Decisions of The Comptroller General of the United States

VOLUME 60 Pages 561 to 622

JULY 1981

UNITED STATES
GENERAL ACCOUNTING OFFICE

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1982

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.50 (single copy), $4.10 foreign; subscription price: $17 a year; $21.25 for foreign mailing.

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[B-199035]

Travel Expenses—Military Personnel—Transfers—To Ship or Other Mobile Unit—After Home Port Change Announcement—Travel Entitlements

When the home port of a ship or other mobile unit to which a Navy member is being transferred is in the process of being changed the member may accompany his dependents or otherwise travel to the newly designated home port prior to reporting to the ship or other mobile unit if that travel is authorized by amendment to the Joint Travel Regulations, provided the travel is necessary to assist in the transportation of the member's dependents or property.

Matter of: Travel Incident to Change in Home Port, July 1, 1981:

This action is in response to a request from the Acting Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) as to whether Volume 1 of the Joint Travel Regulations (1 JTR) may be amended to cover a particular situation involving Navy members assigned to ships staffs and other mobile units which have home ports. When such members are ordered on a permanent change of station to a ship, staff or mobile unit after a home port change for that unit is announced, the proposal is to permit the member to travel to the new home port to assist his dependents to relocate there and then report for duty at the location of the unit, all at Government expense. This matter has been assigned Control No. 80-23 by the Per Diem, Travel and Transportation Allowance Committee.

The question in the present case is whether 1 JTR may be amended to authorize a member to travel at Government expense to a newly designated home port to assist in dependents' relocation and continue at Government expense to travel to the location of the ship or mobile unit at the old home port. The answer to the question is yes.

In 57 Comp. Gen. 198, the question was whether 1 JTR could be amended to permit a member, who is on temporary duty away from his permanent station and who has received permanent change of station orders, making that station his permanent station, to travel at Government expense to his old duty station for purposes of assisting his dependents to relocate. In authorizing the amendment, we stated generally that since changes of duty assignments are for the purpose of carrying out the Government's business, it is a matter over which the member has no control. We concluded by saying that the rationale for travel and transportation entitlements was that members should not be required to expend personal funds for travel and transportation which results from permanent change of station.

We have today issued a decision in *Fedderman* and *Espiritu*, 60 Comp. Gen. 564 (B-200285, B-200857), in which the rule in 57

Comp. Gen. 198 was interpreted to permit travel from a temporary duty station to the old permanent duty station when a transfer of station occurred after a period of temporary duty even though the new permanent duty station was designated prior to the member's departure on temporary duty. Travel at Government expense in those circumstances may be allowed only if the JTRs are amended to provide for it, and only to the extent that travel by the member is performed to assist in relocating dependents and property.

Since dependents and household effects are moved to the new home port at Government expense, we believe that the reasoning in 57 Comp. Gen. 198 as amplified in *Fedderman* and *Espiritu* is equally applicable to this situation. That is, the member should not be required to travel at his own expense to the place to which his dependents and household effects are being transported at Government expense if travel to that place is necessary to assist in transportation of dependents, household goods of personal effects or a privately owned conveyance.

Accordingly, 1 JTR may be amended to authorize the member to travel at Government expense to the newly designated home port of his ship or other mobile unit and thence to the location of that ship or unit. Such travel must be for the purpose of assisting in the relocation dependents, household or personal effects or a privately owned conveyance. Further, travel to the home port may be authorized when the ship or mobile unit is away from the home port or at the old home port during a period of transition.

We trust that this determination will permit appropriate amendments to the regulations in all the circumstances presented.

[B-199354]

Travel Expenses—Military Personnel—Restricted Station Assignments—Travel to "Designated Place" Between Military Assignments—Moving Arrangements, etc. Purpose—Regulation Authority

Dependents of a military member are located at a designated place away from his duty station because of the member's isloated duty, unusually arduous duty, or unaccompanied overseas tour. Travel by the member to the designated place upon assignment to the permanent duty station to which he is not authorized to take his dependents and upon his next permanent change of station at Government expense may be authorized by an amendment to the Joint Travel Regulations, but the authorization of travel to the designated place must be based on the member's need to assist in arranging for transportation of dependents, household or personal effects, or privately owned conveyance.

Matter of: Travel by member to designated place between military assignments, July 1, 1981:

This decision is in response to a request for an advance decision from the Assistant Secretary of the Air Force (Manpower, Reserve Affairs

and Installations) concerning whether the Joint Travel Regulations may be amended to authorize members of the uniformed services, upon return from certain types of duty, to travel to the place where their dependents are located and then on to their new duty station rather than directly to the new station. The matter has been assigned control number 80–16 by the Per Diem, Travel and Transportation Allowance Committee.

For the reasons explained below the answer to the question is yes.

The Assistant Secretary notes that members of the uniformed services are authorized to move their dependents at Government expense to a designated place under paragraph M7005, Volume 1, Joint Travel Regulations (1 JTR), in the following circumstances:

a. Assignment of a member to unusually arduous duty with projected absences of the unit from its assigned home port for more than 50 percent of the time;
b. Assignment of a member to a vessel or afloat staff specified as operating overseas for periods of 1 year or more; and
c. Assignment to a restricted station (to a place where dependents are not permitted).

When dependents move to a designated place, however, the member is only entitled to travel at Government expense from his old duty station to the new duty station. When the member is ordered on his next permanent change of station, his dependents are authorized to travel from the designated place to the new duty station at Government expense. Travel for the member at Government expense, however, is again only authorized from the old to the new permanent station except in those instances where he is serving consecutive overseas tours. It has been pointed out by the Assistant Secretary that the member is often required to travel via the designated place to assist his dependents with their move. To the extent such travel exceeds the cost of direct travel from the old to the new station, it currently must be performed at the member's personal expense. It has been proposed to amend the Joint Travel Regulations to authorize travel for the member at Government expense via the designated place where his dependents are located in such situations.

The Assistant Secretary has cited our decision in 57 Comp. Gen. 198 (1977) as the rationale for authorizing the travel to a designated place for the member to assist his dependents in making the move. In that decision we determined that where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port may be considered travel incident to the permanent change of station. Therefore, it was held that round–trip travel of the mem-

ber to the former permanent station or home port may be performed at Government expense.

Our decision in 57 Comp. Gen. 198 was predicated on a determination that travel back to the permanent duty station from the temporary duty station or new home part could be considered as travel on Government business if it was performed for the purpose of arranging for the travel of dependents and transportation of household or personal effects or a privately owned conveyance. Here the permanent duty station is not involved but the location to which travel would be authorized is the last location to which the dependents traveled at Government expense.

We have today issued a decision in *Fedderman and Espiritu*, 60 Comp. Gen. 564 (B-200285, B-200857), in which the rule of 57 Comp. Gen. 198 was interpreted to permit travel from a temporary duty station to the old permanent duty station when a transfer of station occurred after a period of temporary duty even though the new permanent duty station was designated prior to the member's departure on temporary duty. Travel at Government expense in these circumstances is authorized only if the Joint Travel Regulations are amended to provide for it and only to the extent that travel by the member is performed to assist in relocating dependents and property.

Since dependents and household effects are moved to the designated location at Government expense, we believe that the reasoning in 57 Comp. Gen. at 198 as amplified in *Fedderman and Espiritu* is equally applicable in this situation. That is, the member should not be required to travel at his own expense to the place where his dependents and household goods were transported at Government expense if travel to that place is necessary to assist in transportation of dependents, household goods and personal effects or a privately owned conveyance.

Accordingly, Volume 1 of the Joint Travel Regulations may be amended to authorize a member to travel at Government expense to the designated location to which his dependents and household effects are transported. Such travel may be authorized in connection with travel to the permanent duty station to which dependents may not accompany the member and again upon return from that station in connection with travel to the next permanent duty station.

[B-200285, B-200857]

Travel Expenses—Military Personnel—Temporary Duty—Transfer Pending—Return to Old Station—Moving Arrangements, etc. Purpose

A member of the uniformed service is detached from his permanent duty station upon being assigned to temporary duty and the new permanent duty station is not designated until the end of temporary duty assignment. Member may be authorized travel at Government expense from the temporary duty station to

the old duty station for the purpose of arranging for relocation of dependents and personal effects resulting from the permanent change of station and then travel to the new permanent duty station. The date of the detachment from the old permanent duty station does not affect this entitlement. 57 Comp. Gen. 198, amplified.

Regulations—Travel—Joint—Military Personnel—Amendment—Temporary Duty Pending Transfer

A member of the uniformed services may be paid for travel from his temporary duty station to his old permanent duty station when permanent change of station follows a period of duty at a temporary duty station, but such payments may be made only if the Joint Travel Regulations are amended to authorize travel in such circumstances and only if authorization of return to old permanent station is based on the need to arrange transportation of dependents, household or personal effects or a privately owned conveyance and may not be authorized for purely personal reasons such as a visit or vacation.

Matter of: Staff Sergeant William H. Fedderman, USMC, and Ensign Rita V. Espiritu, USNR, July 1, 1981:

These cases involve a military member's entitlement to permanent change of station allowances under paragraph M4156, Case 3, Volume 1, Joint Travel Regulations (1 JTR). The question is whether travel may be allowed to the old duty station from a temporary duty location where the member is when he is advised of the location of his new permanent station and thence to the new duty station. Members may be authorized travel allowances prescribed in M4156, Case 3, 1 JTR, in such circumstances if return to the former duty station is required for moving the member's dependents and effects to the new permanent duty station.

The case of Staff Sergeant William H. Fedderman, USMC, was submitted by the Disbursing Officer, Marine Corps Finance Center, Kansas City, Missouri, requesting an advance decision. The matter was forwarded here through the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 80–30. The case of Ensign Rita V. Espiritu, USNR, was submitted by the Chief of Naval Operations to the Per Diem, Travel and Transportation Allowance Committee with the request that it be considered with Sergeant Fedderman's case. Accordingly, Ensign Espiritu's case was also forwarded here by the Per Diem, Travel and Transportation Allowance Committee.

Staff Sergeant William A. Fedderman, while stationed at Camp Lejeune, North Carolina, was detached from that station without designation of a new permanent duty station and assigned to temporary duty for instruction at the Recruiters School, Marine Corps Recruit Depot, San Diego, California. He reported for temporary duty in San Diego on April 16, 1980. On May 20, 1980, the Headquarters Marine Corps sent a letter to Marine Corps Recruit Depot, San Diego, in which it was asserted that certain Marine Corps members detailed to

that command for temporary duty without ultimate duty station assignment were not being afforded their complete travel entitlements in accordance with paragraph M4156, 1 JTR, upon permanent duty station assignments at graduation. That is, they were not being afforded allowances for travel from the temporary duty station to the old permanent duty station and then to the new permanent duty station. Based upon the May 20, 1980 letter the Commander of the Marine Corps Recruit Depot modified Sergeant Fedderman's orders authorizing him to return from his temporary duty point in San Diego to his old permanent duty station at Camp Lejeune, North Carolina, and then on to his permanent duty station in Mt. Clemens, Michigan.

The Marine Corps Finance Center questioned the interpretation given to paragraph M4156, Case 3, by Marine Corps Headquarters. It is the contention of that office that paragraph M4156, Case 3, applies only to situations in which the member is not detached from his old permanent duty station and, at the time temporary duty orders were issued, it was fully intended that the member would return to his old duty station upon completion of temporary duty.

Ensign Rita V. Espiritu was apparently enlisted in the Navy for purposes of attending Officer Candidate School. Her permanent station was designated as Pearl Harbor, Hawaii, and she was ordered to travel from Hawaii to Newport, Rhode Island, for 16 weeks' temporary duty for instruction at the Officer Candidate School, and for further assignment. Her next permanent duty station was not assigned at the time the order was issued. Upon completion of training Ensign Espiritu was directed to report to the Chief of Naval Operations, Washington, D.C., for duty. By orders dated June 18, 1980, her original orders were endorsed to permit her to travel from Newport, Rhode Island, to Washington, D.C., via the old permanent duty station in Hawaii under the provisions of paragraph M4156, Case 3, 1 JTR. It was later determined by the Navy that paragraph M4156, Case 3, was not applicable in connection with her orders, inasmuch as she was not notified that her permanent duty station would be changed while she was on temporary duty. As a result Ensign Espiritu was charged for excess transportation furnished resulting in an amount due the United States of $537.42. Leave and traveltime adjustments were also made.

Paragraph M4156, Case 3, of 1 JTR, provides in pertinent part that:

> A member who receives orders while on temporary duty directing a permanent change of station may be authorized permanent change-of-station allowances from the temporary duty station to the old permanent duty station and then to the new permanent duty station via any temporary duty station(s).
>
> * * * * * * *
>
> Travel allowances prescribed by this case may be authorized or approved by the permanent change-of-station order-issuing authority or other official desig-

nated by the Service concerned only when the member must travel to the old permanent duty station to arrange for movement of dependents, to arrange for shipment of household goods, to pick up personal possessions, or to bring his privately owned conveyance to the new permanent duty station.

This regulation, effective August 22, 1978, resulted from our decision 57 Comp. Gen. 198 (1977).

We stated in 57 Comp. Gen. 198 that the Government has an obligation to defray the cost of travel and transportation for members of the uniformed services where the travel is performed as a direct result of a change of a member's permanent duty station. Where a member is ordered on temporary duty away from his permanent station, or is assigned to a vessel deployed away from the home port, such assignment is for the purpose of carrying out the Government's business and the member generally has no choice about the assignment or deployment of the vessel. Therefore, if the member should receive orders for permanent duty at the temporary duty station or the vessel is assigned to a new home port while so assigned or deployed, the member may be reimbursed round-trip travel to the old permanent station or old home port for the purpose of arranging for relocation of his family and effects to the new permanent duty station. The rationale for the travel and transportation entitlements is that the member should not be required to expend personal funds for travel and transportation which results from a permanent change of station.

It is considered that the same rule may be applied in cases such as the present cases. The fact that the members knew when they left their permanent station on temporary assignments that they would not return but would be assigned to other permanent duty stations immediately after completing the temporary duty would not necessarily alleviate the problem involved. A new permanent duty station is not designated when the member leaves on temporary duty and the dependents are not permitted to travel at Government expense on the member's temporary duty orders; therefore, they must wait to move from the old duty station until after the member has departed on temporary duty. In such circumstances orders may be issued authorizing travel, which would be reimbursable under paragraph M4156, Case 3, from the temporary duty station to the old permanent duty station for the purpose of arranging for relocation of the family and effects resulting from the permanent change of station and then to the new permanent station. The rationale for the travel in this instance is the same as stated in 57 Comp. Gen. 198, *supra*.

There should be no legal distinction made with regard to permanent change-of-station entitlements where the member is advised that he will not return to the old duty station while on temporary duty and

where the member is so advised prior to departing the old duty station for a temporary duty assignment. If the order issuing authority determines that the member must return to his permanent duty station to ship household effects, arrange for dependent travel, pick up personal possessions or pick up a privately owned conveyance, such travel is authorized at Government expense under paragraph M4156, Case 3. However, such travel at Government expense is only authorized for the specified purposes and not merely for a return visit or vacation at the previous duty station. Determinations as to the necessity for such travel are primarily a matter for the appropriate service authorities.

Accordingly, the travel entitlement of Sergeant Fedderman and Ensign Espiritu in the circumstances described may be covered by paragraph M4156, Case 3, 1 JTR, provided the return travel was performed for the purposes set out in that provision. If that is the case, Sergeant Fedderman is entitled to return transportation to the old duty station at Camp LeJeune upon completion of the temporary duty in San Diego and then is entitled to transportation at Government expense for himself and his family from the old duty station to the new duty station in Mt. Clemens, Michigan. Per diem may also be authorized for the period of his travel to the old permanent station and then to the new permanent station.

If Ensign Espiritu is determined to have returned for the reasons set out above she is entitled to return transportation from the temporary duty station, Newport, Rhode Island, to her old duty station at Pearl Harbor, Hawaii, and from the old duty station to Washington, D.C. Ensign Espiritu may also be authorized per diem for the period of her travel to the old duty station and then to the new permanent station.

In order to consider fully the questions raised by the submission, we must consider the case of a member who is ordered on temporary duty en route to a new permanent duty station which has been designated prior to the member's departure on temporary duty. Even in that situation it may be that a member would have difficulty getting his dependents and effects to the new permanent duty station if he or she was not allowed to return to the old permanent station to assist. This situation could certainly arise with respect to single members. We have held that a member should not be required to pay the cost of returning from a temporary duty location to his or her former permanent duty station when the return is necessary to assist in the transportation of dependents and property. If, because of the facts involved, the member must return from the temporary duty station to the old duty station for such reasons, the cost should be paid by the Government even

though the location of the new permanent duty station was known at the time of departure from temporary duty.

Therefore, regulations may be issued under which a member may be permitted to return to his old permanent duty station at Government expense if such travel is necessary for the shipment of household effects, for arranging dependents' transportation, to pick up personal effects or a privately owned conveyance, in any case when a transfer of permanent station follows immediately after duty at a temporary duty station. As in the situations where such travel is now authorized by paragraph M4156, Case 3, and this decision, care should be taken to permit such travel only when required for the stated reasons and not when the purpose is purely personal such as for a visit or vacation.

However, since such travel is not authorized under current regulations, payments for travel back to the old permanent station in those circumstances may be made only if authorized in an amendment to the Joint Travel Regulations.

[B-203104]

Travel Expenses—First Duty Station—Training Duty Prior to Reporting—Designation as Permanent Station—Propriety

Director of FBI requests reconsideration of ruling in *Cecil M. Halcomb*, 58 Comp. Gen. 744, that new appointees assigned to training in Washington, D.C., may not have Washington designated as first permanent duty station so as to entitle them to travel and relocation expenses from Washington, D.C., when assigned to permanent duty station after training. No basis exists to alter this ruling since assignment for training is not a permanent assignment, and employee must bear expense of reporting to his first permanent duty station. 58 Comp. Gen. 744, amplified.

Travel Expenses—First Duty Station—What Constitutes—Brief Assignment to Home Office Following Training—Permanent *v.* Temporary Duty Status

New appointees initially assigned to training in Washington, D.C., are responsible for bearing expense of reporting to their first permanent duty assignments following training. FBI may not lessen that responsibility by assigning them to 1 month of so-called "permanent duty" at convenient location following completion of training and prior to intended permanent duty assignment. One month assignment following training should be treated as temporary duty en route to first duty station.

Matter of: Travel and Relocation Expenses for New Appointees to the Federal Bureau of Investigation July 2, 1981:

The Director of the Federal Bureau of Investigation (FBI) has asked us to reconsider the ruling in *Cecil M. Halcomb*, 58 Comp. Gen. 744 (1979). Specifically, he asks whether the *Halcomb* ruling, that a new appointee assigned to training in Washington, D.C., may not have Washington designated as his first permanent duty station, must

be applied to FBI appointees. If this ruling necessarily applies, he asks whether new FBI appointees may be assigned to permanent duty at their place of appointment for as little as 1 month following initial training and, upon transfer to a new permanent duty station, be granted relocation expenses payable to an individual transferred for the benefit of the Government. We find no basis to alter the *Halcomb* ruling inasmuch as it reflects the long-standing proposition that a training site may not be designated as an employee's permanent duty station unless actual and substantial duties are to be performed at that location. Moreover, we would not consider a 1-month assignment to a different location following training as constituting an agent's first permanent duty assignment for purposes of satisfying the requirement that a new appointee bear the expense of reporting to his first duty station. Such an assignment must be regarded as temporary duty enroute to the appointee's first duty station.

The *Halcomb* case involved new appointees to positions not designated as manpower shortage category positions who were not entitled to the travel and transportation benefits authorized by 5 U.S.C. 5723. In *Halcomb*, we considered whether new appointees of the Fish and Wildlife Service, U.S. Department of the Interior, could have Washington, D.C., designated as their permanent duty station during an initial 4-month period of training. The appointees spent no more than 2 weeks in Washington and the balance of their time at Glynco, Georgia. The time in Washington was for matters such as processing of employment papers and taking the Oath of Office. At Glynco, the appointees engaged in training at the Department of the Treasury Law Enforcement Training Center. At the end of the 4-month period, the appointees were assigned to permanent duty elsewhere, at locations determined prior to or upon the completion of training.

Based on the Department of the Interior's action designating Washington as their permanent duty station, the appointees were paid travel and relocation expenses upon assignment to a permanent duty station following training. At the request of a certifying officer, we reviewed the situation and determined that it was inappropriate to designate Washington, D.C., as a permanent duty station. Our reasoning was stated as follows:

> The location of an employee's permanent duty station presents a question of fact and is not limited by the administrative designation. 57 Comp. Gen. 147 (1977). Such duty station must be where the major part of the employee's duties are performed and where he is expected to spend the greater part of his time. 32 Comp. Gen. 87 (1952); *Bertil Peterson*, B-191039. June 16, 1978. There must be some duties beyond taking the oath, physical examination, or job training. 22 Comp. Gen. 869 (1943). Also, see 41 Comp. Gen. 371 (1967). In the instant case the certifying officer says that at the mid-point in training at the FLETC, the trainees are brought to the Washington office for 1 week. That time, together with the time spent when the trainee first reports for swearing in, is normally the total

time spent in the Washington office. Thus, the facts indicate that the agency designation of Washington as the first official duty station is erroneous.

Based on our determination that Washington, D.C., was not their first permanent duty station, we held that the new appointees were not entitled to relocation expenses upon permanent assignment following training, but were required to bear the expense of reporting to that first permanent duty station. We did indicate in *Halcomb* that the new appointees were entitled to be authorized subsistence at the temporary duty site (i.e., the training or processing site) and any travel expenses incurred in traveling to the temporary duty site which were in excess of those which would have been incurred in traveling directly from their home to the first duty station.

In his submission, the Director indicates that in following the above ruling the FBI has encountered serious problems in staffing as well as in recruitment. Prior to the *Halcomb* decision, the FBI had assigned newly recruited agents to 16 weeks of training in Washington, D.C., and had designated Washington as their first official duty station. Following *Halcomb*, the FBI changed its procedure and now designates the "home office" (defined by the FBI as the place where the new appointee is recruited) as the first official duty station. After training the new agents return to the "home office" for 6 months of actual duty. Upon subsequent assignment to a new duty station they are paid transfer related expenses. The fact that new agents are counted against the home office's personnel ceiling has created a number of administrative problems. Offices which recruit successfully become heavily staffed with new personnel. In the case of larger offices, this has sometime created an imbalance between experienced and inexperienced agents with an insufficiency of experienced personnel necessary to handle more complex investigations. In the case of smaller offices, there may be a lack of space, equipment and insufficient investigative work for new agents. In short, the assignment of new agents to a home office for 6 months following training is less than an optimum allocation of manpower and resources.

The FBI feels that its needs would best be served by a return to the procedure of designating Washington, D.C., as the first permanent duty station of new agents. As a less satisfactory alternative to the current practice, the FBI asks whether a 30-day assignment to the new agent's "home office" following training could constitute the agent's first permanent duty assignment.

We are unable to find that the administrative difficulties the FBI has encountered in complying with the *Halcomb* decision provide a basis to reverse or modify that holding. The decision primarily relied on in *Halcomb*, 22 Comp. Gen. 869 (1943), is not an isolated case but one of several which indicate that where an employee performs only

training or the administrative matters necessary for entry on the rolls, the place where these duties are performed is a temporary duty station for determining travel entitlements. *Joanne E. Johnson*, B-193401, May 17, 1979, and B-166030, February 19, 1969. In fact, the *Halcomb* decision is consistent with 10 Comp. Gen. 184 (1930) in which we held that Bureau of Investigation appointees assigned to permanent duty in the field were not relieved of their obligation to bear the expense of reporting to their designated posts of duty by reason of being first assigned to a period of training in Washington, D.C.

As explained in 22 Comp. Gen. 869 (1943), the newly appointed employee who performs actual and substantial duty at his place of appointment—as distinguished from job training or completing administrative matters for entry on the rolls—may have this place designated as his permanent duty station. However, in the absence of such actual and substantial duty, the place of appointment or place of training is only a temporary duty station even if the new appointee's permanent duty station is not ascertained until after his appointment or training. If such is the case, the training site may be regarded as the appointee's designated duty station for administrative purposes but not for the purpose of establishing his entitlement to travel and relocation expenses upon subsequent assignment to a permanent duty station. See *Hughie L. Rattiff*, B-192614, March 7, 1979, and *Donald C. Cardelli*, B-195976, February 8, 1980.

The assignment of agents to a different location—the "home office"—for 1 month following training would not establish that location as their first permanent duty station. An employee's official or permanent duty station is a matter of fact and not merely one of administrative designation. It is the place at which he actually is stationed, the place where he expects and is expected to spend the greater part of his time. 32 Comp. Gen. 87 (1952). We have long held that an employee may not be assigned to a duty station at which he is not expected to remain for an extended period of time for the purpose of increasing his entitlement to travel and relocation expenses. See *Samuel K. Allen*, B-194536, January 9, 1980, and *Linderman and Hester*, B-191121, August 29, 1978.

Neither our decisions nor the applicable regulations establish a minimum amount of time that an employee must remain at a particular post of duty in order to establish that location as his permanent duty station. However, the intended duration of an employee's assignment is certainly a relevant consideration in determining whether a particular assignment is permanent in nature. An assignment expected to last only 1 month would not be considered a permanent assignment for

travel and relocation expense purposes. Further, an employee may not be assigned to a duty station without regard for the needs of the agency but primarily to entitle him to travel and relocation expenses. In the case of a new appointee, the 1-month assignment following training would be considered a temporary duty assignment en route to the employee's first duty station.

Accordingly, newly appointed FBI agents assigned to 16 weeks' training in Washington, D.C., may not have Washington designated as their permanent duty station for purposes of satisfying the requirement that they bear the expense of reporting to their first duty station. The FBI may not lessen that personal obligation by giving the new appointees brief assignments to convenient locations before requiring them to report to permanent duty following training.

[B-199470]

Contracts—Disputes—Contract Appeals Board Decision—Partial Awards—Payment—Indefinite Appropriation Availability

Armed Services Board of Contract Appeals awarded a contractor-plaintiff in a contract dispute a principal amount of $12,226.43 and interest to which he may be entitled by law. Attorney General requested GAO to certify payment of principal from permanent indefinite appropriation contained in 31 U.S.C. 724a, which requires award to be final while interest award was appealed to Court of Claims. Attorney General asked GAO to consider uncontested principal award as final and certified that no appeal had been or would be taken from the award of principal. Risk is extremely remote that Court of Claims would consider *sua sponte* and change uncontested principal award and, since Board could have made "partial award" or principal, it may be certified for payment. Letter dated Oct. 30, 1980, B-199470, to contractor-plaintiff's attorney, which declined to certify principal amount for payment, is modified accordingly.

Matter of: Inland Services Corporation, July 7, 1981:

The Acting Assistant Attorney General, Civil Division, Department of Justice, has asked us to certify payment under 31 U.S.C. 724a (the permanent indefinite appropriation for the payment of judgments) of the principal amount of an award by the Armed Services Board of Contract Appeals to the contractor in the *Appeal of Inland Services Corporation and Weldon Smith, a Joint Venture*, ASBCA No. 24043. Although, under the Department's internal regulations (Department of Justice Order No. 2110.29A, August 25, 1978), the Acting Assistant Attorney General's letter is not a request for a decision, we have elected to respond in this form since the question presented involves a relatively new statute (Contract Disputes Act of 1978) and may be of recurring significance. For the reasons that follow, we concur with the request.

In December 1979, the Board awarded the contractor $12,226.43 on a contract dispute together with interest to which he may be entitled

by law. The Department of the Army, the contracting agency, caused the Justice Department to file an appeal in the Court of Claims on the award of interest insofar as it covered periods prior to the enactment of the Contract Disputes Act of 1978, and at the same time requested our Office to certify payment of the award principal. We denied the request on the basis that the award was not final as required by 31 U.S.C. 724a, inasmuch as the matter was still the subject of continued litigation as evidenced by the appeal. Section 724a provides in part as follows:

> There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414, 2517, 2672, or 2677 of Title 28 and decisions of boards of contract appeals * * *.

The Acting Assistant Attorney General has now certified "on behalf of the Attorney General that no appeal has been or will be taken from the Board award of $12,226.43 to plaintiff" in this matter. In support of his request, the Acting Assistant Attorney General points out that, if the Court of Claims considers the Board's entire award as having been referred to it under 28 U.S.C. § 2510(b)(1) (Supp. III 1979), the section authorizing agencies to appeal Board decisions to the Court of Claims, the Court could enter a partial judgment on the uncontested principal portion of the award. On the other hand, if it is considered that the uncontested portion of the award was not appealed, the plaintiff could simply file a new petition seeking enforcement of the unappealed portion of the Board award. The Government could then stipulate for the entry of a partial judgment which could be paid under 31 U.S.C. § 724a, without awaiting a final decision on the Government's appeal on the interest issue.

Upon reconsideration of the matter, we are now convinced that there is no legal impediment to payment of the principal portion of the Board's award even while the award of interest is still on appeal. This result follows from an analysis of several provisions of the Contract Disputes Act of 1978.

While we cannot normally make partial or interim payments under 31 U.S.C. § 724a, the Contract Disputes Act expressly authorizes the Court of Claims to enter "partial judgments." Section 10(e) of the Act, 41 U.S.C. § 609(e) (Supp. III 1979), provides as follows:

> In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

The joint report of the Senate Committees on Governmental Affairs and the Judiciary explained that the quoted provision—

> * * * permits partial judgments where various claims, counterclaims, and cross-claims can be segmented, so that parties do not have to await the final disposition of all of the litigation before receiving judgment. It is the intent of S. 3178 [the bill which became the Contract Disputes Act] to expedite decisions on claims or portions thereof at the earliest time possible in the appeals process and not to allow unresolved issues on nonrelated claims to hold up the payment on claims that have been decided.

S. Rep. No. 95–1118, 95th Cong., 2d Sess. 31 (1978). This authority is also reflected in the amendment to 28 U.S.C. § 2517(b) made by section 14(f) of the Contract Disputes Act to provide that payment of a partial judgment shall discharge "only the matters described therein."

Section 8(d) of the Act, 41 U.S.C. § 607(d) (Supp. III 1979), authorizes boards of contract appeals to decide appeals from decisions of contracting officers and provides further:

> In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.

Thus, section 8(d) authorizes an agency board to make "partial awards" to the same extent the Court of Claims can under section 10(f). This was the recent conclusion of the General Services Administration Board of Contract Appeals in *Appeal of Capital Electric Company*, GSBCA Nos. 5316 and 5317, March 17, 1981, and we have no reason to disagree. It follows that, had a payment problem been anticipated in this case, the ASBCA could have made a partial award to cover the principal and a separate award to cover the controversial interest. As the Justice Department points out, there are various procedural devices that could arguably be employed now to achieve the same result.

In view of the foregoing, and since the Department of Justice has certified that it will seek no further review of the principal portion of the award, we see no purpose to be served by forcing the contractor now to engage in procedural devices that would clearly have been unnecessary had the Board awarded the principal separately. Also important is the additional cost to the Government of interest that must be paid on the award which would continue to accure throughout the appeal process under section 12 of the Act, 41 U.S.C. § 611. That section provides in part as follows:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim * * * from the contractor until payment thereof. * * *

The Government's liability for interest on an award terminates when the principal is paid, and should be mitigated by the earliest possible payment that is legally permissible and that can be made without substantial risk to the Government.

One of the reasons for our traditional position that a judgment or award is not final for payment purposes until all elements of the liti-

gation have been completed is the remote risk that an appellate court may *sua sponte* review otherwise uncontested issues that were not raised in the appeal. See *e.g.*, B–172574, May 19, 1971. Technically, that risk is still present in this situation. In this context, however, we believe that the authority of the boards and the Court of Claims to render partial awards and judgments, together with the policy considerations that prompted this authority, must be viewed as overriding that admittedly remote risk. Those policy considerations and the Justice Department's certification justify payment here even though the ASBCA strictly speaking did not make a partial award. Therefore we are advising our Claims Group that the principal portion of the award ($12,226.43) may be certified for payment immediately.

[B–201931]

Contracts—Clauses—"Equitable Adjustments: Waiver and Release of Claims"—Interpretation—Armed Services Board of Contract Appeals

Protest that contract clause regarding waiver and release of claims for equitable adjustments is unfair to contractors by requiring that all claims be presented at one time is denied as clause follows policy of Defense Acquisition Regulation 26–204 (1976 ed.) and does not constitute deviation from regulations or standard changes clause. Moreover, Board of Contract Appeals has allowed reservation of claim under protested clause and held that waiver only bars foreseeable, not unforeseeable, costs.

Matter of: Castle Construction Company, Inc., July 7, 1981:

Castle Construction Company, Inc. (Castle), has protested the inclusion of the "Equitable Adjustments: Waiver and Release of Claims" clause in invitation for bids No. N62470–78–B–8135 issued by the Naval Facilities Engineering Command, Norfolk, Virginia.

The IFB, for the construction of a building at the Naval Station in Norfolk, contained the following clause:

100. EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS (7–76)

(a) Whenever the contractor submits a claim for equitable adjustment under any clause of this contract which provides for equitable adjustment of the contract, such claim shall include all types of adjustments in the total amounts to which the clause entitles the contractor, including but not limited to adjustments arising out of delays or disruptions or both caused by such change. Except as the parties may otherwise expressly agree, the contractor shall be deemed to have waived (i) any adjustments to which it otherwise might be entitled under the clause where such claims fail to request such adjustments, and (ii) any increase in the amount of equitable adjustments additional to those requested in its claim.

(b) Further, the contractor agrees that, if required by the Contracting Officer, he will execute a release, in form and substance satisfactory to the Contracting Officer, as part of the supplemental agreement setting forth the aforesaid equitable adjustment, and that such release shall discharge the Government, its officers, agents and employees, from any further claims, including but not

limited to further claims arising out of delays or disruptions or both, caused by the aforesaid change.

Castle argues that the above clause constitutes an alteration to the standard changes clause contained in the contract and requires the contractor to use a "crystal ball" to foresee all possible costs associated with a change order when subsequent change orders may compound the cost ramifications. The clause requires a contractor to place too many contingencies in his bid price to remain competitive. Through the use of the clause, Castle alleges the Navy is attempting to shield itself from the normal obligations of the Government under the changes clause.

The Navy contends that this clause places no greater burden on contractors than when the contractor is preparing his bid on a fixed-price construction contract and must use the same future cost estimating methods as in projecting the cost impact of a change order. Moreover, the clause has been the subject of several decisions of the Armed Services Board of Contract Appeals (ASBCA), which found that waiver of unsubmitted costs occurred.

We agree with the Navy that the clause is not unreasonable and find nothing improper in its use. Moreover, we view Castle's contention that it must use a "crystal ball" to formulate its claims to be unrealistic considering the manner in which the ASBCA has interpreted the clause.

As noted by the Navy, the ASBCA has held certain claims waived by the clause. *CCC Construction Company*, ASBCA 20530, 76–1 BCA 11805 (1976). However, the applicability of the clause to certain costs has been softened in other decisions. See *Hedreen Co.*, ASBCA 20599, 77–1 BCA 12328 (1977), wherein rights may be protected by a written or oral reservation by the contractor. Also, in *Molony & Rubien Construction Co.*, ASBCA 20652, 76–2 BCA 11977 (1976), the Board noted that the clause did not cover costs which were not reasonably foreseeable.

The protester has advanced the argument that this clause is no different than one considered in *Morrison–Knudsen Company, Inc.* v. *United States*, 397 F.2d 826 (Ct. Cl. 1968). Castle argues both clauses attempted to limit the normal coverage of the changes clause.

In *Morrison-Knudsen*, the contract included a clause which limited equitable adjustments the contractor could receive to only those which exceeded the estimated quantities by 25 percent or more. Therefore, on changes involving less than 25 percent, the contractor received nothing. The Court of Claims found that the clause was improper as it modified the changes clause to prevent the contractor from obtaining costs to which he would have otherwise been entitled.

We find this case not to be controlling here. The court found objectionable the denial of costs to which a contractor would have been entitled absent the clause. Here, no costs are denied but are required to be presented at one time.

Finally, Castle contends that this clause constitutes a deviation from the Defense Acquisition Regulation (DAR) standard changes clause which has never been adopted in accordance with the procedures under DAR § 1–109, Defense Acquisition Circular No. 76–17, September 1, 1978. The Navy has responded that this clause follows the policy set forth in DAR § 26–204 (1976 ed.) and, therefore, does not constitute a deviation. DAR § 26–204 (1976 ed.) reads as follows:

26–204 Complete and Final Equitable Adjustments.

(a) Controversies sometimes arise in interpreting what the parties to a contract intended to include within the scope and terms of the supplemental agreement equitably adjusting changes. To assure that equitable adjustments are complete, contractors should make every reasonable effort to present to the Government all elements of adjustment arising out of the change order to which the equitable adjustment pertains. Supplemental agreements containing a release of claims should be made only after all such elements of adjustment have been presented and considered.

(b) The following is a sample release for use in supplemental agreements:

Release of Claims

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ (describe) _____ claims, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the aforesaid claims (except for: _____)

Castle argues that while the sample clause contains a space for listing items not agreed upon and the Navy clause states "except as the parties may otherwise agree" and, therefore, in principle, the clauses are similar, in practice, the Navy's contracting officials refuse to allow any items to remain open.

What Navy personnel do in practice does not affect the validity of the clause or the fact that it does not appear to be a deviation from DAR. If a contractor is not satisfied with the equitable adjustment offered by the Government, the contractor should request a final decision from the contracting officer and follow the disputes clause procedures.

While Castle contends this places too great a financial burden on the contractor, this is a business judgment all contractors must make in negotiating claims with the Government.

The protest is denied.

[B–202105]

General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect

Employee, whose claim for higher exposure environmental pay was denied by our Claims Group, requests reconsideration on basis of Arbitrator's award under

labor-management agreement. In accordance with 4 C.F.R. 21.7(a) payments made pursuant to an arbitration award which is final and binding under 5 U.S.C. 7122 (a) or (b) are conclusive on GAO and this Office will not review or comment on the merits of the award. To the extent that the employee's request places in issue the finality or propriety of implementation of Arbitrator's decision, GAO, under 4 C.F.R. 21.8, will not issue a decision. Those issues are more properly within the jurisdiction of the Federal Labor Relations Authority, pursuant to Chapter 71 of title 5, United States Code.

Matter of: Gerald M. Hegarty—Arbitration Award—GAO jurisdiction, July 7, 1981:

Mr. Gerald M. Hegarty, an employee at the Veterans Administration Hospital, Lincoln, Nebraska, requests reconsideration of his claim for environmental differential pay (EDP) for exposure to micro-organisms with a high degree of hazard. Mr. Hegarty's claim was denied by our Claims Group's settlement Z–2707054 of May 16, 1979, which determined in part as follows:

> The Veterans Administration has determined that you are entitled to differential pay for low degree hazard only. The General Accounting Office will not substitute its judgment for that of agency officials who are in a better position to investigate and determine the rights and obligation of the parties, in the absence of clear and convincing evidence which indicates that the agency determination was arbitrary and capricious.

Mr. Hegarty's request for reconsideration is premised on an Arbitrator's final decision dated November 13, 1980, which concludes that maintenance personnel at the hospital in question do work in close proximity to micro-organisms under both the high and low degree risk circumstances. The Arbitrator's decision, a copy of which Mr. Hegarty has enclosed with his request, discusses the issues which formed the basis of Mr. Hegarty's original claim. The Arbitrator decided that the maintenance workers at the hospital are entitled to some allowance for environmental differential pay. However, under the applicable collective bargaining agreement, he limited the award of EDP to the period beginning 15 days before the grievance was filed.

In view of the decision of the Arbitrator in his case, Mr. Hegarty now asks this Office to review our Claims Group's settlement of his claim for EDP back to November 1, 1970, and to grant his claim for the entire period on the basis that the Arbitrator's decision proves that the VA's action was arbitrary and capricious.

In accordance with our "Procedures for Decisions on Appropriated Fund Expenditures Which Are of Mutual Concern to Agencies and Labor Organizations," 45 Federal Register 55689, August 21, 1980, set out at Part 21 of title 4, Code of Federal Regulations, we will neither review nor comment on the decision of the Arbitrator and we will not review Mr. Hegarty's claim on the basis of the Arbitrator's decision.

We issued these procedures in order to inform both labor and management in the Federal sector of our present policies in light of the enactment of the Civil Service Reform Act of 1978, Public Law 95–454 (5 U.S. Code 1101 notes). The procedures govern requests for GAO decisions concerning the legality of appropriated fund expenditures on matters of mutual concern to Federal agencies and labor organizations participating in the labor-management program established pursuant to Chapter 71 of title 5, United States Code, and other Federal sector labor-management programs. They give labor organizations and Federal agencies equal access to GAO on any matter of mutual concern involving the expenditure of appropriated funds, and extend the right to request an advisory opinion on such matters to arbitrators and other neutral parties. They also provide guidance as to when GAO will defer to procedures established pursuant to Chapter 71 of title 5, United States Code.

In accordance with 4 C.F.R. § 21.7(a), an arbitration award which is final and binding under 5 U.S.C. § 7122(a) or (b) will be considered conclusive on GAO in its settlement of accounts and we will not review or comment on the merits of such an award. However, such an award does not constitute precedent for payment in other instances not covered by the award. Moreover, under 4 C.F.R. § 21.8, we retain the discretion not to issue a decision on any matter which we find is more properly within the jurisdiction of the Federal Labor Relations Authority or other administrative body or court of competent jurisdiction.

In accordance with the jurisdictional policies set out above which we believe recognize the intent of Congress in enacting Chapter 71 of title 5, United States Code, as part of the Civil Service Reform Act of 1978, and in recognition of the important role of labor organizations and collective bargaining in the civil service, we will not review or comment on the merits of this arbitration decision and award which were rendered under chapter 71 of title 5, United States Code. Similarly, to the extent that Mr. Hegarty's request for our decision calls into question the finality of the Arbitrator's decision or the propriety of its implementation, such issues are more properly within the jurisdiction of the Federal Labor Relations Authority.

[B–202057]

Funds—Imprest—Availability—Plants, Art Objects, etc. Purchases

Regulation restricting purchase of personal convenience items does not prohibit purchase of decorative plants, etc., for general office use, when a need for such items is determined by agency official and decorations are permanent additions to office decor and result in improved productivity and morale. Determination of necessity and appropriateness is for agency official and fact that offices in question occupy leased space in privately owned building is irrelevant to determina-

tion whether decorating expenses were proper. Compatibility with agency mission is standard to be used.

Matter of: Purchase of Decorative Items with Imprest Funds, July 8, 1981:

This is an advance decision to Josephine Montoya, Authorized Certifying Officer of the Bureau of Indian Affairs (BIA), concerning the propriety of certifying a reconstructed replenishment voucher in favor of Vernon Tsoodle. Mr. Tsoodle is the cashier at the Andarko Area Office of the BIA, and in September 1977, he made $194.51 in imprest cash disbursements for plants, vases and handicraft items which were used to decorate the Andarko Area Office. Relying on 41 C.F.R. 101–26.103–2 (1980), quoted in full below, the Certifying Officer has denied certification. We disagree with the more restrictive interpretation of the regulations, and the voucher to reimburse the imprest fund may be certified for payment.

The regulation governing purchases of art objects, plants, etc., for Government offices is found at 41 C.F.R. 101–26.103–2. It reads as follows:

> Government funds may be expended for pictures, objects of art, plants, or flowers (both artificial and real), or any other similar type items when such items are included in a plan for the decoration of Federal buildings approved by the agency responsible for the design and construction. Determinations as to the need for purchasing such items for use in space assigned to any agency are judgments reserved to the agency. Determination with respect to public space such as corridors and lobbies are reserved to the agency responsible for operation of the building. Except as otherwise authorized by law, Government funds shall not be expended for pictures, objects of art, plants, flowers (both artificial and real), or any other similar type items intended solely for the personal convenience or to satisfy the personal desire of an official or employee. These items fall into the category of "luxury items" since they do not contribute to the fulfillments of missions normally assigned to Federal agencies.

According to its submission, BIA is satisfied that there was a need for the items, especially in windowless offices as described by the Area Director, and that the purchases were not for the personal convenience of individual employees. However, the letter implies that the other requirements of the regulation were not met. The Andarko Area Office occupies leased space in a privately owned building and, therefore, no plan could have existed for the decoration of the entire building, but only for space occupied by BIA. Secondly, the agency responsible for design and construction of the building could not have approved the purchases, since the building was privately owned.

We have never before construed this regulation, but it seems obvious to us that the first sentence in the quoted section applies to new Federal construction and to major renovations of existing Federal buildings. The second sentence, however, leaves determinations as to the need to purchase such items in "space assigned to any agency" to the discretion of the occupying agency. It seems clear that this sentence

contrasts existing space, including leased space, with newly constructed or renovated space and does not require reference to an agency responsible for design and construction.

We have traditionally allowed such improvements where they would contribute to a pleasant working atmosphere, thus improving morale and efficiency. 51 Comp. Gen. 797 (1972); B–178225, April 11, 1973; B–148562, June 12, 1962. The regulation is in accord with our view, providing that personal convenience items are categorically inconsistent with agency missions, but that other decorations may, in appropriate circumstances, be compatible with work related objectives. Such expenditures have been disallowed by this Office only where they were personal in nature (B–187246, June 15, 1977) or where the decorations were seasonal and not for permanent use (52 Comp. Gen. 504 (1972)).

Thus, expenditures for decorative items are authorized when their purchase is consistent with work related objectives and the agency mission, and the decision as to necessity rests within the agency's discretion pursuant to the regulation's terms.

Since this kind of expenditure could be subject to abuse, we suggest that some uniform guidance on costs and types of approved decorations be offered to BIA cashiers who may be asked to make disbursements for office decorations in the future. Nevertheless, we have no basis to object to these disbursements on the basis of the information provided, and the voucher, if otherwise correct, may be certified for payment to reimburse the imprest fund.

[B–166943]

President's Executive Interchange Program—Government Participants—Entitlements—Travel or Relocation Expenses—Travel Expenses—Per Diem or Commuting Expenses

Federal Government employees assigned to the business sector under the Executive Exchange Program may be authorized relocation expenses or travel expenses not to exceed such relocation expense, whichever is determined more appropriate by the employing Federal agency. 54 Comp. Gen. 87, amplified. This decision was later clarified by B–201704, B–202015, Nov. 4, 1981.

Matter of: Executive Exchange Program Participants—Travel and Relocation Expenses, July 14, 1981:

The question in this case is whether an employing agency has the authority to grant—in lieu of moving expenses—per diem or reimbursement of commuting expenses, to an employee participating in the Executive Interchange Program, when payment of such expenses would be less than or equal to moving expenses. In accordance with the discussion below, we would not object to such payments.

The question was submitted for an advance decision by Mr. Lee M. Cassidy, Executive Director of the President's Commission on Executive Exchange, The White House.

The Executive Interchange Program was established under Executive Order No. 11451 of January 19, 1969. This order designated a commission to develop a program under which executives from the Government and private industry would be placed in positions in each other's sector so as to allow for an interchange of ideas and methods. A program has been developed which places the executives from the Government and private industry in such positions for approximately 1 year. During this time, the executives are assigned positions of significant responsibility and also engage in periodic training and conferences to further enhance the learning experience.

On May 15, 1979, Executive Order No. 11451 was superseded by Executive Order No. 12136. Substantively, the new order makes no relevant changes and the above description of the program is still correct.

Mr. Cassidy recognizes that in our decision, B-166943, August 5, 1974, 54 Comp. Gen. 87, we ruled that Federal employees participating in the program are entitled to travel and relocation expenses authorized generally to employees transferred in the interest of the Government. In reaching this result, we concluded that the nature and purpose of the Executive Exchange Program resulted in the employee being on a work assignment rather than a training assignment. Therefore, we held that the employees were entitled to the travel and relocation entitlements incident to a transfer. 54 Comp. Gen. at 88–89.

Mr. Cassidy requests that we further consider our ruling in 54 Comp. Gen. 87 to allow agencies to authorize travel and transportation entitlements for the program participants in a flexible manner which would alleviate certain problems which have arisen. Mr. Cassidy indicates that the authority to grant a per diem or commuting expenses is sought where this would not only accommodate the employee but result in considerable savings to the Government when compared with relocation costs.

The submission contains several examples of specific problems including the following. A current Department of the Navy employee has been assigned to a private employer approximately 70 miles from his home. The employee may be authorized relocation expenses but not commuting expenses though the employee would prefer the latter and it would cost the Government about one-third as much as relocation expenses. In the other situation, an employee from Washington is assigned to Connecticut for approximately 11 months. For family reasons, he is unable to relocate his family and must bear all the ex-

penses of maintaining a residence in Connecticut and a residence in Washington. If he were authorized a per diem, the cost to the Government would be about one-half of the cost of relocation expenses which he could have received.

In 54 Comp. Gen. 87, we did not consider the question involved in the instant case. We concluded the employees serving under the program were on a working assignment and entitled to the travel and relocation allowances; however, having answered the question raised, we did not discuss whether the nature of the work assignment required that travel and relocation allowances incident to permanent change of station were the exclusive entitlements available to the employee.

We recognize that the Executive Exchange Program has characteristics that are different than those normally involved in Federal employment. The employees while so assigned—normally for 1 year—are placed in a leave-without-pay status. Thus, they preserve fringe benefits, entitlements such as life and health insurance as authorized by law. Compensation for the work assignment is paid by the private sector host. We cannot, therefore, equate, on an absolute basis, employees' rights while on such assignments with other Federal employees. We recognize, though, that they are still employees of the Federal Government. As such, it would not seem to us to be unreasonable to permit them, in appropriate cases, to be authorized a per diem for these limited duration assignments. Accordingly, we hold that Federal employees assigned to the private sector under the program may be authorized per diem (or commuting expenses in lieu of and not to exceed per diem) so long as reimbursement for such costs is an amount less than or equal to relocation expenses. The conclusion we reach is in general accord with the travel expense principles set forth in both the Training Act, 5 U.S.C. 4109, and the Intergovernmental Personnel Assignments Act, under 5 U.S.C. 3375, though the measure of reimbursement in each situation is somewhat different.

[B-194709]

Equipment—Automatic Data Processing Systems—Acquisition, etc.—Master Terms and Conditions—Evaluation—Lease-Purchase Agreements

"Installment purchase plan," which provides for monthly payments over 39-month term, to be renewed at Government's option at end of each fiscal year, submitted in response to solicitation for automatic data processing equipment (ADPE) containing Master Terms and Conditions (MTC) was improperly evaluated, classified and accepted under solicitation as a purchase as it did not conform with the terms of the solicitation and solicitation was not amended so that all offerors were given opportunity to submit such plans.

Equipment—Automatic Data Processing Systems—Lease-Purchase Agreements—Ownership of Equipment Status—Risk of Loss Purpose

Although ADPE under "installment purchase plan" does not clearly fall into either category of Government-owned property or contractor-owned property, since terms of "installment purchase plan" obligate agency to pay contractor full price of equipment upon loss, for purpose of risk of loss this ADPE should be considered contractor-owned property.

Equipment—Automatic Data Processing Systems—Lease-Purchase Agreements—Appropriation Availability—Loss, Damage, etc.—Indemnification of Contractor

Since risk of loss provision in "installment purchase plant" and incorporated into contract imposes on agency risk of loss for contractor-owned equipment, agency should have either obligated money to cover possible liability under risk of loss provision or specified in contract that such losses may not exceed appropriation at time of losses and nothing in contract is to be considered as implying Congress will appropriate sufficient funds to meet deficiencies.

Matter of: Federal Data Corporation, July 14, 1981:

Federal Data Corporation (FDC) protests the award of a contract for automatic data processing equipment (ADPE) to International Business Machines Corporation (IBM) under solicitation No. GSA–CDPR–T–00007N issued by the General Services Administration (GSA). The solicitation, which was issued to satisfy the requirements of the Defense Logistics Agency (DLA), Columbus, Ohio, requested offerors to propose plans for purchase, lease and lease with option to purchase. It also indicated that alternative proposals meeting all mandatory provisions would be accepted. Award was to be made to that offeror proposing the lowest overall cost to the Government.

FDC contends that an IBM alternative purchase plan (APP) accepted by GSA was, in fact, a lease with option to purchase (LWOP) and was not a purchase, although it was evaluated as such. In addition, FDC argues that the IBM plan did not meet the mandatory solicitation requirements applicable to either a purchase or a lease and that the risk of loss clause is improper. The protest is sustained as we do not believe that the APP conforms with the terms of the solicitation. We also believe there is merit in FDC's objection to the risk of loss provision.

The solicitation was issued under the GSA Master Terms and Conditions (MTC) program. Generally, the MTCs establish requirements such as bid bonds, performance bonds, acceptance testing, maintenance requirements and acceptable price plans. These requirements are attached to every solicitation issued under the program and the solicitation specifies the particular ADPE requirements and other technical requirements of the user agency for which GSA is conducting the procurement.

The solicitation and the MTCs contained provisions common to both rental and purchase plans and separate provisions applicable to only rental or purchase plans.

In general, the IBM APP provided that, after acceptance of the equipment, most of the rights and obligations of ownership vest in GSA (GSA, however, cannot sell, transfer or encumber equipment except in accordance with the plan) and the agency shall make monthly payments for 39 months until the entire purchase price is paid, at which time GSA acquires unencumbered ownership of the equipment. GSA's obligation for payment is conditioned on that agency exercising an option at the end of each fiscal year to continue payments for the subsequent year. Ownership reverts to IBM and the equipment is to be returned to the company if the option is not exercised. The APP provides that in the event a machine is lost, destroyed or damaged beyond repair during the term of the APP, the agency must pay IBM the sum it would have paid had it prepaid the total amount due at the time the loss occurred. In short, the APP requires that agency to pay IBM the full price for all equipment lost or destroyed during its term even if the agency had the equipment only a short period under the APP.

FDC asserts that the APP was improperly classified as a purchase plan by GSA and evaluated under the solicitation terms applicable to purchases when, in fact, the APP was a LWOP which should have been considered and rejected pursuant to the solicitation terms applicable to rental plans. Thus, the protester contends the APP conflicts with the following two solicitation provisions which apply to rental but not to purchase plans:

(1) Article XVI which provides that the Government shall have the right of discontinuance (right to cancel) without incurring a financial penalty and the contractor shall remove the equipment at its expense.

(a) Under the APP the Government is obligated for all payments for each one-year term and must pay the transportation costs for equipment which is returned.

(2) Article XVIII (a) and (b), as amended, provide for payment on a monthly basis with invoices to be submitted for the month following use.

(a) The APP provides that at the beginning of each one-year option period the Government is obligated for all payments for that term and monthly invoices are to be paid in advance.

It is FDC's position, citing 48 Comp. Gen. 494 (1969), that in order to qualify as a purchase, a plan must require that current fiscal year funds be committed to fully pay the price for the equipment. Since

there is no such commitment here, FDC concludes that the transaction is no different than a LWOP and must be evaluated as such.

It is GSA's view that the APP is a purchase plan and was properly accepted and evaluated as such under the subject solicitation. In this regard, GSA argues that 48 Comp. Gen. 494, *supra*, has been superseded by our decision B–164908, July 6, 1970. In 48 Comp. Gen. 494, *supra*, our Office objected to an installment purchase plan which continued from year to year beyond the initial fiscal year, unless the Government took affirmative action to terminate the agreement, on the basis that the plan was inconsistent with the Anti-Deficiency Act, 31 U.S.C. § 665, and with 31 U.S.C. § 712(a). GSA contends that in B–164908, *supra*, we approved a type of purchase plan similar to the subject APP which involved the purchase of equipment through installment payments where the obligation of the Government terminated at the end of each fiscal year and was renewed only by the exercise of an option by the Government.

Although we disapproved the plan submitted in B–164908, *supra*, we agree with GSA that our decision indicated that plans such as IBM's APP do not violate the Anti-Deficiency Act, as long as they provide that the Government's obligation terminates at the end of each fiscal year and is renewed only by the exercise of the option by the Government. We do not agree, however, that B–164908, *supra*, indicates that plans such as IBM's APP are acceptable under the MTCs or *should* be classified as a purchase under those provisions. Further, we do not believe that B–164908, *supra*, sheds any light on the propriety of those portions of the APP which were not common to the plan reviewed in that decision.

Both parties cite *General Telephone Company of California*, 57 Comp. Gen. 89 (1977), 77–2 CPD 376, in support of their respective positions. In that case, the protester submitted a lease plan calling for the payment of a basic charge during the first year in addition to the installation charge and the rental payments. In concluding that the basic charge represented an illegal advance payment, we reviewed 20 Comp. Gen. 917 (1941), where we approved a partial payment prior to delivery where title to the material paid for was in the Government, and 28 Comp. Gen. 468 (1948), where payment of earnest money with respect to the Government's purchase of real estate was approved on the theory that under the proposed agreement, equitable title would vest in the Government prior to the vesting of legal title. We then stated that under he plan submitted by General Telephone Company, the Government would never acquire legal or equitable interest to the equipment. In this connection we pointed out at page 93:

> * * * For example, the Government has no right to maintain the equipment independent of the lessor, nor can it demand that the equipment be relocated to another site * * *. In addition, the Government has no interest in the residual value of the equipment * * *.

It is FDC's position that the incidents of ownership set forth in *General Telephone*, *supra*—the right to independently maintain the equipment, the right to relocate the equipment and an interest in the residual value of the equipment—which GSA also cites as indicating that it has purchased the equipment under the APP, all exist under a LWOP submitted under the MTCs.

The classification of a plan such as IBM's APP is, of course, primarily the function of the agency which drafted the MTCs and set forth the criteria under which any such plan must be classified. However, the APP does not appear to fit within the MTC requirements for either a lease or a purchase and its proper designation is at best ambiguous.

The rights and obligations in the equipment conveyed under the APP differ in scope from those on LWOP under the MTC provisions would normally convey. For example, it conflicts with the MTC Article XVI dealing with discontinuance and the cost of returning equipment to the contractor and with MTC Article XVIII (a) and (b) regarding payment of invoices in advance of use.

It further differs from a LWOP as it provides that, once it is executed, the agency has "purchased" the equipment and states that the agency shall have all rights and obligations of ownership, except that during the term of the APP it may not sell, transfer (it may relocate the equipment), assign or encumber the equipment. The APP also states that the agency must pay all costs of ownership, including insurance, maintenance and taxes and provides that in the event the equipment is lost or destroyed it must pay IBM the full purchase price. Of course, all these elements expire and ownership reverts to IBM if the Government fails to exercise its option to continue the plan at the end of each fiscal year. Although the value to the Government of such ownership obligations as the obligations to pay taxes and to assume the risk of loss is open to question, there is no doubt that such elements of ownership do not pass under the MTC provisions which apply to a LWOP. These provide that title and risk of loss shall remain in the contractor. Thus, under the MTCs the "costs of ownership" in a LWOP remain with the contractor.

Even if we were to agree with GSA and classify the APP as a purchase there is litle substance to the "benefits" conveyed by the APP over what GSA would have received under a LWOP. Also the rights and obligations conveyed under the APP would still differ in some aspects from those contemplated by the solicitation.

In this regard the APP states that "this APP shall terminate only at the end of each fiscal year within this period" and "upon execution of this APP, and upon each renewal * * * the Government shall be obligated for all payments for the initial and each renewal term respectively" while the "Termination for Convenience of the Govern-

ment" (T for C) clause referenced in the solicitation in essence, gives the agency the right at any time to terminate the agreement in the Government best interest, in which case the contractor recovers his cost and profit up to the point of termination. Since both GSA and IBM agree that the termination portion of the APP was intended to be secondary to the T for C clause, it is our view that if the Government were to exercise its termination right in accordance with the T for C clause that most fundamental provision which was included in both the solicitation and contract would govern. This does not, however, change the fact that the agency accepted the APP which on its face was not consistent with the terms of the T for C clause. Thus, we are unconvinced by GSA's view that since it appears that the agency would prevail in a dispute with its contractor over termination it was proper for it to accept a plan which contained terms inconsistent with the standard T for C clause.

It appears, therefore, that the APP is not completely consistent with the terms of the solicitation no matter whether it is designated a lease or a purchase. While, given the parties' intentions regarding the ultimate nature of the transaction, it may be appropriate for GSA to view the APP as it did, under the MTCs and the solicitation we believe it was inappropriate for GSA to accept the APP under one of the MTC categories without first amending the solicitation to place offerors on notice of the acceptability of such an arrangement. In this regard, it is a fundamental principle of competitive procurement that offerors must be treated equally and given a common basis for the submission of their proposals. *Host International, Inc.*, B–187529, May 17, 1977, 7–1 CPD 346. In negotiated procurements such as this, any proposal which fails to conform with the material terms and conditions in the solicitation should be considered unacceptable and should not form the basis of an award. See *Computer Machinery Corporation*, 55 Comp. Gen. 1151 (1976), 76–1 CPD 358. Thus, to be acceptable under this solicitation the APP must have met the material terms and conditions applying to either a LWOP or a purchase; it met neither. Therefore, when GSA decided that the APP could be considered, we believe it owed a duty to other offerors, who could not reasonably have been expected to interpret the ground rules set forth in the solicitation as permitting the hybrid approach reflected by the APP, to place them on notice through the issuance of an amendment setting forth clear guidelines indicating the acceptability of such plans and providing an opportunity for all offerors to submit such plans. See *Baird Corporation*, B–193261, June 19, 1979, 79–1 CPD 435; *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76–1 CPD 134.

Further, we agree with FDC that the risk of loss provision in the APP may be inappropriate as it could impose an obligation on the Government inconsistent with 31 U.S.C. § 665 and 41 U.S.C. § 11.

The Government has a long established policy of self-insuring its own property on the theory that the size of the Government's resources permits it to do so. See *General Telephone Company of California*, B–190142, February 22, 1978, 78–1 CPD 148. We have also held that under certain conditions the Government may assume the risk for contractor-owned property. 54 Comp. Gen. 824 (1975).

Although the equipment under the APP does not neatly fit within either the category of Government-owned equipment or contractor-owned equipment, for the purpose of risk assumption, it is our view that it should not be treated as Government-owned property. In this regard, we believe it is most significant that the APP places the obligation on the agency, in the event of loss, to promptly pay the full price of the equipment *to IBM* even though the agency may have possessed the equipment only a few days and paid only one of the 39 payments. Further, we note that the agency never holds unemcumbered title to the equipment under the APP and is not obligated to complete payment and obtain "clear" title to the equipment. Since under the terms of the APP the agency is obligated to pay *to IBM* the full price of any lost or destroyed equipment that obligation is more in the nature of reimbursing a contractor for a loss than self-insuring Government property.

Agreements to assume the risk of loss for contractor-owned equipment have often been disapproved by our Office on the basis of 31 U.S.C. § 665 and 41 U.S.C. § 11 (1976), for the reason that such agreements could subject the United States to a contingent liability in an indeterminate amount which could exceed the available appropriation. See 54 Comp. Gen. 824, *supra*. Here, the agency only obligates a sum sufficient to meet the monthly payments required by the APP for the current fiscal year. Any loss which might occur during the first 2 years of the APP would exceed that amount and therefore unobligated funds must be available in the appropriation to cover such a contingency. While in this case the agency's maximum liability is determinable, the amount of a loss could be such as to exceed the unobligated portion of the appropriation. Thus, we stated in 54 Comp. Gen. 824, *supra*, at 827 that:

> * * * any contracts providing for assumption of risk by the Government for contractor-owned property must clearly provide that: (1) in the event that the Government has to pay for losses, such payments will not entail expenditures which exceed appropriations available at the time of the losses; and (2) nothing in the contract may be considered as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies. Absent inclusion of provisions along these lines, the Department will have to obtain legislative exemption

from the application of the statutory prohibitions against obligations exceeding appropriations. * * *

Although the contract with IBM does not contain such precautions, we do not believe its absence would itself be improper if the agency at the time of contract award had obligated money to cover its possible liability under the risk of loss provision. However, the record indicates and the agency confirms that it did not obligate the funds. Thus, the assumption of risk clause in the APP could create an obligation inconsistent with 31 U.S.C. § 665 which prohibits obligations in excess of or in advance of appropriations made for such purpose unless authorized by law and is therefore improper.

For the reasons set out above, we believe the award to IBM under the APP was improper. We do find it feasible to recommend any corrective action with respect to this contract since award was made nearly 2½ years ago. We are recommending to GSA, however, that it consider whether such APP-type "installment purchases" constitute a real advantage over LWOPs so as to justify another category in the MTC provisions in addition to those relating to leases and purchases. If such plans are considered advantageous, we are further recommending that GSA draft solicitation provisions which clearly set forth the acceptable characteristics and boundaries of such plans. Such action should avert many of the problems raised in connection with the current procurement.

The protest is sustained.

[B-198074]

Appropriations—Fiscal Year—Availability Beyond—Contracts—Replacement Contracts—Default *v.* Convenience Termination

An agency's original obligation of funds for a contract remains available for a replacement contract awarded in a subsequent fiscal year where: (1) existing contract was terminated for default and that termination has not been overturned by a Board of Contract Appeals or a Court; or (2) replacement contract has already been awarded by the time a competent administrative or judicial authority converts the default termination to a termination for convenience of the Government.

Appropriations—Obligation—Deobligation—Availability of Deobligated Funds—Replacement Contracts—Default *v.* Convenience Termination

An agency's original obligation of funds for a contract is extinguished and thus not available for a replacement contract where: (1) existing contract was terminated for convenience of the Government on agency's own initiative or upon recommendation of GAO; or (2) existing contract was terminated for default and agency has not executed a replacement contract prior to order by competent administrative or judicial authority converting default termination to a termination for convenience of the Government.

Appropriations—Fiscal Year—Availability Beyond—Contracts—Replacement Contracts—Default Termination

A replacement contract awarded after original contractor has defaulted may be supported by the original obligation of funds even if awarded in a subsequent year if it satisfies the following criteria: (1) it must be awarded without undue delay after original contract is terminated; (2) its purpose must be to fulfill a *bona fide* need that has continued from the original contract; and (3) it must be awarded on the same basis and be substantially similar in scope and size as the original contract.

Matter of: Funding of Replacement Contracts, July 15, 1981:

The Environmental Protection Agency (EPA) requested a decision on the source of funding for replacement contracts. The EPA's questions arose in connection with EPA contract Number 68-03-6064 with Yale Industrial Trucks, Baltimore/Washington, Inc. However, some of the questions apply to hypothetical situations that are different from the contract situation. The answers given below reflect the different rules applicable to different sets of facts.

EPA awarded a contract on February 22, 1979, for an electric fork lift truck in the amount of $18,258. On June 26, 1979, in accordance with the terms and conditions of the contract, the Agency terminated the contract for default for failure of the contractor to furnish the required equipment by the revised delivery date of June 25, 1979. On July 19, 1979, Yale filed a Notice of Appeal with the Agency, pursuant to the contract's disputes clause. On June 27, 1979, one day after it terminated the Yale contract, EPA awarded a replacement contract in the amount of $20,923 to Clarklift of Detroit, Inc. The contract was funded from the same appropriation as the earlier contract and Yale was billed for the excess costs.

In order to clarify what funds are available in this and similar situations, EPA has requested us to respond to the following questions:

Question #1: "Should the funds originally obligated for the defaulted contract be deobligated in situations where actions of the Contracting Officer are being appealed by a defaulted contractor?"

Answer: No, certainly not prior to the time that a decision on the propriety of the default termination has been rendered. (See also our answer to question 2.)

When a contract is terminated for default, the funds obligated for the contract generally remain available for a replacement contract whether awarded in the same or the following fiscal year. 34 Comp. Gen. 239 (1954), 55 *id.* 1351 (1976). The obligation established for the original contract is not extinguished because the replacement contract is considered to represent a continuation of the original obligation rather than a new contract. 34 Comp. Gen. 239 (1955). This rule was founded on policy considerations as early as 1902 (9 Comp. Dec. 10)

and with a few special exceptions, has been maintained by this Office ever since. See, for example, 55 Comp. Gen. 1351 (1976). The primary reason for the rule was to facilitate contract administration. Under a termination for default clause, the Government can terminate the contract when the contractor's performance fails to satisfy critical requirements of the contract. The default clause provisions allow the Government to repurchase the terminated performance and charge the defaulted contractor for any excess costs. This reprocurement arrangement became known as a replacement contract. If all replacement contracts were treated as new contracts, an agency whose contractor defaults would be required to deobligate prior year's funds which support the defaulted contract, and reprogram and obligate current year funds, even though the particular expenditure was budgeted for the prior year. Because contractor defaults can neither be anticipated nor controlled, a great deal of uncertainty would be introduced into the budgetary process. In some cases agencies would have to request supplemental appropriations to cover these unplanned and unprogramed deficits which could result in costly program overruns. The rule, therefore, avoids many administrative problems that cause procurement delays.

We said earlier that *generally* funds obligated for the original contract may remain available to fund a replacement contract in default situations. There are a few caveats. The replacement contract must be made without undue delay after the default and there must still be a *bona fide* need for the goods or services. Also, the replacement contract must be awarded on the same basis as was the original contract, except for the total cost. A procurement which differs markedly in scope, nature and size will be regarded as a new contract rather than a continuation of the old one.

Returning to the circumstances of the Yale contract presented by EPA, we observe that the source of funding for the replacement contract will be unaffected by the eventual outcome of the contractor's appeal of the default determination. The replacement contract was awarded one day after the termination, in the middle of the fiscal year. Therefore, even if the termination was later held to be for convenience rather than default, and the replacement contract was considered to be a new obligation, the same year's funds could be used. 35 Comp. Gen. 692 (1956), 44 *id.* 399 (1965).

Question #2: "If * * * the contractor wins his appeal in the next fiscal year, are the costs to be funded from the original funding appropriation or from funds current at the time of settlement?"

Answer: When a contractor, whose contract is terminated for default, appeals that action to the agency's Board of Contract Appeals

and is successful in overturning that determination in a subsequent fiscal year, the Board normally converts the default to a termination for convenience of the Government. See Federal Procurement Regulations (FPR) 1–8.707(e) (FPR Amendment 182 August 1977) and Defense Acquisition Regulation (DAR) 7–103.11 (DPC 76–6, January 31, 1977). B–193001.2, September 29, 1980.

If the replacement contract already has been awarded by the time the agency's Board converts the default termination to a convenience termination, no deobligation of the prior year's funds will be required. The original obligation may continue to support the replacement contract.

Because the charge to the original obligation was proper at the time the replacement contract was awarded, we do not think the charge should be retroactively declared improper, thereby creating an Antideficiency Act violation casting doubt on the validity of the contract, and placing a burden on the agency to retroactively adjust its accounting records. This is an additional reason why we advised that there is no reason to deobligate the funds charged to the original obligation for the replacement contract pending the outcome of the appeal by Yale.

On the other hand, if, in a subsequent fiscal year, the Board of Contract Appeals ordered conversion of the default termination to a termination for convenience, and, hypothetically, the replacement contract had not yet been awarded, the original obligation would no longer be available for a replacement contract. This is true whenever a contract is terminated for the convenience of the Government, whether the action is taken at the agency's initiative, pursuant to a recommendation from the General Accounting Office, or as a result of a Board-ordered conversion. Any subsequent contract, even if labeled "replacement" and closely resembling the old contract must be regarded as a new contract and must be charged to the fiscal year funds current at the time the new contract is awarded.

Question #3: "The general rule stated by your office is that 'replacement contracts may be charged to the same appropriation obligated with the defaulted contract, etc.' Based on a similar situation as the Yale transaction described above (and assuming the replacement contract is awarded within a reasonable time), if a replacement contract was not awarded until the next fiscal year, should the additional cost be funded from the original appropriation or the appropriation current at the time of the replacement award?"

Answer: As indicated above, funds obligated under the original contract would be available for the purpose of engaging another contractor to complete the unfinished work. 34 Comp. Gen. 239, above.

Since the "*bona fide*" need is viewed as continuing, the entire cost of the replacement contract must be charged to the appropriation current at the time the need arose. See 42 Comp. Gen. 272, 275 (1962). Legally, the defaulting contractor is liable to the Government for the additional cost of the replacement contract. However, recovery of such funds by the Government may be subject to a great deal of uncertainty and delay if the defaulting contractor is insolvent or for other reasons. Hence, the agency may utilize unobligated funds, if any, from its prior years' appropriations to increase the amount of obligations chargeable in that year for the original contract in order to pay the replacement contractor the full amount owed, (while continuing to attempt collection from the defaulting contractor, of course). 59 Comp. Gen. 518 (1980).

Summary

The rules governing the source of funding for replacement contracts are as follows.

A. The original funds remain obligated and available for funding a replacement contract, regardless of the year in which the replacement contract is award:

(1) Where the contracting officer terminates an existing contract for default on the part of the contractor, and the determination that the contractor defaulted has not been overturned by a Board of Contract Appeals or a Court; or

(2) Where a replacement contract has already been awarded, after an agency terminates for default, by the time a competent administrative or judicial authority converts the default termination to a termination for convenience of the Government.

In both situation, the replacement contract must satisfy certain general criteria to be considered a replacement, as opposed to a new, contract. First, it must be made without undue delay after the original contract is terminated. Second, its purpose must be to fulfill a *bona fide* need that has continued from the original contract. Finally, it must be awarded on the same basis and be substantially similar in scope and size as the original contract.

B. The original funding obligation is extinguished upon termination of the contract and the funds will not remain available to fund a replacement contract:

(1) Where the contracting officer terminates an existing contract for the convenience of the Government, either on his own initiative or upon the recommendation of the General Accounting Office; or

(2) Where the contracting officer has terminated an existing con-

tract for default and has not executed a replacement contract on the date that a competent administrative or judicial authority orders the conversion of the original termination for default to a termination for convenience of the Government.

In these situations, the original obligation must be deobligated to the extent it exceeds termination costs. Any subsequent contract awarded must be regarded as a new contract chargeable to appropriations current at the time of the new award.

C. With reference to the specific facts of the Yale contract situation, FY 1979 appropriation may be charged with the costs of the Clark lift replacement contract regardless of the eventual outcome of Yale's appeal.

[B-199758]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Termination—Members Without Dependents—Sea or Field Duty for 3 Months or More—Sea Duty Interrupted by Shore Duty—Effect

A member forfeits basic allowance for quarters (BAQ) for any period of sea duty for 3 months or more. 37 U.S.C. 403(c). A member assigned to such sea duty is not entitled to receive BAQ when he begins temporary duty ashore, which interrupts his sea duty, unless the orders to perform shore duty effectively terminate the member's sea duty. When the shore duty is merely an adjunct to the sea duty and does not alter the nature of the temporary duty from sea duty to shore duty, then the entire period is considered sea duty. 59 Comp. Gen. 192, amplified.

Matter of: BAQ for Members on Temporary Duty, a Portion of Which Constitutes Sea Duty, July 15, 1981:

The Principal Deputy Assistant Secretary of Defense (Comptroller) has requested our decision on a member's entitlement to basic allowance for quarters (BAQ) during a period of temporary additional duty, a portion of which constitutes sea duty. The request has been assigned Committee Action Number 551 by the Department of Defense Military Pay and Allowance Committee.

The questions arise because of the provision in 37 U.S.C. § 403(c) which requires that BAQ be terminated for members without dependents while they are on sea duty for a period of 3 months or more. The Committee is unsure of the application of our decision at 59 Comp. Gen. 192 (1980) which held that a Coast Guard member who was on sea duty for more than 3 months, with intermittent periods of a few days on shore, was not entitled to BAQ.

The Committee states that it is not uncommon for aviation squadrons and embarked troops assigned to temporary additional duty aboard a naval vessel to be ordered ashore to permit use of the vessel for other operational commitments. While these members are ashore they may be assigned duties that are not considered to be sea duty or field duty as defined by Executive order pursuant to 37 U.S.C.

§ 403(j). The Committee perceives an injustice to these members to be denied BAQ while performing temporary additional duty under conditions that are not considered to be sea or field duty.

Temporary additional duty is a form of temporary duty performed away from the member's permanent station when he is expected to return directly to the permanent station. We have held that 37 U.S.C. § 403(c) requires termination of BAQ whether the sea duty is temporary or permanent. 59 Comp. Gen. 486, 488 (1980).

In view of the above, the Committee presents the following set of facts for our consideration: A member, otherwise entitled to BAQ without dependents at the permanent station, was temporarily assigned to a vessel for 6 months to perform duties defined as sea duty. During the deployment, he was periodically ordered ashore to perform duties that are not considered to be sea duty and upon completion of such temporary additional duty he was directed to return to the vessel. During the period of deployment on board the vessel and during periods of duty ashore he was provided Government quarters. Under those facts the Committee asks the following questions:

1. If the period of duty defined as "sea duty" was four months and the period of duty ashore not so defined was two months, would the member lose entitlement to BAQ for the entire period of TAD?
2. If the period of duty defined as "sea duty" was two months and the period ashore was four months, would the member lose entitlement to BAQ for the entire period of TAD?
3. If the deployment was extended to nine months while the vessel was at sea and the period of duty defined as "sea duty" was three months and one day and the period ashore was five months and 29 days, would the member lose entitlement to BAQ for the entire period of TAD?
4. If the period of duty defined as "sea duty" was three months and one day and the period ashore was two months, would the member be entitled to BAQ for the two month period ashore?
5. If the answer to four above is no, may the DODPM [Department of Defense Military Pay and Allowances Entitlements Manual] be amended to provide that the loss of entitlement is only for the period of duty defined as "sea duty?"

Pursuant to 37 U.S.C. § 403(c) the member will lose entitlement to BAQ as of the date he is to begin duty on board the vessel. In view of the fact that his orders are to perform duties defined as sea duty for 6 months, this statute necessitates forfeiture of BAQ commencing with his temporary duty assignment.

In 59 Comp. Gen. 192 (1980) the member was held to have performed more than 3 months of sea duty, and we denied entitlement to BAQ, although in the course of his duties on board the vessel he received further temporary duty orders to perform duties ashore. While these orders interrupted the member's duty on board the vessel for 3 short periods from 2 to 4 days each, the member was deployed on temporary duty to the vessel and that deployment did not change. There is no indication that the member's sea duty was terminated when he was ordered to perform temporary duty ashore. The member's time

ashore was merely supplemental to his sea duty and was not considered to have changed the nature of his temporary duty assignment.

We recognize that once the deployment begins, circumstances may arise which would require that the member perform temporary duty ashore. In our view, if the member receives orders to perform duties ashore and such orders effectively terminate the member's sea duty, so that the duties ashore cannot be considered a mere adjunct to the sea duty, the member may begin receiving BAQ as of the date the temporary shore duty commences. Such shore duty must amount to a change in the character of the member's temporary duty and not be supplemental to the original temporary sea duty orders as in 59 Comp. Gen. 192.

A member continues to receive BAQ while on temporary duty if he is receiving BAQ at his permanent station as long as the temporary duty is not sea or field duty. See DODPM Table 3-2-3, Rule 14. Whether the member is entitled to BAQ during the period he was performing sea duty, prior to the time he was ordered ashore, depends on the length of time he was performing sea duty. In accordance with 37 U.S.C. § 403(c), if that period of time was less than 3 months the member is entitled to BAQ for that period. However, if that time was 3 months or more, he is not entitled to BAQ. If the member's sea duty is terminated by duty ashore, as explained above, and he is later returned to sea duty, the 3-month period prescribed in section 403(c) begins again.

The situations presented are hypothetical and the facts given do not answer the question of whether the sea duty was performed continuously or whether it was broken by intermittent periods of temporary duty ashore. Furthermore, it is not stated whether the orders to perform duty ashore terminated the sea duty and thus changed the member's temporary duty to shore duty, or whether the periods ashore were similar to those in 59 Comp. Gen. 192 which did not break the member's sea duty. As explained above, these facts are essential to a determination of the member's entitlement to BAQ in each situation presented.

With the explanation of the principles provided here and a full knowledge of the facts of each actual situation which may arise, the individual's entitlement to BAQ should be ascertainable. However, doubtful cases may, of course, be submitted to our Office for determination.

[B-201093]

Leave of Absence—Forfeiture—Restoration—Exigency of the Public Business—Jury Duty

Employee of Department of Navy scheduled 40 hours annual leave in writing for December 1979, but he forfeited 16 hours of such leave at end of 1979 leave

year because he performed jury duty. He is entitled to have such annual leave restored since performance of jury duty constitutes an exigency of the public business under 5 U.S.C. 6304(d)(1)(B). See 5 U.S.C. 6322, which prohibits loss of or reduction in annual leave where employee is summoned to perform jury service.

Matter of: George J. DiGiulio—Restoration of Forfeited Annual Leave, July 15, 1981:

The issue for determination is whether jury duty performed by an employee constitutes an "exigency of the public business" so to allow restoration of forfeited scheduled annual leave. For the reasons stated below, we conclude that annual leave which is forfeited by an employee on those days when he performs jury service may be restored and credited to a separate leave account for his use.

Mr. Daniel K. Silverton, Business Manager, Local No. 2145, International Brotherhood of Electrical Workers (IBEW), appeals, on behalf of Mr. George J. DiGiulio, a civilian employee of the Mare Island Naval Shipyard, Department of the Navy, from the settlement action issued by our Claims Group, (Z-2822798), dated May 14, 1980. The settlement action denied the employee's claim for restoration of 16 hours of annual leave which he forfeited at the end of the 1979 leave year.

In March 1979, Mr. DiGiulio scheduled 40 hours of annual leave to be used between December 24 and 31, 1979, since he would accumulate 40 hours of annual leave in excess of the 240-hour ceiling which a Federal employee may carry forward into a new leave year. The leave was approved, in writing, by the employee's supervisor. However, Mr. DiGiulio was summoned to perform jury duty from December 11, 1979, through January 10, 1980. As a result, he was able to use only 24 hours of his 40 hours of excess leave prior to the end of the leave year. Thus, he forfeited 16 hours of annual leave.

During the period he served as a juror, Mr. DiGiulio was excused from performing his official duties and was granted paid court leave by the Department of the Navy under 5 U.S.C. § 6322 (1976). On February 1, 1980, Mr. DiGiulio made an application for restoration of his 16 hours of forfeited leave, supported by a statement from his supervisor that the leave had been cancelled because the employee was performing jury duty. The supervisor requested that the 16 hours of annual leave be restored and carried forward into the 1980 leave year.

In the administrative report dated April 14, 1980, the Commander, Mare Island Naval Shipyard, through his designated representative, stated that there is no authority under the law to restore Mr. DiGiulio's forfeited excess annual leave as there was no exigency or operational demand that would have prevented him from being excused from duty.

The IBEW, on behalf of Mr. DiGiulio, contends that the forfeited annual leave should be restored under the public exigency provision of the act of December 14, 1973, Public Law 93–181, § 3, 87 Stat. 705, 5 U.S.C. § 6304(d), since jury duty constitutes an "exigency of the public business." The union argues that a criminal trial is public business and that an exigency exists since a trial cannot be deplayed to allow a juror to use annual leave.

Under 5 U.S.C. § 6304(a) or (b), an employee is limited to a maximum accumulation of either 30 or 45 days of annual leave and any excess leave at the beginning of the first full biweekly pay period occurring in a year will be forfeited. Prior to the enactment of Public Law 93–181, December 14, 1973, 87 Stat. 705, leave which was forfeited by operation of 5 U.S.C. § 6304(a) or (b) could not be restored to the employee even if such forfeiture was the result of administrative error or was beyond the employee's control. However, this law added a new provision (5 U.S.C. § 6304(d)(1)) which permits forfeited leave to be restored if forfeiture resulted from; (a) an administrative error, or (b) exigencies of the public business when the annual leave was scheduled in advance, or (c) sickness of the employee when the annual leave was scheduled in advance.

With respect to employees summoned for jury service, 5 U.S.C. § 6322(a)(1) provides that a Federal employee is entitled to leave, without loss of, or reduction in, pay or leave to which he otherwise is entitled, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve as a juror. Further, the original statutory provision governing jury service by employees of the United States, the act of June 29, 1940, ch. 446, § 1, 54 Stat. 689, provided that the time involved in such jury service shall not "be deducted from the time allowed for any leave of absence authorized by law." We have stated that the purpose or intent of the statute, in its entirety, is that an "employee of the United States shall receive his regular compensation or pay during the time he is absent on account of jury service, if otherwise in a pay status, and that the period of such service shall not in any event be charged as annual leave." 20 Comp. Gen. 276 (1940).

Subsequent to the enactment of Public Law 93–181 on December 14, 1973, this Office has not formally addressed the issue presented here, i.e., restoration of annual leave in the "use it or lose it" category which has been forfeited in circumstances where the employee has been summoned to perform jury duty. Clearly, prior to December 14, 1973, 5 U.S.C. § 6304(a) required the forfeiture of all annual leave credited to an employee at the close of a leave year which was in excess of the

ceiling established, regardless of the reason for the employee's failure to use such excess annual leave. B–171947, April 7, 1972.

In two recent decisions involving the issue of exigency of the public business, this Office has allowed the restoration of annual leave in situations where there was a pressing need for the employee's services by his employing agency. *Norbert A. Shepanek*, 58 Comp. Gen. 684 (1979); *William D. Norsworthy*, 57 Comp. Gen. 325 (1978). In examining the legislative history of 5 U.S.C. § 6304(d) and the implementing guidelines contained in Federal Personnel Manual Letter No. 630–22, January 11, 1974, however, exigency of the public business is explained in terms of work requirements and situations where employees cannot be spared. See B–197957, July 24, 1980.

Thus, while it appears that exigency of the public business usually refers to the situation where an employee forfeits his annual leave because of a pressing need for him to perform work for his employing agency, there is no guidance in the legislative history of Public Law 93–181, in the regulations promulgated by the Office of Personnel Management, or in the decisions of this Office, as to whether jury service performed by a Federal employee constitutes an exigency of the public business.

However, turning our attention to the provisions of 5 U.S.C. § 6322 (a)(1), we find a clear statutory pronouncement that prohibits the loss of, or reduction in, the annual leave of an employee during a period of absence where he is summoned to perform jury service. In the situation confronting Mr. DiGiulio, where the employee has properly scheduled the use of his annual leave in advance, but is unable to use such leave in the "use it or lose it" category because he is summoned to perform jury service, forfeiture thereof causes a loss of leave of absence authorized by law which is specifically prohibited by 5 U.S.C. § 6322(a)(1).

The provisions of 5 U.S.C. § 6322 clearly recognize the performance of jury service by a Federal employee as being a matter of public necessity and of official concern to the Government. Further, it is the Office of Personnel Management's recommended agency policy that Federal agencies not ask that their employees be excused from jury duty except in cases of real necessity because of the well-recognized importance of trial by jury in the administration of justice in the United States. See Federal Personnel Manual, chapter 630, subchapter 10. We, therefore, conclude that jury service performed by a Federal employee under the previously discussed circumstances does, in fact, constitute an exigency of the public business. Accordingly, annual leave that is forfeited because of jury service may be restored under the "exigency of the public business" exception contained in 5 U.S.C. § 6304(d)(1)(B).

We note that this result is in keeping with the intent of Congress when it enacted Public Law 93–181 to correct certain inequities where leave is lost through no fault of the employee. See H.R. Rep. No. 93–156, 93rd Cong., 1st Sess. 50 (1973).

Accordingly, the 16 hours of annual leave which were forfeited on those days when Mr. DiGiulio performed jury duty may be restored and credited to a separate leave account for his use. The settlement action of May 14, 1980, by our Claims Group, is overruled.

[B–158487]

General Services Administration—Procurement—Accelerated Payment Procedure—Approval of Use

This Office continues to approve use of accelerated payment procedure by General Services Administration (GSA) whereby payment is made to vendor based upon assurance that goods have been shipped rather than awaiting notification that goods have been received by consignee where it is necessary to take advantage of prompt payment discounts and adequate security has been provided to safeguard interests of United States. While accelerated payment procedures theoretically may be more subject to fraud and abuse than system under which goods must be received before payment is made, there is nothing to indicate that benefits bestowed by accelerated payment system previously used by GSA were outweighed by any losses incurred.

Contracts—Payments—Advance—Prior to Receipt of Supplies, etc.—Accelerated Payment Procedure—Internal Control Adequacy

While specific internal controls necessary to protect Government's interest will vary with nature of particular activity involved, it is essential that agencies using accelerated payment procedures have adequate internal controls to assure that they get what they pay for. Agencies ordering from GSA must keep records that permit them to determine that what is paid for is received in proper quantity and condition. It is incumbent on agency placing order with GSA to match order with invoice, payment and receiving report on a timely basis. If discrepancies exist, the ordering agency should contact GSA for followup action to assure these discrepancies are adjusted.

General Services Administration—Services for Other Agencies—Procurement—Supplies, etc.—Accelerated Payment Procedure—Internal Control Adequacy

Once an order is placed with GSA and GSA pays on certification by vendor that goods have been shipped, ordering agency's internal control system should automatically on a regular basis require followup by ordering agency to determine that all goods have been received. If, after a reasonable period of time, goods have not been received, GSA should then be notified to initiate adjustment with vendor.

Contracts—Payments—Advance—Prior to Receipt of Supplies, etc.—Accelerated Payment Procedure—Internal Control Reliability—Testing

Ordering agencies should consider use of statistical sampling in order to test reliability of operation of system of internal controls established to protect Government's interest under accelerated payment procedures with aim of identifying problems and instituting corrective changes. Furthermore, where statistical sam-

ples indicate possible problems, sample should be expanded in order to achieve better understanding of magnitude of problems.

Matter of: Payment for Goods in Advance of Notification of Receipt, July 17, 1981:

This decision to the Administrator of General Services is in response to an inquiry from Raymond A. Fontaine, Assistant Administrator, Office of Plans, Programs, and Financial Management, Office of the Administrator, General Services Administration (GSA), concerning GSA's practice of paying direct delivery invoices from vendors prior to receiving a notification of receipt of goods from the consignee (ordering agency). While we have previously sanctioned this practice under certain conditions in order to assure prompt payment to vendors, see B–158487, April 4, 1966, recent events have raised doubts within GSA that this is still an acceptable practice and caused GSA to question whether additional safeguards are required to protect the Government against fraud. As discussed below, we affirm our position that GSA's accelerated payment procedure should continue to be used in appropriate circumstances.

The Assistant Administrator indicates that:

> In accord with your 1966 decision, it has been the practice of GSA to pay direct delivery invoices without any requirement for the submission of a receiving report from the recipient agencies. There was total reliance on the assumption of notification on non-receipt by the consignee as noted in the first paragraph of this letter. Recent reviews of internal procedures occasioned by publicized charges of scandal within the agency have resulted in our Office of Finance and Office of Audits taking exception to this policy. They believe it circumvents acceptable internal controls and makes it easier for the perpetration of frauds.
>
> As a result of the views of our Finance and Internal Audits Offices, GSA published a change to the FPMR's as Temporary Regulation A–14 on May 1, 1980, transferring the responsibility for payment of nonstock direct deliveries to the ordering agency or activity. This has created severe problems for timely payments by many of these activities (particularly the Department of Defense). As a result of the November 1980 implementation of these direct billing and paying procedures, contractors are experiencing serious delays in making collections from these activities * * *

Although GSA has decided to review its determination to transfer responsibility for payment of nonstock direct deliveries to the ordering agencies or activity, there is some concern on GSA's part that we may no longer approve of the use of procurement practices whereby payment is made for goods before receiving notification of receipt from the consignee. The Assistant Administrator points to a recent GAO draft guideline as evidence of a possible change in our position regarding the acceptability of this practice. The draft document, entitled "Internal Control Assessment Guide" was recently circulated for comment by this Office to various Federal agencies (including GSA). After our Office has analyzed the comments received and made necessary changes, we plan to issue the document as a general guide for agencies to use in assessing their internal control systems.

The Assistant Administrator made reference to a statement in our guide that "Payments must be supported by proper documentation which includes the authorization for purchase, receipt, acceptance, and validity of the vendor invoice data." He also points out that checklist questions 51 and 52, included in the draft guide, refer to the comparison of receipts, quantities, nature and condition to the orders, and that Question 53 asks "Are certifications that services have been rendered or goods have been received in accordance with the terms and conditions of the contract submitted to an authorized official for approval before payment is made?" Absent anything else, this could be viewed as a shift in this Office's position away from the one taken in our 1966 decision authorizing payment for goods in advance of receiving a notification of receipt from the consignee. On the other hand, the Assistant Administrator mentions GAO's letter of August 17, 1979, to the Heads of all Departments and Agencies, B–160725, which endorsed the payment of bills prior to receipt of receiving reports.

Consequently, we have been asked whether payment in advance of notification of receipt of goods is still an acceptable practice when necessary to assure prompt payment; and if so, what internal controls are considered by this Office to be adequate in order to protect the Government's interest.

In B–158487, April 4, 1966, we held that by virtue of authority set forth in section 305 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 255, GSA (and any other executive agency) could pay direct delivery vouchers prior to receipt of receiving reports from consignees, provided the agency determined that the provisions included in each specific contract or in the general provisions of the standard form for supply contracts provided "adequate security" to safeguard the interests of the United States, and that the advance payment procedure for direct deliveries was in the public interest.

In that case, the fact that GSA was doing business with reputable and financially responsible vendors on a recurring basis, coupled with the fact that ordering agencies would promptly notify GSA of nonreceipt of goods, were deemed adequate security to protect the interest of the United States. Thus, if goods were not received by the ordering agency, the agency would notify GSA, which in turn could seek adjustments in its next procurement from the vendor. Furthermore, the decision recognized that it is in the public's interest to pay vendors quickly in order to take advantage of prompt payment discounts.

Since that decision, we have authorized use of similar procedures by other agencies, B–155253, August 20, 1969, and B–155253, October

26, 1967, and have been critical of agencies of the Government for not taking full advantage of the savings offered through accelerated payment procedures. See our report to the Congress entitled "The Federal Government's Bill Payment Performance is Good but Should be Better" (Report), FGMSD 78–16, pp. 20–21, February 24, 1978. We based our criticisms on the belief that agency failure to use these accelerated payment procedures in some circumstances was costing the Government money through lost prompt payment discounts offered by the vendors. Nothing we have been made aware of since we first approved use of the accelerated payment procedures has caused us to alter our position in this regard.

While an accelerated payment procedure theoretically may be more subject to fraud and abuse than a system under which goods must be received before payment is made, we have been shown nothing that would indicate the benefits bestowed by the accelerated payment system previously used by GSA were outweighed by any losses incurred. Furthermore, even if problems are identified, there may exist a reasonable solution to the identified problems which would protect the Government's interest but preserve the benefits bestowed by accelerated payments. At a meeting held to discuss this matter, which was attended by representatives of GSA, the Department of Defense and this Office, no specific examples of fraud could be cited to demonstrate how the accelerated payment procedures had broken down in protecting the Government's interest. However, prompt payment discount losses suffered under the new direct billing and payment system implemented in 1980 and discussed above, were estimated to be between $1.8 and $2 million dollars.

As mentioned previously, the draft "Internal Control Assessment Guide" is intended to be used as a general guide. As a general rule, there is little question that payments should be made only following receipt of goods. However, before issuing the guide in its final form, we plan to revise it to recognize that exceptions exist to the general rule requiring receipt of goods before payment as long as GSA and the ordering agency can be assured that the Government's interest is protected.

The specific system of internal controls necessary to protect the Government's interest will vary with the nature of the particular activity involved. The controls that may be adequate in a situation where a large volume of small purchases are made on a recurring basis from reputable vendors may be inadequate in other situations. However, it is essential that agencies using accelerated payment procedures have adequate internal controls to assure that they get what they pay for.

Agencies must keep records that permit them to determine that what is paid for is received in the proper quantity and condition. See Report p. 21. To do this, it is incumbent upon the agency placing an order with GSA to match the order with the invoice, the payment and the receiving report and to make this determination on a timely basis. If any discrepancies exist, the ordering agency should contact GSA in order to initiate followup actions to assure these discrepancies are adjusted.

Additionally, the system employed by the ordering agency should not be passive in nature. That is, once an agency places an order with GSA and GSA pays on the certification by the vendor that the goods have been shipped, the system should automatically on a regular basis require followup by the ordering agency to determine that all goods in fact have been received. If after a reasonable period of time the goods have not been received, GSA should be notified to initiate adjustment with the vendor.

Furthermore, ordering agencies should consider the use of statistical sampling in order to test the reliability of the operation of the system of internal controls established to protect the Government's interest with the aim of identifying problems and instituting corrective changes. Furthermore, where statistical samples indicate possible problems, we recommend expansion of the sample in order to achieve a better understanding of the magnitude of the problems.

Should problems develop with the accelerated payment procedure to such an extent that it can no longer be assured that the Government's interest is protected, then at that point abandonment of this procedure may be in order.

[B-199145.2]

Bidders—Responsibility *v.* Bid Responsiveness—Minority Subcontracting Goal—Subcontractor Listing—Solicitation Requirement

General Accounting Office (GAO) affirms decision in *Paul N. Howard Company*, B-199145, Nov. 28, 1980, 80-2 CPD 399, in which GAO concluded that grantees cannot require bidders to submit with bids names of firms planned to be utilized in performing work as a condition of responsiveness. Therefore, grantor's current regulation requiring only certification with bid is consistent with that decision. This decision was extended by 61 Comp. Gen. —— (B-204923, Dec. 14, 1981).

Bids—Responsiveness—Responsiveness *v.* Bidder Responsibility—Minority Subcontracting Goal—Certification of Compliance in Bid—Grant-Fund Procurement

Bid is responsive where bidder certifies in its bid intention to perfrom work by utilizing percentage goal of minority subcontractors. Substitution of one subcontractor for another (whether or not listed in bid), before award, concerns bidder's ability to comply with terms of bid or bidder's responsibility; substitu-

tion after award concerns contract administration. Therefore, GAO's decision in *Paul N. Howard Company*, B-199145, Nov. 28, 1980, 80-2 CPD 399, correctly concluded that after bid opening grantee should permit reasonable substitution of one minority subcontractor for one listed in responsive low bid.

Matter of: Paul N. Howard Company—Reconsideration, July 17, 1981:

The Department of Transportation, Urban Mass Transportation Administration (UMTA), requests reconsideration of our decision in the matter of *Paul N. Howard Company*, B-199145, November 28, 1980, 80-2 CPD 399. That decision concluded that the low bidder on a grantee solicitation should have been allowed to substitute a new minority subcontractor after bid opening. In the *Howard* decision, we reasoned that documentation bearing on a bidder's compliance with the solicitation's minority business specifications concerned the bidder's responsibility and could be provided after bid opening even through the solicitation stated that it could not.

UMTA believes that the decision is too sweeping and would unreasonably restrict participation of minority subcontractors. The Paul N. Howard Company (Howard) suggests that the matter is moot because UMTA changed its regulations to eliminate the problem.

Howard presents sound argument that the earlier decision should not be reconsidered; however, in view of the significant impact of a possible misunderstanding of the earlier decision, we have reconsidered the matter. See *Environmental Protection Agency—request for modification of GAO recommendation*, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50. We conclude that the *Howard* decision was correct.

The *Howard* decision considered Howard's complaint that the grantee, Metropolitan Dade County, Florida, with the concurrence of UTMA, improperly rejected its low bid for the construction of two line sections of stage 1 of the Metro-Dade Mass Transit System. The grantee's solicitation established a goal that a certain percentage of the total value of the contract be awarded to minority subcontractors. The solicitation required each bidder "as a condition of responsiveness" to submit information showing compliance with the goal. The grantee concluded that one of the listed subcontractors in Howard's bid did not qualify as a minority business—a fact not known by Howard until after bid opening. The grantee refused to permit Howard to submit the name of another subcontractor to replace the nonminority business.

The *Howard* decision concluded, in essence, that the Howard bid unequivocally bound Howard to perform the contract by utilizing the goal of minority subcontractors. Whether the goal was met by using the subcontractors named in its bid or a substitute acceptable to the grantee was a precondition to performance, i.e., information

concerning the bidder's responsibility or ability to perform as required by its bid, which could be furnished after bid opening.

First, UMTA is concerned that under the *Howard* decision, grantees cannot treat compliance with minority business requirements as a matter of bid responsiveness. UMTA argues that it is not improper under Federal law to require bidders to identify qualified firms in their bids sufficient to meet a solicitation's minority and female subcontracting goals, as a condition of bid responsiveness. UMTA notes that current regulations require only written assurance or certification of meeting the goals to be submitted with the bid; after bid opening, the names of the minority firms may be submitted. UMTA contends that the *Howard* decision implies that the minority subcontracting certification requirement may never be made a matter of responsiveness.

We believe that UMTA's concern is unwarranted. We have no legal objection if grantee solicitations require that bidders submit with bids a written assurance or certification of meeting the minority subcontracting goals. Failure to submit an unambiguous certification can properly be a basis to exclude the bidder from consideration for award. See *RGK, Inc.*, B-201849, May 19, 1981, 81-1 CPD 384, where the low bidder submitted the required certification but its bid prices of the items to be subcontracted to minority firms was less than the required goal, we concluded that the bid was ambiguous and, thus nonresponsive, and it could not be corrected after bid opening. Further, in *Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al.*, B-202510, April 24, 1981, 81-1 CPD 318, we rejected the argument that affirmative action requirements involve only the bidder's responsibility, not the bid's responsiveness.

In our view, the *Howard* decision does not imply that grantees cannot require that bidders submit with bids a written assurance or certification of meeting the subcontracting goals. Further, we find that UMTA's current regulation requiring certification with the bid as a matter of responsiveness is reasonable and consistent with the *Howard* decision.

In rare instances, our Office has not objected to procuring agencies making matters of responsibility matters of responsiveness for particular procurements. *See* 43 Comp. Gen. 206 (1963), where procuring agency presented clear evidence that listing proposed subcontractors was necessary to prevent bid shopping. Here, there is no evidence that listing proposed minority subcontractors in the bid will promote the cause of affirmative action. Instead, the evidence seems to indicate that well-intentioned bidders are being trapped by unnecessary regulatory requirements. The result is higher costs for the same work.

In sum, the bidder's unconditional certification or written assurance to comply with the solicitation's minority subcontractor requirements

makes the bid responsive on that point. The manner in which the bidder carries out its obligation is a matter of contract and grant administration within the purview of the grantee and grantor, respectively.

Second, UMTA is concerned that a grantee must permit substitution of subcontractors after bid opening as in the *Howard* decision. Again, we believe that UMTA's concern is unwarranted. Where a grantee's solicitation requires certification, the low bidder's agreement to perform the work utilizing the goal of minority subcontractors would satisfy the conditions of responsiveness. If after bid opening an intended subcontractor (whether or not listed in the bid) refuses to perform the work or is not acceptable to the grantee or the grantor agency, there is no legal reason to prohibit the low bidder from substituting another subcontractor acceptable to the grantee and the grantor. The low bidder's compliance with the terms of its bid after award is a matter of contract administration and the grantee's determination of the low bidder's ability to comply with the terms of its bid before award is a matter of the bidder's responsibility.

Accordingly, since there has been no showing of errors of law or fact in the *Howard* decision, it is affirmed.

[B–198295.2]

Contracts—Default—Reprocurement—Defaulted Contractor Low Bidder—Price Higher Than on Defaulted Contract—Subsequent Change to Termination for Convenience

Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent alteration of default termination to termination for convenience pursuant to decisions and orders of board of contract appeals does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action.

Matter of: Mark A. Carroll & Son, Inc.—Reconsideration, July 29, 1981:

Mark A. Carroll & Son, Inc. (Carroll), requests reconsideration of our decision in the matter of *Mark A. Carroll & Son, Inc.*, B–198295, August 13, 1980, 80–2 CPD 114. In that decision, we denied Carroll's protest against the rejection of its bid submitted in response to a reprocurement solicitation issued by the Veterans Administration Medical Center for projects 78–003 and 78–004. We also denied Carroll's claim for bid preparation costs. Projects 78–003 and 78–004 were originally awarded to Carroll in October 1978. Carroll's contract was terminated for default on September 21, 1979.

This Office denied Carroll's protest in our earlier decision on several grounds. First, we declined to consider Carroll's contentions that the

termination of its contract was improper because that was a matter for resolution of the contracting parties. Similarly, we dismissed Carroll's argument relating to the similarity of work under the reprocurement and the defaulted contract, because those matters were then pending before the Veterans Administration Board of Contract Appeals.

We agreed with the Veterans Administration's assertion that our decision in *PRB Uniforms, Inc.*, 56 Comp. Gen. 976 (1977), 77-2 CPD 213, barred the award of the contract to Carroll based upon its low bid. In that case, we held, as we had in earlier cases, that a reprocurement contract may not be awarded to the defaulted contractor at a price higher than the defaulted contract price because to do so would be tantamount to modifying the defaulted contract without consideration. *Aerospace America, Inc.*, 54 Comp. Gen. 161 (1974), 74-2 CPD 130.

Finally, we denied Carroll's claim for bid preparation costs on the grounds that rejection of Carroll's bid was not arbitrary or capricious.

Since our earlier decision, the Veterans Administration Board of Contract Appeals has issued several opinions and orders relating to the default and has awarded compensation to Carroll, converting the termination for default to a termination for convenience of the Government. Carroll has requested our reconsideration based upon the decision of the Board of Contract Appeals.

The central issue presented by Carroll's reconsideration request is whether a contractor whose default termination has been converted to a termination for convenience of the Government is subject to the rule set forth in *PRB Uniforms, Inc., supra.*

In this regard, we have stated that there is no authority to permit the award of a reprocurement contract at a higher bid price to a defaulted contractor until such time as that contractor seeks and receives a termination for convenience of the original contract in the appropriate forum. Until such a ruling is made, the prior contract is legally in default. *Down East, Inc.*, B-196654, December 19, 1979, 79-2 CPD 422.

In this instance, the Veterans Administration Board of Contract Appeals did not issue its decisions and orders regarding the termination for default until several months after the reprocurement contract was awarded. Therefore, at the time the reprocurement contract was awarded, the Veterans Administration had a reasonable basis to consider Carroll's bid ineligible for award solely under the rule set forth in *PRB Uniforms, Inc. supra*, and *MKB Manufacturing Corporation*, 59 Comp. Gen. 195 (1980), 80-1 CPD 34. Accordingly, we find no basis to object to the rejection of Carroll's bid.

The request for reconsideration is denied.

[B-195921]

Compensation—Hours of Work—Fair Labor Standards Act—Red Meat Inspectors—Clothes-Changing, etc. Time

Office of Personnel Management is correct in holding that certain Department of Agriculture red meat inspectors. who are required to wear protective clothing and equipment and to keep them clean, are involved in an integral and indispensable part of their principal activity under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* when they are engaged in clothes-changing and cleanup activities at their worksites. GAO will not disturb OPM's factual findings unless clearly erroneous. *Paul Spurr*, 60 Comp. Gen. 354.

Compensation—Hours of Work—Fair Labor Standards Act—Effect of Practice or Custom—Red Meat Inspectors

Section 3(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, does not exclude red meat inspectors' when they are engaged in clothes-changing cleanup activities from being compensable hours worked under FLSA. There was no custom or practice to exclude such activities from being compensable as meat inspectors' union had always challenged Department of Agriculture's determination to exclude such activities from being compensable from the time FLSA was made applicable to Federal employees. Moreover, Agriculture had paid for a certain amount of clothes-changing and cleanup time in the past.

Matter of: Department of Agriculture Meat Inspectors—Fair Labor Standards Act, July 31, 1981:

The Honorable Bob Bergland, while he was Secretary of Agriculture, requested our decision as to whether time spent by food inspectors of the Department of Agriculture's Food Safety and Quality Service (FSQS) in clothes-changing and cleanup activities, is hours of work under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). Comments on the Secretary of Agriculture's request were solicited and received from the Office of Personnel Management, the Department of Labor, and the American Federation of Government Employees (AFGE), which represents the food inspectors who are the subject of this decision.

For the reasons stated below, we affirm the Office of Personnel Management's determination that time spent by FSQS meat inspectors in clothes-changing and cleanup activities is compensable hours of work under FLSA.

FACTS

The Department of Agriculture states the facts giving rise to this case as follows:

At issue is a difference of opinion between FSQS management and Local 2722 over pay for time spent in clothes-changing and cleanup activities. The union considers such time to be an integral part of the principal duties of slaughter inspection and, therefore, hours of work. Management maintains that such activities are considered as preliminary and postliminary to principal duties rather than an integral part.

All parties are in agreement that other activities such as knife sharpening, drawing and securing keys, badges, and tags, cleaning necessary equipment, and completing administrative paperwork are hours of work under FLSA.

* * * * * * *

The Department of Agriculture reports that it employs some 7,500 food inspectors who inspect meat and poultry but the Position Classification standards do not formally recognize any distinction between those inspectors engaged in red meat inspection and those engaged in poultry inspection. The Department of Agriculture report continues:

> Although the OPM decision concerns only those food inspectors employed in red meat slaughter establishments within the Green Bay area, it is an inescapable conclusion that if the decision is implemented in that area, it will have nationwide impact in that FSQS will have to initiate action to insure consistent and equitable treatment of all red meat slaughter inspectors. The impact of this decision on the food inspectors engaged in poultry slaughter inspection or processed product inspection is unknown at this time. In addition, FSQS employs agricultural commodity graders who also work in red meat activities. Here, too, the impact of this decision unknown.
>
> In 1976, USDA requested clarification of pay entitlements of meat and poultry inspectors from the Civil Service Commission, Bureau of Policies and Standards. A number of questions were asked, including a question regarding preparation and cleanup time as hours of work under FLSA. Mr. Frank S. Mellor, Acting Chief, Pay Policy Division, responded on July 28, 1976. * * * The policy set forth in Mr. Mellor's letter has been applied by FSQS and USDA since that date with regard to pay entitlements for food inspectors who engage in cleanup and clothes-changing activities prior to and after the workday. However, the guidance provided in 1976 appears to conflict with the * * * [recent OPM decision made on this matter] and contributes to the uncertainty USDA and FSQS officials are experiencing in regard to proper interpretation of the FLSA.

The recent OPM decision referred to in the above was made as a result of an FLSA complaint against FSQS filed by the President and members of Local 2722, National Joint Council of Food Inspection Locals, AFGE, on behalf of food inspectors involved in red meat slaughter inspection operations in Green Bay, Wisconsin. In it, Mr. Keith Roelofs, Regional Director for the Chicago Region (now the Great Lakes Region) of the Office of Personnel Management, ruled that time spent by meat inspectors in clothes-changing and cleanup activities is compensable hours of work.

The Secretary of Agriculture disputes OPM's decision and contends that the time spent in performing clothes-changing and cleanup activities is primarily for the employees' benefit. He states that the inspectors are not required to wear a uniform, and the agency does not furnish any work clothes, and the only requirement is that their clothes be clean and washable. Laundry service or disposable work garments are provided by the establishments where the inspections are performed. In addition he states that not all red meat slaughter inspectors get soiled on the job to the degree indicated in the OPM decision.

In view of the above conditions and in view of its interpretation of the guidance given it in 1976 by the Civil Service Commission, Agriculture believes that the time spent in clothes-changing and cleanup activities is not hours of work. Moreover, Agriculture argues that even if the above activities are determined to be hours of work then section 3(o) of FLSA excludes them from the provisions of FLSA.

As indicated above we received comments on the Secretary of Agriculture's submission from OPM, the Department of Labor, and from Mr. Kenneth T. Blaylock, President, American Federation of Government Employees. Although the Department of Labor is the Administrator of FLSA for the non-Federal sector, OPM administers FLSA as to most Federal employees, including those of the Department of Agriculture. 29 U.S.C. § 204(f) (1976). In his report to us on the Secretary of Agriculture's submission, Mr. Alan K. Campbell, former director of the Office of Personnel Management, states that the decision of OPM's Great Lakes Region was correct and urges us to uphold that decision. The Department of Labor also states that the meat inspectors clothes-changing and cleanup activities are a part of their principal activity or activities. Mr. Blaylock likewise urges us to find OPM's determination that the clothes-changing and cleanup time is compensable working time.

ISSUES

Three issues are raised by the Secretary of Agriculture's submission.

1. Is the time spent by food inspectors in clothes-changing and cleanup activities hours of work under FLSA?

2. Did OPM give Agriculture contradictory advice and, if so, does that have an impact on the answer to the first issue?

3. Does FLSA section 3(o) exclude the clothes-changing and cleanup activities from the FLSA's hours of work definition?

We shall discuss such issues in order below.

OPINION

1.

Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a), provides in pertinent part that:

> * * * no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended * * * on account of the failure of such employer to pay an employee * * * overtime compensation, for or on account of any of the following activities * * *
>
> * * * * * * *
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Both the Department of Agriculture and the Office of Personnel Management rely on the holding in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), which interprets the Portal-to-Portal Act, to arrive at their opposing conclusions on whether the clothes-changing and cleanup time is hours of work. The issue before the court in *Steiner* was:

> * * * whether workers in a battery plant must be paid as a part of their "principal" activities for the time incident to changing clothes at the beginning of the

shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employer to provide, or whether these activities are "preliminary" or "postliminary" within the meaning of the Portal-to-Portal Act, and, therefore, not to be included in measuring the work time for which compensation is required under the Fair Labor Standards Act. 350 U.S. at 248.

The Supreme Court found that the legislative history showed that the Senate intended the activities of clothes-changing and showering to be hours worked under FLSA "if they are an integral part of and are essential to the principal activities of the employees." 350 U.S. at 254. The court then held that the clothes-changing and showering activities of the battery plant workers were clearly an integral and indispensable part of the battery plant workers' principal activity of employment. 350 U.S. at 256.

The Department of Agriculture argues that the food inspectors clothes-changing and cleanup activities are not "integral" or "essential" to their principal activity of inspecting meat. Agriculture states that there is no reason to believe food inspectors could not perform inspection activities without putting on certain clothes.

The Office of Personnel Management's Great Lakes Region, however, applied the basic clothes-changing and cleanup test in *Steiner* to the facts in this case after making an on-site inspection and investigation and issued the following findings and determination:

> Our finding is that the inspectors involved in red meat slaughter inspection operations in Green Bay circuits are, *for reasons other than mere convenience*, required to spend time in work preparation, clothes changing and clean up which *we conclude to be an integral part of their principal activity*. Although no specific uniform is required for such work and inspectors furnish their own work clothing, it is clear that certain garments (coats, frocks) head coverings, and safety devices such as aprons, wrist guards, scabbards, etc., are necessary to perform the work. Visits to all three "kill floor" operations provided direct visual evidence to confirm that inspectors become soiled with blood and ingesta during the normal work day. It is not a convenience that such protective clothing must be worn and changed, or that such employees clean up at the end of the day. It would be unreasonable to expect that bloody, bacteria-ridden garments be worn home or to a public place such as a restaurant or grocery store. *We maintain that it is the principal activity, red meat slaughter inspection, that makes the clothing unpresentable and which also makes the wearing of such clothing indispensable to its performance*. Analogous to and consistent with the chemical plant and battery plant employee examples, such a principal activity cannot reasonably be expected to be performed without the wearing of certain clothes and equipment. The time spent on the changing of such clothing at the beginning and end of the workday is hours of work and is thus compensable. [Italics supplied.]

As OPM points out, although no specific uniform is required, the Food Safety and Quality Service's *Meat and Poultry Inspector's Manual of Procedures*, Personal Hygiene, Subpart 8–C, which is attached to this decision as an Appendix, does require the use of certain garments, head coverings and safety devices and requires that soiled or contaminated clothing be changed as often as necessary throughout the workday.

Both the Department of Agriculture's regulations and the job description for meat inspectors place a great stress on sanitation procedures and the necessity that inspectors ensure the cleanliness of the meat slaughtering plant as well as their own persons. Moreover, as noted in Mr. Bergland's submission, and specifically pointed out in AFGE's comments, there is a requirement that meat slaughtering establishments provide commercial laundry service for inspectors' outer work clothing or disposable garments.

The Department of Labor, which administers FLSA for the non-Federal sector, supports OPM's decision:

> We agree with this result. As applied to the facts in this case, it is in accord with *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and many other similar cases. The Department of Agriculture asserts that the food inspectors could perform their duties without wearing special clothes, and that therefore the clothes changing and washup activity is not really an integral or essential part of their job. However, the OPM on-site investigation expressly found that the food inspectors "become soiled with blood and ingesta during the normal workday." Here, as in *Steiner* and subsequent cases, where an employee's job necessarily results in his clothes becoming soiled and unpresentable, clothes changing and cleanup activity is plainly part of the "principal activity or activities" within the meaning of Section 4 of the Portal-to-Portal Act.

It is evident that, given the fact that these meat inspectors get extensively soiled or contaminated and given the rigorous sanitation procedures imposed on the meat inspectors, the clothes-changing and cleanup activities are not merely for the convenience of the meat inspectors. We have held that given OPM's procedures for processing FLSA complaints, which procedures include an opportunity for on-site investigations and a review of all pertinent evidence, we would not disturb OPM's factual findings unless clearly erroneous and the burden of proof lies with the party challenging those findings. *Paul Spurr*, 60 Comp. Gen. 354 (1981). Therefore, we believe it was reasonable for OPM to find that clothes-changing and cleanup activities which occur before and after the regular work shifts are necessary extensions of the red meat inspectors' work and are required of the employees as an integral and indispensable part of the sanitation measures required of red meat inspectors.

Nor do we find that OPM gave the Department of Agriculture conflicting advice as to whether clothes-changing and cleanup activities are compensable work hours under FLSA. In 1976, OPM supplied the following information to the Department of Agriculture in response to Agriculture's question as to whether preparation and cleanup time of meat inspectors was hours worked under FLSA.

> Other activities which may be performed outside the workday and, under normal conditions, would be considered "preliminary" or "postliminary" activities include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

However OPM also stated in the same letter:

> However, if an activity is performed merely for the convenience of an employee and is not directly related to the employee's principal activity or activi-

ties, it should be considered a "preliminary" or "postliminary" activity rather than a principal part of the activity. For example, if an employee cannot perform his principal activity without putting on certain clothes, the changing of clothes would be compensable. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activity, it should be considered a "preliminary" or "postliminary" activity under the Portal Act.

In light of the facts presented, OPM's determination that red meat inspectors' clothes-changing and cleanup activities are hours worked reasonably applies the guidance given Agriculture in 1976.

The Department of Agriculture finally argues that even if we find the clothes-changing and cleanup activities to be an integral part of food inspection jobs, FLSA section 3(o) exempts such activities from being deemed compensable hours of work. Section 3(o) reads:

Hours Worked.—In determining for the purposes of sections 6 [minimum wage] and 7 [overtime] the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Agriculture contends that, since it has never paid red meat inspectors for clothes-changing and cleanup activities and payment for such activities has been in dispute ever since the effective date of Federal employees' coverage under FLSA, such nonpayment is a ". . . custom or practice under a bona fide collective-bargaining agreement" as contemplated by section 3(o).

In determining whether the clothes-changing and cleanup activities are excluded because of custom or practice, OPM was guided by the Department of Labor's instructions in section 31b 01 of its *Field Operations Handbook* which states as follows:

There are certain instances in which clothes changing and washup activities by employees on the premise of the employer are integral parts of the principal activities of the employees because the nature of the work makes the clothes changing and washing indispensable to the performance of productive work by the employees, but the collective bargaining agreement in effect in the establishment is silent as to whether this time should be included in, or excluded from hours worked. Where such clothes changing and washup activities are the *only* preshift and postshift activities performed by the employees in the premises of the employer [and] the time spent in these activities has never been paid for or counted as hours worked by the employer, *and the employees have never opposed or resisted this policy in any manner although they have apparently been fully aware of it*, there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time. [Italic supplied.]

The Office of Personnel Management found that the food inspectors union had indeed opposed or resisted the determination that clothes-changing and cleanup activities from being considered as compensable under FLSA. Moreover, OPM found that in several plants inspectors were in fact receiving compensation for these activities during the 8-hour day. In light of this and the Department of Agriculture's admission that compensation for such activities has been a matter of

discussion "* * * since the effective date of the FLSA amendment * * *," we find that no custom or practice excluded the clothes-changing and cleanup activities from being considered as compensable hours of work. *Secretary of Labor, United States Department of Labor* v. *E. R. Field Inc.*, 495 F.2d 749 (1st Cir. 1974).

* * * * * * *

As noted above, the Department of Agriculture has also expressed concern that the determination of OPM's Great Lakes Region that red meat slaughter inspectors are performing hours of work when they perform clothes-changing and cleanup activities may have an impact on all other food inspectors engaged in poultry slaughter inspection or processed product inspection. We would point out, however, that merely because one type of FSQS inspector has been found to be engaged in hours worked when performing such activities does not mean that all inspectors must also be found to be enaged in hours worked when performing clothes-changing and cleanup activities. A determination of whether an employee has performed hours worked under FLSA depends not on the position classification standards, which are similar for various types of food inspectors, as the Department of Agriculture suggests, but on the actual conditions of employment. It may be that other inspectors change clothes and clean up in circumstances different from those here and they may do so for their own convenience, and not because such activities are an integral and indispensable part of their duties. The application of this decision is, thus, limited to the FSQS inspectors engaged in red meat inspection in circumstances described herein and to those inspectors who are similarly situated.

CONCLUSION

In this decision, therefore, we uphold OPM's determination that red meat slaughter food inspectors of the FSQS within the Green Bay area perform work under FLSA when they are engaged in clothes-changing and cleanup activities. Moreover, we find that no express agreement or custom or practice excluded the clothes-changing and cleanup activities from being considered as compensable hours of work.

APPENDIX

Meat and Poultry Inspector's Manual of Procedures

PERSONAL HYGIENE

Subpart 8–C

(Regs: M–308; P–Subpart H

* * * * * * *

Personnel with clean hands, clothing, and good hygienic practices are essential to the production of clean and wholesome products.

8.16 WEARING APPAREL

(a) Garments

All garments (coats, frocks, etc.) shall be clean, in good repair, and of readily washable material. Street clothes shall be covered while handling exposed edible product. Clothing that becomes soiled or contaminated during the workday shall be changed as often as necessary. White or light-colored garments are desirable.

(b) Head Covering

All persons working where exposed product is handled must wear suitable head coverings to prevent hair from falling into the product.

(c) Aprons, Wrist Guards

Safety devices, such as aprons, wrist guards, etc., shall be of impervious material, clean and in good repair. Persons handling edible products shall not wear leather aprons, wrist guards, or similar devices unless clean, washable coverings are used over them.

(d) Gloves

When during post-mortem inspection it becomes necessary for the inspector to wear gloves, such gloves should be of the surgical type.

Cotton gloves worn by persons handling edible product should not have dyed cuffs that may contaminate product and should be replaced when contaminated.

Mesh gloves or guards must be cleaned and sanitized when contaminated and at the end of daily operations. If such gloves are worn by eviscerators and head or bung droppers, they shall be covered with gloves of impervious material. Mesh gloves must be promptly replaced if the links are broken or missing.

Light-colored rubber or plastic gloves may be worn by product handlers, provided they are clean and in good repair.

* * * * * * *

(h) Footwear

Shoes and boots should be appropriate for operations and, in most cases, of impervious material.

Eviscerator's boots. Persons working on moving top tables shall wear white or otherwise identifiable impervious boots, worn only on the table and adjacent boot cleaning compartment. They must use other footwear when walking to and from working area. To prevent contamination splash to viscera, carcasses, and table, such person must clean and sanitize contaminated aprons, knives, or footwear in boot cleaning compartment.

(i) Personal Equipment

Cloth or twine wrappings on implement handles and web belts are not permitted.

[B-203306, B-203306.2]

Washington Metropolitan Area Transit Authority—Grant-Funded Procurements—Competition Requirements—Subway Project—Lease/Purchase Agreement—Merits of Complaint

Where each offeror's proposal deviated from mandatory, material, additional-rent requirement of grantee's prospectus, grantee should not have considered any proposal as acceptable. Since grantee is willing to accept proposals with such conditions, grantee should so revise prospectus and permit offerors to compete on common basis. In view of this conclusion, other bases of complaint need not be decided; however, several matters to be considered by grantee prior to reopening competition are pointed out.

Matter of: Messrs. Albert Abramson and Theodore N. Lerner, trading as White Flint Place; Travenca Development Corporation, July 31, 1981:

Messrs. Albert Abramson and Theodore N. Lerner, trading as White Flint Place (White Flint), and Travenca Development Corporation

(Travenca) complain against the proposed award to Paramount Development Corporation (Paramount) under a joint development prospectus for the White Flint Metro Station (parcel MA–364) issued by the Washington Metropolitan Area Transit Authority (WMATA).

WMATA acquired the real property involved in this matter pursuant to 80-percent funding from a grant under the Urban Mass Transportation Act of 1964, as amended. White Flint and Travenca request that we review WMATA's proposed award to Paramount in accord with our announcement, "Review of Complaints Concerning Contracts Under Federal Grants," 40 Federal Register 42406 (September 12, 1975). In addition, WMATA requests that our Office consider the matter and provide our views on the merits of the complaint. This decision is rendered in response to WMATA's request.

We understand that WMATA has agreed to abide by our decision on whether WMATA's selection of Paramount was reasonable and consistent with competitive principles. We conclude that WMATA's actions were not reasonable and not consistent with competitive principles.

White Flint and Travenca principally complain that since WMATA's prospectus contemplated a long-term leasehold arrangement with the selected contractor for the whole site, WMATA could not accept Paramount's proposal based on the purchase of the residential portion of the site without inviting similar proposals from White Flint and Travenca. Further, White Flint and Travenca contend that WMATA would be violating the conditions of the Federal grant if it sold a portion of the real property without prior approval from the grantor, the Urban Mass Transportation Agency (UMTA).

White Flint also complains that WMATA's evaluation of its proposal was improper because it was not on a basis comparable to the evaluation of Paramount's proposal, and WMATA's selection of Paramount will not result in the best economic return to WMATA.

Travenca also complains that Paramount and White Flint took material exceptions to the mandatory requirements of the prospectus. In that regard, WMATA reports that Travenca also took exception to a mandatory, material requirement of the prospectus. Travenca further complains that WMATA did not realistically evaluate the financial aspects of the proposals.

We find that each one of the proposals was unacceptable because each one took exception to a material requirement of the prospectus. Consequently, we recommend reopening the competition based on a revised statement of WMATA's current requirements as related to the exceptions taken and other factors calling for corrective action outlined in this decision.

Pursuant to WMATA policy, WMATA formulated and issued the prospectus soliciting proposals for the lease and joint development of real property excess to transit facility requirements at the White Flint Metro Station site. The mixed-use development potential of the site is set forth in the approved Montgomery County, Maryland, sector plan. It depicts 300 hotel units, 650,000 square feet of commercial office space, 73,000 square feet of retail space, and 650 residential units. The project is expected to yield improved ridership, revenue equal to the property's acquisition cost, greater accessibility to and enhanced esthetics of the station, and other benefits. This negotiated-type competition was the method that WMATA used to select the joint development contractor.

The prospectus stated in section IV, Requirements of Lease, that as one of the major lease provisions,

> [a]ll lease proposals will contain a complete rental offer as follows:
> a. Minimum guaranteed rent to be paid during the initial four (4) year development period of the lease. * * *
> b. Minimum guaranteed rent to be paid during the fifth (5th) through the fiftieth (50th) year of the lease.
> c. Additional rent payable to WMATA during the sixth (6th) through the fiftieth (50th) year of the lease. This additional rental, above the minimum guaranteed rent to be paid, *shall be expressed as a fixed percentage of all gross income from the project.* [Italics supplied.]

Section VII, Selection Procedure, stated that the first of the selection factors to be considered in the selection process is "[f]ull conformity to all requirements set forth in the [p]rospectus."

In response to the additional rent requirement for a fixed percentage of all gross income, Paramount proposed 10 percent of gross income exceeding $55 million per year, White Flint proposed 8 percent of gross income exceeding $30 million per year, and Travenca proposed 1.2 percent of all gross income "subordinate to debt service."

From past dealings with WMATA, White Flint explains that the exclusion of some gross income from the additional rent computation would be acceptable to WMATA. It appears that Paramount's past association with WMATA resulted in a similar understanding. Only Travenca was unaware of WMATA's relaxed interpretation of the unambiguous requirements of the additional rent provision. Travenca explains that the "subordinate to debt service" qualification in its proposal did not affect the magnitude of Travenca's rent payments, but established a priority in the event of default; the debtor would be paid before WMATA. WMATA did not reject any of the additional-rent proposals as unacceptable.

A fundamental competitive principle is that all competitors must be given the opportunity to submit offers on a common basis. *Cohu, Inc.*, 57 Comp. Gen. 759 (1978), 78-2 CPD 175; *International Business*

Machines Corp., B–194365, July 7, 1980, 80–2 CPD 12; *Burroughs Corporation*, B–194168, November 28, 1979, 79–2 CPD 376. While we need not decide, we note that this principle would be applicable even if it was determined that WMATA's procurement regulations governed this matter since those regulations provide that contracts shall be made on a competitive basis to the maximum practicable extent.

WMATA contends that its conduct in selecting contractors, like Paramount, for revenue-producing contracts, like this joint development project, is not restricted by the laws that established WMATA or WMATA's procurement regulations. WMATA contends, citing various court decisions and decisions of our Office, that its actions are not subject to objection because they were reasonable. Specifically regarding the prospectus, WMATA argues that the prospectus did not mandate precise conformance to the detail specified at the risk of rejection for nonconformance. WMATA concludes that, in view of the substantial advantage of the Paramount proposal, it cannot be said that the failure to advise Travenca of the permissibility of sheltering some revenue from the application of the additional rent provision constitutes an abuse of discretion requiring that the selection be invalidated.

Where, as here, negotiated-type procedures are used and there is a change in the stated needs or requirements, or the agency decides that it is willing to accept a proposal that deviates from those stated requirements, all offerors must be informed of the revised needs and given the opportunity to submit a proposal on the basis of the revised requirements. *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75–2 CPD 144; *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76–1 CPD 134; *Cohu, Inc., Supra.*

We conclude that the additional rent provision of section IV of the prospectus was a requirement of the prospectus and that, as such, section IV of the prospectus mandated full conformity with it.

In our view, each offeror's proposal deviated from the additional-rent requirement of the prospectus, the requirement was mandatory, and the additional-rent provision was material. Each offeror took an advantage that, under the prospectus, was not permissible. None of the proposals satisfied the terms of the prospectus; therefore, based on WMATA's statement of requirements, none should have been considered acceptable by WMATA. We believe that WMATA's failure to notify the offerors of its willingness to accept such proposals falls short of the standard that all offerors must be given an opportunity to submit a proposal based on the revised requirement. Further, we

believe that WMATA established a mandatory requirement and then ignored its application to all three proposals. We may not speculate on how offerors may have revised the nonfinancial aspects of their proposals had WMATA enforced the requirement as WMATA wrote it. Since WMATA is willing to accept proposals with conditions like those imposed by the offerors, we recommend that WMATA so revise the prospectus and permit the offerors to compete on a common basis.

Accordingly, the competition should be reopened based on a current statement of WMATA's additional-rent requirements. Our conclusion on this point makes it unnecessary for our Office to consider the merits of the other bases of complaint. However, since we have recommended reopening the competition, we point out certain matters which WMATA should consider prior to implementing our recommendation.

WMATA's revised statement of requirements should clearly provide the parameters on the acceptability of lease/purchase proposals. If the sale of a portion of the site is contemplated in the revised prospectus, then we suggest that WMATA obtain UMTA's concurrence prior to award of the contract.

We also suggest that, rather than merely accepting the proposers' financial information, WMATA should evaluate the revenue projections of each proposal from the standpoint of realism and the common elements of each proposal.

The record indicates that all offerors exceeded the limitations of the applicable sector plan distorting the actual financial return to WMATA. To cure this and to provide a common basis for evaluation, WMATA should include in the prospectus the salient aspects of the sector plan which offerors may not exceed for purposes of evaluation. For example, all of the development plans produced peak hour trips exceeding the sector plan guidelines.

Finally, we also suggest that the revised statement of requirements indicate the relative importance of evaluation criteria (such as, economic return, responsiveness with the sector plan, utilization of minority business enterprise, financial qualifications and experience of the offeror, etc.) so that offerors can better tailor proposals to WMATA's requirements.

Since we recommend reopening the competition, claims for proposal preparation costs by Travenca and White Flint need not be considered.

U.S. GOVERNMENT PRINTING OFFICE : 1982 O - 368-184