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[B-198349]

Subsistence—Per Diem—Military Personnel—Temporary Duty—"Lodgings-Plus" System—Staying With Friends, Relatives, etc.

A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging provided by a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations para. M4205-1 provides that under such circumstances there may be no reimbursement for the cost of lodgings.

Matter of: Lieutenant (junior grade) James O. McGranahan—Staying at Friends' Apartment on TDY, November 3, 1980:

By letter of April 2, 1980, an advance decision is requested concerning the reimbursement of expenses for lodging incurred by a member of the military during temporary duty while staying at the apartment of a friend. Since reimbursement is not permitted for expenses incurred by a member for lodging provided by a friend, the claim is denied.

The request for an advance decision was made by Lieutenant (junior grade) S. R. Miller, disbursing officer at Moffett Field, California, and was assigned Control No. 80-13 by the Per Diem, Travel and Transportation Allowance Committee.

For the period of August 20 through September 14, 1979, Lieutenant (junior grade) James O. McGranahan was on temporary duty in San Diego, California, for Legal Officer School. Since Government quarters were not available, Lieutenant McGranahan stayed in the apartment of a friend, to whom he paid $300 in rent. He received no receipt for the payment from the apartment owner or his friend, nor did he furnish any information indicating increased costs incurred by his host due to his stay at the apartment.

This situation is covered by Joint Travel Regulations, para. M4205-1, which provides, in pertinent part:

> If the member uses no lodging during the temporary duty period or utilizes lodging as a guest of friends or relatives, then the average cost of lodging is zero * * *

This provision is established under the authority granted to the Secretaries having jurisdiction over the uniformed services by 37 U.S.C. § 404 (1976). The purpose of the prohibition against reimbursing friends and relatives is to eliminate potential abuses from occurring in connection with claims involving lodging with friends or relatives.

The lodging here was obtained by Lieutenant McGranahan from a friend. Although the friend expected payment for permitting Lieutenant McGranahan to stay in his apartment, the friend did not operate a commercial establishment and this is the type of reimbursement against which the regulation is aimed. Paragraph M4205-1 was revised

January 1, 1978, to its current form, but prior to that paragraph M4205 (effective October 3, 1976) provided, in pertinent part:

> If the member uses no lodging during the temporary duty period or utilizes lodging without cost, including as a guest of friends or relatives, then the average cost of lodging is zero * * *.

The current regulation as revised omitted the language "without cost," indicating that a member may be a guest even if there is some cost involved. Moreover, the Per Diem, Travel and Transportation Allowance Committee advises that the use of the term guest is unfortunate and that the intent of the regulation is to allow zero dollars for lodging whenever a traveler stays with a friend or relative. This regulation was promulgated pursuant to statutory authority and it must be followed. Therefore, Lieutenant McGranahan is not entitled to reimbursement for the lodging expenses he has claimed.

In accordance with the foregoing, the claim for reimbursement must be denied.

[B-180010.07]

Compensation—Prevailing Rate Employees—Negotiated Agreements—Overtime—Double—Supervisory Employees' Entitlement

Long-standing practice of paying double overtime to foremen whose pay is not negotiated but is fixed at 112.5 percent of negotiated journeyman base pay was discontinued because 57 Comp. Gen. 259 held that overtime is limited by 5 U.S.C. 5544 to time and a half, notwithstanding section 9(b) of Public Law 92-392 preserving previously negotiated benefits. Foremen claim restoration of double overtime because section 704(b) of Public Law 95-454 overturned holding and permitted double overtime for nonsupervisory employees who negotiate wages. While not directly covered by sections 9(b) or 704(b), foremen may continue to receive double overtime since broad purpose of these statutory provisions was to preserve prevailing rate practices existing before their enactment. Modifies (extends) 59 Comp. Gen. 583 (1980).

Matter of: W. L. Ableidinger and E. G. Walters—Foreman—Double Time for Overtime Work, November 7, 1980:

Ms. Nedra A. Blackwell, an authorized certifying officer with the Bureau of Reclamation, Pacific Northwest Region, Department of the Interior, has requested a decision as to whether Mr. W. L. Ableidinger and Mr. Eldon G. Walters, employees of the Yakima Project, Bureau of Reclamation, may receive overtime compensation at double time rates.

FACTS

Messrs. Ableidinger and Walters are hourly Foremen II who directly supervise power plant workers whose hourly pay rates are determined through collective bargaining under an agreement between the Department of the Interior and the International Brotherhood of

Electrical Workers, Local Union No. 77. This collective bargaining agreement, which is covered by section 9(b) of Public Law 92–392, August 19, 1972, 86 Stat. 54 (5 U.S. Code 5343 note), provides that nonsupervisory workers shall receive double time compensation for overtime work. The two foremen, however, being supervisory personnel, are excluded from the bargaining unit of the workers they supervise and their pay is administratively established at 112.5 percent of the negotiated journeymen base rate.

Prior to March 14, 1979, it has been the practice of 20 years to pay the foremen double time for overtime work, based on the fact that foremen's wages were expressed as a percentage of compensation of the workers they supervised. The Bureau, however, has now denied Messrs. Ableidinger and Walters' request for double time. The Bureau's decision to deny double time to the foremen was apparently taken because a decision of the Comptroller General, 57 Comp. Gen. 259 (1978), limited overtime compensation under 5 U.S.C. 5544 to time and a half, section 9(b) of Public Law 92–392 notwithstanding. The question presented therefore is whether the foremen may be paid at double time rates for overtime work because their rates of pay are based on nonsupervisory rates which incorporate a double time provision.

OPINION

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

On October 13, 1978, statutory authority to negotiate double overtime for section 9(b) employees was enacted in section 704(b) of the Civil Service Reform Act of 1978, Public Law 95–454, 92 Stat. 1218, which provided that overtime could continue to be negotiated for such employees without regard to 5 U.S.C. 5544. In enacting section 704, the Congress made it clear that it was overruling decision 57 Comp. Gen. 259 (1978) and that it was providing "specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector

of the economy." Conference Report (to accompany S. 2640), House Report No. 95–1717, October 5, 1978, p. 159.

In light of the enactment of section 704, we reconsidered 57 Comp. Gen. 259 (1978) regarding overtime pay. We held in 58 Comp. Gen. 198 (1979) that, since section 704(b)(B) specifically provides that the pay and pay practices of employees covered by section 9(b) of Public Law 92–392 shall be negotiated without regard to subchapter V of chapter 55, title 5, United States Code (which contains section 5544 pertaining to overtime pay for prevailing rate employees), our decision 57 Comp. Gen. 259 was overruled insofar as it had invalidated overtime contract provisions of Interior's prevailing rate employees whose wages were negotiated.

More recently in our decision 59 Comp. Gen. 583 (1980), which was a case similar to that here, we held that certain Corps of Engineer employees who did not negotiate their wages but who had been for 22 years paid double time for overtime under the special Pacific Northwest Regional Power Rate Schedule which was itself based on prevailing wage practices, could continue to be paid double time. We concluded that even though these employees were not specifically covered under section 9(b) of Public Law 92–392 as implemented by section 704(b) of Public Law 95–4554, the broad purpose of these provisions was to preserve prevailing rate practices existing before their enactment.

Here, as in the case of the Corps of Engineers employees, the foremen are not specifically covered by section 9(b) nor by section 704(b), since they do not negotiate their wages. The foremen's wages, however, have for a long time been based on rates established by employees who do negotiate their wages and who are therefore covered by the savings provisions in the above cited laws. Moreover, it has been the practice for 20 years to pay these foremen double overtime. The two foreman who have filed claims for double overtime in the instant case were also involved in *E. G. Walters, et al.*, B–180010.07, June 15, 1977. We found that, since the foremen's salary is assimilated without limitation to the rate of pay negotiated for journeymen, the foremen were entitled to a retroactive pay increase based on a retroactive pay increase which the journeymen had received.

Since the broad purpose of section 9(b) and section 704(b) was to preserve pre-existing prevailing rate practices, and since there is no sound basis for distinguishing the foremen's situation from that presented in 59 Comp. Gen. 583, *supra*, we hold that the payment of double time for overtime to the foremen of the Yakima Project is proper. Therefore, Messrs. Ableidinger and Walters are entitled to double time compensation for overtime work, including corrective payments for the period when double time was discontinued.

[B-199445.4, B-199445.5]

Bids — Acceptance Time Limitation — Dissimilar Provisions— Cross-Referencing—No Entry by Bidder—Bid Responsiveness

Bidders' failure to insert number in space provided for indication of offered bid acceptance period does not render bids nonresponsive where invitation for bids (IFB) contained standard provision that bid would be considered open for acceptance for 60 days unless bidder indicated otherwise in space provided, with asterisk centered in space with footnote to another IFB provision requiring bids to be open for at least 90 days, since asterisk and cross-referencing had effect of incorporating 90-day acceptance period into standard provision, to which bidder committed itself by signing bid.

Matter of: Robert E. Derecktor of Rhode Island, Inc.; Marine Power & Equipment Co., Inc., November 17, 1980:

This decision is in response to the suspension of proceedings by the United States District Court for the District of Rhode Island in a suit filed by Robert E. Derecktor of Rhode Island, Inc. (Derecktor), Civil Action No. 80-0445, pending receipt of our opinion in related protests filed in our office by Derecktor and Marine Power & Equipment Co., Inc. (MP&E), which intervened in the suit. Derecktor's low bid and MP&E's second low bid under Coast Guard solicitation CG-011738-A to construct nine cutters were rejected as nonresponsive because of the firms' alleged failure to offer to keep the bids open for the bid acceptance period stipulated in the invitation. The contract was awarded to Tacoma Boatbuilding Co. (Tacoma), the third low bidder.

Although more than one issue has been raised by the protests, the court has asked us for a decision limited to the narrow issue presented by the rejection of the bids as nonresponsive.

We believe that the two low bids were improperly rejected for failure to offer the required minimum acceptance period.

FACTS

Page 1 of Standard Form (SF) 33, "Solicitation Offer and Award," which was the first page of the invitation, provided:

> In compliance with the above, the undersigned agrees if this offer is accepted within *———————— calendar days (60 calendar days unless a different period is inserted by the offeror) * * * to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule. *CAUTION—See subsection C-21.

All but the asterisk in the space provided and the caution were preprinted. Subsection C-21 stated:

> Bids offering less than 90 days for acceptance by the Government from the date set for opening will be considered nonresponsive and will be rejected.

Bids were opened in June 1980, with the following results:

Derecktor	$349,530,719
MP&E	380,854,103
Tacoma	391,882,517
Avondale Shipyards, Inc	407,496,208
Alabama Dry Dock & Shipbuilding Co	417,752,891
Bath Iron Works Corporation	427,037,689

Derecktor and MP&E, as well as Avondale Shipyards, Inc., failed to insert an acceptance period in their bids, which therefore were rejected as nonresponsive because in the Coast Guard's view the SF 33 language quoted above meant that the two bids properly could be viewed as offering an acceptance period of only 60 days.

GENERAL DISCUSSION

The failure of a bidder to offer at least the bid acceptance period required by a solicitation normally renders the bid nonresponsive. The reasons are two-fold. First, a bid offering less than the required period is not an offer that meets the Government's minimum needs. Second, a bidder which offers a shorter period than that specified gives itself an advantage over other bidders in that its risk is less and it has the option after bid opening to decline award after expiration of its bid or extend its acceptance period if it desires award. See *Hemet Valley Flying Service Co., Inc.*, B-191390, May 8, 1978, 78-1 CPD 344, and cases cited therein. Thus, we have held in a number of decisions that where bidders were advised by standard language that the bid acceptance period would be a certain number of days unless the bidder inserted a different period in the space provided, and the solicitation stated elsewhere that bids offering less than a number of days greater than that "base" number would be rejected as nonresponsive, a bid which specifically offered less than the required period or had no entry in the space provided properly was rejected as nonresponsive. *See, e.g.*, 49 Comp. Gen. 649 (1970); 47 *id.* 769 (1968); 46 *id.* 418 (1966). We nonetheless did recommend that in such circumstances a cross-reference to the required minimum acceptance period provision be made in the standard provision. *See* 46 Comp. Gen. *supra.*

Our position was amplified in our decision in 52 Comp. Gen. 842 (1973), which contained bid acceptance provisions almost identical to those in the instant case, except that they were not cross-referenced in any way. There, 10 of the 13 bidders responding to three solicitations left blank the space on the SF 33 for indicating a bid acceptance period of other than 60 days, and their bids were deemed nonrespon-

sive for failure to comply with the 90-day bid acceptance period. We stated:

> * * * where an invitation contains language specifying a bid acceptance period and another separate provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referenced in such manner as to specifically direct bidders' attention to the fact that insertion of a shorter period will cause the bid to be rejected. * * *
>
> * * * * * * *
>
> * * * the Government has the initial responsibility of stating what is required in reasonably clear fashion. Communication of the minimum bid acceptance period under the instant solicitations * * * was clearly inadequate, as exemplified by the overwhelming number of bidders who obviously either failed to appreciate the 90-day requirement or failed to take proper steps to establish responsiveness to that requirement.
>
> We have observed that a sense of fairness and impartiality should imbue the Federal procurement effort. These solicitations reasonably must be viewed as having contained a trap to ensnare the average bidder into a state of nonresponsiveness as to the bid acceptance period imposed. We must assume that only a grossly misleading invitation would have caused almost all bidders—who expended considerable time and money to compete for the Government's business—to fail to hold their bids open as required.

We recommended that the two solicitations under which award had not been made be canceled and the procurements resolicited with clear bid acceptance period requirements stated.

Since rendering that decision, we have considered situations involving a "standard" acceptance period and a greater one noted elsewhere in the invitation in which (1) the provisions *were* cross-referenced but the bidder *inserted* a bid acceptance period less than that required, *e.g.*, *Hemet Valley Flying Service Co., Inc.*, *supra*, and (2) the provisions were not cross-referenced and the bidder made no entry at all. *E.g.*, *Hild Floor Machine Co., Inc.*, B–196419, February 19, 1980, 80–1 CPD 140.

In the first situation, we found that the bid properly was rejected as nonresponsive because bidders were clearly advised by the cross-reference as to the minimum required bid acceptance period and the bidder offered a shorter acceptance period. In the second situation, we essentially followed the holding in 52 Comp. Gen., *supra*, recommending that the invitation be canceled and readvertised with properly cross-referenced provisions (except that award was recommended for certain line items since the *low* bidder for those items *complied* with the required acceptance period and no other bidder thus would be prejudiced by the award).

DECISION

We recognize that where no alteration is made by the procuring activity in the "standard" bid acceptance period language of the SF 33, the 60-day period is by the provision's terms automatic, and thus

the language contemplates the insertion by the bidder of a *different* bid acceptance period if the bidder intends *other* than 60 days. *Intercontinental Manufacturing Company, Incorporated*, B–180784, June 4, 1974, 74–1 CPD 300.

However, once the *agency* alters the provision by inserting a reference to a period other than 60 days, we believe that the 60-day language no longer is operative but is modified by whatever requirement is otherwise imposed. For example, we have recognized that the agency may strike out the "60" in the SF 33 and insert a different period if necessary to meet its needs. *See* 47 Comp. Gen. 769, 772 (1968). Just as a bidder need not also itself insert that other period in such a situation in order to be bound to that period, we do not believe a separate insertion by a bidder is necessary where, as here, the agency in effect makes an insertion by means of an asterisk cross-referencing to another provision which modifies the SF 33 acceptance period. Thus, we believe the asterisk in the SF 33 provision and the cross-reference to the 90-day provision effectively negated the 60-day language of the SF 33 provision and in its place imposed a 90-day bid acceptance period to which bidders committed themselves by signing their bids, without any need for them to specifically insert "90" on the SF 33.

Consequently, we view the bids of Derecktor and MP&E as offering acceptance periods of 90 days. Therefore, we find the Coast Guard's rejection of those bids as nonresponsive to the 90-day requirement to be improper.

The protests are sustained. In light of the limited nature of the court order and the ongoing judicial proceedings, we are not making a recommendation for corrective action, as that ultimately is for determination by the court.

[B–198448]

Contracts—Stenographic Reporting—Bidder Responsibility

Solicitation for recording and transcript services which preclude use of electronic tape recording devices on basis of agency personnel past experience with other systems and difficulties which concern bidder responsibility, thereby excluding monitored multimicrophone tape record system with successful record of performance in similar proceedings in other agencies which procuring activity has neither tested nor used, unduly restricts competition.

Contracts—Stenographic Reporting—Specifications Propriety

Solicitation for requirements-type contract which fails to include estimates upon which bids will be evaluated and to define "other service" delivery basis upon which bids are sought precludes preparation and evaluation of bids on equal basis. Solicitation should be amended before agency proceeds with procurement to either include estimates and definition or to stipulate ceiling price for services in question.

Matter of: North American Reporting, Inc.; Ace-Federal Reporters, Inc., November 18, 1980:

North American Reporting, Inc. (NAR), and Ace–Federal Reporters, Inc. (Ace), have protested against alleged deficiencies in the Federal Energy Regulatory Commission's (FERC) invitation for bids (IFB) No. FERC–80–B–0001 for stenographic reporting services. NAR contends that the IFB is unduly restrictive of competition because it prohibits the monitored electronic recording method of reporting. Ace, on the other hand, asserts that the IFB is ambiguous because it does not provide estimates for the evaluation of all bid items, define "other services" for which a bid is required, or include sufficient information from which to bid on accelerated delivery services. The protesters conclude that the solicitation is so defective as to preclude adequate competition for the agency's requirements and that it should be rewritten to correct these deficiencies before proceeding with the procurement. The FERC has postponed bid opening pending resolution of the protests.

The IFB contemplates the award of a requirements–type contract under which the successful bidder acts as the official FERC stenographic reporter, produces transcripts, and furnishes copies of the transcripts to the FERC and the public. The IFB divides the FERC's reporting needs into three categories—Schedules "A," "B," and "C"; the latter two schedules pertain to nonpublic proceedings and sale of these transcripts is restricted.

Paragraph "D," page 29, of the IFB states that "(e)lectronic tape recording devices are not acceptable in administrative proceedings before Administrative Law Judges." NAR claims that this provision is unduly restrictive of competition because it excludes a method of reporting already proven before other Federal agencies, citing our decisions in *Bowers Reporting Company*, B–185712, August 10, 1976, 76–2 CPD 144; *National Stenomask Verbatim Reporters Association*, B–183837, August 5, 1975, 75–2 CPD 84; *GSA Reporting Corporation*, 54 Comp. Gen. 645 (1975), 75–1 CPD 70. NAR also refers to many favorable experiences and comparison tests with its equipment by other Government agencies and courts in support of its assertions that the firm's monitored multimicrophone system of direct recording can meet the FERC's actual needs. The protester characterizes those needs as accurate reporting of proceedings and complete transcripts and concludes that the FERC should be concerned with the quality and timely receipt of transcripts rather than with the reporting process itself.

The FERC states that the restriction to which NAR objects does not apply to proceedings which are not before administrative law

judges. It is based upon the following three categories of problems identified by the judges through past use of monitored and unmonitored tape recordings services which they found can: (1) be inefficient due to numerous disruptions and delays, (2) give poor quality transcripts caused by the service or equipment, and (3) create administrative problems in the hearing room. The procuring agency also enumerated the reasons the judges found that tape recording services can have each of these types of problems. The FERC asserts that contrary to NAR's suggestion, a demonstration to compare the protester's direct recording system and stenographic services is neither necessary nor appropriate because an after-the-fact demonstration is irrelevant to the question of the propriety of the agency's use of its administrative discretion in drafting the IFB specifications, citing our decision in *Digital Equipment Corporation*, B-181336, September 13, 1974, 74-2 CPD 167. Furthermore, the FERC emphasizes that the restriction applies equally to all recording services or companies and does not single out NAR for exclusion from the competition.

We have held that the determination of what will satisfy the Government's needs is primarily within the discretion of the procuring officials. We will not interpose our judgment for that of the contracting agency unless the protester shows that the agency's judgment is in error and that a contract awarded on the basis of such specifications would be a violation of law by unduly restricting competition. *Essex Electro Engineers, Inc.*, B-191116, October 2, 1978, 78-2 CPD 247; *Joe R. Stafford*, B-184822, November 18, 1975, 75-2 CPD 324.

Similarly, we will not disturb a reasonable determination by the using agency of how its needs for services of a highly technical or specialized nature should be met. Therefore, in the *CSA Reporting Corporation* and *National Stenomask* cases, cited above, specific and logical deficiencies in a system as related to the agency's needs justify the exclusion of or requirement for particular methods. Such restrictions may properly be based upon actual experience by the agency or others, engineering analysis, logic, or similar rational bases. *Bowers Reporting Company*, *supra*. In our opinion, the reasons set forth by the FERC, however, do not meet this standard.

We believe that our decision in *Bowers Reporting Company*, *supra*, is controlling here. In the *Bowers* case, the agency sought to exclude recording by tape recorder alone on the basis of its experience with tape recording systems which included inaudibility, problems with speakers' words and accents, and the necessity of rescheduling meetings due to poor quality recordings, but did not state that it had ever tested or used the protester's sophisticated, monitored system. We held that difficulties with speaker identification, repetition of testimony,

equipment malfunction, and inaudibility caused by predominating background noise (also alleged here by the FERC), which are not shown to be peculiar to the system, are problems of bidder responsibility. As such, they are adequately protected against because an affirmative determination of a bidder's responsibility is prerequisite to award of a contract.

However, among the reasons enumerated for the three categories of problems listed above, the FERC further explains that the judges found that recording services can be inefficient due to disruptions and delays because there can be a need to stop the hearing every 30 to 45 minutes to change the tape. Similarly, it found that the services can create problems in the hearing room because, among other things, it is often impractical to place enough microphones in the room to accommodate the number of speakers and the wires running throughout the room create a potential safety hazard. NAR states, however, that its system does not require stopping hearings for any reason at any time, that it has reported many hearings (for specified Government agencies and the Congress) identical to and larger than FERC proceedings, that there are no exposed wires or safety hazards and that no one has ever been injured with NAR's system. The FERC, however, takes the position that whether NAR has specifically experienced these problems is irrelevant because the FERC considered the entire field of electronic recording services as a whole and did not consider or compare the merits or demerits of other types of services or contractors in preparing the IFB. While the reasons suggested relate to the method of service and the equipment to be used and therefore do not pertain to bidder responsibility, we believe that the *Bowers* case is nonetheless dispositive.

In our opinion, the FERC's objections merely relate to possible problems which could occur in using some tape recording devices rather than features inherent in all recording devices which necessarily result in the problem phenomena. We note, too, that they may also be problems to which other types of stenographic equipment and services are subject. Moreover, objectionable features, such as frequent tape changes and exposed wires, could be proscribed by the IFB specifications. Finally, NAR has uncategorically stated that these problems are not applicable to its system. We find that the FERC's reasons are no more than a collection of impressions, gained from experience or other equipment and predictions, which we have held insufficient to justify excluding a system, particularly one which has been found acceptable by other agencies in similar circumstances. Therefore, we cannot concur in the FERC's generic exclusion of a reporting method on the basis of features which are not character-

istic of the entire class of devices or services using that equipment. Consequently, we conclude that the IFB provision prohibiting the use of electronic tape recording devices, quoted above, is unduly restrictive of competition and NAP's protest on this ground is sustained.

Ace's protest pertains primarily to that portion of the IFB concerning duplicating services for the public and its objection to the FERC's failure to provide transcript duplication estimates is twofold. Initially, the protester asserts that the absence of estimated quantities for accelerated duplication service to the public precludes bidders from bidding on a rational basis. Ace contends that the IFB therefore also fails to state the quantities upon which bids for accelerated duplication services for the public will be evaluated so bidders do not know the basis upon which their bids are to be evaluated and the successful bidder could well be determined by the evaluation quantity chosen rather than by the lowest bid price.

Section "D" of the IFB provides that bids will be evaluated for each period or option period on the following four cost factors: 1) cost of original and specified copies to the Government, 2) cost to the public and to the FERC of reproduced copies, 3) minimum charges, and 4) surcharges. Ace takes the position that part "B" of the section, "Cost to Public," as amended, requests per page bid prices for tables "A" and "B" for five types of accelerated delivery services (same day, overnight, 3-day, 5-day, and other service) without providing any estimates of the number of transcript pages which may be required contrary to Federal Procurement Regulations (FPR) § 1-3.409(b)(1) (1964 ed. circ. 1) and prevents bidders from knowing the basis on which their bids will be evaluated. Because the IFB prescribes a $0.25 per page rate for regular delivery service (furnished within 10 days of receipt by the FERC) to the public, and bidders are required to bid on same day, overnight, 3-day, and 5-day delivery service, Ace contends that the term "other service" upon which a bid is also required is ambiguous.

The FERC states that the term "other service" is not ambiguous because it has only one reasonable meaning and obviously means every service offered by the contractor not otherwise enumerated. The "other service" category, in the agency's opinion, permits the contractor the flexibility to state a price for service not otherwise specified in the solicitation while at the same time meeting the FERC's requirement that fees be fixed in advance, 18 C.F.R. § 1.21(a) (1980). In answer to Ace's hypothetical question as to whether the term might include delivery performed in 3 hours and 42 minutes, the FERC explains that if Ace has such a service for sale it should quote its prices, but that unless Ace advises the FERC of this particular service, it would not be permitted to offer this "other service" to the public.

We agree with the protester that the term "other service" as used in the amended IFB is ambiguous. If, as the FERC suggests, the term is a catchall category for accelerated delivery services other than those listed, it would appear to include 4-day, as well as 6- through 9-day, delivery at the same price per page—a rate presumably lower than that bid for 5-day service. More importantly, according to the FERC's response to Ace's hypothetical question, the term "other service" may be *any* other delivery service each bidder cares to offer as long as the FERC is so advised. Thus, the bidders are, in effect, defining the term and, as they do so differently, their bids are not comparable because they are not bidding on the same delivery bases. *See* 39 Comp. Gen. 570, 572 (1960). Therefore, we believe that this portion of the IFB accelerated delivery specification is not sufficiently definite to permit the preparation and evaluation of bids on a common basis. *M. J. Rudolph Corporation*, B–196159, January 31, 1980, 80–1 CPD 84; 36 Comp. Gen. 380, 385 (1956).

Similarly, we believe that the FERC's failure to provide estimates for duplication services to the public in violation of FPR § 1–3.409(b)(1) also precludes the preparation and evaluation of the bids on a common basis known to the bidders. Although estimates for its own transcript and duplication requirements for the base and option years were incorporated in the IFB by amendment, the FERC states that no estimates for services to the public have been provided because the incumbent contractor is not required to keep sales data or provide them to the FERC and it is not administratively feasible for the FERC to independently estimate public sales. The FERC contends that it is not soliciting bids for the needs of the public and is not required to estimate those needs, but believes that "Cost to the Public" must be evaluated because it is a required feature of the contract. Bids for transcript duplication services to the public, the agency explains, will be evaluated, therefore, by selecting arbitrary evaluation estimates which will be split equally among the schedules and delivery bases and concludes that application of the same arbitrarily selected estimates to all bids will result in their evalution on an equal basis.

With regard to requirements contracts, our Office has held that, where the quantities of the items to be procured are not known, the IFB must provide some basis for bidding, such as estimated quantities for the various items; and that where it is not administratively feasible to estimate future requirements, the IFB may instead list past orders. 52 Comp. Gen. 732, 737 (1973). Estimates are essential in helping bidders prepare reasonable, intelligent bids and ensure award of the contract to the lowest bidder. *Edward E. Davis Contracting, Inc.*, B–192707, April 20, 1979, 79–1 CPD 280; *Michael O'Connor, Inc.*, 56 Comp. Gen. 108, 109 (1976), 76–2 CPD 456. Therefore, without

estimates, bidders are not provided all the information that might be important to formulate an intelligent bid on a common basis and have to guess the anticipated reproduction requirements of the public. *Elrich Construction Company*, B-187726, February 14, 1977, 77-1 CPD 105; *Instant Replay Equipment Company, et al.*, B-193826, June 15, 1979, 79-1 CPD 423.

Finally, due to the omission of estimates for duplication services to the public, the IFB not only fails to inform bidders of the basis upon which their bids for these services will be evaluated, but also leaves the overall evaluation method to the bidders' speculations and invites unbalanced bidding. Bidders cannot compete on an equal basis as required by law unless they know in advance the basis on which their bids will be evaluated. At a minimum, the basis of evaluation must be stated in the IFB with enough clarity to tell bidders before bid opening the objectively determinable factors (factors which can be stated or ascertained by bidders at the time they are preparing bids) from which a bidder can reasonably estimate the effect of applying these factors to his bid in relation to other possible bids. 36 Comp. Gen. 380, 385 (1956). We have held that, if the bid evaluation provisions of an IFB do not adequately express the procuring agency's intent or reflect the reported actual needs of the agency, the solicitation is defective. *Crown Laundry and Cleaners*, B-196118, January 30, 1980, 80-1 CPD 82, *aff'd*, April 2, 1980, 80-1 CPD 245. We therefore have found evaluation factors based primarily on a subjective determination announced at or after bid opening violative of this requirement because they cannot be determined by the bidders during bid preparation. 36 Comp. Gen. 380, 385 (1956). Consequently, we find the evaluation of bids for duplication services to the public on the basis of unannounced, arbitrary evaluation estimates similarly objectionable because they are not ascertainable in advance by the bidders and preclude bidding on an equal basis.

For the reasons discussed above, we recommend that the instant IFB be amended to correct the aforementioned deficiencies before the FERC proceeds with the procurement. First, the IFB should be amended to omit the restriction excluding the use of the monitored multimicrophone recording system for stenographic reporting services. Second, the term "other service" for accelerated duplication service to the public should be defined if a bid for delivery on that basis will be required. Finally, estimates for anticipated accelerated duplication services to the public must be provided to bidders if the FERC intends to include bids for those services as factors in its bid evaluation. These estimates would also serve to inform bidders of the basis upon which their accelerated service bids and overall bids are to be

evaluated. If, on the other hand, the FERC is unable to estimate the anticipated duplication requirements of the public, it may stipulate a ceiling charge for duplication services rendered on various accelerated bases, as it has done with regard to regular delivery service to the public, and evaluate bids only on the basis of the price for duplication services to the FERC. *See* B-179038, October 4, 1973, *aff'd, CSA Reporting Company*, B-179038, February 13, 1974, 74-1 CPD 66. In that case, however, the FERC must determine that the ceilings for duplication services for the public are reasonable pursuant to the requirements of the Federal Advisory Committee Act, § 11, 5 U.S.C. app. (1976), and the Freedom of Information Act, 5 U.S.C. § 552 (1976), which limit the cost of duplication to be charged to the public to the actual cost of duplication, including a reasonable factor for overhead and profit. *Securities Exchange Commission*, B-184420, July 2, 1975, 75-2 CPD 9; see *Hoover Reporting Company, Inc.* B-185261, July 30, 1976, 76-2 CPD 102.

Accordingly, the protests are sustained.

[B-199251]

Officers and Employees—New Appointments—Relocation Expense Reimbursement and Allowances—Non-Entitlement—Position Outside Conterminous United States

Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2-1.5g(2)(c) of the Federal Travel Regulations (FPMR 101-7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584.

Matter of: Dr. Frank A. Peak—Erroneous Payment of Temporary Quarters Subsistence Expenses, November 18, 1980:

By letter dated April 30, 1980, Dr. Frank A. Peak, an employee of the Department of the Army, has appealed the settlement by the Claims Division which disallowed his claim for reimbursement of temporary quarters subsistence expenses. In its settlement action the Claims Division disallowed his claim in the amount of $530 for temporary quarters subsistence expenses and determined that his reimbursement by the Army in the amount of $1,295.06 for such expenses was an erroneous payment and not subject to waiver.

The record shows that in October 1979 Dr. Peak was appointed to a position as a Veterinary Medical Officer with the Department of

the Army in the Republic of Panama. On October 22, 1979, travel orders were issued for the travel of Dr. Peak and his dependents from the United States to his permanent duty station in the "Canal Zone." The travel orders, in part, authorized temporary quarters subsistence expenses for himself and his wife.

Dr. Peak states that, at about the time he applied for employment with the Department of Defense for a position in Panama, he understood that he would receive a temporary living allowance until he could obtain permanent quarters for a maximum of 90 days. He further states that upon his arrival in Panama he and his dependents occupied temporary quarters for approximately 42 days. He received reimbursement from the Army for $1,295.06 for the cost of temporary quarters subsistence and he now claims that he is entitled to an additional $530 incident to the occupancy of temporary quarters.

On February 12, 1980, the Department of the Army advised Dr. Peak that the authorization of reimbursement for temporary quarters subsistence was erroneous and that temporary quarters subsistence expenses are not payable to new appointees assigned to a first duty station. He was further advised that as he was reappointed after a break in service he was a new employee. Accordingly, he was informed that he would be required to refund the payment he had received for temporary quarters subsistence expenses in the amount of $1,295.06.

The Claims Division, by Certificate of Settlement dated April 15, 1980, disallowed Dr. Peak's claim for temporary quarters subsistence expenses on the basis that as a new appointee he was not entitled to reimbursement for such expenses. He was also advised that his indebtedness for the erroneous payment could not be waived under 5 U.S.C. § 5584 as that statute does not allow waiver of erroneous payments of travel and transportation expenses.

Upon appeal Dr. Peak contends that he is entitled to payment of temporary quarters subsistence expenses on the basis that his travel orders authorized reimbursement for such expenses. He suggests that the Government is contractually bound by that authorization because he accepted the position in Panama in reliance on this indication that he would be paid temporary quarters subsistence expenses.

Section 5923 of title 5, United States Code, provides, in part, that an employee and his family may receive a quarters allowance for the reasonable cost of temporary quarters for a period not in excess of 3 months after first arriving at a new post in a foreign area.

For purposes of entitlement to overseas differentials and allowances under subchapter III of chapter 59 of title 5, United States Code, including temporary lodging allowance under section 5923 of title 5,

United States Code, 5 U.S.C. § 5921(6) (1976) defines "foreign area" as follows:

(A). The Trust Territory of the Pacific Islands; and (B) any other area outside the United States, the Commonwealth of Puerto Rico, the Canal Zone, and territories and possessions of the United States. * * *

Under the Panama Canal Treaty effective October 1, 1979, the Republic of Panama regained full sovereignty over the Canal Zone. Section 3(b) of the implementing legislation, the Panama Canal Act of 1979, Public Law 96–70, September 27, 1979, 93 Stat. 455 (22 U.S.C. 3602), provides in part that:

* * * for purposes of applying the Canal Zone Code or other laws of the United States and regulations issued pursuant to such code or other laws to transactions, occurrences, or status on or after the effective date of this Act: (1) "Canal Zone" shall be deemed to refer to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements.

The effect of Section 3(b) is to redefine the term "Canal Zone" insofar as laws of the United States which refer to the Canal Zone apply to events occurring after the effective date of the Panama Canal Treaty. See H. Rept. No. 96–98, Part 1, p. 41. Accordingly, that area formerly known as the Canal Zone which has now been redefined as the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements, continues to be outside the definition of "foreign area" for purposes of overseas differentials and allowances.

As Dr. Peak was stationed in that part of the Republic of Panama, which by definition is not a "foreign area" for purposes of overseas differentials and allowances he is not entitled to a temporary lodging allowance under 5 U.S.C. § 5923.

The entitlement to travel and relocation expenses of employees transferring to a post of duty in the area formerly known as the Panama Canal Zone is governed by the Federal Travel Regulations (FTR) (FPMR 101–7) (May 1973).

New appointees to positions outside the conterminous United States are entitled only to the travel and transportation expenses listed at paragraph 2–1.5g(2)(b) of the FTR. As specifically noted at FTR para. 2–1.5g(2)(c), new appointees to positions overseas are not entitled to certain allowances payable to transferred employees under 5 U.S.C. §§ 5724 and 5724a, including temporary quarters subsistence expenses. In providing that these and other allowances are not payable to new appointees, the cited regulations merely reflect the extent of authority granted by 5 U.S.C. § 5722 to pay travel and transportation expenses for new appointees to positions overseas. The expenses that may be paid to new appointees to shortage-category positions

within the United States are similarly limited. See 5 U.S.C. § 5723 and FTR para. 2–1.5f(4).

Since Dr. Peak was a new appointee at the time he traveled to his duty station in the former Canal Zone area, there is no authority by which he may be authorized reimbursement of temporary quarters subsistence expenses.

We recognize that Dr. Peak was furnished travel orders which purported to authorize reimbursement for temporary quarters subsistence expenses and we do not dispute that he may have relied on this erroneous authorization in determining to accept the position in the former Canal Zone area. Unfortunately, this combination of circumstances does not provide a basis to pay Dr. Peak the temporary quarters subsistence expenses claimed or to relieve him of responsibility to refund the amount erroneously paid to him.

It is a well-settled rule of law that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or by regulation. See *Matter of Reza Fassihi*, 54 Comp. Gen. 747 (1975), and cases cited therein. The Government is not estopped from repudiating unauthorized acts taken by one of its officials. *Matter of Joseph Pradarits*, 56 Comp. Gen. 131 (1976). Any payments made on the basis of such erroneous authorizations are recoverable. *Matter of T. N. Beard*, B–187173, October 4, 1976.

We note that Federal employment does not give rise to a contractual relationship in the conventional sense. *Bers* v. *United States*, 207 Ct. Cl. 941 (1975). Thus, there is no basis to consider his claim for allowance upon contract law.

Concerning Dr. Peak's request for waiver of the indebtedness resulting from the erroneous payment for temporary quarters subsistence expenses, the authority to waive erroneous overpayments under 5 U.S.C. § 5584 is specifically limited to payments of pay or allowances "other than travel and transportation expenses and allowances and relocation expenses." Since the temporary quarters subsistence expenses are relocation expenses, there is no authority to consider for waiver the erroneous payments made to Dr. Peak.

Accordingly, we sustain the action of the Claims Division in disallowing Dr. Peak's claim and denying waiver.

[B–196946]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Confinement in Guard House, etc.—Conviction Not Overturned

Basic allowance for quarters (BAQ) is not authorized when a member, without dependents, is convicted by court-martial, which does not direct forfeiture of allowances, and the member is sentenced to confinement in a guardhouse, brig,

correctional barracks or Federal penal institution, regardless of whether the member was receiving BAQ prior to confinement or his assigned quarters were terminated, provided the sentence is not overturned or set aside. 40 Comp. Gen. 169 (1960) and 40 *id.* 715 (1961), distinguished.

Matter of: Basic allowance for quarters while member is in confinement, November 19, 1980:

The Assistant Secretary of Defense, Comptroller, requests a decision on whether members without dependents, confined to a guardhouse, brig, correctional barracks, or Federal penal institution, pursuant to a court-martial which does not direct forfeiture of allowances, is entitled to basic allowance for quarters (BAQ) during confinement. The circumstances are discussed and set forth in Committee Action No. 547 of the Military Pay and Allowance Committee, Department of Defense.

The questions presented are as follows:

a. A member, without dependents, is convicted by court-martial and sentenced to 2 years confinement. The United States Disciplinary Barracks (USDB) Fort Leavenworth, Kansas, is designated as the place of confinement. The member will not be returned to duty status upon completion of the period of confinement. If this member was assigned to adequate Government quarters at the old duty station and that assignment was terminated upon transfer to the USDB, would he be entitled to BAQ for the period of confinement? Would the answer be the same if the member was in receipt of BAQ at the old duty station?

b. A member, without dependents, is convicted by court-martial and sentenced to 2 years confinement. The guardhouse or brig at the member's permanent duty station is designated as the place of confinement. The member will not be returned to a duty status upon completion of the period of confinement. If this member was assigned to adequate Goverment quarters before being confined, and the assignment to quarters was terminated because the member was not to be returned to duty, would he be entitled to BAQ during the period of confinement? Would the answer be the same if the member was in receipt of BAQ before the period of confinement?

Title 37, United States Code, section 403(b), provides that "* * * a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank or rating and adequate for himself * * * is not entitled to a basic allowance for quarters * * *." Basic allowance for quarters is not part of the pay of a member but is rather an allowance which is payable when adequate Government quarters are not furnished, and BAQ is not an amount of a members' naturally due compensation which he forfeits when quarters

are furnished but is rather an allowance which is authorized when quarters are not so furnished. This rationale was expressed by the Court of Claims in *Byrne* v. *United States*, 87 Ct. Cl. 241, 248 (1938):

> * * * Commutation is for the purpose of compensating an officer for expenses incurred in providing private quarters for himself and his dependents when the Government fails to provide public quarters. On this theory only can recovery be had and, as it appears in this case that the officer has not been put to any expense, no right to reimbursement has been established.

The theory behind BAQ is reimbursement for something paid out. *Byrne*, *supra*. Once confined the member has no out-of-pocket expenses for quarters and thus has no basis for receiving BAQ. By analogy, under circumstances where a member of the armed services has been hospitalized in a Government hospital without being put to any expense to provide quarters for himself, our decisions have held that he was furnished the equivalent of quarters in kind. This has been grounded on the theory that during such hospitalization he is furnished all the quarters he can use and that we would not be warranted in construing the law so as to authorize the payment of BAQ. See B-130107, February 7, 1957, and cases cited therein. The same is true for confinement. The member is not being put to any expense to provide quarters for himself, and in accordance with his conduct he has been furnished the equivalent of quarters in kind; he is furnished all the quarters he can use for the duration of his confinement. Thus, there is no basis for paying BAQ regardless of whether the member was in receipt of BAQ prior to confinement or was assigned to adequate quarters which were terminated.

The fact that we have held that there is entitlement to BAQ for periods when a member is confined if the charges are later withdrawn, the court-martial results in an acquittal, or if there is a conviction and the sentence is later set aside or disapproved is not considered controlling in the circumstances here in question. If confinement is disapproved after it was enforced we held that BAQ should be paid because the quarters ordinarily provided for confinement in a guardhouse, brig, disciplinary barracks, etc., may not properly be regarded as adequate quarters assigned to a member appropriate to his rank, etc. 40 Comp. Gen. 169, 171 (1960). See also 40 Comp. Gen. 715 (1961). Freedom of use and of ingress and egress were basic considerations in this matter. 40 Comp. Gen. at 172.

That rule is predicated upon the retroactive disapproval of confinement. It results in part from the requirement that the individual be restored all rights and privileges to individuals whose confinement is not approved after it has taken place. However, a member whose conduct results in conviction by court-martial with a sentence to confinement and the conviction is not later overturned or set

aside, is in a different situation. That is, he is placed in such quarters as the proper result of his conduct, and under these circumstances those quarters are appropriate and adequate. The curtailment of the freedom to come and go at will is also a consequence of the member's own conduct and in such circumstances has no bearing on BAQ. Accordingly, the fact that BAQ is allowed when a period of confinement is retroactively disapproved provides no basis for holding that BAQ should be paid to those who are confined and whose sentences to confinement are not later altered.

[B-198726, B-198792]

General Accounting Office—Jurisdiction—Labor Stipulations—Service Contract Act of 1965—Inequality of Competition in Procurement

Although responsibility for administration and enforcement of Service Contract Act rests with Department of Labor, not General Accounting Office, protest is sustained where protester is denied opportunity to prepare offer and have it evaluated on common basis because solicitation contained wage determination and required inclusion of budget breakdown by category of labor and rate of compensation, but agency in evaluating offer ignored inclusion by awardee of compensation rates which indicated failure to comply with wage determination.

Matter of: Education Service District of Washington County, November 19, 1980:

Education Service District of Washington County (ESDWC) protests the award by the U.S. Department of Agriculture, Forest Service (Forest Service), of two negotiated contracts to EDGE, Inc. (EDGE), under solicitation Nos. R6-80-41 and R6-80-147. Both awards are for contracts under 16 U.S.C. § 1703(c) (1976) to operate Youth Conservation Corps (YCC) camps, and both contracts have been performed.

ESDWC asserts that: (1) EDGE is not eligible for award since it is not a private nonprofit organization which has been in existence for 5 years as required by the act and the solicitation; (2) EDGE represented in its proposal that it had operating arrangements with Southern Colorado University when no such arrangements existed; (3) EDGE did not submit an offer adequate to meet the minimum requirements of the contract; (4) EDGE fails to provide certain employee benefits which are required by law; and (5) EDGE's proposal indicated on its face that its staff salaries did not comply with the Service Contract Act (SCA) wage determination which was included in the solicitation, but the agency ignored this in evaluating and awarding the contract despite the specific solicitation requirement of inclusion of wage rates by labor category.

We agree with ESDWC's final contention. Therefore, we need not consider the other contentions. *Lawrence Johnson & Associates, Inc.*, B–196442, March 11, 1980, 80–1 CPD 188.

The solicitations in question included SCA wage determinations and required that:

> The price proposal * * * shall include an itemized breakdown of the project price, including types or categories of labor, together with person-hours for each category indicating rate of compensation for each unit.

EDGE's proposal indicated that for at least one job category ("assistant cook") it would not pay a compliant salary. EDGE expressed its rate by a range rather than a fixed rate, but for the "assistant cook" category it would be noncompliant even if it were to pay at the highest rate in the range. For certain other labor categories it would be noncompliant at the lower end of its stated salary range, but possibly compliant at the upper end. While EDGE has asserted that, in fact, it did pay compliant salaries over the course of the contract, the salaries which it contends were paid do not comport with those stated in its proposal.

We have consistently held that administration and enforcement of the SCA rest with the Department of Labor and not with our Office. *Massa Flooring Co., Inc.*, B–187974, January 19, 1977, 77–1 CPD 40; *SIMCO Electronics*, B–187152, August 31, 1976, 76–2 CPD 209. However, in this case, the effect of the Forest Service's procurement practices in this respect has been to effectively prevent the protester from competing on an equal basis with the awardee. Thus, the question with which we are concerned is not that of enforcement, but one of the propriety of the agency's use and evaluation of the express solicitation requirements.

The Forest Service concedes that there is some question regarding EDGE's compliance with the wage determination levels based on the rates allotted in EDGE's proposal. However, the Forest Service contends that the applicability of the SCA to this type of contract is an unresolved question currently being considered by the Department of Labor. The agency further asserts that the evaluation criteria do not provide for evaluation of the budget proposal in determining the award. The latter position is contrary to the solicitation terms. While it does provide for technical evaluation separate from price evaluation, it also requires submission of a price proposal, including the above-quoted rate of compensation requirement, and it provides 160 points maximum for the technical proposal and 350 points maximum for the price proposal. The solicitation states that: "Award will be made to the responsible offeror whose proposal deemed technically acceptable and within the competitive range will be the most advan-

tageous to the Government price and other factors considered." Thus, the budget proposal was critical in determining the award.

In effect, despite the Forest Service's apparent reservations about the applicability of the SCA, the solicitation contained the SCA wage determination and provided a mechanism for evaluating to assure that proposals were compliant. Consequently, the agency effectively elected to waive the requirement by ignoring the noncompliant wages provided in EDGE's proposal. The result was to penalize offerors whose proposals reflected higher salary costs in order to be compliant with the solicitation requirements.

It is a fundamental principle of Federal procurement law that a solicitation must be drafted in such a manner that offers can be prepared and evaluated on a common basis. *Computek Inc., Ontel Corporation*, 54 Comp. Gen. 1080 (1975), 75–1 CPD 384; *Lawrence Johnson & Associates, Inc., supra.* To that end, Federal Procurement Regulations (FPR) § 1–3.805–1(d) (1964 ed. amend. 153) provides:

> When, during negotiations, * * * a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. * * *

In this case, the Forest Service waived the SCA wage determination levels for EDGE without advising any offerors of this waiver. We believe that this impropriety deprived the other offerors of an opportunity to compete on a common basis.

Since the contracts for the YCC programs have been performed, no meaningful relief is possible. However, the contracts provide for renewal at the option of the Government for two additional YCC programs. We recommend that these renewal options not be exercised. In addition, prior to issuing any new solicitations, the Forest Service should ascertain definitively the applicability or inapplicability of the SCA to the YCC program operation contracts and structure the solicitation and evaluate the new proposals accordingly. By separate letter of today we are advising the Secretary of Agriculture of the defects in this procurement and of our recommendation.

The protest is sustained.

[B–199242]

Bids—Late—Mail Delay Evidence—Certified Mail—Mail Receipt, But Not Envelope, Postmarked

While protester had certified mail receipt postmarked by Postal Service, envelope containing protester's late bid did not have required U.S. Postal Service postmark indicating that it had been mailed at least 5 days before bid opening date. Therefore, bid did not comply with

invitation for bids requirements and agency was entitled to reject bid as late.

Matter of: N.Y. Enterprise Capital Corp., November 24, 1980:

N.Y. Enterprise Capital Corp. (Enterprise) has protested the refusal by the Federal Supply Service (FSS) of the General Services Administration to accept its late bid for invitation for bids (IFB) No. 5FCB–13–80–035. Enterprise would have been the low bidder for certain items.

Bid opening was 3:30 p.m., April 30, 1980. Enterprise claims it mailed its bid on April 23, 1980, using certified mail and that its employee asked the postal clerk to postmark both its receipt and the envelope containing the bid. There was a postage meter impression made by Enterprise's postage machine already upon the envelope. The clerk postmarked and returned the receipt but did not postmark the envelope.

Enterprise's bid arrived at FSS offices on May 5, 1980, and FSS informed Enterprise its bid was late. However, upon Enterprise's submission of the receipt, postmarked April 23, 1980, FSS concluded that Enterprise's bid was acceptable. Another bidder protested FSS's ruling and, upon reconsideration, FSS concluded that Enterprise had not met the "late bid" requirement of article 7 of standard form 33–A which had been included in the IFB. Once again, Enterprise's bid was ruled late.

The IFB provided that late bids sent by registered or certified mail were acceptable if sent at least 5 days before bid opening. Further, the IFB stated:

> The only acceptable evidence to establish:
> The date of mailing of a late bid, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on *both* the envelope or wrapper *and* on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a hand cancellation bull's-eye "postmark" on both the receipt and envelope or wrapper.) [Italics supplied.].

Enterprise maintains that under the "Certified Mail" procedures of the United States Postal Service, its bid envelope was placed in the mail on April 23, 1980, the date postmarked on its certified mail receipt. Section 912.7 of the Postal Service's Domestic Mail Manual (Issue 2, 5–15–80) instructs the postal clerk to verify names, addresses, delivery instructions, and postal charges before giving the mailer a postmarked receipt and concludes—

> Deposit article in mail. Do not return to the mailer.

The requirement for a postmark on both the receipt and the envelope was added to the late bid clause by amendment 193 to the Federal Procurement Regulations dated July 6, 1978 and that amendment contained the following rationale for the requirement:

> While certified mail service provides a receipt to the sender and a record of delivery at the office of address, no record is kept at the office at which it was mailed. Consequently, when metered postage is used, the only evidence establishing the date of mailing is the postmark on the certified mail receipt. *Because the U.S. Postal Service cannot substantiate that the certified bid envelope was actually deposited in the mail on the date shown on the postmarked receipt, it is questionable that the postmarked certified mail receipt under these circumstances is a reliable indication of the actual date of mailing.* [Italics supplied.]

While Enterprise argues that this new requirement for a postmark on both the receipt and envelope is unnecessary, in view of the Postal Service requirement that the item being mailed should not be returned to the mailer, we find this position to be without merit. The solicitation instructions are clear and reflect the requirement in the FPR's. We see no basis for waiving the IFB requirement even though the Postal Service manual provides that the postal clerk shall not return the mail to the sender since, in the absence of the postmark on the envelope, there is no evidence that the mail was deposited on the date stamped on the receipt held by the sender.

The protest is denied.

[B-199289]

Transportation—Bills—Payment—Proper Carrier To Receive—"Last" Carrier Identification—Evidence in GBL

In determining whether billing carrier is last (delivering) carrier in privity with contract of carriage, and entitled to payment of transportation charges under 41 CFR 101-41.302-3(a)(1) and 101-41.310-4(a)(1), General Services Administration (GSA) regulations authorize Government agency to look to properly accomplished, covering Government bill of lading (GBL).

Transportation—Bills of Lading—Accomplishment—What Constitutes—Transportation Payment Act, 1972—Billing Carrier *v.* Consignee's Certification

Under Transportation Payment Act of 1972, 49 U.S.C. 66(c) (1976), and Government payment regulations, "Properly accomplished" GBL is one on which billing *carrier* certifies that it made delivery, there being no need for *consignee's* certificate.

Transportation—Payment—To Other Than Destination Carrier

Where billing carrier was issued GBL, it actually performed major part of transportation services, and presented properly accomplished GBL showing it as delivering carrier, Government agency correctly paid origin (billing) carrier, even though claimant actually performed delivery.

Matter of: Freeport Fast Freight, Inc., November 24, 1980:

Under 4 CFR Part 53 (1980), Freeport Fast Freight (Freeport) requests review of settlement action taken by the General Services Administration (GSA) on Freeport's claim for transportation charges relating to a shipment of Government property that was transported from Richmond, Virginia, to Rock Island, Illinois, on Government bill of lading (GBL) N-0056810, dated July 18, 1978.

The claim for $714.86, which was initially filed with the United States Army Finance and Accounting Center, in April 1979, was denied by that agency for the reason that the transportation charges had been paid to B&P Motor Express, Inc. (B&P), in September 1978.

In support of its claim before the GSA and in this Office, Freeport contends that the Government erroneously paid B&P. The claimant asserts that the error arises because Freeport was the delivering carrier, and as the last carrier in privity with the contract of carriage it was entitled to payment.

The GSA disallowed the claim, contending that even if Freeport actually was the delivering carrier the Government correctly paid B&P because evidence on the original GBL, which was presented by B&P, established that B&P delivered the shipment, and that by the terms of the GBL, as expressly governed by Title 41, Subpart 101-41.3 of the Code of Federal Regulations, identification of the "last" carrier is properly made by reference to evidence on the covering GBL.

We agree with GSA that 41 CFR 101-41.302-3(a)(1) and 41 CFR 101-41.310-4(a)(1) permit the paying agency, generally, to rely on a properly certified, original GBL to determine whether the billing carrier is the last carrier in privity with the contract, and to pay that carrier, even though another carrier actually delivered the shipment.

Prior to 1974, Government regulations dealing with the presentation and payment of transportation bills were set forth on the reverse of the GBL, and in Title 4 of the Code of Federal Regulations, whereas now they are published in 41 CFR Subpart 101-41.3. See 58 Comp. Gen. 799, 801 (1979). Also the GBL was revised, and among other changes permitted certification by the authorized billing carrier rather than the consignee as to delivery of the consignment. In our pre-1974 decisions we held that payment of transportation charges is correctly made when the billing carrier presents a properly accomplished or certified GBL indicating that the property was received in apparent good order and condition from the claimant, and payment is made in good faith. See B-172981, May 27, 1971, and B-171825, May 10, 1971. These decisions, which involved Condition 1 of the GBL and previous regulations of this Office, contemplated that a "properly

accomplished" GBL was one on which the consignee's certificate of delivery had been signed by the consignee. See A–24222, July 9, 1971.

Thus since enactment of the Transportation Payment Act of 1972, Pub. L. No. 92–550, 86 Stat. 1163, 49 U.S.C. 66(c), and the revised Government payment regulations, the meaning of "properly accomplished or certified" GBL has changed in that the carrier no longer is required to obtain an accomplished *consignee's* certificate of delivery on the original GBL to receive payment. B–182952, February 27, 1975. Now, the billing *carrier* certifies that it has made delivery. In relation to the paying agency's good faith, we see no difference in the legal effect of the consignee's certificate under prior procedure, and the carrier's certificate of delivery under current procedure.

Here, B&P certified on the original GBL that it was the delivering carrier; and the claimant concedes that B&P actually transported the shipment from its origin in Virginia, to Chicago, Illinois (where it was transferred to Freeport for delivery to Rock Island). The GBL was issued to B&P, the only carrier shown thereon and B&P presented the GBL to the paying agency for payment. Therefore, since the GBL was regular on its face and otherwise in good order for payment to the last carrier which is shown as B&P on the cerificate of delivery, the Army Finance Office was correct in making payment to B&P. The Government has no legal obligation to distribute monies apparently properly paid to the billing carrier. B–171825, supra.

Freeport's payment to B&P of its interline revenue share, $478.96, in anticipation of being paid by the Government, and the bankruptcy of B&P are not legally relevant facts.

Accordingly, GSA's settlement is sustained.

[B–195418]

Panama Canal Commission—Employees—Civil Service Reform Act of 1978—Senior Executive Service—Inapplicability

Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission.

Matter of: Panama Canal Commission—Applicability of Senior Executive Service, November 25, 1980:

By letter dated July 23, 1980, the Administrator of the Panama Canal Commission has requested our decision whether the employees

of the Commission are subject to the provisions of Title IV of the Civil Service Reform Act of 1978,[1] establishing a Government-wide Senior Executive Service (SES), designed to insure the high quality of Government executives.

The Panama Canal Commission was established effective October 1, 1979, by the Panama Canal Act of 1979,[2] as successor to the Panama Canal Company. The establishment of the Commission was required by the Panama Canal Treaty of 1977, and the purpose of the 1979 Act is to provide legislation implementing the Treaty between the United States and the Republic of Panama.

The Panama Canal Company as a Government Corporation was excluded from the Senior Executive Service. The Panama Canal Commission, however, is an agency for the purpose of the SES under the definition in 5 U.S.C. § 3132(a)(1). Nevertheless, the Commission believes that its positions are not subject to the provisions of Title IV of the Civil Service Reform Act (CSRA) governing the Senior Executive Service. The Commission relies on sections 1202 and 1212 of the Panama Canal Act of 1979 (22 U.S.C. 3642 and 3652). Under section 1202(a) of that law, positions in the Commission have been statutorily excepted from the competitive service and have been placed outside of the appointment, classification, and pay provisions of title 5, United States Code. Moreover, section 1212 of the Act provides that the Commission shall operate under a separate Panama Canal Employment System, established by the President. That system is required to conform to the Panama Canal Treaty and to conform, to the extent practicable and consistent with the Panama Canal Act, to the policies, principles, and standards applicable to the competitive service.

The Commission points out that several provisions of the Panama Canal Act and the Panama Canal Treaty would be inconsistent with statutory requirements of the SES, if the SES were to be interpreted as applying to the Commission and that sections 1202 and 1212 of the Act appear to be intended to permit the establishment of an employment system that conforms to the treaty but to which provisions of law relating to appointments in Federal agencies in the United States do not apply of their own force.

An opinion on this question was also sought by the Commission from the Office of Personnel Management (OPM), the agency responsible for administering the SES program. In an opinion dated July 25, 1980, the General Counsel of OPM concluded that the SES is not applicable to the Panama Canal Commission. OPM reasoned that, while

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[1] Pub. L. 95-454, October 13, 1978, 92 Stat. 1111, 1154 (codified at 5 U.S.C. § 3131 *et. seq.*).
[2] Pub. L. 96-70, § 1101, 93 Stat. 452, 456, September 27. 1979, 22 U.S. Code 3611.

the Commission was created as an Executive agency (§ 1101 of the Act), it is clear from sections 1202 and 1212 of the Panama Canal Act that its employees would be excluded from the civil service generally and subject to its own personnel system. Further, OPM found it significant that the Act does not make provision for placing Commission positions in the SES. If Congress had intended to include Commission employees under SES it would have expressly provided for it particularly since Congress was very mindful of the CSRA which became effective 9 months prior to the Panama Canal Act. OPM developed this point further as follows:

> In fact, a careful reading of P.L. 96-70 discloses that when Congress wanted certain civil service laws to apply to Commission employees, it knew how to make specific provisions for it. For example, section 1209 extends coverage to certain Commission employees for work injuries (5 U.S.C. Chapter 81), retirement, (5 U.S.C. Chapter 83), life insurance, (5 U.S.C. Chapter 87) and health insurance (5 U.S.C. Chapter 89), and denies it to others, e.g., non-citizens, those appointed after October 1, 1979 etc. In addition, section 1241 makes the early retirement provisions of 5 U.S.C. § 8336 applicable in certain instances. Also, section 1271 confers the Labor Management Relations coverage of 5 U.S.C. Chapter 71 on Commission employees. It is especially noteworthy too, under section 1224, that Commission employees were made subject to veterans' preference, to the title 5 removal or suspension provisions applying to the competitive service and to certain wage grade provisions in 5 U.S.C. § 5544(a).
>
> On the other hand, it is also apparent in section 1112(a), (Code of Conduct for Commission Personnel), for example, that Congress was not subjecting the Commission to the Code of Conduct requirements in 5 C.F.R. Part 735, the civil service regulations applicable to Executive agencies generally, but instead was directing the Commission to establish a system that was substantially equivalent to Part 735.
>
> Moreover, with the language in section 1212(a), that the Panama Canal Employment System shall "(3) conform *to the extent practicable and consistent with the provisions of this Act*, to the policies, principles, and standards applicable to the competitive service," there can be no doubt that Congress was presupposing that title 5 provisions would not apply to Commission employees unless it was so provided in the Act or, in the Commission's discretion, it was practicable to do so. Thus, in view of the specific authorities Congress accorded the Commission, we find the absence of express language in the law on SES applicability particularly persuasive that Congress did not intend SES to apply. [Italic supplied.]

In reconciling the CSRA with the Panama Canal Act, OPM noted that the SES was never intended to embrace positions created by a later law for the purpose of operating a new agency under its own statutory authority. Under general rules of statutory construction, the Panama Canal Act, the later law, would take precedence over the earlier law, CSRA. OPM also pointed out that since the Act is the more specific statute, applying only to Panama Canal Commission employees whereas the CSRA applies to employees in the Executive branch generally, the two statutes can easily coexist by considering the conflicting provisions of the Act as specific exceptions to the SES reach of CSRA.

Finally, OPM noted the various provisions of the Panama Canal Treaty, particularly those provisions designed to foster participation

of Panamanian nationals at high management levels and growing participation at all other levels, along with employment procedures which would give Panamanian nationals employment preference, which conflict with the CSRA. The OPM opinion recognized that a treaty cannot be deemed to have been abridged or modified by a later statute, such as CSRA, unless such purpose on the part of Congress has been clearly expressed. *Cook* v. *United States*, 288 U.S. 102, 120 (1932). Thus, OPM concluded that, without express language to the contrary, the CSRA cannot be found to impliedly repeal the Panama Canal Treaty. Since the Treaty and SES are basically incompatible, the Treaty and its implementing statute cannot be disturbed by a CSRA provision with which it happens to conflict.

We are in agreement with the conclusions reached by both the Panama Canal Commission and the Office of Personnel Management. We believe that the statutory independence of the Panama Canal Commission mandates the conclusion that the Congress did not intend the Senior Executive Service provisions to apply to the Commission. We have previously reached the same conclusion with respect to the *Federal Reserve Board*, 58 Comp. Gen. 687, B-195418, July 30, 1979. The Federal Reserve Act exempted the Board's employees from the appointment and pay provisions of the civil service laws and regulations. In the absence of a definite indication that Congress intended otherwise, we held that the specific provisions of the Federal Reserve Act prevailed over the more general SES provisions of the Civil Service Reform Act. The same reasoning is equally applicable to the Panama Canal Commission.

As to the Panama Canal Commission, therefore, we hold that its employees are not covered by the Senior Executive Service.

[B-200886]

Synthetic Fuels—Procurement—National Defense Needs—Defense Production Act—Presidential Authority—Appropriation Sufficiency

Under section 305 of Defense Production Act of 1950, as amended, President or delegate may enter into contracts for purchase or commitment to purchase synthetic fuels as long as there are sufficient appropriations in advance to pay the amount by which the contract price exceeds the estimated market price for the fuel at the time for performance.

Matter of: Synthetic Fuel Purchase Contracts Under Defense Production Act, November 26, 1980:

The Deputy Assistant Secretary of Defense has requested our opinion on the authority of the President, or his delegate, to enter into long term contracts for the purchase of synthetic fuels in ad-

vance of appropriations under section 305 of the Defense Production Act of 1950, as added by section 104(e) of the Defense Production Act Amendments of 1980, Pub. L. No. 96–294, 94 Stat. 611, 619 (to be codified at 50 U.S.C. App. § 2095).

Section 305 authorizes the President to enter into contracts to purchase synthetic fuels for purposes of national defense. The Act requires that any contract entered under this authority contain a provision allowing the President to refuse delivery of the fuel and instead to pay the contractor the amount by which the price specified in the contract exceeds the prevalent market price for that fuel at the time delivery under the contract is required. The Deputy Assistant Secretary specifically asks whether it is necessary to have appropriations in advance to cover the full price of the contracts, or whether it is sufficient only to have advance appropriations to cover the difference between the contract price and the estimated market price at the time of scheduled delivery should the President refuse to accept delivery of the fuel.

For the reasons indicated below, we conclude that the President or his delegate may lawfully enter into contracts to purchase synthetic fuels so long as there are sufficient appropriations in advance to cover the estimated payments which will be due in the event the President chooses to refuse delivery of the fuel.

Public Law 96–294 amended the Defense Production Act by adding a new section 305. Section 305 directs the President to take immediate action to achieve production of synthetic fuel to meet national defense needs. He may issue loan guarantees, make direct loans, or

> contract for purchases of, or commitments to purchase, synthetic fuels for Government use for defense needs. * * * (Section 305(b)(1)(A)(i)).

Funds to carry out Section 305 were appropriated by the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96–304, 94 Stat. 857, 880. The act appropriated $3 billion for this purpose, to remain available until expended.

Subject to price ceiling limitations, purchases or commitments to purchase authorized by section 305 may be made

> (A) without regard to the limitations of existing law (other than the limitations contained in this Act) regarding the procurement of goods or services by the Government; and
>
> (B) *subject to section 717(a)*, for such quantities, on such terms and conditions (including advance payments subject to paragraph (3)) and for such periods as the President deems necesary. [Section 305(c)(1) italic supplied.]

The section 717(a) referred to authorizes all activities under the Defense Production Act through September 30, 1981, and contains a proviso

> * * * That all authority hereby or hereafter extended under title III of this Act shall be effective for any fiscal year only to such extent or in such amounts

as are provided in advance in appropriation Acts. * * * (50 U.S.C. App. § 2166(a)).

The incorporation of the language of section 717(a) into section 305 makes it clear that the President cannot enter into purchase contracts until an appropriation for the purpose has been enacted. We previously interpreted the language of section 717(a) in a letter to the Chairman, Senate Committee on Banking, Housing, and Urban Affairs. B-96983, August 1, 1979. We said:

In our opinion, this proviso requires that, with respect to the authorities granted in sections 302 and 303 of the Act, the exercise of which will result in the actual expenditure of funds, Congress must appropriate these funds before the authorities can be used.

The fuel purchase authority in section 305 will also result in the expenditure of funds and thus the reasoning in our letter applies to section 305.

Section 305(d)(3) of the Act provides:

(3) Any contract for such purchases or commitments to purchase shall provide that the President has the right to refuse delivery of the synthetic fuel involved and to pay the person involved an amount equal to the amount by which the price for such synthetic fuel, as specified in the contract involved, exceeds the market price, as determined by the Secretary of Energy, for such synthetic fuel on the delivery date specified in such contract.

The Deputy Assistant Secretary has not provided us with a sample of a contract for purchase or commitment to purchase to be used under section 305. However, based on the inclusion of the provision required by section 305(d)(3), the contract would allow the Government two options, either of which would constitute full performance. At the time of performance, the Government could either accept the fuel and pay the contractor the price set by the contract, or refuse the fuel and pay the contractor the difference between that contract price and a lower market price.

Unless the market price for fuel at the time for performance is zero, the likelihood of which we view as very nearly impossible, the amount the Government must pay the contractor if it chooses not to accept the fuel will be less than the full contract price. It is thus within the sole power of the Government to limit its potential liability under the contract to the difference between contract price and market price while still fully performing.

In our opinion when a contract gives the Government the option of two performances at different prices, then the Government has incurred an obligation only for the lesser amount because the Government cannot be held to any greater liability. The Government can lawfully enter into such a contract, without violating the prohibition against contracting in advance of appropriations, if at the time it enters the contract it has sufficient appropriations available to pay the

lesser amount. *Cf. Newport News Shipbuilding and Drydock Co.*, 55 Comp. Gen. 812, 826 (1976).

Therefore, it is our opinion that the President may enter into synthetic fuel purchase contracts without violating section 717(a) of the Act so long as he has sufficient appropriations in advance to pay any anticipated difference between the contract price and the estimated market price at the time of performance.

Our view is supported by section 305(d)(5) of the Act, which provides:

> (5) In any case in which the President, under the provisions of this section, accepts delivery of any synthetic fuel, such synthetic fuel may be used by an appropriate Federal agency. Such Federal agency shall pay for such synthetic fuel the prevailing market price for the product which such synthetic fuel is replacing, as determined by the Secretary of Energy, from sums appropriated to such Federal agency for the purchase of fuel, and the President shall pay, from sums appropriated for such purpose pursuant to the authorizations contained in sections 711(a)(2) and 711(a)(3), an amount equal to the amount by which the contract price for such synthetic fuel as specified in the contract involved exceeds such prevailing market price.

This provision makes it clear that Congress intended the funds appropriated to carry out section 305 to be used only to pay the amount by which the contract price exceeds the market price for the fuel. (Also *see* H.R. Rept. No. 96–165, 96th Cong., 1st Sess. 24 (1979).) If the Government decides to purchase the fuel, the part of the price equal to the market price is to be paid from the appropriations for fuel purchases of the agency which will actually use the fuel. Since it cannot be known until the time for performance whether the Government will accept the fuel, or which agency will actually use it if accepted, the Congress did not intend that the market price portion of the cost would be paid from an appropriation current at the time the contract is entered. Rather it intended that this portion of the purchase price would be paid from the using agency's appropriation current at the time of performance.

Further support is found in section 305(g). The first paragraph of this provision requires each contract entered under section 305 to specify in dollars the maximum liability of the Government under the contract. The second paragraph states that in determining this maximum liability:

> purchase agreements shall be valued as of the date of each such contract based upon the President's estimate of the maximum liability under such contract * * *

Since the full contract price would be *known* at the time the contract was entered, the only liability that the President could *estimate* would be the difference between that price and the market price at the date for performance. Thus the maximum liability, which the Government would have to have sufficient appropriations in advance to cover, is only the difference between the contract and market prices.

[B-199152]

Fair Labor Standards Act—Applicability—"Foreign Exemption"—Not For Application—Overseas Temporary Duty—Return Travel on Nonworkday Within Same Workweek

Three Navy employees who are nonexempt under Fair Labor Standards Act (FLSA) are entitled to overtime under FLSA for return travel from Scotland. "Foreign exemption" under FLSA is construed narrowly, and hours of work in covered area during same workweek will defeat "foreign exemption."

Compensation—Traveltime—Hours of Work Under FLSA—What Constitutes "Workweek"—Overseas Temporary Duty—Return Travel on Nonworkday Within Same Workweek

Three Navy employees completed temporary duty in Scotland on Friday, the last day of their "regularly scheduled administrative workweek," and returned to United States on Saturday, a nonworkday. Travel on nonworkday which is within 7-day workweek is compensable under Fair Labor Standards Act. "Regularly scheduled administrative workweek" is a concept under title 5, United States Code, and has no application to the FLSA.

Compensation—Wage Board Employees—Overtime—Traveltime

Three Navy employees who performed temporary duty in Scotland returned to United States on Saturday, a nonworkday. Traveltime is not compensable as overtime under title 5, United States Code, under these circumstances.

Matter of: Paul G. Abendroth, et. al.—Overtime claim for travel, November 28, 1980:

The issue in this decision is whether employees who are nonexempt under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, are entitled to overtime compensation for travel where they are returning from temporary duty at an overseas location. We hold that although they are not eligible for overtime under title 5, United States Code, they are entitled to overtime under the FLSA since the return travel within the same workweek defeats the "foreign exemption" under the FLSA.

This decision is in response to a request from A. W. Countryman, Chief Steward, Federal Employees Metal Trades Council, Portsmouth Naval Shipyard, Portsmouth, New Hampshire. The request has been handled as a labor-management relations matter under our procedures contained in 4 C.F.R. Part 21 (1980). We have received comments on this matter from the Commander, Portsmouth Naval Shipyard, and we have requested and received a report from the Office of Personnel Management (OPM) on the issue of overtime entitlement under the FLSA.

BACKGROUND

In October 1979, 29 Pipefitters at the Portsmouth Naval Shipyard were assigned to temporary duty at the Shipyard's worksite in Holy Loch, Scotland. Work was due to be completed on Friday, October 12,

but due to unforeseen circumstances, three Pipefitters, Paul G. Abendroth, Fred R. Bragdon, and Paul W. Dubois, were selected and assigned to work on Friday and return home on Saturday, October 13. These three employees were paid for 8 hours of overtime while in travel status on Saturday although their return travel involved 12 hours of traveltime. However, the Shipyard subsequently collected back the overtime payments from the employees on the basis that overtime could not be paid for this travel under either title 5, United States Code, or the FLSA.

The union argues that although work in a foreign area is exempt from coverage under the FLSA, the three employees in this case returned to the United States on Saturday, October 13, and thereby performed "hours of work" within their administrative workweek in an area covered by the FLSA. The Shipyard argues, however, that these three employees did not perform work in the United States within their "regularly scheduled administrative workweek" and, therefore, the time spent in travel status is not compensable under the FLSA.

OVERTIME UNDER TITLE 5

Under the provisions of 5 U.S.C. § 5544(a) (1976), a prevailing rate employee may not be compensated for time spent in travel status away from the official duty station unless the travel:

(i) involves the performance of work while traveling,
(ii) is incident to travel that involves the performance of work while traveling,
(iii) is carried out under arduous conditions, or
(iv) results from an event which could not be scheduled or controlled administratively.

Neither the union nor the Shipyard claims that these three employees are entitled to overtime compensation under this section. That is consistent with our decisions holding that such travel is not considered hours of works for the purposes of title 5, United States Code. See, for example, 49 Comp. Gen. 209 (1969).

OVERTIME UNDER FLSA

The remaining question is whether these nonexempt employees are entitled to overtime under the FLSA. In view of the authority of the Office of Personnel Management under 29 U.S.C. § 204(f) (1976), to administer the FLSA with respect to Federal employees, we requested OPM's views of this matter.

The report from OPM states that the "foreign exemption" contained in 29 U.S.C. § 213(f), and 5 C.F.R. § 551.204, exempts from the overtime provisions of the FLSA any employee whose services during the workweek are performed in a workplace within a foreign country or certain territories. However, it is OPM's view that exemp-

tion criteria, including the foreign exemption, are to be narrowly construed. After reviewing the legislative history of section 213(f), OPM believes that the purpose of the exemption is to exclude the application of the FLSA only to an employee who is an integral part of the foreign economy. Thus, since the FLSA is a workweek law, OPM concludes the exemption is applicable on a workweek basis to an employee on temporary duty if the employee spends the entire workweek in the foreign area. Where the employee performs any compensable work in a "covered" area (the United States or certain territories or possessions) in any workweek, OPM believes it would not be appropriate to apply the foreign exemption. Thus, since travel is considered "hours of work" under the FLSA, OPM concludes that an employee who is permanently stationed in a covered area and who performs compensable travel to or from an exempt area will not be subject to the foreign exemption for that workweek. See also Federal Personnel Manual (FPM) Letter 551–7, para. 2.a.

The Shipyard argues that since these three employees performed all their work within the "regularly scheduled administrative workweek" (presumably Monday through Friday) in Scotland, a foreign area, their travel on Saturday to a covered area does not fall within this workweek and is therefore not compensable.

Although there does not appear in the OPM regulations any definition of the term "workweek," we believe for the purposes of the FLSA that an employee's workweek cannot be limited to his "regularly scheduled administrative workweek," which is a term used for purposes of compensation under title 5, United States Code. See 5 U.S.C. §§ 6101 and 5544. We note, for example, that under the Department of Labor's regulations governing FLSA in the private sector, a workweek is defined as a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods. See 29 C.F.R. § 778.105 (1979). In addition, in determining what constitutes "hours worked," the regulations issued by OPM cite the following example in FPM Letter 551–1, Attachment 4:

> Time spent traveling (but not other time in travel status) away from his official duty station is "hours worked" when it cuts across the employee's workday. The time is not only "hours worked" on regular workdays during normal work hours but also during the corresponding hours on nonwork days. Thus, if an employee regularly works from 8:30 a.m. to 5:00 p.m. from Monday through Friday, the time spent traveling during these hours is worktime on Saturday and Sunday as well as on the other days.

Therefore, we conclude that time spent traveling need not be limited to the employee's "regularly scheduled administrative workweek" in order to be compensable under the FLSA.

Applying these principles to the facts of this case, we assume that these three employees' regular workdays were Monday through Friday and that their workweek for the purposes of the FLSA was Sunday

through Saturday. The travel they performed on Saturday was "hours worked" under the FLSA during the workweek. Therefore, the foreign exemption would not be applicable due to the performance of compensable work (travel) in the covered area during that workweek.

Acordingly, these employees are entitled to overtime compensation under the FLSA for the hours of travel on Saturday that corresponded to their normal working hours.

[B-199341]

Federal Labor Relations Authority—Jurisdiction—Unfair Labor Practices—Settlement—Union Dues Allotments—Wrongful Termination by Agency

Federal Labor Relations Authority has issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The Department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, provides for dues allotments to unions and authorizes Authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if approved by the Regional Director of the Authority. Modifies B-180095, Oct. 2, 1975.

Unions — Federal Service — Dues — Allotment For — Agency's Wrongful Discontinuance—Settlement of Unfair Labor Practice Complaint

If an employee authorizes the deduction of union dues from his pay, a Federal agency is obligated to withhold the amount from the employee and pay it over to the union. The payment of the dues is a personal obligation of the employee, and where the agency wrongfully fails to withhold the dues and later reimburses the union pursuant to the settlement of unfair labor practice charges, the agency must either collect the dues from the employee or waive collection of the debt.

Matter of: Department of Labor—Union Dues Allotments—Unfair Labor Practice Settlement, November 28, 1980:

This decision is in response to a request by Alfred M. Zuck, Assistant Secretary for Administration and Management, Department of Labor, for an advance decision concerning two different questions involving dues allotments. We shall address the second question first.

1. *Reinstatement of 71 Dues Allotments Revoked by the Department of Labor in March 1980*

During contract negotiations between American Federation of Government Employees Local 12 and the Department, the union alleged that 71 dues allotments had been wrongfully terminated on the first full pay period after March 1, 1980. Pursuant to an agreement with AFGE Local 12 dated April 23, 1980, the Department restored the allotments of the 71 employees effective with the pay period ending April 19, 1980. The 71 employees have filed an unfair labor practice charge against the Department of Labor alleging that they were

not given an opportunity to revoke their dues within 1 year. In order to settle this charge, the Department of Labor has requested our authorization to reimburse the 71 employees for dues withholding allotments made after March 1, 1980.

Subsequent to the Department's letter to us, the General Counsel of the Federal Labor Relations Authority has decided not to issue a complaint on this charge because the 71 employees did not have the right under the statute to have their dues allotments terminated prior to September 1, 1980. Since the charge has been dismissed, the question is moot and no answer is required.

2. *Wrongful Termination of 40 Dues Allotments*

Prior to January 11, 1979, the effective date of the Federal Labor-Management Relations Statute (5 U.S.C. chapter 71, § 7101 *et seq.*), enacted as title VII of the Civil Service Reform Act of 1978, Public Law 95-454, October 13, 1978, 92 Stat. 1192, an employee could revoke his dues allotment to a union semiannually under section 21 of Executive Order 11491, as amended. On and after January 11, 1979, dues allotments may only be revoked after a period of 1 year. 5 U.S.C. § 7115(a).

On February 23, 1979, the Federal Labor Relations Authority issued a Notice and Direction to heads of agencies and unions directing them not to effectuate employee revocation of dues assignments received by the agencies on or after January 11, 1979, but to continue to withhold dues and maintain these funds in a suspense or escrow account pending further advice from FLRA. Despite this notice the Department of Labor honored 40 dues allotment revocations received between January 11, 1979, and March 1, 1979, and made them effective for the pay periods ending March 24, 1979, through June 16, 1979.

The Authority, on April 19, 1979, interpreted 5 U.S.C. § 7115(a) and ruled in effect that, absent an agreement to the contrary, the annual dues revocation date would be either September 1, 1979, or the anniversary of the date on which the employee first authorized dues withholding, whichever is later. See *Interpretation and Guidance* (FLRA No. O-PS-1). The ruling applies only to revocation requests submitted to agencies on or after January 11, 1979.

On September 18, 1979, AFGE Local 12 filed unfair labor practice charges concerning the Department's setting of March 1, 1979, as the effective date for employees to revoke dues withholding allotments. Amended charges were filed on March 14 and May 6, 1980. The union alleged that the Department had wrongfully terminated 40 dues withholding allotments during the period beginning March 3, 1979, and ending June 16, 1979. On May 16, 1980, the Regional Director of the FLRA issued a formal complaint and notice of hearing on the charge. FLRA Case No. 3-CA-506. The Union and the Department now pro-

pose to settle the unfair labor practice charge by having the Department reimburse the local for the dues of the 40 employees which had been revoked effective for the payroll periods ending March 24, 1979, through June 16, 1979, until the first full pay period beginning after September 1, 1979. No payments would be required from the 40 employees. The Department of Labor is prepared to settle the unfair labor practice complaint in this manner if we approve the payment.

In a prior decision, we held that, where union dues were not collected by an agency due to administrative error, the agency may not use appropriated funds to directly pay union dues without either seeking to recover the amounts from the employees or exercising its authority to waive collection from the employees under 5 U.S.C. § 5584. B–180095, October 2, 1975. That case arose under section 21 of Executive Order 11491, as amended, and the controlling issue here is to what extent we should follow our 1975 decision in a case arising under the new statutory labor-management relations program.

The Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, differs materially from the prior Executive order program. Federal agencies are now under a statutory duty, upon receiving an employee's written authorization, to withhold union dues from the employee's pay and to pay the allotment to the exclusive representative for the bargaining unit. The allotment is made without cost to the union or the employee. 5 U.S.C. § 7115(a). Dues "checkoff" is no longer dependent upon an agreement between an agency and a labor union as it was under section 21 of the order, and a dues allotment under section 7115(a) may not be revoked for a 1-year period as opposed to 6 months under section 21. Moreover, Congress has created a new agency, the Federal Labor Relations Authority, and invested it with the duty to administer the Federal Labor-Management Relations Statute.

The Department of Labor's termination of the 40 dues allotments to AFGE Local 12 was clearly erroneous. In the first place, the Department disregarded the Authority's direction of February 23, 1979, not to honor revocation requests filed on or after January 11, 1979, pending a ruling by the Authority. In the second place, the Department continued to terminate dues allotments even after the Authority's ruling on April 19, 1979, that allotments were revocable only on September 1, 1979, or the anniversary date of the employee's authorization, whichever is later. Hence, the Department's action in terminating allotments from March 24 through June 16, 1979, was wrongful and in violation of the statute, as it has been interpreted by the Federal Labor Relations Authority, the agency Congress empowered to administer the statute and to establish policies and guidance relating to matters arising under the statute. 5 U.S.C. § 7105(a)(1).

Congress has also provided that wrongful actions under 5 U.S.C. chapter 71 shall be remedied through unfair labor practice proceedings. Among other things, the statute provides that it shall be an unfair labor practice for an agency to fail or refuse to comply with any provision of chapter 71. 5 U.S.C. § 7116(a)(8). When the Federal Labor Relations Authority finds that an unfair labor practice has been committed by an agency, the Authority may order such action as will carry out the purpose of the statute. 5 U.S.C. § 7118(a)(7)(D). There need not be a formal finding of a violation by the Authority before payment is made. The General Counsel of the Authority has the duty to investigate charges of unfair labor practices and to issue complaints where appropriate, and he may provide for informal methods of settlement. 5 U.S.C. § 7118(a)(1) and (5). The stated policy of the General Counsel is to encourage voluntary settlements which effectuate the policies of the statute in order to reduce Government expenditures and promote amity in labor relations. In this regard, regulations have been promulgated concerning both formal and informal settlements during the various stages of unfair labor practice proceedings. See 5 C.F.R. § 2423.11 (1980).

We believe that these new statutory provisions governing union dues allotments, together with the evident intent of Congress to provide a remedy for violations of the statute, compel us to conclude that an agency may use apppropriated funds to reimburse a labor union for dues allotments wrongfully terminated by the agency in violation of 5 U.S.C. § 7115(a).

However, the payment of union dues is a personal obligation of the employee. Therefore the agency, after using appropriated funds to reimburse the labor union for the agency's error in wrongfully revoking the dues allotments, must seek to recover the amount of the dues from the employees or exercise its power to waive collection from the employees under 5 U.S.C. § 5584 (1976). Our decision in B–180095, October 2, 1975, is modified, to allow an agency to reimburse the union from appropriated funds under circumstances discussed above, and then to collect or waive the debt from the employees.

Therefore, if the proposed settlement between the Department of Labor and AFGE Local 12 is approved by the Regional Director of the Federal Labor Relations Authority, we would have no objection to the Department's payment to the union of the amount the union would have received if the 40 dues allotments had not been wrongfully terminated in 1979. However, since the dues not withheld remain a personal obligation of the 40 employees, the Department must take action either to collect the dues from the employees or to waive collection of the debts.

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