit the transfer of unused *effective* purchaser credit for road construction earned after December 16, 1975, from one timber sale to a purchaser to another timber sale to the same purchaser within the same National Forest." [Italic supplied.]

The Forest Service cites the legislative history of that provision in Senate Report at 94–426 (1975) and House Report No. 94–656 (1975) as showing congressional recognition that ineffective purchaser credits are a common occurrence in timber sale contracts and that the timber industry recognizes that no payment is offered for ineffective purchaser credit. We see no reason to disagree.

The Purchaser's contention that the volume estimate was so far off as to constitute gross error must be rejected on the basis of our prior decisions which have held that discrepancies of up to 80 percent were not so gross as to afford a legal basis for Government reimbursement of the purchaser. See B–136117, June 6, 1958.

The Purchaser has cited numerous Court of Claims, Boards of Contract Appeals, and GAO decisions which treat erroneous Government estimates in such diverse areas as construction contracts, requirements contracts and surplus sales contracts. These decisions, which generally permitted reformation because of erroneous contract estimates despite Government disclaimers thereof, fall under Rule II, above, because the estimates constituted material aspects of those contracts.

Underlying our belief that Rule II analysis is inappropriate in the area of timber volume estimates are the following considerations: (1) the purchaser is free to initiate its own timber volume estimates; (2) the purchaser is not given a fixed stumpage rate that it must pay, but rather a floor rate which tends to be low, see 105 Cong. Rec. 3870 (1959); (3) the subject matter of the contract is the "included timber" within its confines and usually falls within Rule I; and (4) the

purchaser is only required to purchase such merchantable timber as it actually removes from the sale site. Moreover the purchaser's assertion, that timber cruises are "exact scientific" measurements of timber volume upon which prospective buyers are entitled to rely despite disclaimers of warranty and buyer responsibility, in our opinion, is not supported by the history of this program.

In certain distinguishable circumstances, reformation has been allowed. See *Everett Plywood & Door Corp.* v. *United States*, 190 Ct. Cl. 80 (1969); *L. Z. Hiser*, B–188785, May 23, 1977, 77–1 CPD 357. In the latter case, we allowed reformation of a timber sale contract where the Government's unilateral computer error resulted in the purchaser being overcharged $1,806. The Forest Service advised that notwithstanding the contract's disclaimer of warranty, there was present in the contract a provision CT6.8, "Measuring Methods," which represented that sampling interval of 1:1 had been used to measure red pine, the subject matter of the computer error. It was the Forest Service's view that since a 1:1 sampling frequency meant that every single red pine tree had been measured, a purchaser might reasonably be expected to rely on such a 1:1 estimate notwithstanding the express disclaimer. We held reformation to be proper in part because such a strong representation of accuracy, unlike here, operated to convert an expressly disclaimed timber sale volume estimate into a material fact. In addition we note that the Hizer contract involved a premeasured timber sale in which payment was made based on the contract estimate of timber, while in this case the purchaser paid only for the timber removed.

The Purchaser also cites our decision in *Sierra Pacific Industries—Reconsideration* (*Sierra*), 58 Comp. Gen. 388, 389 (1979), 79–1 CPD 238, which concerned the road construction aspect of a timber sale contract. In *Sierra*, the specifications describing the amount of road-clearing work were erroneous. This is, in our view, a Rule II situation since a material requirement of the contract was identified erroneously. It is similar to our decisions in *Zip-O Log Mills, Inc.* (*Zip-O*), B–188304, July 14, 1977, 77–2 CPD 25, and *Zip-O Log Mills—Reconsideration*, B–188304, September 8, 1978, 78–2 CPD 178, where the specifications describing the amount of excavation work were erroneous. These cases, where we recommended remedial action, are clearly distinguishable.

Accordingly, the Purchaser's claim is denied.

[B-193283]

General Accounting Office — Jurisdiction — Contracts — Contracting Officer's Affirmative Responsibility Determination — General Accounting Office Review Discontinued — Negligence in Determination Alleged

General Accounting Office will not review affirmative determination of responsibility, alleged to have been "carelessly and negligently" made; prior decision on this point is affirmed.

Contractors — Responsibility — Responsibility *v.* Contract Administration — Allegation of Nonresponsibility After Award

Mere fact that allegation of nonresponsibility is made after award does not change question of responsibility into one of contract administration.

Matter of: American Athletic Equipment Division, AMF Incorporated — Reconsideration, November 9, 1979:

American Athletic Equipment Division, AMF Incorporated (AMF), requests reconsideration of our denial of its protest of the award of two contracts for military stopwatches by the Defense Logistics Agency's (DLA) Defense General Supply Center, Richmond, Virginia.

AMF had alleged that the awardee, the Z.A.N. Co. (ZAN), either could or would not deliver a Qualified Products List (QPL) product, as required by the specifications. AMF also alleged that ZAN was not an authorized distributor of the qualified product.

In our decision, *American Athletic Equipment Division, AMF Incorporated*, 58 Comp. Gen. 381 (1979), 79-1 CPD 216, we reaffirmed an earlier holding that QPL procurements may not be restricted to QPL manufacturers and their authorized distributors. *See D. Moody & Co., Inc. et al.*, 55 Comp. Gen. 1 (1975), 75-2 CPD 1. We stated that ZAN had not taken exception to the specifications requiring a qualified product, and was therefore bound to deliver such a product. We indicated that AMF's protest otherwise involved questions of ZAN's responsibility or of contract administration and did not meet the criteria for review by our Office.

In requesting reconsideration, AMF argues that our decision did not accurately reflect its basis of protest, in that we stated:

> * * * *AMF has submitted an affidavit* to the effect that ZAN's subcontractor quotation from its proposed supplier, submitted to DLA during the preaward surveys conducted, specified delivery of a non-QPL product. * * * [Italic supplied by AMF.]

In its protest, AMF states, it pointed out that a preaward survey report included a quotation from Lemania, a Swiss manufacturer and ZAN's proposed supplier, for a stopwatch identified as "Calibre number 6200." According to AMF, this watch had not been tested or quali-

fied, and was different and less expensive than the Lemania 28260, conforming to Military Specification 14823, as required by the solicitation.

AMF argues that this evidence that ZAN intended to supply nonconforming goods, rather than the affidavit, should have been the determining factor in our decision. The contracting officer's affirmative determination of ZAN's responsibility was "so carelessly and negligently" made that it should have been challenged by our Office, AMF concludes, pointing out that the protested contracts, as well as two prior ones held by ZAN, have now been terminated for default.

DLA has terminated the protested contracts for default because ZAN failed to make timely deliveries. The agency acknowledges that the Army Armament Research and Development Command has now tested the stopwatches furnished by ZAN under a previous contract and found that they do not comply with the Military Specification. DLA states that it suspects that 1,000 stopwatches accepted under one of the protested contracts also are nonconforming.

Nevertheless, the contracting officer argues that he neither knew nor should have known that the stopwatch referred to in Lemania's quotation was not the qualified product. He states that "calibre" is not an accepted usage for the word model, and that he assumed that it related in some way to the diameter of the stopwatch. The first preaward survey, the contracting officer continues, was primarily concerned with Lemania's ability to supply ZAN with watches in time for the firm to meet the delivery schedule specified in the solicitation; due to a mistake-in-bid claim, delivery was advanced and it appeared that ZAN would have no problem meeting the new schedule. A second preaward survey, performed a month after the first, recommended complete award.

The threshold issue raised by AMF's request for reconsideration is whether our Office should extend its scope of review of affirmative determinations of responsibility. Since 1974, it has been our policy not to review such determinations except in cases where actions by procuring officials are tantamount to fraud, *Central Metal Products, Incorporated*, 54 Comp. Gen. 66 (1974), 74–2 CPD 64, or where the determination of responsibility has been made contrary to the solicitation's provisions. *Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974), 74–2 CPD 376.

In the latter situation, we review the responsibility determination to assure that the terms of the solicitation are being applied. If, for example, the solicitation requires that bidders must have a certain degree of experience, our review would be limited to determining whether the awardee has submitted evidence from which the contracting officer

could reasonably conclude that the specified experience requirement would be met.

In the absence of definitive responsibility criteria, the contracting officer's determination of responsibility involves primarily business judgment. We continue to review these judgments, in appropriate cases, where negative determinations of responsibility are protested, in order to assure that bids are not arbitrarily rejected. We discontinued our review of protests involving affirmative determinations of responsibility (with the exceptions noted above) because our experience indicates that contracting officers are strongly motivated to make affirmative determinations of responsibility correctly.

Moreover, the criteria for determining whether a bidder is responsible are "not readily susceptible to reasoned judicial review" and, as a practical matter, protesters lack the firsthand knowledge and access to the low bidder's plant and records needed to enable them to prove that alleged arbitrary actions did in fact occur. *Central Metal Products, Incorporated, supra*, quoting *Keco Industries, Inc. v. United States*, 492 F. 2d 1200, 1205 (Ct. Cl. 1974).

Upon reconsideration, we do not believe it appropriate to extend the scope of review to cases in which the contracting officer's affirmative determination of responsibility is allegedly negligent and/or careless. Our prior decision on this point is affirmed.

We are, however, somewhat concerned by the apparently routine acceptance by the preaward survey team and the contracting officer of the supplier's quotation which identified the stopwatches being furnished to ZAN as Calibre 6200. Calibre, in connection with watches, has a specific meaning.

> The model number given to a watch movement by the factory. (Webster's New International Dictionary of the English Language 316, col. 3 (3d ed. 1971).)

Obviously, neither the survey team nor the contracting officer was aware of this definition. While DLA procures a broad range of military goods and supplies, and its procurement personnel may not be immediately familiar with all the terminology for a given item, we believe they should be alert to and inquire as to the meaning of unusual terms, such as calibre. We are not aware of any unit of measurement—metric or U.S.—of which 6200 would be a logical diameter for a stopwatch.

In any case, when AMF protested approximately one week after award, we believe DLA should have attempted to determine whether there was any basis for its allegation that ZAN did not intend to supply a qualified product. Instead, the agency argued that ZAN's bid was responsive and that the difference between the qualified product and the Calibre 6200 was irrelevant or, alternatively, a matter of contract administration. The fact, however, that the allegation was made

after the award does not change the question of the contractor's responsibility into one of contract administration since the protest allegation went to what the agency should have known prior to award.

By letter of today, we are advising the Director, DLA, of our views.

[B-194861]

Public Lands — Interagency Loans, Transfers, etc. — Damages, Restoration, etc. — Authority

In the absence of specific statutory authority, the Department of Army may not reimburse the Department of Agriculture for cost of restoration of real property damaged by Army training exercises in De Soto National Forest. Generally, one executive department may not be reimbursed for real property damaged by another executive department. 44 Comp. Gen. 693 (1965).

Matter of: Use of One Agency's Real Property by Another — Liability for Damage, November 20, 1979:

The Acting Chief, Field Services Office, U.S. Army Finance and Accounting Center, Department of the Army, asks in effect whether funds are available to reimburse the United States Forest Service, Department of Agriculture, for the cost of restoration of damaged property in the De Soto National Forest. The property was damaged by the 220th Military Police Brigade during training exercises conducted August 6–10, 1978. The land was loaned for the training exercises pursuant to a memorandum of understanding between the Army and the Forest Service authorizing use by the Army of the De Soto National Forest. While this document was not included in the submission, it appears that it included provision for payment by the Army for damage as a result of Army's use of the property.

A voucher for $922, for restoration of the damage, was presented to the Finance and Accounting Officer, Headquarters United States Army Aviation Center and Fort Rucker, for certification. On the basis of the following, we believe this voucher may not be certified for payment.

Generally, in the absence of statutory authority, one executive department cannot pay another executive department for use of or for the restoration cost of real property loaned to or used by the former department, even though the use permits that were issued required restoration of the property or payment of damages. (This longstanding general rule is referred to as the interdepartmental waiver doctrine.) 32 Comp. Gen. 179 (1952); 44 *id.* 693 (1965).

However, an opinion from the Office of the Staff Judge Advocate (SJA), Headquarters, 1st United States Army, cites a Senate Appropriations Committee report on the Department of Defense Appropriations Bill for 1966 (S. Rep. No. 625, 89th Cong., 1st Sess. 23

(1965)), which states, under the heading, "Damage to Federal Lands Resulting from Maneuvers," that

> Such funds as may be required [apparently referring to operation and maintenance funds] may be used to restore lands under jurisdiction of other Government agencies, damaged while being used for military training purposes under agreement with such agencies.

The SJA suggests that this legislative history, coupled with language included in the Department of Defense Appropriations Act for 1966 (79 Stat. 863), does provide authority to pay the damages. An Army witness, testifying on that appropriation, stated that our Office had informally indicated that an expression of congressional intent would suffice to permit interdepartmental reimbursements. Hearings on H.R. 9221 before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess. 114 (1965) (statement of General Taylor). The quoted language was apparently put in the Senate Report to accomplish this.

A Comptroller of the Army memorandum, dated September 24, 1965, to the Chief of Engineers, states the Comptroller's understanding that, given this express intent in the Senate Committee Report, the Army could use appropriations for operations and maintenance to pay for damages caused by the use of property for military training. According to the submission, the Comptroller of the Army has informally advised that he takes the position that language in subsequent appropriation acts continues the authority to make such payments.

It is apparently the Comptroller's view, joined by the SJA, that, although the language quoted above only appeared in the 1965 Senate Report, the appropriation acts from that year on carried forward the intent stated in the 1965 report. According to them, the following provision in the 1979 Appropriation Act, and similar provisions in earlier acts, authorize payment by Army of the cost of restoration of the Forest Service property:

> Sec. 808. Appropriations for the Department of Defense for the current fiscal year shall be available * * * (e) for leasing of buildings and facilities including payment of rentals for special purpose space at the seat of government, and in *the conduct of field exercises and maneuvers*, or, in administering the provisions of title 43, United States Code section 315q, rentals may be paid in advance * * *. Pub. L. No. 95-457, Oct. 13, 1978, 92 Stat. 1231. [Italic supplied.]

The Fort Rucker Staff Judge Advocate, on the other hand, argues that no payments can be made to the Department of Agriculture. He does not believe that section 808(e) constitutes specific statutory authority to avoid the interdepartmental waiver doctrine. He points out that the 1964 Defense Appropriations Act which was applicable and was considered in our decision in 44 Comp. Gen. 693 (1965), included essentially the same language concerning field exercises quoted above from section 808(e) of the 1979 Act (92 Stat. 1244). See 77 Stat. 258, 264. That opinion held that the interdepartmental waiver

doctrine applied and that no specific statutory authority for payment was found in the 1964 Appropriations Act. As to the Senate Report language purporting to authorize payment, the Fort Rucker SJA points out that no similar statement could be found in reports on later appropriation acts containing the section 808(e) language in essence.

The interdepartmental waiver doctrine is based upon the premise that ownership of property is in the Government and not in a particular department. Since any repairs or replacement would be for the future use and benefit of the loaning department the appropriation of the borrowing agency may not be charged with the cost. B–159559, August 12, 1968. In 32 Comp. Gen. 179 (1952) this Office stated that the concept of interdepartmental waiver is so "firmly imbedded in the substantive law of the United States as to require specific statutory authority to overcome the rule." At 180.

We recognize that the language in Senate Report No. 625, 89th Cong., was a direct response to 44 Comp. Gen. 693, intended to overcome its effect but, whatever its legal effect at the time, the Report language was applicable only to the appropriation for fiscal year 1966. Subsequent reports have not repeated it, as far as we have been able to determine.

The Comptroller of the Army refers to section 808(e) of the General Provisions as providing the necessary statutory authority today. This language was also in the Appropriations Act for 1966, but it cannot be read to supply the specific statutory authority necessary to overcome the interdepartmental waiver doctrine. The clause simply authorizes advance payment for use of property in the conduct of field exercises and maneuvers, with no mention of payment of damages.

Concerning the memorandum of understanding in which the agreement was made to reimburse for damages, in 44 Comp. Gen. 693, 695, we stated that such an agreement was contrary to the established principle that an executive department may not be reimbursed for use or depreciation of real property loaned, used, or damaged by another department and was therefore impermissible. See also 32 Comp. Gen. 179 (1952).

Under these circumstances, the prohibition against reimbursement for property damages during an interdepartmental loan remains applicable. The voucher may not be certified for payment.

[B–195946]

Travel Expenses — Air Travel — Reservation Penalties — Recovery

Penalty payments made by air carriers for failing to furnish accommodations for confirmed reserved space are due the Government, not the traveler, when payments result from travel on official business. This is so notwithstanding that the

delay in the employee's travel did not result in any additional cost to the Government and regardless of the fact that the travel was performed outside of the employee's regular duty hours.

Compensation — Overtime — Traveltime — Administratively Controllable

Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event.

Matter of: John B. Currier, November 26, 1979:

Mr. David L. Olexer, an authorized certifying officer for the Forest Service, U.S. Department of Agriculture, requests an advance decision of this Office concerning the propriety of payment of two related claims presented by Mr. John B. Currier, an employee of the Forest Service.

Upon return from temporary duty on Thursday, August 24, 1978, Mr. Currier was unable to use his confirmed plane reservation because the airline had overbooked that particular flight. Mr. Currier was rebooked on the next available flight and told by the airline ticket agent that he would be compensated for his inconvenience and delay in an amount equal to the ticket price. Subsequently a check was issued to Mr. Currier in the amount of $53.70.

When Mr. Currier was advised by the agency that the check had to be endorsed over to the Government, he questioned the requirement because he felt that the check belonged to him personally insofar as it represented compensation for his personal delay and inconvenience. He pointed out that the delay in his return travel did not result in any increase in his per diem entitlement.

Based on our holdings in B-148879, July 20, 1970, and B-148879, August 28, 1970, the Forest Service denied Mr. Currier's claim to be refunded the amount of the denied boarding compensation. In those decisions we held that employees traveling on Government business may not retain liquidated damages payments made by airlines for failure to provide confirmed reserved space. The basis for so holding is explained in our decision of July 20, 1970, as follows:

* * * an individual traveling on official business may be reimbursed under applicable statutes for additional expenses caused by unavoidable delays. We, therefore, stated the rule that when a carrier is liable for liquidated damages for failure to provide a traveler on Government business with confirmed space on its flight it is the Government which is damaged and which should be compensated. See also B-151525, dated June 18, 1963, copy enclosed.

In addition, decisions of this Office have consistently held, in these and other circumstances, that an employee of the Government may not be directly reim-

bursed from private sources for expenses incurred incident to the performance of official duties. Any such payments made in accordance with statutory authority must be to the Government and if tendered to an individual employee shall be viewed as having been received on behalf of the Government. 36 Comp. Gen. 268, 41 *id.* 806, 46 *id.* 689, B–166850, dated June 13, 1969.

Mr. Currier is not satisfied with the disposition of his claim by the agency and presents the following alternative arguments in support of his claim which is now before this Office:

It is my contention that I was not traveling on official time and the inconvenience was my personal loss of time. Therefore the check for compensation was rightfully mine. The two Comptroller General decisions used to rationalize the decision reference "damages suffered by Government" and there were none; and "official duties" and I was traveling after my regular duty hours.

If it is your opinion that I was on official business at the time, then the check should go to the Government. However, in that case, since I was considered on official business, I should receive four and one-half (4.5) hours of overtime or compensatory time since my duty hours ended at 1630 and I did not arrive home until 2100.

Mr. Currier's argument that the delay for which he received denied boarding compensation did not result in any "damage" to the Government was specifically addressed in B–148879, August 28, 1970. In response to the claimant's argument that no additional expenses were attributable to his delay, we stated:

As for the fact that, in your case, no additional expenditures were incurred for which the Government would have reimbursed you, we would point out that, although this was so, other travelers in the same circumstances may incur such expenses and cases may well arise in which those expenses would exceed the amount of the denied boarding compensation airlines are required to tender.

More recently in B–192841, February 5, 1979, we rejected a claim for refund of denied boarding compensation based on an argument similar to Mr. Currier's that the travel was performed outside regular duty hours. Pointing out that the employee was nonetheless on official business, we noted that under the provisions of the Federal Travel Regulations (FPMR 101–7) (May 1973), paragraph 1–3.5b, penalty payments made by air carriers for failing to furnish accommodations for confirmed reserved space are due the Government, not the traveler, when the payments result from travel on official business. See also FPMR 101–41, 41 C.F.R. § 101–41.209–4 (1977).

Therefore, since Mr. Currier was traveling on official business within the meaning of paragraph 1–3.5(b) of the Federal Travel Regulations, the check which was tendered to him by the airline for its failure to furnish accommodations for confirmed reserved space due the Government, must be viewed as having been received on behalf of the Government. Accordingly, the claim may not be allowed on the basis of Mr. Currier's personal delay and inconvenience.

As an employee exempt from coverage under the Fair Labor Standards Act (29 U.S.C. 201), Mr. Currier's entitlement to overtime compensation is governed by the applicable provisions of section 5542(b)

(2)(B) of title 5 of the United States Code, which states in part as follows:

> (b) For the purpose of this subchapter—
>
> * * * * * * *
>
> (2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—
>
> * * * * * * *
>
> (B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

An agency may grant compensatory time or pay overtime compensation for travel performed outside an employee's regular workday or workweek only if one or more of the conditions set forth in section 5542(b)(2)(B) have been met. B–172671, March 8, 1977. This applies equally to the initial travel and the return trip. 51 Comp. Gen. 732 (1972) and B–172671, *supra*.

There is nothing in the administrative record which indicates that the conditions listed in items (i) or (ii) apply to Mr. Currier's travel. Similarly there is no evidence in the record that the travel in question was performed under arduous conditions as contemplated by item (iii), and this is true even though some delay and inconvenience was involved. See for example, 41 Comp. Gen. 82 (1961); and B–191045, July 13, 1978.

Thus, the issue presented in Mr. Currier's case is whether, under 5 U.S.C. § 5542(b)(2)(B), his travel on August 24, 1978, resulted from an event which could not be scheduled or controlled administratively. FPM Supplement 990–2, Book 550, Subchapter S–1–3 provides that the phrase "could not be scheduled or controlled administratively" refers to the ability of an executive agency to control the event which necessitates an employee's travel.

While the airline's action in overbooking the flight on which Mr. Currier had reservations was beyond the agency's control, the fact that his return travel was delayed by that event is not determinative. B–160928, April 16, 1970, and *James C. Holman*, B–191045, July 13, 1978. To meet the requirements of the statute, the event which necessitated Mr. Currier's travel outside of regular duty hours must have been one which could not be scheduled or controlled administratively. Nothing in the record shows that an event beyond the agency's control required Mr. Currier to return on Thursday evening rather than during duty hours of that or the following workday. In fact, the administrative report indicates that Mr. Currier was responsible for scheduling his own travel and suggests that he could have scheduled his return so he could be home well within his normal workday. An em-

ployee's mere presence at his permanent duty station on the following workday is not normally considered an administratively uncontrollable event. *Raymond Ratajczak*, B–172671, April 21, 1976, and *James C. Holman*, *supra*.

Accordingly, Mr. Currier's time in a travel status during hours outside his regular workday on August 24, 1978, did not constitute hours of employment within the meaning of the exceptions contained in 5 U.S.C. § 5542(b)(2)(B) so as to entitle him to overtime compensation or compensatory time off.

[B–189072]

Fraud — False Claims — Forfeiture — Rule — Applicability — Military Personnel

The decision in 57 Comp. Gen. 664 (1978), holding that where a civilian employee submits a travel voucher wherein part of the claim is believed to be fraudulent, and that only the expenses for days for which fraudulent information was submitted should be denied, is applicable to military members and non-Government employees traveling pursuant to invitational travel orders as well. 57 Comp. Gen. 664, amplified.

Fraud — False Claims — Related, etc. Claim Effect — Item and Date Separability — Fraudulent Claim For Lodgings Effect — Actual Expenses *v.* Per Diem

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for those days. A fraudulent claim for lodgings taints the entire claim for an actual expense allowance for days for which fraudulent information was submitted and payments for those days will be denied to the claimant.

Matter of: Fraud — Travel Expense Claims, November 27, 1979:

This decision amplifies our ruling in 57 Comp. Gen. 664 (1978) concerning payment by the Government to individuals who submit travel vouchers wherein some expenses are frauduently claimed or inflated. It is issued in response to several questions submitted by the Assistant Secretary of the Army (Manpower and Reserve Affairs) on behalf of the Per Diem, Travel and Transportation Allowance Committee.

Specifically, the Assistant Secretary poses the following questions:

a. While the decision [in 57 Comp. Gen. 664] primarily involved travel claims of civilian employees, is it equally applicable to military members and non-government employees traveling under invitational travel orders pursuant to the Joint Travel Regulations?

b. Is the term "subsistence expenses" as used in 57 Comp. Gen. 664, synonymous with the term "per diem allowance" as defined in the Joint Travel Regulations, Volume 2, Appendix D * * *?

c. In Comp. Gen. Decision B–172915 of 27 September 1971, it was ruled that the per diem allowance is an indivisible item of allowance. At that time, the per diem allowance was a flat rate. However, since July 1972, the rate of per diem allowance has been computed on a lodging plus basis (average cost of lodging

plus a fixed amount for meals and miscellaneous expenses). This in essence would tend to divide the per diem allowance into two separate segments. For example, if a traveler did not incur any lodging expense because he lodged with friends or relatives, he would still be entitled to a fixed amount (currently $16.00 per day) for meals and miscellaneous expenses. In view of the revised method of computation, would a claimant who submits a fraudulent lodging receipt be denied not only the amount allowed for lodging, but also the flat rate currently allowed for meals and subsistence expenses?

d. In those instances when a traveler is under orders which authorize an actual expense allowance, because temporary duty is in a high cost area, and a fraudulent lodging receipt is submitted with a travel claim, is the traveler to be denied not only the amount claimed for the lodging, but also the amount claimed for meals, laundry, pressing, and the cleaning of clothes and other expenses?

Our answer to question a is yes. The decision in 57 Comp. Gen. 664 does apply to military members and non-Government employees traveling under invitational travel orders. We note that 57 Comp. Gen. 664, although dealing primarily with civilian personnel, expressly modifies our prior decision in B–172915, September 27, 1971, discussing fraudulent claims submitted by military personnel, indicating thereby that the scope of 57 Comp. Gen. 664 is not limited solely to civilian personnel.

Question b seeks clarification of the term "subsistence expenses" as it is used in 57 Comp. Gen. 664, 667. There we held that for subsistence expenses the voucher should be separated according to individual days, each day comprising a separate item for determining the items tainted by fraud.

At the outset it is helpful to distinguish between our reference to "subsistence expenses" and "actual subsistence expense" allowance. The latter refers to the actual expense allowance authorized under 37 U.S.C. § 404(d) (1970). "Subsistence expenses" however is a general term referring to both those expenses associated with per diem and those associated with actual subsistence expense allowance payments. Therefore, for the purpose of question b the terms are the same, and the question is answered yes.

Question c asks whether an individual who submits a claim for per diem in which lodgings are fraudulently misrepresented can nonetheless be paid his meals and other expenses included in his per diem claim. Similarly, question d asks whether an individual on an actual expense allowance who submits a fraudulent lodging receipt should be denied payment only for lodging, or for that amount plus his other subsistence expenses, *e.g.* food and laundry, as well.

Our general rule is that "each separate item of pay and allowances is to be viewed as a separate claim," and only those separate claims which are fraudulent are to be denied. 41 Comp. Gen. 285, 288 (1961). Furthermore:

As to what constitutes a separate claim for these purposes, such an item is one which the employee could claim independently of his other entitlements. Accordingly, a fraudulent claim for per diem would not necessitate the denial of

the other separate items on the voucher, which are not fraudulently based. As to subsistence expenses, the voucher may be separated according to individual days *whereby each day comprises a separate item of per diem or actual subsistence expense allowance.* * * * A fraudulent statement for any subsistence item taints the entire subsistence claim for the day. [Italic supplied.] 57 Comp. Gen. 664, 667.

As this passage indicates, each day of per diem or each day of actual subsistence allowance is a separate item for the purpose of evaluating what parts of a voucher which contains or is supported by fraudulent statements may be paid. Although various individual expenses are included within an item, it is the entire item that is disallowed. Because per diem under the lodgings-plus system includes all charges for meals, lodging and other expenses, a fraudulent representation of lodging costs taints the entire item of per diem for a given day. Similarly, such a fraudulent submission for lodging submitted pursuant to an actual subsistence expense allowance taints the entire item of allowance for the specific day involved. Therefore, questions c and d are answered yes.

[B-193398]

Compensation — Night Work — Night Differential — Overtime Basis — Entitlement Criteria — Intermittent Overtime

Night differential under 5 U.S.C. 5545(a) (1976) is payable not only to employees who regularly work a night shift but also to employees who perform occasional overtime during a scheduled night shift, not necessarily in their tour of duty. However, the scheduled night tour must be in the same office or work unit and must not be a special shift established for the convenience of one employee.

Compensation — Night Work — Regular Tour of Duty Requirement — Intermittent Overtime Status

Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) when they habitually and recurrently perform overtime at night due to the nature of their employment which requires them to remain on duty until their tasks are completed or until they are relieved from duty.

Compensation — Night Work — Intermittent Overtime Basis — Absence of Fixed Schedule — Discernible Pattern Requirement

Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) where such overtime is considered "regularly scheduled work." Regularly scheduled means duly authorized in advance (at least 1 day) and scheduled to recur on successive days or after specified intervals. The overtime need not be subject to a fixed schedule each night but it must fall into a predictable and discernible pattern.

Matter of: Social Security Administration — Payment of Night Differential, November 27, 1979:

This decision is in response to a request from the Department of Health, Education, and Welfare (HEW) concerning the payment of night differential to employees of the Social Security Administration

(SSA) who perform occasional overtime work at night. The question raised by SSA is what constitutes "regularly scheduled work" as the phrase is used in 5 U.S.C. § 5545(a) (1976) which authorizes payment of night differential to certain employees who perform work between the hours of 6 p.m. and 6 a.m.

The Social Security Administration has various employees who, on an irregular or occasional basis, perform overtime work between the hours of 6 p.m. and 6 a.m. The agency has not paid night differential to its employees for such work on the ground that it was not regularly scheduled work or it was not performed during a regularly scheduled tour of duty falling between the hours of 6 p.m. and 6 a.m. See 34 Comp. Gen. 621 (1955). However, in view of more recent decisions of our Office, SSA has asked us whether overtime work in various factual situations constitutes "regularly scheduled" work so as to entitle the employees performing such work to the payment of night differential. While we cannot make determinations in all the situations, we shall clarify the general rules to be applied in determining when night differential is payable in connection with overtime work performed on an irregular or occasional basis. Also, to the extent feasible, we shall apply such rules to the factual situations presented to us. This decision concerns only the entitlement of these employees to night differential for overtime work which would be in addition to overtime or holiday pay payable under either title 5, United States Code, or the Fair Labor Standards Act, 29 U.S.C. 201.

The authority for the payment of night differential is contained in 5 U.S.C. § 5545(a) (1976), which provides, in pertinent part, as follows:

> Except as provided in subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m. * * *.

It is clear that employees who regularly work a night shift are entitled to night differential added to their basic compensation. See, for example, 36 Comp. Gen. 657, 659 (1957) citing the legislative history of the statute. In addition, our decisions have held that any occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m. which falls within a regularly scheduled tour of duty, but not necessarily his scheduled tour, will result in the payment of night differential. 34 Comp. Gen. 621 (1955); 33 *id.* 4 (1953); and B–174388, February 28, 1972. See also 5 C.F.R. § 550.122(d) (1978). In this regard, we believe the scheduled tour of duty must be in the same office or unit in order to qualify for night differential under these decisions. See 36 Comp. Gen. 657, *supra*. Thus, where a special workweek is created for SSA "schedulers" from Wednesday through Sunday, this would constitute a regularly scheduled tour of duty for other data processing employees in the same office or unit who normally work

Monday through Friday but who occasionally work at night on Saturday or Sunday. On the other hand, where the agency has established a special midnight work shift for the personal convenience of only one employee, we do not believe that constitutes a regularly scheduled tour of duty for other employees who occasionally perform overtime outside their regular tours of duty but during this special tour of duty.

Where there is no established tour of duty or shift which falls between 6 p.m. and 6 a.m., our decisions have allowed payment of night differential for overtime work performed during those hours in the following two situations. First, we have allowed the payment of night differential to an employee who habitually and recurrently performs overtime work at night where, by virtue of the inherent nature of his employment, he is required to remain on duty until the completion of his task(s) or until relieved from duty. 42 Comp. Gen. 326 (1962); 41 *id.* 8 (1961); and *Nathaniel R. Ragsdale*, B–181237, April 15, 1975. See also *Aviles* v. *United States*, 151 Ct. Cl. 1 (1960). Such cases often involve security guards or couriers who may not perform night work according to a fixed hours-of-work pattern but who do so for such a sufficiently long period of time that it becomes usual or customary. See *Ragsdale*, *supra.*

In this regard we do not believe that the overtime required by large caseloads and chronic understaffing in SSA claims processing centers results from the inherent nature of the work performed by employees processing claims as contemplated in our decision in 41 Comp. Gen. 8, *supra.* The record indicates that the work could be done at any time and has been done by employees on a voluntary basis. Therefore, in the absence of scheduled tours of duty, such overtime work at night would appear to qualify for night differential only if considered "regularly scheduled work" as discussed below. On the other hand, where a day shift nurse and physician remain on the scene of a medical emergency as long as necessary, such overtime would be considered part of the inherent nature of their employment so long as such medical emergencies occurred habitually and recurrently, not just occasionally.

The second situation in which we have allowed payment of night differential in the absence of an established tour of duty or shift is where the overtime work to be performed is considered to be "regularly scheduled work." Our decisions have held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. 42 Comp. Gen. 326, *supra;* 40 *id.* 397 (1961); *Robert C. Austin*, B–188686, May 11, 1978; and B–174388, February 28, 1972. This is to be distinguished from overtime which is scheduled on a day-to-day or hour-to-hour basis. See 52 Comp. Gen. 319, 322 (1972); B–151168, May 25, 1976; and B–168048, February 16, 1970.

The overtime must be scheduled in advance. In this regard we held in 37 Comp. Gen. 1, 3 (1957) that the term "scheduled" in reference to call-back overtime under 5 U.S.C. § 912a, now codified in 5 U.S.C. § 5542(b)(1), meant notification to the employee prior to the beginning of the workweek. However, later decisions have looked to notification 1 to 4 days in advance of the work as sufficient to constitute overtime scheduled in advance under 5 U.S.C. § 5542(a). See 52 Comp. Gen. 319, *supra;* 48 *id.* 334 (1968). Thus, for the purposes of the payment of night differential, we hold that overtime is considered scheduled in advance so long as notification is made at least 1 day prior to the performance of overtime. It would not be necessary, as suggested by SSA, to restrict the scheduling requirement to situations where notification was given 7 days prior to the event or any time prior to the workweek in which the event occurs.

However, it is not merely sufficient that the overtime be scheduled in advance in order to be considered "regularly scheduled." As noted above, the overtime must also be scheduled to recur on successive days or after specified intervals. See *Austin*, *supra.* Overtime which will be performed every other week or 1 or 2 days every month has been considered regularly scheduled. See 39 Comp. Gen. 73 (1959); and B-159040, July 12, 1966. Thus, where an SSA building inspector must perform 3 hours of overtime the first Friday of every month, such overtime may be considered regularly scheduled. Similarly, where SSA's Bureau of Data Processing regularly schedules (pursuant to union agreement) overtime 3 or more days each week to cope with workload demands, such overtime may be considered regularly scheduled. The same answer would apply to test administrators who give courses and tests to night shift employees 24 times per year and to Program Service Center employees who perform 2 or more hours of overtime for each shift for periods of 2 to 5 workweeks or more.

The overtime need not be subject to a fixed hours-of-work schedule but it must recur so frequently and at such regular intervals as to fall into a predictable and discernable pattern. See *Customs Special Agents*, B-191512, October 27, 1978; and B-178653, August 6, 1973. Thus, overtime work which we would not consider "regularly scheduled work" for the purposes of night differential would include situations where a work completion deadline resulted in extensive overtime which was apparently not authorized in advance or scheduled to recur on successive days or after specified intervals. Similarly, where computer operators performed overtime to correct malfunctions or run new programs but only on 16 occasions over a period of 3 years, such overtime would not be considered regularly scheduled work.

Finally, we have been advised that SSA has received over 1,000 overtime claims involving the performance of irregular or occasional overtime at night. Such claims should be processed in accordance with

the above. Also, the proposed SSA regulations (Manual Circular) regarding payment of night differential, which accompanied the HEW request for a decision, should be revised in accordance with the guidelines in this decision prior to issuance.

[B-195385]

Intergovernmental Personnel Act — Transportation of Household Goods—Return Expense Reimbursement—New Location

Under 5 U.S.C. 3375, Western Carolina University employee who completed assignment with Federal Government under Intergovernmental Personnel Act (IPA) may be reimbursed cost of moving his household goods and dependent travel to Cleveland State University, not to exceed the constructive cost of such travel and transportation to Western Carolina University. Employee's own travel costs may be reimbursed to the same extent since he was not required by regulation or the terms of his IPA agreement to return to Western Carolina University.

Matter of: Jandhyala L. Sharma — Intergovernmental Personnel Act, November 27, 1979:

The Administrator, National Credit Union Administration, requests an advance decision as to whether or not Mr. Jandhyala L. Sharma may be paid moving expenses under the circumstances shown below.

The record shows that Mr. Sharma, Assistant Professor of Finance, Western Carolina University, was assigned to the National Credit Union Administration (NCUA), Washington, D.C., under the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371–3376 (1976). The Assignment Agreement indicated that the NCUA would pay Mr. Sharma's "Travel and Transportation to and from Washington, D.C. not to exceed $4,000."

The NCUA paid $1,304.94 to move Mr. Sharma from Cullowhee, North Carolina, to Washington, D.C. Mr. Sharma has now requested that NCUA pay his moving expenses to Cleveland, Ohio, since his assignment is completed and he has accepted a position at Cleveland State University.

The NCUA specifically asks:

> Can our agency pay his relocation costs with him moving to Ohio instead of back to North Carolina. If not, can we pay him $2,695.06, the original $4,000 less moving expenses already paid.

The authority for the assignment of personnel to or from State or local governments under the IPA is contained in 5 U.S.C. §§ 3371–3376 (1976). By virtue of 5 U.S.C. § 3372(b), that authority applies equally to the assignment of personnel to or from institutions of higher education.

Under 5 U.S.C. § 3372(c), as amended by Pub. L. 95–454, a Federal employee may be assigned under the IPA to a State or local government only if he agrees to serve in the Civil Service upon completion of the assignment for a period equal to the length of the assignment.

Although the governing regulations of Federal Personnel Manual (FPM), Chapter 334, Subchapter 1–4b reflect the general expectation that an employee will return to his agency at the end of an IPA assignment, no similar obligation of service following the assignment is imposed upon an employee detailed to a Federal agency from a State or local government. Subchapter 2–1b(2)(b) states only that an IPA agreement involving the movement of a State or local government employee should provide that the employee can return to the home agency to a position comparable to that from which he was assigned. Since neither the regulations nor the IPA agreement governing Mr. Sharma's assignment to the NCUA requires him to return to the Western Carolina University, the fact that he instead accepted a position in Cleveland, Ohio, does not preclude the payment of return travel and transportation expenses otherwise authorized.

Travel and transportation expenses incident to IPA assignments are authorized under 5 U.S.C. § 3375. Subsection (a)(2) of section 3375 provides as follows:

> (a) Appropriations of a Federal agency are available to pay, or reimburse, a Federal or State or local government employee in accordance with—
> (1) subchapter 1 of chapter 57 of this title, for the expenses of—
> (A) travel, including a per diem allowance, to and from the assignment location;
> (2) section 5724 of this title, for the expenses of transportation of his immediate family and of his household goods and personal effects to and from the assignment location;
> (3) section 5724a(a)(1) of this title, for the expenses of per diem allowances for the immediate family of the employee to and from the assignment location; * * *

As a condition to payment of these expenses, 5 U.S.C. § 3375(b) requires the assigned employee to agree in writing to complete the entire period of his assignment or 1 year, whichever is shorter, unless separated for reasons beyond his control that are acceptable to the agency concerned. See FPM Chapter 334, Subchapter 1–7.

The travel and transportation expenses authorized under 5 U.S.C. § 3375 are payable in accordance with the instructions contained at FPM Chapter 334, Subchapter 1–7 and insofar as otherwise provided for by the regulations contained in the Federal Travel Regulations (FTR) (FMPR 101–7) implementing the specifically applicable provisions of chapter 57 of title 5 of the U.S. Code. Since Mr. Sharma completed his IPA assignment he is entitled to travel and transportation expenses from Cullowhee, North Carolina, to Washington, D.C., and return. That entitlement includes the expenses of his immediate family's travel as well as transportation of household goods and personal effects. Paragraph 2–8.2d of the FTR allows reimbursement of the cost of the transportation of household effects to an employee's new official station or some other point selected by him. However, the total amount which may be paid or reimbursed by the Government cannot exceed the cost of transporting the property in one lot by the

most economical route from the employee's last official station to his new official station. The regulations contain a similar provision for the travel of members of an employee's immediate family. See FTR para. 2–2.2a. Consistent with these regulations, Mr. Sharma may be reimbursed for the costs he may incur of transporting his household goods and for his dependents' travel, to Cleveland, Ohio, not to exceed the constructive cost of such transportation and travel to Cullowhee, North Carolina. *Ralph M. Koontz*, B–186338, December 7, 1978; *Ramon* v. *Romero*, B–190330, February 23, 1978.

Mr. Sharma is also entitled to reimbursement for his own travel expenses to and from the assignment location under the provisions of subchapter I of chapter 57, of title 5 of the U.S. Code. Because that subchapter is applicable to temporary duty and other such travel, the implementing regulations contemplate that the employee will in fact report to his assigned temporary or permanent duty station. For this reason they do not contain a provision for payment of travel expenses similar to FTR paras. 2–2.2a and 2–8.2d cited above, when the employee travels to an alternate location. However, unlike in the case of a Federal employee on temporary duty travel, a Federal agency generally does not have a particular interest in assuring that a State or local government employee returns to a particular location upon the completion of his IPA assignment. For this reason, we see no basis to object to an agency's determination to pay for a State or local government employee's travel to an alternate location upon the satisfactory completion of his IPA assignment, provided the cost reimbursed does not exceed the constructive cost of travel to the location designated in the IPA agreement. Therefore, Mr. Sharma may also be reimbursed for the cost of his personal travel expenses to Cleveland, Ohio, not to exceed the constructive travel costs to Cullowhee, North Carolina.

The Administrator's questions are answered accordingly.

[B–196680]

Attorneys — Fees — Appropriate Authority to Award — Merit Systems Protection Board — Special Counsel's Status — Back Pay Act Applicability

The Special Counsel of the Merit Systems Protection Board is not an "appropriate authority" with power to award attorney fees under the Back Pay Act, as amended, 5 U.S.C. 5596. However, the Special Counsel may include a recommendation to pay reasonable attorney fees in his recommendation for corrective action to be taken by an agency under 5 U.S.C. 5596.

Merit Systems Protection Board — Special Counsel — Authority Under Civil Service Reform Act of 1978 — Corrective Action — Recommendations — Attorney Fees

The Special Counsel of the Merit Systems Protection Board may not recommend the payment of attorney fees in those cases where the corrective action recom-

mended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees.

Matter of: Attorney Fees — Authority of Special Counsel, MSPB, November 27, 1979:

By letter of November 2, 1979, H. Patrick Swygert, the Special Counsel of the Merit Systems Protection Board, has requested our opinion as to the authority of the Special Counsel to recommend payment of reasonable attorney fees under the Back Pay Act, 5 U.S.C. § 5596. That section provides, in part, as follows:

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

* * * * * * *

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; * * *.

Specifically, four questions are presented by Mr. Swygert. The first two are:

1. Is the Special Counsel an "appropriate authority" within the meaning of section 5596? In this connection, we note that regulations of the Office of Personnel Management define the "appropriate authority" referred to in 5 U.S.C. 5596 to include "the Merit Systems Protection Board, including the Special Counsel," 5 CFR 550.803(d)(7), as amended, 44 FR 48954 (August 21, 1979).

2. Is a determination by the Special Counsel "that there are reasonable grounds to believe that a prohibited personnel practice has occurred . . . which requires corrective action" by an agency (5 U.S.C. 1206(c)(1)(A)) an "administrative determination . . . found by appropriate authority" within the meaning of 5 U.S.C. 5596(b)(1)? In other words, may the Special Counsel include, as part of the corrective action recommended to an agency, the payment of reasonable attorney fees to a complainant employee or applicant?

Under 5 U.S.C. § 1206, as added by section 202 of the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1125, October 13, 1978, the Special Counsel is given various responsibilities with the authority to recommend corrective action to the agency concerned or to the Merit Systems Protection Board, as appropriate. The statute does not vest the Special Counsel with power to order corrective action. As Mr. Swygert has pointed out present regulations of the Office of Personnel Management define "appropriate authority" under 5 U.S.C. § 5596 to include "the Merit Systems Protection Board, including the Special Counsel," but it is not clear whether these regulations were intended to make the Special Counsel an appropriate authority independent of the Board. We understand, however, that the Office of Personnel Management anticipates publication in the near future of a proposed amendment which will delete "including the

Special Counsel" from the appropriate authority provision of the backpay regulations. In any event, since the Special Counsel can only determine that there are reasonable grounds to believe, not find, that an improper action has occurred and since he can only recommend, not order, corrective action, we believe that the Civil Service Reform Act did not confer "appropriate authority" status under 5 U.S.C. § 5596 upon the Special Counsel.

We further believe that the authority given to the Special Counsel under 5 U.S.C. § 1206(c)(1)(A)—to recommend corrective action when he finds that there are reasonable grounds to believe that a prohibited personnel practice has occurred—includes the right to recommend to an agency that reasonable attorney fees be awarded to the complainant employee if the matter is within the purview of 5 U.S.C. § 5596. It is immaterial for that purpose that the Special Counsel is not deemed to be an appropriate authority. The Back Pay Act, however, does not extend to applicants for employment. Therefore, a recommendation for attorney fees by the Special Counsel in such cases would not be appropriate.

The third question is:

3. If the answers to 1 and 2 are in the affirmative, may the Special Counsel recommend as part of the corrective action that an agency pay attorneys' fees in a case where the prohibited personnel action has not "resulted in withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee," such as in a case of geographic lateral reassignment of an employee in reprisal for whistleblowing or exercise of an appeal right? If so, with what qualifications, if any?

When a prohibited personnel practice has not resulted in loss of pay, allowances, or differentials, and thus is outside the purview of 5 U.S.C. § 5596, we find that the Special Counsel is without authority to recommend attorney fees as a part of the corrective action. The Special Counsel may only make such a recommendation where there exists an authority whereby the agency vested with power to take or order corrective action is authorized to award attorney fees.

The fourth question is:

4. May reasonable attorneys' fees be paid by an agency in settling a complaint pending with the Special Counsel, where the settlement obviates any formal recommendation by the Special Counsel to the agency for corrective action? That is, may such fees be paid on the basis of the agency's determination or acknowledgement of an unjustified or unwarranted personnel action before or without issuance of formal findings and recommendations by the Special Counsel?

If the complaintant employee's agency makes a determination that there has been an unjustified personnel action requiring corrective action under 5 U.S.C. § 5596, we see no objection to the agency authorizing payment of reasonable attorney fees, otherwise allowable under that authority, notwithstanding the complaint is pending with the Special Counsel. In such case, the issuance of formal findings and recommendations by the Special Counsel for corrective action is unnecessary.

[B-194217]

Compensation — Overtime — Inspectional Service Employees — Sunday and Holiday Work — Midnight-to-Midnight Cutoff

Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1½ days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper.

Matter of: Overtime Compensation — Immigration Inspectors, November 29, 1979:

By letter dated September 27, 1979, Mr. James A. Broz has appealed the July 13, 1979, settlement of our Claims Division denying him additional overtime compensation for work performed on Sunday, January 18, 1976, and Sunday, August 22, 1976. While Mr. Broz does not question the Claims Division's determination that he was paid in accordance with the applicable regulations, he asks whether those regulations are in fact a correct interpretation of the Overtime Act of March 2, 1931, 8 U.S.C. § 1353a.

Mr. Broz is employed by the Immigration and Naturalization Service (INS) as an immigration inspector. As such, he is entitled to overtime compensation for inspectional duties under the following authority of 8 U.S.C. § 1353a:

§ 1353a. Officers and employees; overtime services; extra compensation; length of working day

The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perfrom duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of such employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for such employees or the overtime pay herein fixed.

Overtime compensation payable under the above-quoted authority is commonly referred to as "1931 Act overtime."

The INS regulations implementing the 1931 Act are set forth in Administrative Manual (AM) 2818. Insofar as pertinent to Mr. Broz' claim, Section 6 provides for payment of 2 days' pay in addition to any payment for the basic workweek for time on duty of 8 hours or less on a Sunday or holiday. Section 5 of those regulations provides:

Section 5, Computation of Overtime Payments: An immigration officer shall be entitled to the following payments for overtime in the fifteen-hour period be-

ginning at 5 p.m. on one day and ending at 8 a.m. on the following day except where either of these days is Sunday or a holiday. Where either day is a Sunday or a holiday, an immigration officer shall be entitled to the following payments for overtime separately in the seven-hour period from 5 p.m. to midnight which precedes a Sunday or a holiday but which itself is not one, and separately again for the eight-hour period from midnight to 8 a.m. on days following Sundays and holidays which themselves are neither. The following payments for overtime shall also apply to overtime at any time during the period of the sixteen hours on a Sunday or a holiday remaining upon identification of the eight hours of Sunday or holiday duty:

One-half day's pay for the initial time on duty of less than three hours: *Provided,* that time on duty is at least one hour;

One day's pay for time on duty of three hours or more, but less than five hours during the period;

One and one-half days' pay for time on duty of five hours or more, but less than seven hours during the period;

Two days' pay for time on duty of seven hours or more, but less than nine hours during the period; or

Two and one-half days' pay for time on duty of nine hours or more during the period.

For the purpose of computing an inspectional employee's overtime, the Attorney General has authorized "rollback" time, a credit of up to 2 hours for remaining on duty. Section 7 of AM 2818, which is made applicable to Sunday work by section 8 of AM 2818, provides that in addition to actual time spent on inspection, time shall be allowed for remaining on duty as follows:

* * * Where two hours or less intervene between completion of an immigration officer's basic hours and the expected or actual time of an arrival, the beginning of time on duty shall be the time at which the immigration officer's basic hours of work ceased: *Provided,* That where these ceased before 5 p.m., the beginning of time on duty shall be at 5 p.m. Where more than two hours so intervene, the beginning of time on duty shall be considered to be the time two hours before the time arrival is expected, but in no case earlier than 5 p.m. The ending time shall be the time at which the actual inspection was concluded, 8 a.m., or the beginning time of his next basic hours of duty, whichever is earliest. * * *

Rollback time is similar in concept to "back-up time" authorized for customs inspectors and discussed in 37 Comp. Gen. 276 (1957).

On January 18, 1976, Mr. Broz worked an 8-hour Sunday shift from 9 a.m. to 5 p.m. for which he received 2 days' pay. He does not question the correctness of this payment. Rather, his claim concerns the amount of 1931 Act overtime pay to which he is entitled on that day for working in the morning from 7:15 a.m. to 8:40 a.m. and at night from 11 p.m. to 12:20 a.m. on Monday morning. His work assignments on Sunday, August 22, 1976, involved similar circumstances.

For the purpose of applying the computational principles for Sunday work set forth in Section 5 of the INS regulations quoted above, only the time that Mr. Broz worked on Sunday was used and the hours worked at night were combined with those worked in the morning as follows:

Actual Time	Hours	Rollback	Total
7:15 a.m. to 8:40 a.m.	1.25	2	3.25
11:00 p.m. to midnight	1.00	2	3.00
Total			6.25

Under its regulations, INS paid Mr. Broz one and one-half days' pay for time on duty of 5 hours or more, but less than 7 hours.

Mr. Broz questions the INS' authority to consider the calendar day from midnight to midnight of Sunday, exclusive of the 8 hours of his Sunday shift, as a single period for the purpose of computing his overtime entitlement and claims that he should have been paid 2 days' pay for his work on Sunday, January 18, 1976. He feels he is entitled to 1 day's pay for his 3.25 hours of work in the morning and 1 day's pay for the 3 hours of work at night since each separate period of work involved time on duty of 3 hours or more, but less than 5 hours. Essentially, Mr. Broz quetions whether INS may use the midnight cutoff for Sundays and holidays or whether it must regard the period from 5 p.m. of the day preceding the Sunday or holiday until the beginning of the 8 hours of the Sunday or holiday duty as one continuous period for the purpose of determining 1931 Act overtime entitlement. The same question pertains to the period beginning at the end of the 8 hours of Sunday or holiday duty and ending at 8 a.m. of the day following the Sunday or holiday.

Within the limitation set forth in that provision, the 1931 Act authorizes the Attorney General to fix a rate of extra compensation for overtime services of INS officers and employees "who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, *or* on Sundays or holidays to perform inspectional duties." Based on that language, recognizing a distinction between work performed on Sundays and holidays and work performed on other days, we do not believe that the Attorney General exceeded his broad discretion to determine what constitutes overtime services under that Act in prescribing the midnight cutoff for Sundays and holidays. In 24 Comp. Gen. 483 (1945) we considered and posed no objection to a substantially similar Treasury regulation concerning Customs employees that provided a midnight-to-midnight cutoff for Sundays and holidays. That regulation, quoted at page 488 of the decision, provided that the night hours at the end of the workday preceding a Sunday or holiday and the night hours at the beginning of the next regular workday shall be considered as part of a single night.

We find no basis to question the INS regulation insofar as it treats the period from midnight-to-midnight on Sundays and holidays, exclusive of the hours of Sunday or holiday duty, as a single period for computing inspectional employees' 1931 Act overtime entitlement. Accordingly, our Claims Division's settlement denying Mr. Broz' claim for an additional one-half day's pay on each of the two Sundays involved is sustained.

[B-195227]

Accountable Officers — Relief — Delegation of Authority — Administrative Denial — Finality Regardless of Amount Involved

Delegation of authority to agencies to resolve administrative irregularities up to $500 is relevant only when agency believes accountable officer should be relieved of responsibility. Since General Accounting Office's (GAO) role is limited to concurring or refusing to concur with agency head's findings that statutory requisites for relief have been met, GAO may not grant relief, when no such findings have been made, regardless of the amount involved.

Matter of: Finality of Immigration and Naturalization Service's decision on responsibility of accountable officer for physical losses of funds, November 29, 1979:

The Acting Associate Commissioner of Management for the Immigration and Naturalization Service requests our decision concerning the finality of an agency's decision on the responsibility for an irregularity in accounts up to $500.

The Immigration and Naturalization Service determined that Mr. David Milne, an accountable officer, was liable for a physical shortage of funds and withheld $90 from his paycheck to make up the loss. Claiming that the agency had disregarded its own regulations in holding him accountable, Mr. Milne then appealed to the General Accounting Office for a refund of the $90. Mr. Milne specifically stated he was not applying for relief under 31 U.S.C. § 82a-1. In denying Mr. Milne's refund request, our Claims Division stated:

> We have no authority to reverse the determination made by the Immigration and Naturalization Service that you were one of the "accountable officers," in view of the fact that we have delegated to all federal agencies the authority to administratively resolve irregularities in accounts of up to $500. See 54 Comp. Gen. 112 (1974).

After our denial of his refund request, Mr. Milne submitted a grievance to the Immigration and Naturalization Service. The Service refused to consider the grievance because its grievance procedures cover only matters which are *not* subject to final administrative review outside the agency. The Service maintains that final responsibility for administrative review of account irregularities up to $500 remains with the General Accounting Office.

The Service now asks whether the delegation of authority to Federal agencies to resolve irregularities up to $500 divests the General Accounting Office of responsibility for final review of the administrative resolution. If this answer is in the affirmative, the Service also wishes to know if the $500 limit applies to irregularities occurring before August 14, 1974, when the limit was raised from $150 to $500.

GAO has authorized the heads of departments and agencies to grant relief to accountable officers for physical losses of funds if the amount

involved is less than $500. 3 GAO 57.3, 58. (This authority does not cover losses due to fraud or to improper payments by the accountable officer. See 7 GAO 28.14(3).) This authorization simply means that if the agency has made the requisite statutory determinations under 31 U.S.C. § 82a–1—*i.e.*, that the loss or deficiency occurred while an accountable officer (or his subordinate) was acting in the discharge of his official duties, and that the loss or deficiency occurred without fault or negligence on the part of the accountable officer (or his subordinate)—the agency need not submit the matter to the GAO to obtain our concurrence with its findings and the agency may grant relief and adjust the account.

If the agency has not made these determinations, neither the agency nor the GAO has any authority to grant relief to the accountable officer, regardless of the amount involved. When relief is not granted to an accountable officer, the agency has no alternative but to proceed immediately to collect the amount of the shortage from the officer, unless restitution is otherwise made.

Since GAO's sole authority, with respect to relief of accountable officers of other agencies, is limited to giving or withholding concurrence with the agency's determinations it has no role to play when the agency has either not made the requisite statutory determinations or has made a determination adverse to the officer. Such agency action is final, as far as the GAO is concerned, and it cannot overrule any aspect of the agency's findings leading to the conclusion that it will not grant (where the loss is less than $500) or request GAO to grant, relief to a particular accountable officer.

In summary, the finality of an agency's decision either not to grant relief (where appropriate) or not to request GAO to grant relief for a physical loss of funds does not depend on the presence or absence of an authorization from the GAO to resolve administrative irregularities up to a stated sum. GAO's statutory authority is limited to granting relief when it concurs with an agency's findings that relief *should* be granted. If no such findings are made by the agency, there is nothing for GAO to review. It is therefore unnecessary to address the Service's second question about the applicability of the authorization from the GAO to irregularities occurring before August 14, 1974.

As to the question of Mr. Milne being an accountable officer, we have held that any Government officer or employee, civilian or military, who by reason of his employment is responsible for or has custody of Government funds is an accountable officer. Thus, an officer or employee who receives or collects money for the Government is accountable to the Government for all money collected. It is clear from the record that Mr. Milne accepted the funds in question by reason of his employment and thus is an "accountable officer" insofar as those funds are concerned.

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