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[B-201031]

## Compensation—Aggregate Limitation—Applicability to Credit Hours—Flexitime Experiment

A grade GS-16, step 4 employee of the National Security Agency, being paid $50,112.50 per annum, the maximum salary payable under 5 U.S.C. 5308, was transferred from an office participating in a flex-time experiment under title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, to an office not participating. He may be paid for his accumulated credit hours under the authority of section 106 of that Act. The limitations on maximum allowable pay in 5 U.S.C. 5547 and 5308, and section 304 of the Legislative Branch Appropriation Act of 1979, do not apply to payments for credit hours.

## Matter of: Paul E. Peters—Flexible Work Schedules—Application of Pay Ceiling to Credit Hour Payment, August 3, 1981:

This decision is at the request of Mr. W. Smallets, Finance and Accounting Officer, National Security Agency, who asks whether the maximum pay limitation imposed by 5 U.S.C. § 5308 (1976) applies to payments for accrued credit hours authorized by section 106(b) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95-390, September 29, 1978, 92 Stat. 755, 758, 5 U.S.C. § 6101 note.

Mr. Smallets states that Mr. Paul E. Peters, a grade GS-16, step 4 employee of the National Security Agency, earning the maximum $50,112.50 per annum allowed by 5 U.S.C. § 5308, was transferred from an office which participated in an alternative work schedules experiment under Title I of Public Law 95-390, to an office which was not participating in such an experiment. Mr. Peters was paid $138.52 in compensation for 5¾ credit hours earned during the pay period of June 22 to July 5, 1980. Mr. Peters subsequently paid back $138.52 to the National Security Agency pending receipt of a decision from the Comptroller General as to the application of 5 U.S.C. § 5308 to the payment for credit hours.

The Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95-390, provides in section 106(a) that full-time employees may accumulate not more than 10 credit hours which can be carried over into succeeding pay periods. Upon termination of an employee's participation in an experiment under title I of the Act, section 106(b) authorizes payment for accumulated credit hours as follows:

> (b) Any employee who is on a flexible schedule experiment under this title and who is no longer subject to such an experiment shall be paid at such employee's then current rate of basic pay for—
>
> (1) in the case of a full time employee, not more than 10 credit hours accumulated by such employee * * *.

Section 5308 of title 5, United States Code, however, limits the pay of employees as follows:

> Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

The question, therefore, is whether section 5308 operates to prevent payment for credit hours accumulated under Title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978 to those individuals already being paid at the level V ceiling.

We conclude that section 5308 does not prevent payment for credit hours as that section applies only to "pay" under "any provision of this subchapter" (Pay Comparability System) and not to payments authorized elsewhere. 55 Comp. Gen. 196 (1975). Since payments for accumulated credit hours are not authorized in the Pay Comparability System subchapter, but are authorized by Public Law 95–390, 5 U.S.C. § 6101 note, those payments are not limited by the restrictions in 5 U.S.C. § 5308.

There are two other statutory pay limitations, however, which must also be considered in this matter. The first is 5 U.S.C. § 5547 which states:

> An employee may be paid premium pay under sections 5542, 5545(a)–(c), and 5546 (a), (b) of this title only to the extent that the payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for GS–15.

Since payment for credit hours is not a form of premium pay under either 5 U.S.C. §§ 5542, 5545(a)–(c), or 5546 (a) or (b), the limitation in 5 U.S.C. § 5547 has no application to the accumulation of credit hours or to payment for credit hours.

The second pay limitation applicable at the time of the payment to Mr. Peters is found in section 101(c) of Public Law 96–86, October 12, 1979, 93 Stat. 656 (H.J. Res. 412) which refers to and applies the pay limitation in section 304 of the Legislative Branch Appropriation Act of 1979, Pub. L. 95–391, September 30, 1978, 92 Stat. 763, 788, which states as follows:

> Sec. 304. (a) No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—
>
> * * * * * * *
>
> (2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.
>
> * * * * * * *
>
> (c) For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

We do not view credit hours as salary or pay in the sense contemplated by section 304 of the Legislative Branch Appropriation Act of 1979. The payment for accumulated credit hours is not a payment of salary or basic pay, but instead is to be viewed as similar in nature to the lump-sum payment for accrued annual leave made under 5 U.S.C. § 5551(a) when an employee leaves Federal service. Just as the lump-sum leave payment is, under the terms of section 5551(a), pay for tax purposes only, a lump-sum payment for accrued credit hours is neither basic pay nor salary for any general purpose and is not pay for purposes of any of the pay caps discussed above. Compare *Bodine* 60 Comp. Gen. 198 (1981).

Therefore, since neither 5 U.S.C. §§ 5547, 5308, nor section 304 of the Legislative Branch Appropriation Act applies to limit payment for credit hours, Mr. Peters is entitled to be paid at his regular hourly rate for the 5¾ credit hours he accumulated during the period of his participation in the experiment under title I of Public Law 95-390.

[B-201848]

**Contracts—Awards—Advantage to Government—Single *v.* Multiple Awards—Fund Reallocation After Bid Opening—Defense Procurement**

Invitation for bids permitted separate awards on three schedules where low aggregate bid exceeded available funds. Cognizant agencies, after receipt of low aggregate bid in excess of available funds, increased amount after bid opening. Award to low aggregate bidder was unjustified where a significantly lower bid on one schedule was rejected. Portion of contract pertaining to that schedule should be terminated for convenience, if feasible, and awarded to low bidder on that schedule.

**Matter of: Norcoast-BECK Aleutian, August 3, 1981:**

Norcoast-BECK Aleutian (Norcoast) protests the award of schedule "A" to Hoffman Construction Company (Hoffman) under Army Corps of Engineers invitation for bids (IFB) No. DACA85-81-B-0001.

The IFB established three schedules and a combined schedule for three separate construction projects at Shemya Air Force Base, Alaska. The bid evaluation clause of the IFB stated in part:

> 1. AWARD: Award will be made to the low responsive, responsible bidder on Combined Schedules A, B, & C if sufficient funds are available for each of the three projects. * * * If the amount offered, by the low bidder on the combined schedule, for any of the projects exceeds the funds available for that project, the combined schedule will not be awarded and only then will bids on individual schedules be evaluated. If individual bids are evaluated, then award will be made on Schedules A, B, and C separately or together in any combination that is in the best interest of the Government.

To determine whether funds were available, the IFB set forth a formula prorating certain bid prices among the three schedules.

The amount programmed for schedule "A" from the 1981 military construction appropriation for Shemya Air Force Base was $1,550,000. Hoffman's bid on schedule "A" was $1,751,000 and its evaluated bid on that schedule was $1,817,753.33. Norcoast's bid on schedule "A" was $1,354,850, approximately $400,000 less than Hoffman's. Hoffman was the low bidder on the other two schedules.

After bid opening, the Corps contracting officer, in conjunction with the Alaska Air Command, revised upward the funds available for schedule "A" under the provisions of Air Force Regulation (AFR) 89-1 (June 20, 1978) which provides as follows:

(4) Before award:

(a) For bases having more than one MCP [military construction project] in a paricular fiscal year, AFRCE [Air Force Regional Civil Engineers] can authorize award of a project whose CWE [current working estimate] does not exceed 125 percent of the PA [programmed amount] if the station authorization limitation * * * is not exceeded.

The revised programmed amount for schedule "A" was $1,937,500, which was in excess of Hoffman's evaluated bid. The Corps thereafter determined that Hoffman's bid on schedule "A" was within the funds available and awarded it the contract for schedules "A," "B," and "C" as the low aggregate bidder.

Norcoast alleges that the Corps and the Air Force improperly manipulated the funding for schedule "A" subsequent to bid opening so as to bring Hoffman's bid within the funds available for that schedule, thus avoiding evaluation of individual schedule bids and award to Norcoast of schedule "A".

The Corps responds that, under previous GAO decisions and under statute, there is authority to reallocate funds during the course of a procurement. Once the reprogramming took place, the Corps argues, funds were available, and the bid evaluation clause required a single award on the combined schedule, notwithstanding the award of schedule "A" at a significantly higher price. Finally, the Corps intends to avoid using this bid evaluation clause in the future to prevent a similar situation from arising.

For the reasons stated below, the protest is sustained.

Our Office has consistently held that the language of 10 U.S.C. § 2305(c) (1976), requiring award to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, mandates award on the basis of the most favorable cost to the Government, assuming responsiveness of the bid and responsibility of the bidder. *Tennessee Valley Service Company*, B-188771, July 20, 1977, 77-2 CPD 40; *Mark A. Carroll and Sons, Inc.*, B-194419, November 5, 1979, 79-2 CPD 319. The award of schedule "A" to Hoffman was not at the most favorable cost to the Government.

Furthermore, the bid evaluation clause specifically permitted multiple awards in the best interest of the Government, where, as here, the low aggregate bid exceeded available funds on an individual schedule.

As mentioned above, funds became available for schedule "A" only because of the reprogramming under the above AFR. However, the reprogramming was authorized under the AFR (89-1(4)(b)), in our view to take advantage of rather than reject a reasonably priced low bid.

In support of its action, the Corps cites *H. M. Byars Construction Co.*, 54 Comp. Gen. 320 (1974), 74-2 CPD 233; *Rock, Inc.*, B-186961, November 9, 1976, 76-2 CPD 394; and *Praxis, Ltd.*, B-186157, August 10, 1976, 76-2 CPD 146. In those cases, the bid schedule consisted of a base bid and certain alternatives that increased the scope of work. Funding was increased after bid opening, enlarging the scope of work to be awarded, which resulted in a different low bidder since separate awards were not permitted. We held in each case that the agency was entitled to rely upon the additional funds in making an award to the responsible bidder with the lowest responsive bid on the increased work. In contrast, here, the Corps and the Air Force exercised the discretion to make funds available not to award increased work to a low bidder, but rather to award the same work to other than the low bidder. Therefore, these cases do not support the Corps' position. The agencies' actions did not result in an award on the basis of the most favorable cost to the Government.

We conclude that Norcoast should have been awarded the schedule "A" contract. However, the Corps advises us that approximately 25 percent of the work on schedule "A" has been completed. Thus, we recommend that the Corps consider the feasibility of immediately terminating the schedule "A" portion of the contract and awarding the remainder of the work to Norcoast.

Protest sustained.

[B-203450]

## Occupational Safety and Health Review Commission—Authority of Commissioners—Delegation to Chairman—Administrative Functions—Vacancy in Chairmanship Effect

The Chairman of the Occupational Safety and Health Review Commission is responsible for the administrative functions of the Commission. In the absence of a chairman such responsibilities rest with the remaining two commissioners. Therefore, if remaining two commissioners agree on administrative action, such action is valid. Accordingly, remaining two commissioners may execute lease for purpose of housing computer.

## Matter of: Occupational Safety and Health Review Commission—Commissioners' Authority:

The General Counsel of the Occupational Safety and Health Review Commission (Commission) requests a decision on whether, in the absence of a chairman, the remaining two commissioners may execute a valid lease.

As the submission indicates, the Commission has recently acquired a new computer system which is presently in storage due to inadequate facilities to house it. Since immediate use of the computer is desired, an adequate physical plant must be secured as it is not feasible to use the Commission's current location. Therefore, the Commission proposes to locate the computer in leased quarters in Maryland. The General Counsel states in his letter that under the Occupational Safety and Health Act of 1970 (Act) the Chairman is authorized to enter into a lease agreement of this sort. Presently, however, there is a vacancy on the Commission and the President has not designated an interim chairman from the remaining two commissioners. Thus, the question presented is whether the remaining commissioners can validly execute a lease for the purpose of housing the Commission's recently acquired computer.

Section 12(e) of the Act, Pub. L. No. 91–596, 84 Stat. 1604, codified at 29 U.S.C. § 661(d) (1976), states as follows: "The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission * * *." The above provision which delegates to the Chairman administrative functions is not unique to the Commission. For example, under the 1950 Reorganization Plan No. 8, 64 Stat. 1264 (1950), executive and administrative functions of the Federal Trade Commission were transferred to its Chairman. Evidently, the administrative functions of agencies organized as commissions were transferred to their respective chairmen to ensure that these agencies would operate efficiently and expediently. Without this delegation of power, an affirmative vote of a majority of commissioners would be required on administrative actions requiring the commissioners to expend a great deal of time and effort on internal operating matters rather than on substantive functions.

Although the administrative functions of agencies organized as commissions have often been delegated to their respective chairmen for efficiency purposes, in our view when there is a vacancy in the chairman position, the remaining commissioners must retain a residual power to perform administrative functions. Absent this power, the operations of commissions could possibly cease. In the instant case, the authority of the remaining two commissioners of the Occupational Safety and Health Review Commission to perform administrative functions in the absence of a chairman is found in section 12(f) of the Act. This section of the Act states as follows: "For the purpose of carrying out its functions under the Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members." Pub. L. 91–596, 84 Stat. 1604, 29 U.S.C. § 661(e). Thus under this statutory scheme, in the absence of a chairman, the two remaining commissioners, upon their affirmative vote, possess the authority to perform the administrative functions of the Commission such as the execution of a lease.

Accordingly, the two remaining commissioners have the authority to execute the subject lease agreement.

[B-201083]

**Leaves of Absence—Annual—Cancellation of Approved Annual Leave—Resulting Loss Claims—Airline Discounts**

Employee who purchased "super-saver" airline ticket and arranged to take annual leave in anticipation of a personal trip may not be reimbursed for additional air travel expense incurred when employee's official duties caused him to make alternate flight reservations which disqualified him from receiving the "super-saver" fare since there is no legal basis for the claim.

**Matter of: John W. Keys III, August 5, 1981:**

This action is in response to a request from the Authorized Certifying Officer for the Water and Power Resources Service, United States Department of the Interior, as to whether the claim of John W. Keys, III may be paid. The request concerns the liability of the Government for $98.62 in additional personal air travel costs incurred by Mr. Keys when his official duties caused him to change his flight reservations. We find that reimbursement may not be authorized.

Mr. Keys, an Assistant Regional Director for the Water and Power Resources Service, indicates that he had planned to take a personal trip from Boise, Idaho, to Denver, Colorado, on October 17–19, 1980. On September 15, 1980, Mr. Keys purchased a "super-saver" (discounted) airline ticket and at the same time, he arranged to take annual leave on the afternoon of October 17, 1980. Prior to entering annual leave status, circumstances developed in connection with Mr. Keys' official duties which caused him to remain at the office that afternoon and also to return on an earlier flight on Sunday, October 19. As a result, Mr. Keys found it necessary to change his flight reservations and he was charged an additional $98.62 since the change disqualified him from receiving the "super-saver" fare. Mr. Keys claims that the additional charges were directly connected with the performance of official business and has requested that the Government reimburse him for the additional personal expense.

As supportive of Mr. Keys' claim, several decisions were cited that allowed reimbursement where additional travel costs were incurred as a result of the cancellation of annual leave. See, e.g., *Gregg Marshall*, 58 Comp. Gen. 797 (1979); 52 Comp. Gen. 841 (1973). However, these decisions involve official travel intermingled with personal business, while Mr. Keys' claim involves only personal travel. More apposite to the present situation are those cases which have denied claims for purely personal expenses such as hotel room deposits and dependents' travel costs, which resulted from the cancellation of annual leave. See, e.g., *Delbert C. Nahm*, B-191588, January 2, 1979; *Karl G. Sessler*, B-190755, June 15, 1978; and B-176721, November 9, 1972.

The certifying officer could not find any authority under which payment could be made. Our own research also has not revealed any law or regulation under which we may authorize payment to Mr. Keys for the additional personal travel expense incurred. While it is unfortunate that Mr. Keys found it necessary to change his travel plans and incurred additional costs as a result of the change, there is no authority under which we may authorize reimbursement for the additional expense. Accordingly, payment of the claim may not be made.

## [B-196851]

### Subsistence—Per Diem—Temporary Duty—Dual Lodgings

An individual (employed as a pilot) through no fault of his own and in circumstances beyond his control spent the night away from the temporary duty location to which he expected to return. Lodging expenses both at and away from that temporary duty station may be paid. Also, lodging costs may be paid if the pilot unexpectedly remains overnight at his permanent station. Payments in these cases must be based on a determination by the appropriate agency official that the employee acted reasonably in retaining the lodgings at his temporary duty station. 55 Comp. Gen. 690, B-164228, June 17, 1968, and similar cases are overruled; 59 Comp. Gen. 609, 59 *id.* 612, and 51 *id.* 12 are modified (extended).

### Matter of: Milton J. Olsen, August 6, 1981:

The issue in this case is whether Mr. Milton J. Olsen, an employee of the United States Forest Service, is entitled to be reimbursed the lodging costs he incurred at his temporary duty station when as a result of unforeseen circumstances he was forced to spend the night at his permanent duty station. In connection with the stay at his permanent station we are asked whether he would be entitled to reimbursement for any meals taken at or in the vicinity of his permanent station. We are also asked whether Mr. Olsen is entitled to be reimbursed for dual lodging costs he incurred, on a different occasion when he unexpectedly spent the night in a city other than his original temporary duty station having retained his accommodations at that station. Mr. Olsen is entitled to be reimbursed on an actual cost basis for the lodgings which he did not occupy at his temporary duty station on both occasions since it appears that he acted reasonably in retaining the lodging at the original temporary duty station.

These questions were presented by Mr. H. Larry Jordan, an authorized certifying officer, National Finance Center, United States Department of Agriculture.

Mr. Olsen is employed as a pilot by the Forest Service. During the fire seasons he is generally detailed from his permanent duty station, Ogden, Utah, to a temporary duty station to enable him to be available to transport personnel during emergency situations. In this case, Mr. Olsen was detailed to Boise, Idaho, and while there he claimed and was reimbursed actual subsistence expenses not to exceed $41 per day. On those occasions when Mr. Olsen had to leave Boise and there was a possibility he would not return that night, he would check out of his motel. In two instances, however, he anticipated returning to Boise, but due to conditions beyond his control, he was forced to remain away from Boise for the night. As a result he incurred expenses for the lodgings he did not use.

The first instance involved a flight where, due to engine trouble, he had to remain in Ogden, his permanent station, overnight and he stayed at his own home, although he retained the motel room in Boise.

The second instance involved a flight where due to rerouting he was compelled to stay in Salt Lake City, Utah, since he had exhausted his crew limitation time and could not fly any more that day. Both Boise and Salt Lake City are high rate geographical areas having limitations of $41 and $49 respectively, at the time the travel in question was performed. The certifying officer asks if Mr. Olsen is entitled to any reimbursement for the costs he incurred at his temporary duty station while he was away from it through circumstances beyond his control.

In connection with the first instance when Mr. Olsen spent the night at his permanent station, the general rule in such cases is that the Government may not pay subsistence expenses or per diem to civilian employees at their headquarters or official duty station, regardless of any unusual working conditions. See 53 Comp. Gen. 457 (1974); B–185885, November 8, 1976; and B–185932, May 27, 1976.

Thus, he would not be entitled to reimbursement for the costs of any meals taken at his official station. However, in certain instances an employee may be reimbursed on an actual expense basis for costs (e.g., deposits on lodgings) incurred in anticipation of temporary duty, or when temporary duty has been shortened by official orders. Lodging costs incurred in anticipation of the originally ordered temporary duty may be paid even though the employee is not in a travel status. See 59 Comp. Gen. 609 (1980) and 59 Comp. Gen. 612 (1980). In those cases we held that when an employee has acted reasonably in incurring otherwise allowable lodging expenses pursuant to temporary duty travel orders but the orders are later canceled for the benefit of the Government and the employee is unable to obtain a refund, reimbursement of the expenses should be allowed to him as a travel expense to the same extent that they would have been if the orders had not been canceled.

It is our view that this rule should be applied to Mr. Olsen's situation, even though it does not involve the cancellation or amendment of orders by the Government. That is, in situations where the employee acts reasonably, as determined by the agency, in incurring costs for lodging but is unable to occupy such lodging because of conditions beyond his control and the costs are incurred incident to his temporary duty, he may be reimbursed on an actual expense basis for the lodging costs to the extent that they would have been paid had the temporary duty been performed.

Thus, in the first instance Mr. Olsen may be reimbursed for the lodging costs incurred in Boise even though he spent the night at his official duty station, since he acted in a reasonable manner in incurring the costs.

With regard to the dual lodging costs incurred in Boise and Salt Lake City, we have held in the past that if it is determined by an appropriate agency official that an employee had no alternative but to retain his lodgings elsewhere, he could be reimbursed up to the monetary maximum on an actual subsistence expense basis to at least partially defray the expenses of maintaining two lodgings. See 55 Comp. Gen. 690 (1976) and B-164228, June 17, 1968.

However, in 51 Comp. Gen. 12, as well as in 59 *id.* 609 and 59 *id.* 612, lodging costs incurred by employees for lodgings they could not use as a result of a change in the Government requirements have been paid without regard to the fact that per diem could not be paid. In this case the employee remains in a temporary duty status and is entitled to per diem or actual subsistence expense reimbursement. But he has in a similar manner incurred expenses for lodging which he could not use. In the cited cases otherwise allowable lodging costs have been paid, not as a per diem or subsistence allowance, but as an allowable travel expense. Similarly, in this situation by analogy to the rule in those cases we believe that the lodging costs may be paid to the extent that they would have been payable had the temporary duty not been changed. Payment need not be limited under the previously applied dual lodgings rule but may be in addition to per diem or actual subsistence expenses payable for the travel as actually performed.

Accordingly, those decisions involving dual lodgings, which restrict the employee to the daily allowance authorized to pay for both lodgings, need no longer be followed. In the future the employee may be reimbursed in accordance with either the per diem or actual subsistence expense allowance authorized in his orders based upon the lodgings actually occupied and may also be reimbursed the additional cost incurred for the lodging he does not occupy to the extent such costs would have been allowed had travel plans not been changed, if an appropriate determination is made by the agency.

The vouchers submitted are returned and may be certified for payment if otherwise correct.

[B-202044]

**Property—Private—Damage, Loss, etc.—Government Liability—Commuting to Work by Auto—Transit Strike**

Government employees who were involved in accidents while commuting to and from work during New York transit strike did not damage their vehicles "incident to service" and cannot make a claim cognizable under the Military Personnel and Civilian Employees' Act of 1964. Commuting is a personal expense which in the absence of extremely unusual circumstances may not be borne from appropriated funds.

**Property—Private—Damages, Loss, etc.—Government Liability—Vehicle Operated on Government Business**

Section 5704 of title 5, which reimburses a Government employee who uses his own vehicle for official Government business on a mileage basis, includes in that basis the cost of insurance, if any. See 5 U.S.C. 5707. Therefore, reimbursement under 5 U.S.C. 5704 for damage to a vehicle of an employee officially authorized to use it is precluded. However, a claim for damage can be made under the Military Personnel and Civilian Employees' Claims Act of 1964, even if the employee is reimbursed on a mileage basis.

**Matter of: New York Transit Strike—Claims for Motor Vehicle Damages, August 6, 1981:**

The Director of the Division of Accounting, Fiscal and Budgeting Services of Region II of the Department of Health and Human Services (HHS), has requested our decision as to the payment of claims for automobile damages incurred by Government employees during the New York City Transit Strike in April 1980. There are three claims involved.

Mr. Constantino Conte is a lender examiner for the Office of Education (now Department of Education) who is authorized to regularly use his automobile on official Government business. Returning from a bank where he had been conducting a program review, he found that the front windshield of his automobile had been damaged. All but the $50 deductible of the replacement cost has been paid for by his insurance company. He now requests reimbursement of the $50.

Mr. Michael Hurley is an employee of the Northeastern Program Service Center. During the transit strike, he was authorized to join a carpool and to use his own automobile. While driving home from work he was involved in an accident. All but $200 of the cost of repair has been paid by Mr. Hurley's insurance company. He now seeks the $200 deductible as well as $450 in anticipated additional insurance premiums over the next 3 years.

Mr. Joseph Gillespie is a collection agent for the Office of Education (now Department of Education). He was authorized to use his own automobile to drive himself and others to work during the strike. One morning, after discovering that his previous parking arrangements had fallen through, he attempted to park partially on the sidewalk. As a result, the exhaust pipe, muffler, and tailpipe of his vehicle were torn off. He seeks reimbursement of the cost of repairs, $95.96.

We have a copy of the memo the Office of General Counsel for Region II of HHS sent to the three employees' divisions, outlining the different options for handling their claims. That office correctly points out that the applicable statute is the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. §§ 240–243 (1976 and Supp. III, 1979) and not the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1976), or the Federal Employees' Compensation Act 5 U.S.C. §§ 8101 *et seq.* (1976 and Supp. III 1979). Apparently, at least two of the claimants were under the erroneous impression that they could recover under one of the latter two statutes. The Federal Employees' Compensation Act deals with compensation for Government employees who have job-related injuries. The Federal Tort Claims Act is concerned with suits filed by third parties against the United States Government for the negligent or wrongful acts of its employees. A claim by an employee against the United States for injuries or damages incurred in the course of his or her employment is not within the purview of the Federal Torts Claim Act. B–185513, March 24, 1976.

The Military Personnel and Civilian Employees' Claims Act of 1964 authorizes the head of each agency or his designee to pay claims up to $15,000 for damages to, or loss of, personal property incident to an employee's service. 31 U.S.C. § 241(b)(1). Under section 241(c)(3). a claim is allowable only if the damage was not caused in whole or part by the negligent or wrongful act of the claimant.

In addition, 31 U.S.C. § 242 states:

> Notwithstanding any other provision of law, the settlement of a claim under this Act is final and conclusive.

Accordingly, if a claim is cognizable under this Act, we have no role in settling it. In the context of the three specific claims presented we will turn our attention to whether the Act covers them.

With respect to whether the claimed losses were incurred incident to service, we note that the legislative history of the Act does not contain a discussion of the type of claim intended to be covered. B-169236, April 21, 1970. However, except in extremely rare situations, it is clear that commuting to or from work is not a covered activity. We stated in 60 Comp. Gen. 420 (1981), about commuting costs in general that:

> The settled rule is that employees must bear the cost of transportation between their residences and official duty locations. 11 Comp. Gen. 417 (1932); 15 *id.* 342 (1935); B-189114, February 14, 1978. The fact that emergency conditions necessitate additional trips or otherwise increase commuting costs does not alter the employee's responsibility. 36 Comp. Gen. 450 (1956); B-189061, March 15, 1978. Similarly, the unavailability of public transportation alone does not shift this personal obligation to the Government. 19 Comp. Gen. 836 (1940); 27 *id.* 1 (1947); B-171969.42, January 9, 1976. These general rules clearly assign the responsibility for home-to-work transportation to the individual employee in nearly every circumstance. We have made exceptions to the general rule only in emergency situations where even alternate transportation was unavailable or scarce and Government operations were closed down except for a few essential personnel who were ordered to report to work. However, none of those circumstances are applicable to the 1980 transit strike or the UMTA employees claiming reimbursement.

Since the claims of Messrs. Hurley and Gillespie involve property damage to their respective cars while commuting, we have concluded that their claims are not compensable under this Act.

Their employer, the Northeastern Program Service Center, issued a "Transit Strike Plan" memorandum which stated that each employee had the responsibility "to make every effort to reach the office during a transit strike." As distinguished from the situation in B-158931, May 26, 1966, involving an earlier New York transit strike, employees not making it into work would be charged annual leave. The memorandum continued in part:

> We are attempting to clarify whether or not employees who are using their cars to drive fellow employees to and from work will be eligible for reimbursement for travel expenses. However, you will be covered under the Employee Compensation Act and the Federal Tort Claims Act. We still need drivers, * * *

The Center's Director sent Mr. Hurley (and other employees) a memorandum dated March 31, 1980, which stated in part:

> In the event of a transit strike beginning April 1, 1980 you are hereby directed to form a carpool to transport the people mentioned below to the Northeastern Program Service Center for the duration of the strike.
>
> For this purpose, you will be protected by the Federal Employees Compensation Act, the Federal Tort Claims Act, which will cover any injury and damage claims for which you may become liable.

(The record does not state, but we presume Mr. Gillespie received similar memoranda.)

We first note that the HHS General Counsel memorandum indicated that while the above quoted memoranda may have been somewhat ambiguously worded, they were not intended to indicate that the two Acts mentioned would provide compensation for damages to the drivers' own property. We agree that the memoranda only purport to indemnify the drivers for liability to other persons. Therefore, these employees are not entitled to rely on the memoranda for purposes of seeking reimbursement for damage to their vehicles.

Second, even if there was some confusion as a result of the memoranda, we have substantial doubt that in the absence of unusual circumstances more calamitous than this transit strike, an agency can direct its employees to drive their cars and to transport fellow employees to work, or pay them for it, or that it can determine that employees doing so may be covered under the Federal Tort Claims Act, the Federal Employees Compensation Act, or the Military Personnel and Civilian Employees Claims Act. Getting to work is the employee's personal responsibility, although the agency is authorized to assist by providing carpool information and the like. An employee's responsibilities do not and cannot normally include driving to work (as distinguished from using any other mode of transportation available) or providing transportation to his fellow employees, even during and because of a transit strike. In this case the agency apparently did not even distinguish between critical and noncritical personnel. Accordingly, we do not see any legal basis for the Northeastern Program Service Center to extend the protections of the Military Personnel and Civilian Employees Claims Act to its employees while they commuted to work.

Therefore, these employees are in the same situation as other Federal employees who commute to work: they do so at their own risk. Thus, reimbursement of the damage sustained to the employees' cars is not authorized.

Finally, we turn to the claim of Mr. Conte. While the damage to his car occurred during the transit strike, it is unrelated to the previous two claims. Mr. Conte was using his vehicle for official business and was within the scope of his employment when the damage occurred. The front windshield of his car was damaged when he was on official business conducting a program review. Therefore, his loss may properly be considered a loss incident to service under the coverage of the Military Personnel and Civilian Employees Claims Act. B-185513, March 24, 1976.

In view of the provisions of the Military Personnel and Civilian Employees Claims Act, it is not within the jurisdiction of this Office to consider Mr. Conte's claim for damage to his automobile. B-187913, February 9, 1977; B-180994, June 12, 1974. The reasonableness of the possession of the property in question and negligence on the part of the owner are questions for determination by the Secretary of HHS or his designee. B-195295, November 14, 1979; 31 U.S.C. §§ 241 (a) and (c). (Mr. Conte now works for the Department of Education as a result of the splitting of the Department of Health, Education and Welfare into the Department of Health and Human Services and the

Department of Education. However, we assume that the Secretary of HHS or his designee will handle his claim since it, along with the two others, have been submitted to us through HHS.) Settlement of the claims, if made in accordance with the Act, applicable regulations, and any overall policies prescribed by the President pursuant to 31 U.S.C. § 241(b)(1), would be final and conclusive. B-185513, *supra;* B-187913, *supra*; B-180994, *supra*; 31 U.S.C. § 242.

In connection with Mr. Conte's claim, HHS' Office of General Counsel has expressed reservations about the applicability of the Act if the individual involved was reimbursed a mileage rate from the Government for the use of his automobile. Apparently, Mr. Conte was, at the time his vehicle was damaged, being reimbursed seventeen cents per mile. Under the provisions of 5 U.S.C. § 5704 (1976), a mileage rate authorized for the use of a privately owned automobile is in lieu of actual expenses. The mileage rate includes reimbursement of the cost of insurance, if any. See 5 U.S.C. § 5707 (1976). The only actual expenses authorized for reimbursement in addition to the mileage rate are parking fees, ferry fare, and bridge, road and tunnel tolls. We have specifically held that a claim for damage to a private automobile sustained while engaged on official Government travel is precluded under that statute where reimbursement was made on a mileage basis. B-185513, March 24, 1976; 15 Comp. Gen. 735 (1936). However, we have also held that while a claim for damages to a private vehicle cannot be reimbursed under the provisions of 5 U.S.C. § 5704, settlement of the claim can still be made under the Military Personnel and Civilian Employees Claims Act. B-185513, *supra;* B-174669, February 8, 1972.

[B-198459]

**States—Fire-Fighting Services—Local Governments, etc.—Legal Obligation to Provide Services Without Reimbursement—Services to Federal Government—Contracting Authority**

Absent specific statutory authority contracts for fire services are not authorized where a non-Federal governmental entity such as Rural Fire District is legally obligated under state or local law to provide fire service without compensation. Where no antecedent legal obligation exists, however, contracts may be executed.

**Property—Public—Fire-Fighting Services—Mutual Aid Agreements**

Mutual aid agreements are statutorily authorized in all jurisdictions as are actual cost reimbursements for losses incurred in fire suppression activities on Federal lands.

**Matter of: Bureau of Land Management: Contracts for Fire Protection, August 11, 1981:**

The Director of the Bureau of Land Management (BLM) has asked for our opinion on whether the BLM may legally contract with individual Rural Fire Districts in Oregon and Washington to secure fire protection and firefighting services for Federal lands situated within the district's boundaries. The lands in question are extensive tracts of timber, and the Rural Fire Districts affected are legally required to protect these large, sparsely populated areas. BLM strongly urges that the contracts are authorized. The Department of the Interior Regional Solicitor's Office in Portland, Oregon, analyzed state laws, court decisions and previous Comptroller General's decisions and concluded that contracts with Rural Fire Departments in those states are improper. We agree with the Regional Solicitor's conclusion.

In a long line of cases, the Comptroller General has held that there is no authority to charge appropriations with the cost of providing fire services where a non-Federal governmental unit is required by state or local law to provide the services without compensation to all property owners within its jurisdiction. 24 Comp. Gen. 599 (1945); B-153911, December 6, 1968. Additionally, we have held that if the governmental unit's provision of fire services is supported in whole or in part by property taxes or other levies from which the Federal Government is constitutionally exempt, any additional payment specifically for fire protection amounts to an unconstitutional tax. 49 Comp. Gen. 284 (1969).

Both of these obstacles could be overcome by statute. However, the statute relied upon would have to explicitly authorize contracts with or payments to local governments legally obligated to provide fire protection to property owners without charge. We have held that statutory authority to enter into agreements to pay state agencies for "services" is insufficient to support a contract for legally required fire protection. B-105602, December 17, 1951. This is consistent with the interpretation of "specific statutory authority" applied in appropriations law generally. Compare, for example, 38 Comp. Gen. 33 (1958) (statutory authority to train operating personnel for nuclear ship does not extend to training Maritime Administration personnel) and 41 Comp. Gen. 529 (1962) (authority to engage in printing does not include authority to print business cards, which the Comptroller General has held is personal expense).

BLM argues that it has statutory authority for fire service contracts and cites several statutes as support for that proposition. Particularly mentioned are 43 U.S.C. §§ 1469 and 1738 (1976). Section 1469 provides that:

> [n]otwithstanding any other provision of law, persons may be employed or otherwise contracted with by the Secretary of the Interior to perform work occasioned by emergencies such as fire, flood, storm, or any other unavoidable

cause and may be compensated at regular rates of pay without regard to Sundays, Federal holidays, and the regular workweek.

Section 1738 deals with resource protection operations and it provides in pertinent part as follows:

The Secretary is authorized to enter into contracts for the use of aircraft, and for supplies and services, prior to the passage of an appropriation therefor, for airborne cadastral survey and resource protection operations of the Bureau. He may renew such contracts annually, not more than twice, without additional competition. Such contracts shall obligate funds for the fiscal years in which the costs are incurred.

These statutes grant specific authority for BLM to engage in several activities which would otherwise be prohibited by law: employing firefighters without regard to overtime and premium pay requirements; procuring the use of aircraft; making contractual arrangements for supplies and services for the resource protection operations of BLM in advance of appropriations; and renewing contracts without competition. Although these statutes generally are applicable to contracting and other activities in support of fire services, they do not specifically mention entering into contracts with state or local government entities which are required by law to provide fire services without charge, and hence do not provide the needed authority. The kinds of contracts which are authorized by the statute would be for seasonal personnel, procurement of their equipment, chemical fire suppressants, etc., and contracts for complete fire services with providers who are not legally obligated to offer that service without charge.

BLM urges that the legislative history of section 1738 implies a broader authority on the part of the Secretary of the Interior to contract generally for fire services. However, to say that all contracts for fire services are authorized by the legislative history would be to take the crucial words of the Senate Report out of context. The legislative history speaks of "*renewable* contracts for protection of public lands from fire *in advance of appropriations* * * *." S. Rept. No. 94-583, 57 (1975). [Italic supplied.] The fact that the specific exemptions from other restrictions are reiterated in the legislative history supports the foregoing analysis that contracts with governmental units, which must be specifically approved, are not intended to be authorized by the statute. Additionally, the revision of this statute which was accomplished in 1975 did not revise the provision concerning fire services. Rather, it expanded the renewable advance contract authority to other resource protection operations and surveys.

Further support is derived from the fact that the statute and legislative history both address renewing the contracts without competition. Contracts with local governments for fire services would not usually lend themselves to competitive procurements. In fact, such contracts would almost always be sole source procurements, because in states where local governments are obligated to provide fire service, there ordinarily are no privately operated competing fire companies. Thus, the contracting authority is not implicitly extended to contracts with state and local governments which are required to provide such services without charge. In all, we do not think that the legislative history supports the contention that an otherwise prohibited act is authorized.

Because the authority to contract with a legally obligated governmental unit must be specific, and because the requirement is Federal in origin, the Supremacy Clause analysis put forward by BLM is not a consideration in our decision. The other statutory arguments advanced—analogizing the provision of fire services to the statutorily authorized conduct of state and local law enforcement activities on Federal lands, and to the authority to reimburse localities for extraordinary fire-related losses under the Federal Fire Prevention and Control Act, 15 U.S.C. § 2210 (1976)—are similarly unpersuasive.

It is clear from the above discussion that no specific statutory authority exists to enable the BLM to voluntarily contract with governmental units for fire services, but even if states insisted on compensation, there would still remain the question of an unconstitutional tax. Again, the Congress can waive the Federal Government's immunity from state and local taxation, but only by an express, affirmative act. *Mayo* v. *United States*, 319 U.S. 441 (1943). BLM conceded in its submission that but for the argued statutory authority to contract, the proposed payments would amount to an impermissible tax. As we have found no authority to contract, that conclusion must also prevent payments to Rural Fire Districts.

Further, local Fire Districts are not lacking for Federal financial participation in their activities. We must assume that some of the districts in question receive payments in lieu of taxes under 31 U.S.C. §§ 1601 *et seq.* That law provides payments up to $1,000,000 annually based on a formula related to population. These payments are intended to compensate a local government for the loss of revenue occasioned by large tax-exempt Federal land holdings and to underwrite the locally provided services which the Federal lands receive. B–149803, May 15, 1972.

Additionally the Fire Districts may make claims for any extraordinary losses incurred in fighting a fire on Federal property under the Federal Fire Prevention and Control Act. That Act, codified at 15 U.S.C. §§ 2210 *et seq.*, provides that only expenses "over and above [the District's] normal operating costs * * *" may be reimbursed on a claim. This most recent legislative pronouncement on the financial treatment of fire services for Federal property clearly indicates that

Congress did not intend to underwrite the overhead costs of local fire districts. Exising compensation methods alone are applicable to general operating expenses. These methods would include payments in lieu of taxes, tax exemptions affirmatively waived by Congress, payments under permissible contracts for fire protection, *e.g.*, contracts with private fire companies and with governmental units not required by law to provide fire services, and other payments specifically authorized by law.

Finally, there is the suggestion that our traditional test in fire service cases of antecedent legal obligation on the part of a governmental unit is inappropriate, and that instead, the test should be whether the investment is for the primary benefit of the Government. This theory rests on the assumption that the contract proceeds are used to improve equipment and services of local Fire Districts across the board and the Government, as a large landowner in the district, would be the principal beneficiary of those improvements if a fire should occur.

This primary benefit analysis was first employed in 55 Comp. Gen. 1437 (1976). That case allowed the purchase and installation of a traffic light on Government property. The signal regulated traffic on a state highway, allowing improved access to a Government installation. We found that regulation of traffic is universally a function of local governments. However, the local government was unwilling to put a traffic light at the intersection of the state highway and the Federal property's access road, presumably because it would not benefit from the light. The light was installed by the Government on its own property, and, although it made the whole intersection safer for both Government and private travelers, it had the primary effect of allowing faster and safer ingress and egress at the Government installation.

The "primary benefit" analysis may be appropriate for a capital item like a traffic light, but it is less applicable to the purchase of a municipal service because it is impossible to determine how much, if any, of the upgraded services provided to the general public by the Federal contract payments would ever inure to the Government's benefit. We note in this regard that, under optimum circumstances in the present case, no fires would occur, and the Government would receive no tangible benefit for its investment. Further, we question whether the affected Rural Fire Districts would ever be able to fully assume responsibility for extinguishing major forest fires without additional Federal assistance. The Department of the Interior would still need to maintain its tanker aircraft and heavy equipment, to employ smoke jumpers and the like for deployment to major fires. Therefore, the benefit to the Government could never result in savings of all fire-related expenditures.

We do not question that BLM has authority under 43 U.S.C. § 1738 to contract for some kinds of fire services. It is authorized to contract for services in jurisdictions where no governmental unit is obligated to provide free fire protection. In neighboring Idaho, for example, where fire protection of timber and range lands was the obligation of individual property owners, we found contractual arrangements to be entirely proper. See, B-163089, October 19, 1970, and B-163089, February 8, 1968; compare 34 Comp. Gen. 195 (1954). It is also free to contract for fire protection with entities not otherwise legally obligated to provide such service if such entities exist. Also, a different result would probably obtain in the case of a Federal enclave under the rationale expressed in 45 Comp. Gen. 1 (1965) which permitted a contract with local Fire District for protection of a tract of Federal land which was part proprietary and part dedicated to the sole use of the Government—a Federal enclave. The theory was that the fire district was not legally required to provide fire protection services for the Federal enclave and it would not be possible to segregate costs for services provided as between the proprietary and sole use Federal land.

Finally, although we hold that contracts with Rural Fire Districts are improper in the states of Washington and Oregon, we agree with the Regional Solicitor that mutual aid agreements, pursuant to 42 U.S.C. § 1856 (1976) could be executed at those installations having a federally maintained firefighting capability.

[B-200753.2]

**General Accounting Office—Recommendations—Contracts—Prior Recommendation—Withdrawn—Cancellation of Solicitation Justified**

Prior decision, 60 Comp. Gen. 316, that refuse collection services invitation improperly was canceled because contracting officer erroneously calculated inflation factor in finding low bid price unreasonable is reversed, since on reconsideration agency has shown that in view of procurement history regarding services low bid was unreasonably high.

**Bonds—Bid—Requirement—Administrative Determination**

Contracting officer has discretion to determine whether it is necessary that solicitation require firms to furnish bid bonds with their bids.

**Contracts—Awards—Small Business Concerns—Set-Asides—Administrative Determination—Repetitive Military Procurements**

Defense Acquisition Regulation provides that once service has been successfully acquired through small business set-aside, all future requirements of contracting activity for that service must be set aside unless contracting officer, in exercise of judgment, determines that there is not reasonable expectation that offers from two responsible small businesses will be received and award will be at reasonable price.

**Bids—Competitive System—Equal Bidding Basis For All Bidders—Government Equalizing Differences**

Contracting agency is not required to equalize competition on particular procurement by considering competitive advantage accruing to offeror by virtue of its incumbency.

**Matter of: Honolulu Disposal Service, Inc.—Reconsideration, August 12, 1981:**

The Department of the Army requests that we reconsider our decision *Honolulu Disposal Service, Inc.*, 60 Comp. Gen. 316 (1981), 81-1 CPD 193, in which we sustained Honolulu Disposal Service, Inc.'s protest against the cancellation of Lot II of invitation for bids (IFB) DAHC77-80-B-0280 for a contract for refuse collection services at Fort Shafter, Hawaii, for fiscal years 1981-1983. The IFB was canceled because the contracting officer found Honolulu's low bid of $206,974.41 for each fiscal year unreasonable. The basis for the contracting officer's finding was that the bid was 25.36 percent higher than the yearly price in the previous 2-year (fiscal years 1978 and 1979) contract for the services, whereas the average annual inflation rate was only 9.2 percent. We found that the contracting officer, in working from the previous contract price to calculate what the Army should expect to pay for the 3 fiscal years involved in the instant IFB, improperly failed to compound that 9.2 percent rate for the second and third years of performance. We held that if the previous contract price was increased by 9.2 percent per year compounded for each of 3 years, the $620,923.23 3-year cost to the Government under a contract with Honolulu would have been considered reasonable. We therefore sustained the protest.

The record disclosed that between the cancellation of the solicitation and our decision, the Army resolicited the requirement and awarded a new contract. We recommended that the Army determine whether it was practical and otherwise legally appropriate to terminate that contract. We pointed out that in considering the weight to be attached to termination costs, if any, "the Army should keep in mind the importance of taking corrective action to protect the integrity of the competitive procurement system."

For the reasons set forth below, we reverse the decision.

In the request that we reconsider the decision, the Army admits that the contracting officer failed to compound the annual inflation rate when judging the reasonableness of Honolulu's bid price. However, the Army advances two new factors to show that the Honolulu's price nonetheless was unreasonable. See 4 CFR § 20.9 (1980), providing for our reconsideration of a decision if the requester presents information not previously considered.

First, the Army states that the fiscal year 1977 contract price for the refuse collection service was $147,577.56, the fiscal year 1978 price was $158,302.20, and the yearly price for fiscal years 1979 and 1980 was $165,103.54. The Army points out that the yearly contract prices increased only approximately seven percent ($10,724.64 from 1977 to 1978) and four percent ($6,801.34 from 1978 to 1979) over that 4-year period. In view of this procurement history, the Army suggests that the yearly contract price for fiscal years 1981–1983 could reasonably have been expected to increase similarly from the fiscal year 1980 price of $165,103.54; in the Army's view the increase thus should have been to not more than $181,614 per year for 3 years, or $544,842 total (a ten percent increase). Accordingly, the Army argues that Honolulu's price of $206,974.41 per year for fiscal years 1981–1983, totaling $620,923.23, in fact was unreasonable notwithstanding consideration of the effect of inflation on the cost of the services.

Second, the Army advises that the contract that resulted from the resolicitation, which in our March 13 decision we recommended be terminated if practical and otherwise legally appropriate, was awarded at a bid price of $172,963.20 per year. The Army suggests that this fact confirms that Honolulu's price of $206,974.41 per year under the initial solicitation actually was unreasonable, or at least indicates that termination of the resolicitation contract and reinstatement of and award to Honolulu under the canceled solicitation would not be in the Government's interest.

A determination of price reasonableness properly may be based on a comparison with procurement history, as well as other relevant factors. *Coil Company Inc.*, B-193185, March 16, 1979, 79-1 CPD 185. As we pointed out in our initial decision, because the determination is a matter of administrative discretion often involving the exercise of business judgment by the contracting officer, we will not question it unless it is unreasonable or there is a showing of bad faith or fraud. *Espey Manufacturing and Electronics Corporation*, B-194435, July 9, 1979, 79-2 CPD 19. While we believe our original decision was proper, the facts now presented lead us to a different conclusion.

The contracting agency's experience in the procurement of these services in the four fiscal years preceding the procurement in issue is that the Army's cost increased less than 12 percent total from fiscal year 1977 to fiscal year 1980, an average of three percent each year even though substantial inflation was prevalent in the economy. We believe that it was reasonable for the contracting officer to expect a similar increase in the contract price for the fiscal year 1981–1983 period, *i.e.*, to award a contract at a yearly price averaging a three percent increase per year over the 3-year period of the contract.

However, Honolulu's bid totaling $620,923.23 for 3 years ($206,-974.41 per year) is $76,081.23 more—or fourteen percent—than what the procurement history indicated to the Army that it should expect to pay over that period. While our initial decision noted that the total cost of accepting Honolulu's bid for fiscal years 1981–1983 appeared reasonable when applying and compounding a 9.2 percent yearly inflation rate to the previous contract price, it nonetheless appears excessive when other factors are considered.

In addition, while the determination to reject a bid and readvertise must be based on the facts available at the time, we have held that it is not improper to consider the results of a resolicitation as evidence in support of that determination. *Coil Company Inc., supra.* The low bid of $172,963.20 per year through fiscal year 1983 under the Army's resolicitation is not only substantially lower than Honolulu's bid of $206,974.41 under the canceled IFB, but in fact is lower than what the Army expected to pay each year based on its experience in procuring these services.

Under the circumstances, we believe that the contracting officer reasonably could conclude that Honolulu's bid under the initial invitation was too high and thus the solicitation properly was canceled. We therefore withdraw our March 13 recommendation that the contract awarded under the resolicitation be terminated and the canceled IFB reinstated with award to Honolulu.

In doing so, we are mindful of our recent decision where we held that we would not consider evidence on reconsideration that an agency could have but did not furnish during our initial consideration of a protest. See *Interscience Systems, Inc.; Cencom Systems, Inc.—Reconsideration*, 59 Comp. Gen. 658 (1980), 80–2 CPD 106. That holding arose out of a situation in which the agency had made a general conclusionary statement concerning the availability of competition but neither it nor the interested party concerned offered any support whatsoever for that position until the agency requested reconsideration of our decision which was adverse to the agency on that point. Our holding was not meant to encompass the very different situation here, where the agency did indeed provide evidence in support of its position and the record contained some indication (from both the agency and the protester) that the resolicitation had produced a substantially lower bid than was obtained initially.

Because we initially sustained Honolulu's protest against the cancellation, it was not necessary in that decision to consider certain issues raised by the firm regarding the resolicitation of the Fort Shafter refuse collection contract. In view of the above, we will now discuss those matters.

Honolulu complained that the Army departed from prior practice by deleting the bid bond requirement from the resolicitation and by refusing to limit participation to small business firms.

In a report on Honolulu's protest against the cancellation of the original invitation, the contracting officer stated:

We have 13 companies listed as refuse collection services firms, with one of them determined to be other than small. However, Contracting Division has been asking for both a Bid Bond and 100 percent Performance Bond, which makes it very difficult for small business firms to comply. As a result one big business firm and one small business have been the only firms able to submit bid bond. One other small business was able to post cashier checks in lieu of a bid bond. * * *

The new solicitation therefore, has the bid bond requirement deleted and the performance bond reduced to 50 percent of the contract price. * * * A solicitation restricted to small business firms with requirement that Bid and Performance Bonds be obtained will mean that only one firm, Honolulu Disposal Service, Inc. will be able to bid. [Honolulu was the only bidder on Lot II under the initial invitation.] To issue the solicitation on a non-restricted basis will mean competitive prices for all lots. Under the circumstances, SBA is in agreement with the Contracting officer in his determination to submit procurement on a non-restricted basis.

There is no legal requirement that bid guarantees be furnished in every case. Rather, the contracting officer has the discretion to decide whether a bid bond is necessary in a particular situation to insure that the successful bidder execute further contractual documents and bonds. See Defense Acquisition Regulation (DAR) § 10–102 (1976 ed.); *cf. Willard Company, Inc.*, B–187628, February 18, 1977, 77–1 CPD 121 (concerning performance bonds). We have no basis to conclude that the discretion was abused in this case.

Regarding the decision not to set the procurement aside for small business, DAR § 1–706.1(f) (DAC No. 76–19, July 27, 1979) provides that once a service has been successfully acquired through a small business set-aside, all future requirements of the contracting activity for that service must be set aside unless the contracting officer determines that there is not a reasonable expectation that offers from two responsible small businesses will be received and the award will be at a reasonable price. These are the same considerations that enter into a decision whether to set aside a procurement in the first instance under DAR § 1–706.5(a)(1) (1976 ed.), and we therefore have stated that the repetitive set-aside provision appears to be consistent with the general DAR set-aside policy. *Fermont Division, Dynamics Corporation of America; Onan Corporation*, 59 Comp. Gen. 533, 542–543 (1980), 80–1 CPD 438.

Thus, while it is within a contracting officer's discretion to determine whether to set a procurement aside initially, see *Technical Services Corporation; Artech Corporation, and Sachs/Freeman Associates, Inc.*, B–190970, B–190992, August 25, 1978, 78–2 CPD 145 at page 14, once that discretion has been exercised and the decision to set aside made, the next procurement of the service *must* be set aside unless there is no reasonable expectation of the receipt of offers from two responsible firms and a reasonable contract price. See *Otis Elevator Company*, B-195831, November 8, 1979, 79-2 CPD 341.

However, the determination of the extent of the competition expected and whether the price will be reasonable essentially are business judgments for the contracting officer to make, although we note that DAR § 1-706.3(d) (1976 ed.) provides that where a contracting officer decides not to set aside a procurement the matter should be referred to the Small Business Administration (SBA) representative (if one is assigned and available) for review and his concurrence or appeal. In view of the quoted discussion from the Army's report, we have no basis to question the contracting officer's judgment here, with which the SBA concurred, that a set-aside pursuant to DAR § 1-706.1 (f) should not be effected on resolicitation.

Honolulu also complains about the Army's award of an interim contract for the period October 1, 1980, when performance under the canceled IFB was to begin, until December 31, 1980, by which date it was anticipated that the full requirement (less the first 3 months) could be resolicited and a new contract awarded. That contract was awarded to the incumbent (fiscal year 1980) contractor after the contracting officer solicited oral offers from a number of firms, including Honolulu and the incumbent. Honolulu asserts that the interim procurement was biased in favor of the incumbent because only that firm had not start-up costs to consider in calculating an offer, and had the personnel to begin performance on short notice.

Honolulu's complaint is without merit. The initial solicitation was canceled on September 24, 1980. The oral solicitation was conducted immediately thereafter to avoid the sanitation problems that would result from a lapse in refuse collection services after the fiscal year 1980 contract expired one week later. In this respect, DAR § 3-501 (d) (ii) authorizes an oral solicitation where the processing of a written solicitation would, to the Government's detriment, delay the furnishing of supplies or services.

Further, we often have recognized that a firm may enjoy a competitive advantage because of its incumbency. See *ENSEC Service Corp.*, 55 Comp. Gen. 656 (1976), 76-1 CPD 34. The Government is not required to equalize the competition unless the competitive advantage enjoyed is the result of preference or of unfair action by the Government. *Oshkosh Truck Corporation*, B-198521, July 24, 1980, 80-2 CPD 161. In view of the circumstances of the instant interim procurement as described above, the incumbent's competitive advantage here is irrelevant to the legality of the contract award, notwithstanding that it may have caused the firm to be successful in the competition. As we stated in *Tenavision, Inc.*, B-199485, July 28, 1980, 80-2 CPD 76:

> * * * The purpose of competitive procurement is not to insure that all bidders face the same odds in competing for Government contracts. Rather, the purpose is to insure that the Government obtains its minimum requirements at the most favorable price. * * *

Since our March 13 decision contained a recommendation for corrective action, we had furnished copies to the House Committee on Government Operations, the Senate Committee on Governmental Affairs, and the House and Senate Committees on Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation. We are advising those committees of this action on reconsideration.

Our initial decision is reversed and the protest is denied. Our recommendation for corrective action therefore is withdrawn.

## [B-201716]

**Travel Expenses—Military Personnel—Leaves of Absence—Officially Interrupted—Application of 24-Hour Rule**

Current regulations, which limit a service member's entitlement to return travel and transportation expenses upon recall from authorized leave of 5 days or more due to urgent unforeseen circumstances only if recall is within 24 hours of departure from the duty station, may be amended to authorize entitlement for recalls after 24 hours. Such amendment should set forth definite criteria to be followed if authorization of expenses is to be allowed after 24 hours. Modifies in part 46 Comp. Gen 210.

**Matter of: Travel Allowances Upon Recall from Extended Leave. August 12, 1981:**

This case concerns whether a military member on an authorized leave of absence for over 5 days who is recalled to duty due to urgent unforeseen circumstances may receive return travel and transportation expenses if the recall is more than 24 hours after his departure. As will be explained, the Joint Travel Regulations, which presently preclude reimbursement for recalls more than 24 hours after the member's departure, may be amended to allow return travel and transportation expenses for recalls after 24 hours, under certain circumstances.

The case was submitted for an advance decision by the Assistant Secretary of the Navy (Manpower, Reserve Affairs & Logistics) and was assigned Control No. 80-34 by the Per Diem, Travel and Transportation Allowance Committee.

Volume 1 of the Joint Travel Regulations (1 JTR) paragraph M6601–1 states in pertinent part:

> * * * when a member departs from a permanent station for the purpose of taking an authorized leave of absence of 5 days or more and, because of an urgent unforeseen circumstance, it is necessary to cancel the member's authorized leave status and recall the member to duty at the permanent station within 24 hours after departure therefrom, travel and transportation allowances will be authorized as provided in subpar. 2. * * *

Paragraph M6602–1 is essentially identical to the above except that it applies to recall from leave to duty at a temporary duty station rather than permanent station. Neither paragraph M6601–1 nor paragraph M6602–2 makes provision for a member to be authorized return travel and transportation expenses for recall to the duty station after 24 hours due to urgent unforeseen circumstances. Additionally, 1 JTR, paragraph M6600 states the general rule that a member on leave who departs from a duty station does so at his own risk, and that if a member, while at or en route to a leave point, is directed to return to the duty station after having been on leave in excess of 24 hours, the member will bear the cost in returning.

We are specifically asked if the words "within 24 hours after departure therefrom" may be deleted from paragraphs M6601–1 and M6602–2 as well as whether the language in paragraph M6600 regarding the 24-hour rule may be deleted. These deletions would enable a member on an authorized leave of absence of 5 days or more to be authorized travel and transportation expenses upon recall to duty whenever he was recalled.

In 46 Comp. Gen. 210 (1966), we approved an amendment to Volume 1 of the Joint Travel Regulations to include the portion of paragraph M6601–1 now under discussion. As noted in the decision, the proposed regulation was submitted so as to afford military members a benefit already afforded to civilian employees of the military services under a provision in the regulations applicable to them, Volume 2 of the Joint Travel Regulations. Indeed, the proposed regulation was essentially the same as the one in effect for civilian employees. See 46 Comp. Gen. at 211. Thus, our approval of the regulation recognized that similar benefits for military members and civilian employees of the military could be afforded in this type of situation.

With this recognition that there is no factual or legal impediment to affording military members and civilian employees equality of treatment in entitlement to return travel expenses upon recall to duty after going on extended leave, the problem may be resolved by using cases involving civilian employees as precedent.

In 39 Comp. Gen. 611 (1960) the reason for the 24-hour recall limitation is explained. In that case, we were presented with a proposed regulation which the Department of the Air Force wished to apply to its civilian employees. The proposed regulation set forth the requirement that the civilian employee of the Air Force on an authorized leave of 5 days or more would receive return travel and transportation expenses if recalled "very shortly after arrival at the place of beginning leave." Because of the possibility of various interpretations of the quoted portion, we suggested language which limited the entitlement to employees recalled within 24 hours after departure from the duty station. See 39 Comp. Gen. at 612–613. Thus, the 24-hour requirement was a suggestion to avoid interpretive difficulties.

In more recent decisions, we have had occasion to discuss specifically the matter of recalls from intended leave. We indicated that where an agency has no specific regulation covering the situation of recall, the criteria suggested in 39 Comp. Gen. 611 (1960) (i.e., reimbursement of travel expenses if recalled within 24 hours) should be followed. B–190755, June 15, 1978. We have indicated, however, that an agency may adopt a regulation which is not so restrictive, B–190646, January 25, 1978, discussing B–186129, November 17, 1976 (56 Comp. Gen. 96 (1976)). As indicated in 56 Comp. Gen. 96 (1976), such factors as how much leave was remaining and if the purpose of a trip had been accomplished are factors which could be considered by an agency in promulgating an appropriate regulation.

Accordingly, we do not object to expanding the authority to reimburse members recalled to duty from extended leave. We would suggest, however, that the 24-hour provision not be eliminated, but rather that an alternate provision be added to take into account situations where the recall is after 24 hours but the purpose of the member's trip on leave has been defeated or a substantial portion of the scheduled leave period has been eliminated by the recall.

## [B-201899]

**Officers and Employees—Transfers—Relocation Expenses—Loan Processing—Second Mortgage on Old Residence—Proceeds Applied to House Purchase**

Transferred employee obtained money from second mortgage on old residence to make downpayment on purchase of new residence. Second mortgage was on employee's old residence which he was unable to sell due to high interest rates, low availability of mortgage money, and high real estate prices. Transaction to obtain funds to make downpayment was not an "interim personal financing loan" but a loan upon employee's equity in old residence. Such transaction was thus essential to enable employee to make downpayment on residence at new duty station incident to transfer. Hence, expenses of second mortgage are reimbursable, if otherwise proper. 5 U.S.C. 5724a(a)(4) and FTR para. 2-6.2d.

Matter of: Arthur J. Kerns, Jr.—Real Estate Expenses—Second Mortgage, August 12, 1981:

This decision is in response to a request by Mr. D. E. Cox, Authorized Certifying Officer, Federal Bureau of Investigation (FBI), United States Department of Justice, as to whether he may certify for payment a reclaim travel voucher in the amount of $596.35. The reclaim was submitted by Mr. Arthur J. Kerns, Jr., an employee of the agency, for reimbursement of costs incurred in obtaining a second trust on his old residence in order to purchase a new residence at his new official duty station.

The record discloses that by letter dated August 22, 1979, Mr. Kerns was officially transferred from Washington, D.C., to Phoenix, Arizona. His transfer was effected on October 8, 1979. Mr. Kerns reports that upon receipt of his official transfer letter, he immediately contacted a realtor and placed his Falls Church, Virginia residence on the market. He states that at that time, there was no buyer interest in the property. He reports that in October 1979, he leased the house to an individual who expressed an interest in purchasing it. Due to the slow real estate market, Mr. Kerns requested and was granted a 1-year extension to sell his residence in Virginia. During this period, the employee was attempting to arrange for the necessary financing to purchase his new residence in the Phoenix area. In order to qualify for a loan, Mr. Kerns was required to take a second trust on his Virginia residence which allowed him to use the equity therein for the downpayment on his new house in Scottsdale, Arizona. He reports that he has been unable to sell his Falls Church residence due to high interest rates, low availability of mortgage money, and high real estate prices.

In September 1980, Mr. Kerns submitted a travel voucher for reimbursement of real estate expenses which he had incurred including the costs incurred in obtaining the second trust on his Falls Church residence. The expenses claimed included legal and related costs, lender's appraisal fee, mortgage title policy, and transmittal charges for sending and returning closing documents for the second trust on the Virginia residence. The FBI administratively disallowed those expenses which were shown to be associated with obtaining the second mortgage.

The certifying officer states that the financial transaction involved in the claim by Mr. Kerns may be considered as normal real estate expenses in today's real estate market, but he is unable to find any authority within the Federal Travel Regulations to allow reimbursement for the expenses directly associated with obtaining money by taking a second trust on the employee's Virginia residence.

The statutory and regulatory authority for reimbursement of real estate expenses incurred by a Federal civilian employee upon transfer of official station is contained in section 5724a(a)(4), title 5, United States Code, 1976, and paragraph 2–6.2d of the Federal Travel Regulations (FPMR 101–7, May 1973). It is to be noted that reimbursement of expenses connected with a second mortgage transaction is not specifically precluded by either the cited statute or regulation. In this regard, this Office has held that expenses incurred in connection with the negotiation of a second mortgage, if otherwise proper, are reimbursable to the same extent as expenses incurred in connection with first mortgages, provided such charges do not exceed the customary costs therefor in the locality involved, are reasonable, and do not compensate the lender for the high risk involved. *James J. Beirs*, B-184703, April 30, 1976; *Charles L. Putnam and Billie L. Verble*, B-183251, May 29, 1975; B-167605, August 21, 1969; B-166698, May 27, 1969.

While we are cognizant that here, the second mortgage was not obtained on the residence which Mr. Kerns was purchasing and was made on the employee's old residence which he had been unable to sell, we do not regard this transaction by Mr. Kerns to obtain funds to make the downpayment on the residence at his new duty station as being extraordinary or unusual in light of today's real estate climate, i.e., high interest rates, low availability of mortgage money, and high real estate prices, so as to preclude reimbursement under the Federal Travel Regulations; *cf.*, *Willard L. Steenhout*, B-199304, March 31, 1981, and B-165686, December 20, 1968. Rather, we view the second mortgage transaction on the old residence as a part of the "total financial package," as being essential in the purchase of the new residence in Scottsdale, Arizona. As such, the second mortgage was not an "interim personal financing loan" disassociated from the purchase of the new residence, but was a loan made by the employee on his equity in his old residence to enable him to make the downpayment on the residence being purchased at his new post of duty, incident to his transfer of official station. Compare 55 Comp. Gen. 679 (1976), and *James J. Beirs*, B-184703, April 30, 1976.

We would also point out that the Application for Reimbursement of Expenses Incurred Upon Sale or Purchase (or both) of Residence Upon Change of Official Station submitted with the travel voucher shows that the expenses of the purchase of the Scottsdale, Arizona, residence have been administratively approved as being reasonable in amount and customarily paid by buyers in the Scottsdale area. Further, the evidence of record does not indicate that Mr. Kerns obtained the money from the second mortgage on his Virginia residence to compensate the lender for any high risk involved in purchasing the Scottsdale residence.

Accordingly, in light of the rule enunciated in our cited decisions and the particular facts herein involved, the claimed real estate expenses associated with the second mortgage on Mr. Kern's Falls

Church, Virginia, residence may be certified for payment, if otherwise proper.

[B-177610]

**Federal Credit Unions—Services Furnished by Government—Telephones Not Included**

Federal agency may not provide telephone services, on a reimbursable basis, to Federal employees' credit union which has been allocated space by the agency pursuant to 12 U.S.C. 1770. Such use, absent authority similar to that provided by 12 U.S.C. 1770, would violate 31 U.S.C. 628, which makes appropriations available solely for the objects for which they are made. 58 Comp. Gen. 610, modified in part.

**Matter of: Federal Services to Employee's Credit Union Service Centers, 58 Comp. Gen. 610 (1979)—Further Issues, August 17, 1981:**

This is in response to a request for further discussion of issues in our decision, *Federal Services to Employees' Credit Union Service Centers*, 58 Comp. Gen. 610 (1979). In that decision, rendered at the request of the Director, Fiscal and Accounting Management, United States Forest Service, Department of Agriculture, we held that the cost of telephone services provided by the Government to a Federal employee credit union should be billed to the credit union. The Forest Service now questions whether a Federal agency can provide credit unions with the telephone equipment and services even though these services are reimbursed by the credit union.

The Forest Service contends that since we have ruled that telephone services for credit unions are special services the cost of which should be borne by the credit union, an agency's initial expenditure of appropriated funds for the service would be a violation of 31 U.S.C. § 628, which requires appropriated funds to be used solely for the purposes for which they were appropriated. The Forest Service states further that, since reimbursement must be deposited in the miscellaneous receipts account of the U.S. Treasury, the net effect is that the agency's appropriation is used to fund the credit union's telephone services.

Upon reconsideration, we conclude that absent authority similar to that in 12 U.S.C. § 1770, for providing space and related services to Federal Employee Credit Unions at no cost, provision of telephone services to credit unions, which are private organizations, would violate 31 U.S.C. § 628 whether or not the cost of providing the services were reimbursed. In the first place, it is clear, as stated in our 1979 decision, that provision of telephone service to credit unions would result in extra expense to the Government agency providing the service. Such expense would be reflected in direct charges for installation of telephones to be used by the credit union and for monthly use rates for such telephones (which would in all probability be dedicated to the exclusive use of the credit union). Also, credit union use of FTS lines would ultimately be reflected in the cost to the agency for use of FTS lines. Furthermore, it would not appear impractical for credit unions to procure telephone service directly even where the service is to be installed in federally controlled space.

Accordingly, we conclude that Government agencies may not provide telephone services to Federal employee credit unions on a reimbursable basis but that, instead, credit unions should procure such services directly. 58 Comp. Gen. 610 (1979) is modified accordingly.

## [B-200989]

**Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—"Adverse Agency Action" Effect**

Acceptance of proposals on day following formal protest to agency constitutes adverse agency action, and protest to General Accounting Office (GAO) must be filed within 10 days thereafter to be considered timely.

**Contracts—Protests—Timeliness—Significant Issue Exception**

When untimely protest raises previously unconsidered issues regarding General Services Administration (GSA) classification of equipment and applicability of regulations covering automatic data processing equipment *vs.* those covering telecommunication acquisitions, GAO will review matter pursuant to the significant issue exception to Bid Protest Procedures.

**Equipment—Automatic Data Processing Systems—General Services Administration—Responsibilities Under Brooks Act—Classification of Equipment**

Under Brooks Act, GSA has discretion to define type of equipment to be considered automatic data processing equipment, and protester disagreeing with recent reclassification of modems should seek change through GSA, not bid protest process.

**Equipment—Automatic Data Processing Systems—Acquisition, etc.—Fixed–Price Requirement—Not Undue Restriction On Competition**

In view of need to avoid buy-ins and to evaluate life cycle costs accurately, thus insuring that Government obtains automatic data processing equipment at lowest overall cost, requirement for fixed or finitely determinable prices does not unduly restrict competition.

**Equipment—Automatic Data Processing Systems—Acquisition, etc.—Fixed–Price Requirement—Tariffed Carriers—Ineligibility to Compete**

Tariffed carrier, whose existing rates are subject to change and which must by law treat all classes of customers receiving similar services in same manner, cannot be considered for award of fixed price contract.

**Matter of: American Telephone and Telegraph Company, August 19, 1981:**

American Telephone and Telegraph Company (AT&T) protests the refusal of the Social Security Administration (SSA), Department of Health and Human Services, to amend a solicitation to permit tariffed carriers, whose rates are subject to change by filing of revised tariffs with the Federal Communications Commission, to compete for award of a contract for equipment to be used in connection with SSA's nationwide telecommunications system.

AT&T alleges that the equipment in question has been wrongly classified as automatic data processing equipment, which must be procured on a fixed-price basis. Rather, the protester argues, it should be procured according to the regulations covering telecommunications, which require that both tariffed and nontariffed carriers be given an opportunity to compete.

We find the protest clearly untimely. However, because it raises issues which we have not previously considered with regard to which regulations apply to the equipment being procured and whether a tariffed carrier may be excluded from competition for this type of equipment, we have reviewed the matter pursuant to the significant issue exception to our Bid Protest Procedures, 4 C.F.R. § 21.2(c) (1981). For the following reasons, we find that SSA properly applied the regulations covering automatic data processing equipment, and that the fixed price requirement does not unduly restrict competition.

The protested solicitation is one of three issued by SSA, under a delegation of procurement authority from the General Services Administration (GSA), for the purpose of acquiring equipment for a system known as SSADARS (Social Security Administration Data Acquisition and Response System). This particular solicitation was for 2,040 modems (a modem is a device which modulates and demodulates signals transmitted over data communications facilities) and 7 associated diagnostics (which will detect and isolate malfunctions or mistakes) needed for the attachment of terminals to the SSADARS network. About half of the approximately 1,850 terminals are located in SSA field offices; the remainder are on GSA's Advanced Records Systems, a teletype-based message system serving Federal agencies.

The threshold issue is the timeliness of AT&T's protest. SSA issued the solicitation on June 10, 1980, with a closing date of July 25, 1980. It stated that fixed prices must be offered for the initial contract period. For each separate option renewal period, prices were required to be either fixed or finitely determinable. On June 27, 1980, AT&T requested SSA to amend the solicitation so that proposals could be submitted on other than a fixed price basis. On July 8, 1980, SSA issued Amendment No. 1 in which it again stated that fixed prices were required and that prices under a common carrier regulatory tariff would not be considered fixed for purposes of this solicitation. Although the amendment was mailed to all offerors, AT&T states that it did not receive it until a special inquiry was made on July 17, 1980. In any event, AT&T filed a formal protest with SSA on July 24, 1980, one day before closing. The firm did not submit a proposal or take any further action until it received a reply from the contracting officer dated October 9, 1980; its protest to our Office was received on October 23, 1980.

Although AT&T argues that it should not have been required to file a protest with us until the contracting officer denied its protest to SSA, this is not the case. Acceptance of proposals on the day following AT&T's formal protest constituted adverse action by SSA, and any subsequent protest to our Office should have been filed within 10 days. *Bird-Johnson Company*, B-199445, July 18, 1980, 80-2 CPD 49. We therefore find the protest untimely.

We have considered the matter, however, because AT&T argues that the contracting officer, in deciding that fixed prices were required, incorrectly relied on Federal Procurement Regulations (FPR) Subpart 1-4.11 (1964 ed.), which deals with automatic data processing equipment, software, maintenance, and supplies, rather than on Subpart 1-4.12 (Temp. Reg. 51, 44 Fed. Reg. 41431 (1979)), which deals with telecommunications. We have not previously considered which regulation covers the equipment in question, although we have recognized that there is considerable confusion in this general area. See *Browne Time Sharing, Inc.*, B-190038, May 9, 1978, 78-1 CPD 347. It is significant because the telecommunications regulation, § 1-4.1202(a)(3), states in pertinent part:

(3) * * * Agency telecommunications shall not be limited to tariff descriptions. Requirements shall be set forth in a manner that will afford both tariff and nontariff suppliers opportunities to compete.

In commenting on the protest, GSA advises us that it agrees with SSA's contracting officer that modems are considered automatic data processing equipment, not telecommunications equipment. At one time, according to GSA, modems were considered communications equipment and appeared on the Federal Supply Catalog (FSC) Group 58 Schedule for telecommunications equipment. As a result of a joint study by the Federal Supply Service and the Automatic Data and Telecommunications Service (ADTS), however, modems and other equipment which are closely related to and used with automatic data processing equipment were transferred to FSC Group 70, administered by ADTS. All items appearing on the Group 70 Schedule must be procured in accord with FPR Subpart 1-4.11, GSA states.

Under the Brooks Act, 40 U.S.C. § 759, GSA is authorized to coordinate and provide for the purchase and lease of automatic data processing equipment by Federal agencies. The type of equipment to be considered within this category is largely left undefined in the statute, although the legislative history is replete with statements describing it as commercially available, mass-produced, and general purpose. The House Committee on Government Operations recognized:

> * * * [R]apidly shifting developments in the interrelated fields of defense, space, communications and ADP could make any presently acceptable distinctions obsolete. * * * there is no pressing need for strict statutory definition. * * * the specific definition of the general-purpose ADP equipment is left to the BOB [Bureau of the Budget, now Office of Management and Budget] and GSA and the issuance of appropriate regulations. H.R. Rep. No. 802, 89th Cong., 1st Sess. 34 (1965).

In view of this legislative history, we believe it is within GSA's discretion to categorize modems as automatic data processing equipment, rather than as telecommunications equipment. AT&T takes issue with the recent reclassification and notes that it was done as the result of an internal study by GSA which was not subject to public comment. Nevertheless, if AT&T believes modems have been wrongly classified, the proper forum for requesting a change is GSA, rather than the GAO through its bid protest process.

As for the fixed price requirement, the automatic data processing regulation requires use of a standard clause covering fixed price options. It states that when known requirements exceed the basic period of the contract to be awarded, to avoid buy-ins and to insure that the Government obtains the equipment at the lowest overall cost, both initial and subsequent requirements must be satisfied on a fixed price basis. See FPR §§ 1-4.1107-14, Use of Standard Clauses, and 1-4.1108-4, Fixed Price Options. In addition, this requirement for either a fixed price or, in the case of option years, a finitely determinable price is necessary if the Government is to evaluate system life costs accurately. See generally *Computer Machinery Corporation*, 55 Comp. Gen. 1151 at 1155 (1976), 76-1 CPD 358. Although the regulation may restrict competition to firms offering fixed prices, in view of these legitimate needs, we do not believe it is an undue restriction.

We cannot conclude that AT&T offered a fixed price, since its rates are subject to the jurisdiction of the Federal Communications Commission (FCC) and could be changed by the filing of a revised tariff during the term of the contract. Under the Federal Communications Act of 1934, as amended, a carrier may increase its rates merely by giving 90 days' notice to the FCC and to the public. No action by the

Commission is needed to allow an increase to go into effect, although either upon complaint or on its own initiative the FCC may conduct a hearing into the lawfulness of any new charge. 47 U.S.C. §§ 203(b) (1), 204(a) (1976); see also *American Broadcasting Companies, Inc.* v. *FCC*, 643 F. 2d 818, 822 (D.C. Cir. 1980). After a hearing, the FCC is authorized to prescribe "just and reasonable" new charges, 47 U.S.C. § 205(a); however, the amount considered just and reasonable will vary according to the carrier's capital expenses and operating costs. In any event, existing rates clearly are not fixed.

AT&T argues that in *Anchorage Telephone Utility*, B-197749, November 20, 1980, 80-2 CPD 386, we found that a tariffed carrier could be evaluated as if it were offering a fixed price. Our decision in that case, however, turned on the unique nature of the equipment being leased ("AUTOVON" switches to be used by the Defense Communications Agency in Anchorage and Fairbanks, Alaska). The agency found that the price of this "special assembly" service had actually decreased over the term of three other contracts; in addition, rates for this type of service generally are developed to reflect actual costs, and thus are unlike services where tariffs may be increased due to political and economic factors. The agency therefore concluded, and we agreed, that the chance of an increase in rates due to regulatory jurisdiction was remote.

The Anchorage case, however, is limited to its particular facts, which are unlike those in the instant case. We also note that in Anchorage, the carrier selected for award had agreed not to initiate any rate increases from the start of service. AT&T, however, has not made any such offer and is, in effect, attempting to reserve the right to change its prices during the 96-month (with options) term of performance.

Because AT&T's existing rates are subject to change, there is no basis for comparing them with the rates of non-tariffed carriers or for determining the lowest overall cost to the Government under any of the four pricing plans to be evaluated by SSA. (These include purchase, lease with option to purchase, rental, and rental with payments to be applied to the purchase price. AT&T, obviously, would only be able to offer a rental rate based on its existing tariff.)

Moreover, except for maintenance costs after the first year, the price of the successful contractor will not be subject to escalation under the Consumer Price Index (CPI) or any other formula. According to the solicitation, maintenance costs during option years will be adjusted according to the CPI; for evaluation purposes, a 10 percent compound increase per year was projected. Whatever increases the CPI ultimately permits for maintenance—a relatively minor portion of the contract—the percent of increase will be the same for all offerors and thus may be evaluated. A price increase due to filing of a revised tariff by AT&T, on the other hand, would not be limited to maintenance and is totally unpredictable for evaluation purposes.

The protest is denied.

[B-199339]

**Agriculture Department—Forest Service—Appropriations—Crediting Salary Deductions for Rental Charges—Government-Furnished Quarters—Applicable Fund**

Forest Service may transfer amounts of payroll deductions for use of Government quarters to separate appropriation accounts used to fund maintenance and operation of such quarters, even though salary expenses may be paid from several different accounts for a single employee. 5 U.S.C. 5911(c) does not preclude consolidation of various salary deductions for administrative convenience in making payments for maintenance expenses. 50 Comp. Gen. 235, modified.

**Matter of: Payments for quarters maintenance and operation expenses from salary deductions for quarters, August 25, 1981:**

The Director, Office of Fiscal and Accounting Management, Forest Service, Department of Agriculture, requests clarification of our decision 59 Comp. Gen. 235 (1980), concerning the proper appropriation to be credited with payroll deductions for use of Government quarters. The specific inquiry is whether the Forest Service may credit the amount of the deductions to the appropriation account that funds the maintenance and operation services for quarters and facilities, rather than the appropriations to which the employee salaries are charged. We conclude that there is authority to credit the maintenance and operation appropriation account customarily used to fund such services. 59 Comp. Gen. 235, *supra*, is clarified.

In our 1980 decision, we noted and agreed with the position of the Office of Management and Budget that deductions from employees for maintenance and operation expenses of Government quarters occupied by them should be treated as reimbursements (rather than refunds of in-kind salary payments) to be credited to the appropriation or fund account that provides the service under the authority of 5 U.S.C. § 5911(c).

That section provides that payroll deductions for these expenses "shall remain in the applicable appropriation or fund." Because the appropriations from which Forest Service salaries are paid are also available for the payment of operation and maintenance expenses of Government quarters, we interpreted section 5911(c) as allowing retention of deductions in the salary appropriations for use in defraying operation and maintenance expenses. The alternative, absent section 5911(c), would have been deposit of the deductions in the Treasury, pursuant to 31 U.S.C. § 484.

The Forest Service's request for clarification, however, points out that salaries for employees living in Forest Service housing are usually "project financed" so that the appropriations to which their salaries are charged can vary "from hour to hour" and can involve as many as six different appropriations within a 2-week pay period. The request also points out that Forest Service housing units are ordinarily maintained from a single available appropriation—that for Forest Management, Protection and Utilization. Literal compliance with our decision, therefore, would require what the Forest Service suggests is an unnecessary administrative burden because quarters deductions would have to be credited to the various salary accounts when employees' time and attendance is recorded and operation and maintenance expenses would have to be financed from these various accounts.

Our earlier decision was based on the assumption that all salaries were paid from a single appropriation which was also available for operating and maintaining the housing facilities in question. We therefore held that "any funds remaining in the appropriation as a result of payroll deduction for Government quarters would be available for the expenses of operating and maintaining those quarters as well as any other expenses properly payable from that appropriation."

This is still our view. The term "applicable fund" refers to the appropriation account from which an employee's salary is paid—whether one account, as we had originally assumed, or several different accounts, as we now learn is the practice. In any event, the amount of the salary deductions "remain in the applicable appropriation or fund," as the statute requires—whether one account or several—and are available for the quarters expenses.

This does not mean that the individual salary accounts must each be charged separately with the costs of maintaining the employee's quarters on some sort of pro rata basis. (As stated above, in our earlier decisions, we had assumed that a single account would pay both salaries and maintenance expenses. This erroneous assumption evidently caused the confusion.) Section 5911(c) makes all the salary deductions regardless of which account they are in, available for maintenance purposes and therefore the Forest Service can use them for that purpose utilizing any administrative mechanism which will facilitate accounting for the expenses incurred. Thus, there is no legal objection to the policy described in the submission whereby all quarters deductions would be transferred from their respective salary accounts to the other accounts established to fund maintenance expenses for employee housing.

This budgetary treatment, however, does not relieve the Forest Service of its responsibility to properly account for its income and expenses in connection with the providing of quarters and subsistence. In this instance, the expenses incurred can reasonably be expected to differ from the amounts collected. A proper matching and reporting of the income and expenses is needed so that management can determine the adequacy and reasonableness of the rates charged and make needed adjustments.

[B-202942]

**Contracts—Options—Not to be Exercised—Requirements to be Resolicited**

Issuance of competitive request for proposals was not in derogation of option for same items under current contract because option in protester's existing contract was not actually exercised. Where record shows, as here, that option is exercisable at sole discretion of Government, General Accounting Office will not consider, under Bid Protest Procedures, incumbent contractor's contention that agency should have exercised or is obligated to exercise contract option provisions.

**Contracts — Options — Exercising — What Constitutes — Evidence Sufficiency**

Where contracting officer did not actually execute modification exercising option, GAO concludes that evidence is insufficient to establish that binding agreement exercising option arose by actions of parties.

**Contracts—Negotiation—Justification**

GAO has no basis to object to agency's determination to use negotiated procurement method because adequate time is unavailable to assemble proper data package suitable for formal advertising and agency has no basis to restrict competition to companies in specialized container field.

**Contracts—Negotiation—Competition—Use of Government Facilities, Materials, etc.—Competitive Disadvantage—Not Resulting from Unfair Government Action**

Protester contends that it has competitive disadvantages because it previously acquired necessary equipment and has no need for Government-furnished equipment which is to be furnished at no cost to successful offeror. Agency has no legal obligation to eliminate protester's competitive disadvantage because protester's situation did not result from preference or unfair action by agency.

**Matter of: Lanson Industries, Inc., August 25, 1981:**

Lanson Industries, Inc. (Lanson), protests the issuance of request for proposals (RFP) No. F33657-81-R-0319 by the Air Force for A-10, 30mm ammunition container assemblies.

Lanson contends that the Air Force has no need to conduct the procurement because the Air Force satisfied its requirement for these assemblies by exercising the option in Lanson's current contract (No. F33657-80-C-0043) with the Air Force for these assemblies. Alternatively, Lanson contends that the Air Force is obligated to exercise its option in lieu of conducting a competitive procurement. Lanson also argues that if a competition is proper, then there should be an evaluation factor included in the RFP to reflect the rental value of Government-furnished equipment that offerors propose to use in performing the contract.

The Air Force reports that it did not exercise the option in Lanson's current contract, it is not obligated to exercise the option, and it will permit the successful offeror to use the Government-furnished equipment, making an evaluation factor unnecessary.

We conclude that Lanson's protest is without merit.

Lanson's current contract, awarded competitively, contained a requirement for a basic quantity of 19,500 units and an option quantity of 13,500 units. The option quantity was considered in the evaluation of proposals. The Air Force needed more units than the basic quantity but funding was available for only 11,084 units. Discussions between the Air Force and Lanson and Lanson's letter dated January 13, 1981, agreeing to a reduced quantity, led to the preparation of modification P00004 to change the option quantity from 13,500 to 11,084. At the Air Force's request, Lanson's president went to Wright-Patterson Air Force Base and executed the modification. That day, the Air Force sent a letter dated January 21, 1981, to Lanson enclosing a copy of the unexecuted modification, stamped "advance copy for information only." Before the contracting officer executed the modification, the Air Force received an unsolicited proposal from Wayne H. Coloney Company, Inc. (Coloney), which indicated that the Air Force could realize substantial savings by conducting a competitive procurement in lieu of exercising the Lanson option. On January 23, 1981, after receipt of the Coloney proposal, the Air Force notified Lanson that the exercise of the option would be delayed or prevented. Shortly thereafter, the Air Force notified Lanson of its intention to test the market instead of exercising the option.

First, Lanson contends that the Air Force's January 21, 1981 letter constituted the written notice contemplated by the procurement regulations, indicating that the option was exercised by the Air Force. Lanson argues that the Air Force's request that its president visit Wright-Patterson Air Force Base to execute the modification supports its contention that a mutually binding obligation was created by the January 21, 1981 letter. In Lanson's view, the Air Force has no need to issue the RFP.

In response, the Air Force reports that it did not exercise the option because it did not execute the modification. The Air Force explains that it would have exercised the option by (1) executing the modification reducing the option quantity and (2) issuing notice that the Air Force was exercising the option for the reduced quantity; neither of the events occurred.

The modification states on page 1A that the supplemental agreement "shall be subject to the written approval of the Secretary or his duly authorized representative and shall not be binding until approved." While Lanson's president executed the modification, the Air Force's contracting officer did not. Further, the January 21, 1981 letter transmitted two copies of the modification marked "advance copy for information only" and requested Lanson to execute one copy and return it to the Air Force. We find no evidence in the January 21, 1981 letter or any other document in the record that the Air Force intended to exercise the option prior to the time its contracting officer would execute the modification, which did not occur. Thus, we must conclude that the Air Force did not actually exercise its option in the Lanson contract.

Second, Lanson contends that the Air Force had an obligation to exercise the option because the Air Force evaluated the option price in selecting Lanson for its current contract on the grounds that (1) there was a known requirement and (2) realistic competition for the option quantity was impracticable. Lanson argues that it relied on these factors and concluded that the option quantity would not be subject to a second competition. Lanson states that the only risk it took was that funds would not be available.

In response, the Air Force contends that the exercise of the option was the unilateral right of the Government and there was no contractual obligation to exercise the option. The Air Force notes that the RFP, which led to the current Lanson contract, contained the standard clause providing that while the option quantity would be evaluated, "[e]valuation of option will not obligate the Government to exercise the option or options." The Air Force also notes that Lanson's contract contains an option provision stating that the contracting officer "may exercise the option." Further, the Air Force notes that procurement regulations permit the contracting officer to exercise an option only if it is determined to be the most advantageous method of fulfilling the Government's need.

Where the record shows, as here, that the option was exercisable at the sole discretion of the Government, our Office will not consider under our Bid Protest Procedures the incumbent contractor's contention that the agency should have exercised or is obligated to exercise contract option provisions. See *C. G. Ashe Enterprises*, 56 Comp. Gen. 397 (1977), 77-1 CPD 166. Accordingly, this aspect of Lanson's protest is dismissed.

Third, Lanson contends that, even if the Air Force did not actually execute the modification exercising the option, the actions of the parties were enough to create a binding agreement to purchase the reduced option quantity. Lanson points to its president's trip to Wright-Patterson Air Force Base made with the understanding that both parties would execute the modification. Lanson views the Air Force's preparation and presentation of the modification to its president as an offer and Lanson's execution as requested as its acceptance.

In our view, the record establishes that the Air Force did not intend that the option be exercised when the modification was executed by Lanson's president. Instead, it is clear that the Air Force believed that, just as was stated on page 1A of the modification, the reduction in the option quantity was not effective until the contracting officer signed the modification. From the Air Force's perspective, there could not be a binding agreement at least until the modification was signed by its contracting officer. We believe that the Air Force's actions are consistent with that view. Accordingly, we conclude that the actions of the parties did not create a binding agreement.

Fourth, Lanson contends that, if a competition is to be held, it should be on the basis of formal advertising, not negotiation. Lanson notes that the existing data package is adequate for companies in the specialized container field to provide the required container assemblies. In reply, the Air Force reports that a data package adequate for formal advertising is not available and could not be prepared and approved within the available time. Further, the Air Force did not determine that it was necessary to restrict the competition to companies in the specialized container field.

We will not object to a determination to negotiate on the basis advanced by the Air Force where any reasonable ground for the determination exists. See 41 Comp. Gen. 484, 492 (1962). Here, the record provides a reasonable basis for the Air Force's determination because adequate time was unavailable to assemble a proper data package and there was no basis to restrict the competition to companies in the specialized container field. Thus, this aspect of Lanson's protest is without merit.

Fifth, Lanson contends that any competitor other than Lanson would receive a distinct competitive advantage unless there is an evaluation factor for Government-furnished equipment. Lanson explains that, in connection with its current contract, it developed its own production equipment. Therefore, if the Government furnishes equipment to the successful offeror under the instant RFP, Lanson will be at a competitive disadvantage since it does not need the Government equipment. Lanson argues that the RFP is improper because it does not contain a factor to eliminate Lanson's competitive disadvantage as required by Defense Acquisition Regulation (DAR) § 13–503 (1976 ed.).

In response, the Air Force states that no adjustment factor is necessary because the Government equipment is available to the successful offeror. The Air Force notes that the RFP leading to Lanson's current contract contained an evaluation factor for Government-furnished equipment because only Coloney could use the equipment at that time.

DAR § 13–503 provides that, in negotiated procurements, competitive advantage arising from the use of Government production and research property shall be eliminated by the use of an evaluation factor. Usually, the evaluation factor is employed in a solicitation when only one firm is permitted to use Government-furnished equipment. We are not aware of a situation, like this, where an evaluation factor was employed because of a firm did not require Government-furnished equipment, which the Government was willing to make available to any firm.

Our analysis begins with the premise that there is no legal requirement for the Government to furnish equipment to a successful offeror to be used in performing a Government contract. See *Southwest Marine, Inc.; Triple "A" South*, B–192251, November 7, 1978, 78–2 CPD 329. It is Government policy to eliminate competitive advantage by employing an evaluation factor when only one firm is permitted to use Government-furnished equipment in performing the required work. DAR § 13–501. However, when the Government equipment can be furnished to any offeror, in our view, the Government has not participated in establishing a competitive advantage. It is well settled that the Government has no obligation to eliminate a competitive advantage that a firm may enjoy because of its own particular circumstances or because it gained experience under a prior Government contract or performed contracts for the Government unless such advantage results from a preference or unfair action by the agency. See, e.g., *Varo, Inc.*, B-193789, July 18, 1980, 80-2 CPD 44; *ENSEC Service Corp.*, 55 Comp. Gen. 656 (1976), 76-1 CPD 34.

Here, firms other than Lanson arguably have a competitive advantage—or, in Lanson's terms, only Lanson has a competitive disadvantage—because Lanson previously acquired the necessary equipment and has no need for the Government-furnished equipment. Lanson has made no showing that its situation results from a preference or unfair action by the agency.

We conclude that Lanson's acquisition of equipment to perform its current contract, based on its business judgment, is the reason that Lanson believes it is now at a competitive disadvantage. Lanson's situation did not result from Government preference or unfair action. The Government has no legal obligation to eliminate Lanson's competitive disadvantage by effectively increasing the cost to the Government for the required assemblies. Accordingly, this aspect of Lanson's protest is without merit.

Finally, we note that under DAR § 13-506, where Government production and research property is offered for use in a competitive procurement, any costs incurred by the Government relating to making the equipment available (such as transportation and rehabilitation costs) will be included in the evaluation of bids or proposals to the extent such costs are not assumed by the user. This regulation applies whether or not a competitive advantage factor is included in the evaluation in accordance with DAR § 13-503. We assume that the Air Force will consider the provisions of DAR § 13-506 prior to any award in this case.

Protest denied.

## [B-202961]

**Bids—Acceptance Time Limitation—Bids Offering Different Acceptance Periods—Shorter Periods—Extension Propriety—Request Prior to Expiration of Shorter Period**

Bidder who offered a bid acceptance period shorter in duration than that requested in invitation may not extend that period in order to qualify for award. To permit such an extension would be prejudicial to other bidders who offered the requested acceptance period.

**Matter of: Ramal Industries, August 25, 1981:**

Ramal Industries Inc. (Ramal) protests award to Revere Copper and Brass Incorporated (Revere) under invitation for bids No.

DAAA09-81-B-0022, issued by the United States Army Armament Materiel Readiness Command for procurement of copper cones for M483A1 projectiles.

Ramal contends that Revere should not be allowed to extend its bid because it only offered a 30-day bid acceptance period while a 60-day acceptance period was requested. The Army argues that the bid extension made be allowed because it was offered before the Revere bid had expired. We agree with Ramal.

In B-162000, September 1, 1967, we held that a bidder who submits an acceptance period of a shorter duration than the period requested in the solicitation has no right to extend its acceptance period. Also, in *Timberline Foresters*, 59 Comp. Gen. 726 (1980), 80-2 CPD 195, we held that a bidder who submits a bid acceptance period that is shorter than that requested accepts the risk than an award may not be made before that shorter acceptance period expires.

We recognize that both of these decisions involved situations where the bid had expired before the bidder attempted to extend the acceptance period. We are aware of no prior decision that involves the exact situation here, i.e., whether a bid which offers less than the requested bid acceptance period may be extended prior to the initial acceptance period expiring.

However, we believe the same result is required. Where a bidder offers less than the requested acceptance period, he has not assumed as great a risk of price or market fluctuations as did other bidders.

Further, section 2-404.1(c) of the Defense Acquisition Regulation, the regulatory guidance concerning acceptance period extensions, states:

> (c) Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties if any) in order to avoid the need for readvertisement.

We believe this regulation addresses the situation where the requested bid acceptance period is about to expire. Here, only Revere's bid would have expired prior to 60 days after bid opening. Since other bids would have remained available for award, Revere should not have been permitted to extend its bid beyond the original 30 days. See 42 Comp. Gen. 604, 607 (1963) and 48 *id.* 19, 21 (1968).

Because of the above holding, it is unnecessary to discuss other issues raised by Ramal.

The protest is sustained and Revere's bid should not be considered for award.

[B-198590]

**General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect—Arbitration Awards—Comptroller General Decision Requested**

Where an arbitrator has requested that the parties in dispute seek the Comptroller General's opinion as to the legality of a labor-management agreement provision, the Comptroller General will issue a decision to the parties on their request. 4 C.F.R. 22.7(b) (1981).

**Compensation—Negotiation—Savings' Clause Applicability—Applicable Rate—Construction *v.* Operation and Maintenance Rates—Temporary Employees**

Negotiated labor-management agreement provision, which is protected by savings provision of section 9(b) of Pub. L. 92-392, Aug. 19, 1972, provides for payment of construction rates of pay to specified temporary employees of Grand Coule Project Office. The arbitrator found that as of September 1979 the payment of construction rates of pay to temporary employees was not a prevailing practice in the area. Since section 704 of the Civil Service Reform Act of 1978, Pub. L. 95-454, Oct. 13, 1978, requires that agreement provisions protected by section 9(b) shall be negotiated in accordance with prevailing rates and practices, we conclude that these temporary employees may not continue to be paid at construction rates of pay.

**Matter of: Grand Coulee Project Office—Temporary Employees—Construction or Operation and Maintenance Pay Rates, August 26, 1981:**

This decision is issued pursuant to a joint request from the Columbia Basin Trades Council and the United States Water and Power Resources Service (formerly Bureau of Reclamation), Department of the Interior. The issue presented is whether the Service's Grand Coulee Project Office may pay construction rates of pay, rather than operation and maintenance rates, to temporary blue collar employees in the occupations listed in the negotiated labor-management agreement.

We decide, for the reasons stated below, that these temporary employees of the Grand Coulee Project Office may not continue to be paid at construction rates of pay.

## BACKGROUND

The joint request from the Columbia Basin Trades Council and the Water and Power Resources Service was directed by the arbitrator's opinion and award in the Matter of the Arbitration between the Columbia Basin Trades Council and all of its constituent Unions, Spokane, Washington, and the Grand Coulee Project Office, Bureau of Reclamation, U.S. Department of the Interior, Grand Coulee, Washington (W. J. Dorsey, Jr., Arbitrator), FMCS #79k/18263, Case No. 3.

The arbitrator was presented with the question as to the propriety of action taken by the Water and Power Resources Service to terminate the payment of construction rates of pay to employees hired on a temporary basis in 20 different blue collar occupations. At issue was whether the Service violated a provision in the labor-management agreement by discontinuing the payment of construction rates of pay to the temporary employees who are covered by the agreement.

The contract language in dispute is found in the Supplementary Labor-Management Agreement No. 2 (Wage Schedule 1977–1979) to the Basic Labor-Management Agreement between the Bureau of Reclamation, Grand Coulee Project Office, United States Department of the Interior, and the Columbia Basis Trades Council and it states as follows:

Temporary employees in the following classifications will be hired *at local prevailing construction rates of pay.* Such employees are not entitled to either sick or annual leave but will receive appropriate fringe benefit payments. All other temporary employees will receive the negotiated rates of pay.

Boilermaker
Carpenter
Electrician (power systems)
Lineman
Rigger (structural and high line)
Utilityman
Sandblast operator
Laborer
Mechanic (heavy duty)
Machinist
Operator general (mobile power equipment) class 3
Operator general (mobile power equipment) class 2
Operator general (mobile power equipment) class 1
Oiler
Painter (brush)
Painter (spray)
Pipefitter
Concrete finisher
Truck driver class 2
Truck driver class 1

*Night Differential:* Night pay differential has been considered in revising the above wage rates and does not apply to the above rates. [Arbitrator's italic.]

The arbitrator found that this contract language antedated the signing of the Supplementary Labor-Management Agreement No. 2 (Wage Scale, 1975) in July 1975. He stated that the language in dispute was in place when the 1971 version of the Supplementary Labor-Management Agreement No. 2 was agreed to by the parties.

In 1975, management sought to negotiate changes in this provision on the ground that the temporary employees involved were intermingled with the general operation and maintenance work force and could not be identified as performing construction work. After unsuccessfully attempting to negotiate changes, management on December 18, 1977, discontinued payment of construction rates of pay to the temporary employees in question, relying on the following legal analysis from the Department of the Interior's Solicitor's Office.

Whether the temporary employees in question may be paid at construction rates depends on the pay practices of those employers whose rates are used as comparison points for the negotiated wage schedule. If the prevailing practices justify the use of construction rates, and thereby the description of the affected employees as "construction" employees, then they may also receive additional hourly wage increments in lieu of entitlement to certain fringe benefits they do not otherwise receive. However, if they cannot legitimately be considered to be construction workers, they are not entitled to such additional increments in lieu of fringe benefits.

The Service conducted a survey and found that it was not the practice in the area for private employers to pay construction rates of pay for temporary operation and maintenance workers. Thus, since the Service found that the temporary employees in the above-quoted job classifications were not engaged in construction work, it unilaterally decided not to pay them construction rates of pay any longer. Grievances were filed by employees in the bargaining unit which were ultimately presented to the arbitrator for resolution.

## ARBITRATOR'S FINDINGS

Based on the survey questionnaires which were a part of the Service's wage survey relating to the payment of construction rates of pay to temporary employees by utilities in the Pacific Northwest Region, the arbitrator found that as of September 29, 1979, "* * * the payment of construction rates for temporary operation and maintenance workers in the classifications listed in the contract is *not* 'a prevailing practice in the area surveyed for wages and working conditions.' " [Arbitrator's italic.] He then stated that this raised the question as to whether the contract provision calling for the payment of construction rates was illegal. The arbitrator, however, declined to rule on the legality of this longstanding contract language and stated the following:

Instead he [the arbitrator] will rule, as he must in view of the contract language, that the Employer's unilateral actions in setting aside and ignoring the clear and unambiguous contract language found in Supplementary Labor Management Agreement No. 2 of the parties * * * violated its contract with the Columbia Basin Trades Council and that all of the Employer's temporary hourly employees on board prior to December 18, 1977, and all temporary employees hired by the Employer on and after December 18, 1977, in the express classifications listed in the Supplementary Labor-Management Agreement No. 2, are entitled to back wages based on the "local prevailing construction rates of pay" for their classifications from December 18, 1977 (for new hires) or from the start of the pay period beginning February 12, 1978 (for all temporary employees on board prior to December 18, 1977) until the date of receipt of a Comptroller General's decision which might declare such payment invalid.

In addition, the Arbitrator in his Award has ordered that the parties jointly, within sixty days of receipt of his Decision and Award in this case, formally apply to the Comptroller General of the United States for a ruling on the legality of the contract language in question and that until such time as the Comptroller General may rule that this contract language is illegal and therefore null and void under Section 1.4 of Article I of the contract, the Employer must continue to pay its temporary employees in the classifications in question the negotiated rate appropriate to their classification, also as set forth in Supplementary Labor-Management Agreement No. 2.

By this particular type of relief the Arbitrator has attempted to make the members of the bargaining unit whole for the unilateral action taken by the Employer, in direct violation of the particular, express and long-standing contractual language of the parties, and at the same time afford the Employer an opportunity to settle this dispute on the legality of the contract language in question by a joint application with the Columbia Basin Trades Council for an opinion of the Comptroller General of the United States.

The arbitrator further explained his actions as follows:

The Arbitrator is a creature of the parties, who, pursuant to their express contractual provisions, chose him to hear their dispute in this case and to make his decision *on the basis of the contractual provisions which the parties entered into.* Under the particular, express and long-standing contractual provisions of the parties which are clear and unambiguous, the temporary hourly employees of the Employer in the classifications listed in the contract were, and are, entitled to be paid "at local prevailing construction rates of pay." All the Arbitrator has done in his Decision and Award in this case is to find that the Employer violated these express contractual provisions, that the employees in question are due back pay, that the Employer should pay this back pay, that within sixty days of the date on which the parties receive his Decision and Award in this case they should jointly resort to the Office of the Comptroller General for an opinion from the expert in the field of pay statutes for federal employees for a permanent resolution of their dispute on the legality of this contractual provision, but that until such a decision declares the contractual provision illegal, the Employer must continue to pay the local prevailing construction rates to the employees in question. [Arbitrator's italic.]

## JURISDICTION

Thus, the arbitrator ordered the union and management jointly to seek our decision on the legality of the disputed language in the labor-management agreement. Accordingly, we shall consider this matter as a joint request of the parties and issue a decision thereon under our "Procedures for Decisions on Appropriated Fund Expenditures Which are of Mutual Concern to Agencies and Labor Organizations," 4 CFR Part 22 (1981) originally published as 4 CFR Part 21, at 45 Fed. Reg. 55689–92, August 21, 1980. See specifically 4 CFR § 22.7(b) (1981).

In deciding this case, we shall confine our opinion to the question submitted as to the legality of the contract provision in question. Under 5 U.S.C. § 7122 (Supp. III, 1979) we no longer have the authority to review arbitration awards. See H.R. Rep. No. 95–1403, 95th Cong., 2d Sess., July 31, 1978, 56, 57. Thus, we express no opinion on the arbitrator's ruling that the temporary employees are entitled to backpay at construction rates until the date of receipt of a Comptroller General decision declaring such payments invalid. Any payments made by the agency pursuant to the arbitration award are conclusive on the General Accounting Office. 4 CFR § 22.7(a) (1981). *See* 58 Comp. Gen. 198, 200 (1979).

## OPINION

In submitting the legal question to us pursuant to the arbitrator's instructions, the Water and Power Resources Service takes the position that the payment of construction rates is illegal. The Service's position is based on its view that these temporary employees are engaged in the maintenance, repair, and upkeep of the powerplant and related facilities and that the payment of construction rates to such employees is not a prevailing practice among the northwest utilities that make up the wage survey.

The Columbia Basin Trades Council does not dispute the Service's contention that the employees are not engaged in construction work nor does it dispute the Service's contention about the prevailing practice in the area. The union's position is basically that the labor-management agreement requires payment of construction rates and that management had no authority to unilaterally terminate the payment of construction rates in violation of the agreement.

We start with the arbitrator's finding that the payment of construction rates of pay to the temporary operation and maintenance employees involved is not a prevailing practice in the area surveyed for wages and working conditions. This finding is consistent with the Service's statements as to the work performed by the temporary employees and with the survey results obtained pursuant to the recommendation of the Solicitor's Office.

We now turn to the relevant statutes. Pay policies and procedures for most prevailing rate employees are prescribed by subchapter IV of chapter 53 of title 5, United States Code, as amended by Pub. L. 92–392, August 19, 1972, 86 Stat. 564, 5 U.S.C. § 5343 note, which requires that rates of pay be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. This subchapter requires pay to be fixed by means of area wage schedules established periodically from wage surveys made by lead agencies or by the Office of Personnel Management. However, section 9(b) of Pub. L. 92–392 exempts certain employees who had negotiated their wages on or before August 19, 1972.

Section 9(b) has been amplified by section 704 of the Civil Service

Reform Act of 1978, Pub. L. 95–454, October 13, 1978, 92 Stat. 1218, 5 U.S.C. § 5343 note, which reads as follows:

> (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92–392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92–392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.
>
> (b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of—
>
> (A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;
>
> (B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code, or
>
> (C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code.

Accordingly, negotiated provisions of labor-management agreements which were in effect on August 19, 1972, such as the provision here in question, are protected and may be continued under the provisions of sections 9(b) and 704, even though these negotiated provisions may be in conflict with certain other provisions of law or prior interpretations thereof.

However, the application of section 704(a) is premised on the concept that prevailing rates and practices shall be used in determining what the terms and conditions of employment and other employment benefits are. Moreover, section 704(b) specifically requires that the pay and pay practices of employees under these negotiated contracts "* * * shall be negotiated in accordance with prevailing rates and pay practices * * *." Thus, even though the Congress gave broad authority for the negotiation of wages to those employees who had historically negotiated their wages, Congress insisted that the authority shall be governed by prevailing rates and pay practices.

As has been indicated, the contract provision here in question was in existence before August 19, 1972, and thus falls within the purview of sections 9(b) and 704. However, the arbitrator has found that, as of September 1979, the payment of construction rates of pay for temporary operation and maintenance workers in the occupations listed in the agreement was not a prevailing practice in the area. Therefore, since section 704 provides that contract provisions protected under section 9(b) of Pub. L. 92–392 shall be negotiated in accordance with prevailing rates and practices, the arbitrator's finding compels us to conclude that the agreement provision requiring payment of construction rates of pay is not valid under section 704. Accordingly, the temporary operation and maintenance workers at the Grand Coulee Project Office may not continue to be paid at construction rates of pay.

## [B-202037]

**Accountable Officers—Physical Losses, etc. of Funds, Vouchers, etc.—Without Negligence or Fault**

Relief is granted to IRS accountable officer for loss of $600 money order stolen from wire basket where it was placed pending transmission to cashier for deposit. Until the theft occurred, the office securiy practices were thought to be adequate and the accountable officer complied with them in every respect. Overrules in whole or in part B-197616, Feb. 24, 1981, B-201840, Apr. 6, 1981, and similar cases.

**Statutes of Limitation—Accountable Officers—Irregularities in Accounts—Physical Losses/Shortages—Relief Requests—No Time Bar**

The long period of time between the year the theft occurred and the year in which relief was requested for the accountable officer is not a bar to consideration of relief in physical loss cases. The three year period prescribed in 31 U.S.C. 82i after which an accountable officer's accounts must be considered settled is not applicable in physical loss or shortage cases.

**To Fiscal Assistant Secretary, The Department of the Treasury, August 31, 1981:**

This is in response to your request that relief from liability be granted to Mr. Henry P. Seufert, former Director of the Brookhaven Service Center for the loss by theft on June 18, 1974, of a $600 money order. We grant relief for the reasons detailed below.

The long period of time between the year the theft occurred (1974) and the year in which you requested relief for the accountable officer (1981) raises a threshold question about our authority to consider this case. In two very recent cases (B-197616, February 24, 1981, and B-201840, April 6, 1981), we held that the accountable officer's account must be considered settled after the expiration of the 3-year period prescribed by 31 U.S.C. § 82i. No further charges could be raised against him, and therefore no further adjustments to the account could be made. It followed, we said, that we no longer had authority to grant or deny relief.

We have reconsidered those decisions, in the light of the legislative history of 31 U.S.C. § 82i, and have concluded that we were wrong. It is now clear that the statute was intended to protect disbursing, certifying, and accountable officers from having to answer exceptions raised by the General Accounting Office (GAO) to payments they made (not involving fraud or criminal activities) more than 3 years after the alleged erroneous payment was made. In physical loss cases, however, the GAO is not concerned with erroneous payments to which it wishes to take an exception. A debt against the accountable officer arose automatically when his funds were discovered to be short. The only question before the GAO is whether to grant the officer relief, thereby absolving him from responsibility for the loss and allowing restoration of the account.

Since the account can never be restored without restitution from the accountable officer (assuming inability to collect from the thief) unless the Department of Treasury receives a releif authorization, we conclude that there is no time bar precluding our consideration of requests for relief from responsibility for physical losses or shortages of funds. B–197616, February 24, 1981; B–201840, April 6, 1981, and any other cases which indicate that relief from responsibility for physical losses or shortages, may not be considered if more than 3 years has elapsed since the loss or shortage was discovered are hereby overruled.

Turning now to the merits of this case, the Internal Revenue Service (IRS) investigation reports indicate that the theft occurred on or about June 18, 1974, in a Contact Unit of the Manhattan District Office. A taxpayer, Mr. Roger Callendar, while being assisted by a tax examiner removed a $600 money order from a wire basket located on the tax examiner's desk.

Mr. Callendar confessed to the theft and stated that there was no collusion with any IRS employee. Mr. Callendar was sentenced to 2 years in prison (suspended) and 3 years probation. The court did not order Mr. Callendar to make restitution nor did IRS collection actions result in recovery of the funds.

At the time of the theft, it was the common practice and control procedures in the Manhattan District Office to accumulate remittances in the wire baskets for transmission to the cashier for deposit. There was no indication that any examiner deviated from prescribed practices then required. The administrative report states that the security practices of the office were considered adequate until the investigation following the theft indicated serious deficiencies. Office security procedures have been corrected.

Based on the above you have determined that the unrecovered loss of the $600 occurred through no fault or negligence of Mr. Seufert and that the loss occurred while Mr. Seufert was acting in discharge of his official duties. Therefore, you have requested relief from liability in accordance with the provision of 31 U.S.C. § 82a–1.

31 U.S.C. § 82a–1 (1976) authorizes this Office to relieve an accountable officer from liability if we concur with a determination by the

agency head that the loss occurred (1) while the accountable officer was acting in the discharge of his or her official duties and (2) without fault or negligence of the accountable officer. If relief is granted, the law also authorizes adjusting the account by charging the appropriation or fund available for the disbursing function when the adjustment is effected, absent another appropriation specifically provided therefor. You have made the required determination on behalf of Mr. Seufert.

With respect to this case, the record clearly shows that the loss occurred as a result of a theft and that all employees were following common practices and procedures. The deficiencies of the then prescribed security procedures were not recognized until after the theft had taken place.

IRS requires that reasonable security protection be afforded to property entrusted to the IRS. See *The Physical and Document Security Handbook*, IRM 1 (16) 41. It is a doubtful whether allowing funds to accumulate in wire baskets accessible to anyone entering the office would be considered "reasonable security precautions." If Mr. Seufert had been aware of the lax security procedures then in effect at the District office he would have been negligent in his duty not to have taken corrective action. We have been informally advised, however, that Mr. Seufert did not have this knowledge and since he was not directly responsible for the security program, we cannot find him negligent. Accordingly, we grant relief to Mr. Seufert.

However, your request for relief should have also included the tax examiner who had physical control of the funds. There may be more than one accountable officer in a given case and the concept of accountability is not limited to the person in whose name the account is officially held, B-193673, May 25, 1979; B-197324, March 7, 1980. Any Government officer or employee who physically handles Government funds, even if only occasionally, is "accountable" for those funds while in his or her custody. Therefore, the tax examiner was also liable for the loss. Collection action should be taken against the tax examiner unless you decide to request relief for him or her also. B-191942, September 12, 1979.

Finally, the GAO Policy and Procedures Manual calls for a report of financial irregularities (which have not been resolved administratively) 2 years after the date the accounts are made available to this Office for audit. 7 GAO Policy and Procedures Manual § 28.14; B-161457, August 1, 1969. (Fraud or other serious irregularities of substantial amount or significance must be reported as soon as possible.) We recommend that you take corrective measures to ensure that your personnel are aware of the need for timely action to avoid any future delays in reporting irregularities to this Office.

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