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Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester—Single *v.* Multiple Awards

Protest asserting that multiple contract awards were improper under the "Additive and Deductive Items" clause of the solicitation is timely filed after bid opening, because it challenges the propriety of the awards rather than the terms of the solicitation.

Contracts—Awards—Multiple—Contrary to Solicitation's Terms—Protest Sustained

Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government.

Matter of: Northeast Construction Company, April 1, 1982:

Northeast Construction Company (Northeast) protests the award of contracts to Mitchell Construction Company, Inc. (Mitchell), and to Bill Strong Enterprises, Inc. (BSEI), under invitation for bids (IFB) No. F08650-81-B-0174, issued by the Department of the Air Force for rehabilitation of Capehart housing units at Patrick Air Force Base, Florida. The protester essentially contends that, contrary to the terms of the IFB, the Air Force improperly awarded separate contracts for portions of the construction work rather than making award to Northeast on its low aggregate bid.

We find the protest to be meritorious.

The IFB solicits a base bid for replacement of windows (item 0001) and rehabilitation of kitchens and bathrooms (item 0002) in specified housing units and includes five deductive bid items decreasing the number of units in which rehabilitation work is to be done. Paragraph 10 of the IFB Standard Form (SF) 22, "Instructions to Bidders (Construction Contract)," advises that award will be made to the responsible bidder whose bid is most advantageous to the Government, price and other factors considered, and that the Government may accept any item or combination of items of a bid absent a provision to the contrary in the IFB or a restrictive limitation in the bid. Similarly, paragraph 22 of the IFB, "Additional Instructions to Bidders," states that the Government reserves the right to make award of any or all schedules of any bid, unless the bidder specifically qualifies its bid, and to make award to the bidder whose aggregate bid on any combination of bid schedules is low. The clause further defines the word "item" used in paragraph 10 of SF 22 as "schedule" for the purpose of the IFB. Finally, the IFB includes the "Additive or Deductive Items" clause prescribed in Defense Acquisition Regulation (DAR) §7-2003.28 (Defense Acquisition Circular (DAC) No. 76-26, December 15, 1980), which provides, in pertinent part, as follows:

The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, * * * minus * * * those * * * deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. * * *

The Air Force estimates for items Nos. 0001 and 0002 were $1,308,711 and $2,054,921, respectively, for a total estimate of $3,363,632. Of the nine bids received at the bid opening, those of the protester and the awardees were as follows:

Bidder	Item 0001	Item 0002	Total base bid
Northeast	$867,000	$1,431,400	$2,298,400
BSEI	1,088,504	1,428,400	2,516,904
Mitchell	858,790	1,832,948	2,691,738

The Air Force awarded item 0001 to Mitchell at $858,790 and item 0002 to BSEI at $1,428,400—a total cost to the Government of $2,287,190 ($11,210 less than Northeast's low aggregate bid of $2,298,400).

Northeast takes the position that paragraph 22 of the IFB instructions modified any right the Air Force might otherwise have to make multiple contract awards because it defined the term "item," used in SF 22, paragraph 10, as "schedule." The protester asserts that the IFB included only one "schedule," comprised of seven bid items, and argues that the contracting agency therefore could not separately award the bid items of that schedule. Northeast insists that the IFB, which does not include the required clause for evaluation of multiple awards set forth in DAR §7-2003.23(b) (DAC No. 76-26, December 15, 1980), failed to notify bidders that the Air Force contemplated multiple awards. The protester concludes that the IFB precluded prospective bidders from competing on an equal basis, resulted in awards on a basis other than that stated in the IFB, and compromised the integrity of the competitive bidding system, requiring termination of the contracts and award to Northeast.

The Air Force contends that Northeast's protest to our Office is untimely because it concerns provisions of the solicitation which were apparent, but were not protested prior to bid opening. *See* 4 C.F.R. §21.2(b)(1) (1981). In denying Northeast's initial protest to the contracting officer, the Air Force explained that it was not necessary to apply the evaluation method specified in the "Additive or Deductive Items" clause because the low bid for item 0002 did not exceed the available funds. Contrary to the protester's assertions, the contracting agency states that in accordance with paragraph

22, the bid items should be read as, for example, "Schedule 0001" and that the Air Force expressly reserved the right to make separate awards absent qualifications in the bids. The Air Force asserts that the contracting officer correctly determined, pursuant to paragraph 22, that it was in the Government's best interest to make multiple awards at a savings to the Government, citing 47 Comp. Gen. 233 (1967). The Air Force further suggests that multiple contract awards under these circumstances are consistent with DAR § 7-2003.23(b), which provides for evaluation of bids on the basis of advantage to the Government that may result from making more than one award where the individual awards result in the lowest aggregate price to the Government.

We do not agree with the Air Force that Northeast's protest is untimely. Where the protester asserts that it reasonably interpreted an IFB as contemplating an aggregate award and had no reason to believe prior to award that it would be interpreted otherwise, the protester is contending that the IFB precludes award on an item basis, not alleging an apparent solicitation deficiency. *Carolina Parachute Company,* B-198199, July 30, 1980, 80-2 CPD 79. Timeliness of the protest is determined not by the bid opening date, but from the time the protester knew or should have known the basis of protest. *See* 4 C.F.R. § 21.2(b)(2) (1981). Therefore, Northeast's protest to the Air Force within 10 working days after notice of the awards is timely, and its subsequent protest to our Office within 10 working days after the contracting agency's denial of its protest at that level will be considered on the merits. 4 C.F.R. § 21.2(a) (1981).

We concur in the protester's assertion that paragraph 34, quoted above in pertinent part, states the controlling basis of bid evaluation and award and that it requires an aggregate award provided such a bid falls within the funds available for the project. In our opinion, items 0001 and 0002 constitute the IFB base bid requirements. The narrative statement preceding the bid items states that the contractor is to perform all work required to rehabilitate the kitchens and bathrooms in 333 housing units and replace awning windows in 999 units. The remaining bid items, collectively listed under the heading "Deductive Bid Items," pertain only to the rehabilitation work specified in item 0002. Award of the greatest deductive bid item would still result in a contract for the rehabilitation of 228 units in addition to the window replacement.

We find that paragraph 10(c) of SF 22, as modified by paragraph 22 of the IFB instructions, merely preserved the contracting agency's right to award schedules, not items, separately. The definition of the term "item" as "schedule" expressly applies only to paragraph 10 of SF 22 rather than to that term as it is used in the rest of the IFB. The fact that the narrative description of the agency's requirement is stated conjunctively, in addition to the failure to include multiple awards as an evaluation factor in the IFB, further

indicates that the Air Force did not contemplate making multiple awards at the time the IFB was issued.

The award of a contract pursuant to advertising statutes must be made on the same terms that were offered to all bidders. Because the IFB "Additive and Deductive Items" clause clearly advised bidders that an aggregate award was contemplated, an award made under the IFB must be made to the low aggregate bidder notwithstanding that it will cost the Government more than multiple awards would cost. *Com-Tran of Michigan, Inc.*, B-200845, November 28, 1980, 80-2 CPD 407.

In its report on the protest, the Air Force states that items 0001 and 0002 of the IFB are clearly intended to be severable, that the items are not tied together or related in any way which would require an aggregate award, and that there is no factual necessity for the window replacement and the rehabilitation work to be done by the same contractor. Such statements would ordinarily require the resolicitation of the procurement on a basis that permits multiple awards. *Blue Bird Coach Lines, Inc.*, B-200616, January 28, 1981, 81-1 CPD 51; *Com-Tran of Michigan, Inc., supra;* B-179253, October 4, 1973. However, in this case, having regard for the fact that all bids have been exposed, that the $11,210 difference between the aggregate award basis and the item award basis is less than a half of 1 percent of the $2,298,400 aggregate bid, that resolicitation of the same work on a different award basis would further delay the procurement and create an auction atmosphere, and that award on an aggregate basis would meet the Government's needs as well as an award on a multiple basis, we recommend that the awards to Mitchell and BSEI be terminated for the convenience of the Government and that an award be made to Northeast, the low aggregate bidder, instead of resolicitating the procurement.

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

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-205489]

Purchases—Small—Competition—Adequacy

Since small purchases do not require maximum competition, General Accounting Office (GAO) will review a contracting agency's approach to defining the field of competition only in a case of fraud or intentional misconduct, or where it appears that there has not been a reasonable effort to secure price quotations from a representative number of responsible firms. Once the field of competition is defined, how-

ever, GAO will review the procurement to insure that it is conducted and concluded consistent with the small purchase selection procedures and the concern for a fair and equitable competition that is inherent in any procurement.

Purchases—Small—Requests for Quotations—Misplaced Lower Offer—Effect on Award

In view of the need for the orderly and expeditious fulfillment of an agency's requirements, GAO will not disturb a small purchase contract where after award the contracting agency discovers a lower priced offer that had been timely received but misplaced before it could be recorded, absent evidence of a conscious or deliberate effort to prevent award to that offeror.

Matter of: R. E. White & Associates, Inc., April 1, 1982:

R. E. White & Associates, Inc. protests the Defense Logistics Agency's (DLA) issuance of a purchase order for pressure switches to Hydra Electric Co. under request for quotations (RFQ) DLA 900-81-T-BT36. Quotations in response to the RFQ, which was effected under the small business procedures at Defense Acquisition Regulation (DAR) § 3-600 *et seq.* (1976 ed.), were due by April 19, 1981, and delivery was requested by June 22. The purchase order was issued on May 17 at $205 per unit with delivery in 300 days. White protests that it offered to furnish surplus units for $63.25 each by the delivery date specified in the RFQ.

We deny the protest.

White inquired as to the status of the purchase on October 1. The buyer at DLA responded in an October 26 letter advising of the award, and that the agency disregarded White's lower quotation because in a letter sent by White one month before the RFQ was issued the firm expressed its displeasure with the activity's procurement practices and stated that it therefore was "suspending all new quotations and proposals." The buyer stated that Hydra Electric's quotation thus "was the only active quote available to us at the time of award." White complains that it rescinded the letter "suspending" its quotations by telegram before this RFQ was issued.

In response to White's protest, DLA reports that the advice given to White by the buyer was erroneous. DLA states that it actually did not know that White had submitted a lower quotation at the time the agency issued the purchase order to Hydra Electric. DLA asserts that it first discovered White's quotation when the contracting officer reviewed the procurement records to respond to White's October 1 inquiry about the procurement's status. The agency asserts that the quotation appears to have been placed in the procurement file for this solicitation after the purchase order was issued. DLA notes, however, that the quotation evidently was timely, and speculates that it had been misplaced or mishandled by the Government after its receipt and before it could be recorded in the computer that abstracts responses to solicitations for this type of requirement. DLA suggests that the buyer's advice that White's quotation consciously had been disregarded reflected a misunder-

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standing on his part of the contracting officer's report of his review. DLA's report also indicates that the surplus switches identified by White in the firm's quotation would have been acceptable.

DLA nonetheless notes that this Office has stated that our review of small purchases is limited to cases of fraud or intentional misconduct, or where it appears that the procuring activity has not made a reasonable effort to secure price quotations from a representative number of responsible firms as anticipated by small purchase regulations. See *Ikard Manufacturing Company,* B-192308, October 25, 1978, 78-2 CPD 301. On the basis of its view that its actions were at most negligent, and because it did solicit quotations from four firms, DLA argues that we should not consider the merits of the protest.

The limited review standard noted by DLA, however, is intended to apply only to protests against the contracting agency's approach to defining the field of competition for a small purchase. For example, we will apply that standard to a protest against allegedly restrictive RFQ specifications, *e.g., Tagg Associates,* B-191677, July 27, 1978, 78-2 CPD 76, as well as to a protest that a firm simply was not solicited for a quotation, *e.g., Security Assistance Forces and Equipment oHG,* B-195830, February 8, 1980, 80-1 CPD 114. We limit our consideration of these types of protests because the small purchase procedures, which are designed to minimize the administrative cost that otherwise might be the equivalent of or exceed the cost of acquiring relatively inexpensive items, permit purchases without the need to maximize competition, in contrast to other procurements. The contracting officer need only solicit quotations from a reasonable number of potential sources, judge the advantages and disadvantages of particular products in relation to the prices quoted, and determine in good faith which quotation will best meet the Government's needs. *Security Assistance Forces & Equipment oHG, supra.* The fact that a particular firm may have been precluded or excluded from the competition is irrelevant to the propriety of the purchase as long as there was no fraud or intentional misconduct, and the competition was reasonable in scope.

The limited review standard, however, is not intended to suggest that simply because any restrictions on the competition were not the result of fraud or intentional misconduct and the competition was reasonable in scope we will not review a small purchase after quotations are solicited and the field of competition thus is defined. The procurement still must be conducted and concluded consistent with the small purchase selection procedures and the concern for a fair and equitable competition that is inherent in any procurement. Thus, for example, although that award in a small purchase need not be to the firm offering the lowest quotation if another is more advantageous to the Government, *JCL Services, Inc.,* B-182994, June 16, 1975, 75-1 CPD 343, we will review an unsuccessful offeror's protest against a contracting officer's decision that a higher

quotation in fact was more advantageous to the Government. See *City-Wide Photography Consultants, Inc.,* B-203193, June 3, 1981, 81-1 CPD 444. We believe that our review similarly is appropriate here.

We deny the protest, however. It is unfortunate that White's timely qoutation was misplaced after receipt and before it was recorded, and was not discovered until after DLA issued the purchase order to Hydra Electric. Nonetheless, we believe that the general need for the orderly and expeditious fulfillment of an agency's requirements precludes disturbing a small purchase contract based on a misplaced offer discovered after award, absent a showing of a conscious or deliberate effort by the agency to prevent the selection of that offeror.

There is no evidence here of any deliberate effort by contracting personnel to preclude White from receiving the order in issue. We therefore will not object to the award to Hydra Electric.

The protest is denied.

[B-204204, B-204204.2]

General Accounting Office—Jurisdiction—Transportation Charges—Payment—Discount Deductions—Recovery Claim

Carrier's claim to recover monies deducted by agencies on the basis of a tender's prompt-payment discount provision constitutes a claim for transportation charges under 31 U.S.C. 244(a) (Supp. III, 1979), since the claim involves a discount taken by the agencies based on application of a tender, and the 3-year statue of limitation for the filing of claims is applicable.

Contracts—Discounts—Transportation Charges—Discount Period—Commencement Date

Under carrier's tender which allows Government a discount from charges billed by carrier when bill is paid within 15 days of date of voucher, the Government is not entitled to a discount when payment is made more than 15 days after the date of the voucher. For billing purposes, the date placed on the voucher by the carrier is the voucher date.

Statutes of Limitation—Claims—Transportation—Discount Deductions—Carrier's Recovery Claim

Where statute permits filing of transportation claims within a 3-year statute of limitation period, carrier cannot be estopped from filing such claims within this period by its acceptance of initial payment of bill submitted.

Matter of: American Farm Lines, Inc., April 5, 1982:

American Farm Lines, Inc. (AFL), asks that we review prompt-payment discounts taken by the United States Finance and Accounting Center and the Navy Finance Center on 24 bills submitted for payment by AFL. AFL alleges that the Government improperly took a prompt-payment discount offered under AFL Tender 389 on these vouchers.

AFL has filed these claims directly with GAO, rather than with either the paying agency or the General Services Administration

(GSA). AFL alleges that these are claims against the United States for consideration by GAO under 31 U.S.C. §71 (1976) and, therefore, are subject to the 6-year statute of limitations for claims filed with GAO under 31 U.S.C. §71a (1976).

Since it appeared to us that AFL's claims concerned payments for transportation services, we asked GSA to review AFL's claims.

GSA asserts that these claims are governed by 31 U.S.C. §244(a). The relevant portion of this act provides:

> Payment for transportation of persons or property for or on behalf of the United States by a carrier * * * shall be made upon presentation of bills therefor prior to audit by the General Services Administration, or his designee.
>
> * * * * * * *
>
> That every claim for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Services Administration, or by his designee within three years * * * from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later.

GSA has reviewed microfilm copies of the bills underlying AFL's claims. GSA reports that AFL never filed the claims with either GSA or the paying agency for the allegedly improper discount deduction. GSA asserts that the 3-year statute of limitation is applicable to these claims, and that at least one of the claims is time-barred since it was not filed within 3 years from the accrual of the cause of action which coincides, in this case, with the date of payment. For those 23 claims which were filed with GAO prior to the expiration of the statute of limitations, GSA states that AFL's claim is without merit. GSA reasons as follows: Tender 389 states that a cash discount is applicable on payment of vouchers for transportation charges when "paid within 15 days of date of voucher." GSA contends that the date of receipt of the bill by the finance agency is the applicable date, rather than the voucher date. Using the date of receipt, GSA reports all discounts were properly taken within 15 days.

Furthermore, GSA asserts that the Government awarded AFL contracts and expedited payment of AFL's bills because of this discount, and after having received these benefits, AFL now contends the Government did not meet the terms of AFL's offer. GSA views AFL's acceptance of the discounted payments, over an extended period of time, as a pattern of conduct which creates an estoppel, preventing AFL from reclaiming these discounts.

We first conclude, as indicated above, that AFL's claims to recover the money taken constitute claims for charges under a tariff for transportation services which are within the purview of the act, and are therefore subject to the 3-year statute of limitation. The discount concerns the interpretation of a tender provision and we can find no reason to distinguish the discount tender provision from any other tender provision.

Thus, under the act, claims for transportation charges generally should be received by GSA within the 3-year statutory period. Since GSA has had an opportunity to review these claims, and advised us of its position and the record is before us, we view it as appropriate for our review.

We agree with GSA that one claim under one carrier bill, 2-664-P, is time-barred. The bill was paid by the Department of the Navy on March 6, 1978, and, therefore, the 3-year statute of limitation expired 3 years from the date of payment, or on March 6, 1981. The claim was not filed with GAO until July 21, 1981, and GSA received notice of the claim after this date. *American Farm Lines, Inc.*, B-203045, August 11, 1981. Therefore, this claim cannot be considered.

However, concerning the 23 other claims, these were filed with GAO on September 17, 1981, and we sent them to GSA in a letter dated September 20, 1981. Since the statute of limitation did not expire on the first of these claims until October 1981, we consider these claims timely filed. To rule otherwise would unfairly penalize AFL for the time involved in GAO developing the record and rendering a decision. As a result of GAO referring these claims to GSA for its views, GSA thereby received notice of these claims prior to the expiration of the 3-year statute of limitations.

Concerning the merits of AFL's claims, this Office has held in a directly analogous situation that, where contract language permits application of a discount when an invoice is paid within 9 days from the date of the invoice, the Government is not entitled to the discount where the payment is made later than 9 days after the date of the invoice. *American Brands, Incorporated, Philip Morris, Incorporated*, B-172101, March 7, 1974, 74-1 CPD 122. AFL's tender clearly stated the vouchers had to be "paid within 15 days of date of voucher" for the discount to be applied. Thus, since the only date supplied by the carrier on the voucher is the voucher date, the discount was improperly taken.

Therefore, in our view, under the tender's terms the discount was improperly taken on these 23 bills.

GSA also contends that AFL cannot assert these claims because of its established course of conduct in accepting the discounted payment over the past 3 years. However, the act specifically contemplates the filing of supplemental bills and claims for transportation charges within the 3-year statute of limitations and, thus, in view of this statutory provision, the theory of estoppel is inapplicable to these claims. *Cf., American Farm Lines*, B-200939, May 29, 1981.

GSA should take settlement action consistent with this decision.

[B-198571]

General Accounting Office—Jurisdiction—Attorney Fee Claims—Discrimination Complaint Cases

Employee filed discrimination complaint and was awarded retroactive promotion in 1979. Claim for attorney fees is denied since General Accounting Office (GAO) is without authority under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(k) and 2000e-16, to consider discrimination complaints or claims for attorney fees incident to such complaints. Regulations authorizing payment of attorney fees in discrimination cases were issued subsequent to this employee's case and are not retroactively effective.

Attorneys—Fees—Civil Service Reform Act of 1978—"Appropriate Authority" Decisions—Review—Back Pay Act Regulations

Employee filed discrimination complaint and was awarded retroactive promotion as remedy under Title VII of Civil Rights Act. Claims for attorney fees under Back Pay Act, as amended, 5 U.S.C. 5596, is denied since employee is appealing to GAO only agency's denial of attorney fees which is not permitted under regulations implementing the Back Pay Act.

Matter of: Trinie A. Hellmann—Attorney Fees—Discrimination Complaint, April 6, 1982:

ISSUE

The issue in this decision is the entitlement of an employee to attorney fees incident to her discrimination complaint that resulted in an award of a retroactive promotion. We hold that our Office is without jurisdiction to consider discrimination complaints or claims for attorney fees under Title VII of the Civil Rights Act of 1964, as amended. In addition, regulations authorizing the payment of attorney fees by Federal agencies under Title VII of the Civil Rights Act of 1964 would not be applicable to this case because the relief sought by the complaint was granted prior to the issuance of these regulations. Furthermore, we find no authority under the Back Pay Act, as amended, for payment of attorney fees under these circumstances.

BACKGROUND

This decision is in response to the appeal by Ms. Trinie A. Hellmann from our Claims Group settlement, Z-2819117, March 14, 1980, denying her claim for attorney fees. In presenting this claim, Ms. Hellmann has been represented by her attorney, Mr. Shelby W. Hollin.

Ms. Hellmann, an employee of the Department of the Air Force, filed a discrimination complaint on March 2, 1979, regarding a promotion action. Following an investigation it was found that Ms. Hellmann was denied promotion to grade GS-11 because of her sex, and on August 3, 1979, the agency granted her a retroactive promotion to grade GS-11 effective February 25, 1979. Ms. Hellmann's

claim for reimbursement of attorney fees in connection with the discrimination complaint was denied by the Air Force and our Claims Group.

On appeal Mr. Hollin argues on behalf of Ms. Hellmann that reimbursement of attorney fees is appropriate under the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1216, October 13, 1978, and under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k) (1976). In addition, Mr. Hollin argues that our Office retains the authority to review claims for attorney fees despite language to the contrary in recently published final regulations implementing the Back Pay Act. See 46 Fed. Reg. 58271, December 1, 1981.

DISCUSSION

We note that Ms. Hellmann's discrimination complaint was filed under procedures set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1976), and 29 C.F.R. Part 1613. However, we have held that it is not within the jurisdiction of our Office to investigate or render decisions on claims of discrimination in employment in other agencies of the Government. See *Martha B. Poteat,* B-196019, April 23, 1980; *Clem H. Gifford,* B-193834, June 13, 1979.

With regard to the payment of attorney fees under Title VII of the Civil Rights Act, we had previously held that Federal agencies had no authority to pay such fees administratively in the absence of specific legislation or appropriate regulations. See *Poteat, supra,* and decisions cited therein. However, on April 9, 1980, the Equal Employment Opportunity Commission (EEOC) issued interim revised regulations authorizing the payment of attorney fees by Federal agencies incident to the settlement of discrimination complaints. 45 Fed. Reg. 24130 (published in 29 C.F.R. § 1613.271 (1981)). According to the EEOC's supplementary information accompanying the revised regulations, these regulations apply only to pending and future complaints as of their effective date, April 11, 1980. The new authority, therefore, would not apply to Ms. Hellmann's claim. *Poteat, supra.*

As is the case with discrimination complaints, there is no right of appeal to our Office on claims for attorney fees under Title VII of the Civil Rights Act of 1964 and 29 C.F.R. § 1613.271 which have been denied by an agency or the EEOC. Therefore, we conclude that we are without authority to consider claims for attorney fees arising out of discrimination complaints under Title VII of the Civil Rights Act of 1964.

As to Mr. Hollin's claim under the Back Pay Act, as amended, we note that with the enactment of the Civil Service Reform Act, the Back Pay Act now provides for the payment of "reasonable attorney fees" related to the finding of an unjustified or unwarranted

personnel action. 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979). However, we believe this claim for attorney fees under the Back Pay Act must be denied for the following reason.

As noted above, the employee's complaint was filed under the procedures of Title VII of the Civil Rights Act, and the remedy was granted under that authority, not under the Back Pay Act. Moreover, under the Back Pay Act and the implementing regulations, there is no appeal to GAO of the claim for attorney fees under these circumstances. Regulations issued pursuant to the Back Pay Act provide in section 550.806(a) that the request for attorney fees may be presented only to the appropriate authority that corrected or directed correction of the personnel action. The regulations also provide in section 550.806(g) that the award of attorney fees and the amount of such fees is subject to review only if provided for by statute or regulation. 46 Fed. Reg. 58276-7, December 1, 1981. In the present case Ms. Hellmann's claim for attorney fees was presented to the Air Force, the agency which corrected the personnel action, and the claim was denied. We find no authority to consider a claim for attorney fees separate and apart from a claim for backpay under the Back Pay Act.

Accordingly, we sustain our Claims Group settlement denying Ms. Hellmann's claim for attorney fees.

[B-202953]

General Accounting Office—Jurisdiction—Subcontracts

General Accounting Office will consider a protest of a subcontract award where the agency instructs its prime contractor not to select the protester and where the agency participates in selecting the subcontract awardee.

Contracts—Subcontracts—Competition—Applicability of Federal Norm—Procurements "For" Government

Agency's instruction to its prime contractor that it select another source besides the protester is inconsistent with the Federal norm requirement for competition to the maximum practicable extent, which was incorporated into the prime contract, where the record does not show that the protester was unavailable as a source of supply or unable to provide the services within the required timeframe.

Matter of: National Data Corporation, April 6, 1982:

National Data Corporation protests a subcontract award by an Environmental Protection Agency (EPA) prime contractor—Fein Marquart Associates, Inc.—to obtain teleprocessing services for the Chemical Information System maintained by EPA,[1] and developed by Fein Marquart under its prime contract. The National Institutes of Health (NIH) had been responsible for obtaining teleprocessing

[1] Section 10 of the Toxic Substances Control Act, 15 U.S.C. § 2609 (1976), requires EPA to establish, with the assistance of other agencies, a data retrieval system concerning the effects of chemical substances and mixtures on health and the environment, and authorizes EPA to enter into contracts for the development of such a system.

services for the System, which National Data had provided under a subcontract with an NIH prime contractor. EPA, however, assumed responsibility for the teleprocessing services from NIH and directed Fein Marquart to select a source for the services; this effort apparently was within the scope of Fein Marquart's prime contract. National Data basically alleges that EPA directed Fein Marquart not to contract with National Data, and that EPA participated in the selection of Information Consultants, Inc. (ICI) without affording National Data an opportunity to compete. We sustain the protest.

Although EPA and the protester disagree as to many of the facts of this case, the following facts are uncontroverted. NIH's prime contract, under which National Data was providing teleprocessing services as a subcontractor, expired May 1, 1981, although it did contain an option for one year's renewal. NIH gave the prime contractor a deadline of April 1 to submit a proposed subcontract for a one-year extension of the services. The prime contractor and National Data, however, formally presented a contract to NIH on April 3, 1981. Meanwhile, on April 2, EPA directed its prime contractor, Fein Marquart, to select another teleprocessing source. This was to be only an interim measure since EPA intended to recompete Fein Marquart's contract with an award projected for October 1, 1981. Fein Marquart selected ICI, the only available source other than National Data.

On April 9, both proposed subcontracts were presented to the Chemical Information System Steering Committee, composed of representatives from EPA, NIH, and two other Government agencies, for "selection between them" (according to the minutes of the Steering Committee meeting). At the meeting, the Government representatives decided to approve Fein Marquart's subcontract with ICI and to allow the NIH prime contract and the National Data subcontract to expire.

Generally, the contracting practices and procedures employed by prime contractors—who normally are acting as independent contractors—are not subject to the statutory and regulatory requirements governing direct Federal procurement. *See Singer Company, Inc., Kearfott Division,* 58 Comp. Gen. 218 (1979), 79-1 CPD 26. Our Office, therefore, considers subcontractor protests only in limited circumstances, such as where the Government's active or direct participation in the selection of the subcontractor has the net effect of rejecting or selecting a potential subcontractor or significantly limiting subcontract sources. *Optimum Systems, Inc.,* 54 Comp. Gen. 767 (1975), 75-1 CPD 166. We consider that situation to be present here, since EPA directed its prime contractor to select a source other than National Data, and the Government, through the Steering Committee, actually selected the subcontractor. While EPA argues that Fein Marquart selected ICI as its subcontract source without any Government participation, the Steering Committee still selected between Fein Marquart's subcontract with ICI

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and the NIH prime contractor's subcontract with National Data. Under the circumstances, we will consider the protest's merits.

The frame of reference for our review where an agency directly participates in the selection of the subcontractor generally is the Federal norm, embodied in the procurement statutes and implementing regulations. *See* 49 Comp. Gen. 668 (1970). An essential element of the Federal norm is the requirement for maximum practicable competition. See *General Electrodynamics Corporation—Reconsideration*, B-190020, August 16, 1978, 78-2 CPD 121. In this respect, while we recognize the propriety and necessity to deviate from some details of the Federal norm where they are not appropriate for application to prime contractor procurements, *see* 49 Comp. Gen., *supra*, EPA has not argued that the requirement for maximum practicable competition should not apply here. In fact, EPA's contract with Fein Marquart expressly required competition for subcontracts to the maximum practicable extent.

We believe that EPA's instruction to Fein Marquart that it select another subcontractor other than National Data, and the consequent exclusion of National Data, did not conform to the Federal norm of maximum practicable competition. The record shows that ICI was the only available teleprocessing source other than National Data, and the effective result of EPA's instruction thus was a directed subcontract award to ICI. We believe that National Data should have been afforded the opportunity to compete for the Fein Marquart subcontract.

EPA explains that it instructed Fein Marquart to select another source because National Data and NIH's prime contractor appeared unable or unwilling to come to an agreement with NIH for continued teleprocessing services after May 1, 1981, when the prime contract was due to expire. As stated previously, NIH had given the prime contractor a deadline of April 1 to present a subcontract agreement for such services, but did not receive the agreement until April 3. Since no contract had been delivered by the deadline, EPA, after consultation with NIH, directed Fein Marquart to locate another source to begin providing teleprocessing services until a new prime contract could be awarded.

Although EPA certainly had an urgent need to obtain teleprocessing services by May 1, that urgency did not justify eliminating National Data from competition unless EPA could reasonably conclude that National Data was not a qualified, available source of supply. We construe the requirement for maximum practicable competition in direct Federal procurements to mean that while an agency may use accelerated procurement procedures to meet an urgent need, it still must attempt to achieve competition and to treat each competitor as fairly as the circumstances will permit. *Las Vegas Communications, Inc.—Reconsideration*, B-195966.2, October 28, 1980, 80-2 CPD 323. Only where the contracting officer reasonably concludes that no competition is available within the

required timeframe will this Office condone a noncompetitive award for reasons of urgency. See *Security Assistance Forces & Equipment oHG,* B-200350, March 18, 1981, 81-1 CPD 212.

We do not see why National Data was not considered a potential subcontract source for the Fein Marquart subcontract. The record lacks any evidence that the failure of NIH's prime contractor to present a subcontract agreement to NIH by the April 1 deadline (the agreement was presented on April 3) was attributable to National Data being unavailable as a source of supply, or unable or unwilling to provide the services beginning May 1. Rather, the negotiations between NIH and its prime contractor clearly indicated National Data's interest in the teleprocessing services subcontract, although the parties involved in those negotiations may have had difficulty coming to terms. Also, as the incumbent teleprocessing services provider, National Data certainly could have met EPA's need beginning on May 1. In fact, as of April 3, 2 days after the deadline imposed by NIH but still 6 days before the Steering Committee's meeting, the Government had National Data's proposal to continue teleprocessing services past that date.

The only "competition" here at all was conducted by the Government Steering Committee. The Steering Committee reviewed Fein Marquart's sole-source subcontract with ICI for teleprocessing services, and the NIH prime contractor's proposed subcontract with National Data, and decided which it preferred. In effect, then, the Steering Committee competed the two proposed subcontracts against one another.

We believe that the Steering Committee's action simply compounded the problem, however, since it thrust the protester into a competition without its knowledge. At the time it negotiated its proposed subcontract with NIH's prime contractor, National Data was not aware that its subcontract arrangement would be in competition with any other subcontract proposals. Further, the subcontracts were negotiated by different parties, at different times, and under different ground rules. In this respect, when EPA instructed Fein Marquart to select another source, it stipulated that any subcontract must be at no cost to EPA (all users of the Chemical Information System, including EPA, pay set fees for the use of the system, and EPA wanted the subcontract cost to be fully defrayed by these fees). The record does not indicate that National Data negotiated its subcontract under a comparable constraint; in fact, the cost aspect of the ICI subcontract evidently was a critical element in the Steering Committee's choice of that firm.

We sustain the protest against the sole-source subcontract award to ICI. We do not recommend any corrective action, however, since EPA has already initiated a competitive procurement for a new prime contract and projects an award shortly. Nonetheless, by separate letter we are advising EPA of our views for purposes of future subcontract selections.

[B-204068]

Pay—Drill—Training Assemblies—Reserves and National Guard—Nonprior Service Personnel—Period Awaiting Initial Active Duty Training

Army Reserve member awaiting assignment to initial active duty for training attended 22 training assemblies after termination of 180-day period following his enlistment. The member's claim for training pay may not be allowed since Army Regulation 140-1 provides that a nonprior service member is not eligible for inactive duty training pay (drill pay) for assemblies attended after the expiration of 180 days while awaiting initial active duty for training.

Matter of: Private Dewey Scalf—Entitlement to inactive duty training pay, April 6, 1982:

May a Reserve member awaiting initial active duty for training be paid inactive duty for training pay for training assemblies attended after 180 days had passed since his enlistment?

This question was asked in a letter dated June 24, 1981, with enclosures, from the Finance and Accounting Officer, United States Army Garrison, Fort Indiantown Gap, Annville, Pennsylvania 17003. The answer is no since the regulations precluding the payment were promulgated pursuant to statute and have the force and effect of law and therefore may not be waived without specific statutory authority. The request was approved by the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-A-1139. It was forwarded here by endorsement dated July 16, 1981, from the Office of the Comptroller of the Army.

Private Dewey Scalf enlisted in the Army Reserves on July 7, 1978. At that time, he was ordered to active duty for training and was assigned a certain training/pay status in accordance with applicable regulations. He sustained an injury in August 1978 which delayed his assignment to his initial active duty for training. During the period he was waiting to physically qualify for this training period, he attended a total of 42 scheduled training assemblies during the period August 12, 1978, to June 10, 1979.

The Army Finance and Accounting Center paid Private Scalf for 20 assemblies attended between August and December 1978, but disallowed payment for training duty performed during the period January 13 to June 10, 1979. According to the Finance and Accounting Officer, denial of drill pay was based on provisions in Army Regulations allowing Reserve members in Private Scalf's training/pay category a maximum of 24 training assemblies with pay during a 180-day period following enlistment, prior to performing active duty for training.

Section 206 of title 37, United States Code, is the authority for the payment of pay to members of the Reserves and the National Guard for the performance of inactive duty training. Subsection (b) of that section provides in part as follows:

(b) * * * The Secretary concerned shall, for the National Guard and each of the classes of organization within each uniformed service, prescribe—

* * * * * * *

(2) The maximum number of assemblies or periods of other equivalent training, instruction, duty, or appropriate duties, that may be counted for pay purposes in each fiscal year or lesser periods of time; and * * *.

Reserve duty training pay is administered under the provisions of paragraph 80422, AR 37-104-3 (February 28, 1978). Subparagraph 80422(2)(b) of the regulations prescribes eligibility criteria for each of several training/pay categories, and states that these guidelines are in addition to minimum standards set forth in AR 140-1.

Provisions in paragraph 3-35 and figure 3-1, AR 140-1, assign training/pay status to nonprior service personnel awaiting initial active duty for training. Explanatory notes accompanying figure 3-1 provide that:

For NPS obligors and nonobligors who are high-school graduates or possess GED equivalency at the time of enlistment, and bona fide high-school seniors enlisting within 90 days immediately preceding graduation, status will begin immediately and continue for up to 180 days. During this period, the individual may be paid for up to 24 scheduled training assemblies. If IADT [initial active duty for training] does not begin at the end of 180 days, the individual will not be eligible for IDT [drill] pay for training assemblies attended after the expiration of the 180 days while awaiting IADT. * * *

Since these regulations were promulgated pursuant to 37 U.S.C. 206, they are statutory regulations and have the force and effect of law and may not be waived except when specifically authorized. See 31 Comp. Gen. 193 (1951).

Since Private Scalf was not ordered to initial active duty training at the end of 180 days, he is not eligible for pay for the 22 training assemblies he attended after the expiration of that period. Accordingly, the vouchers forwarded with the request for decision may not be paid and will be retained here.

[B-205222]

Contracts—Labor Surplus Areas—Evaluation Preference—Eligibility of Bidder—First-Tier Subcontractors—"Converter" Status Effect

Where the first-tier subcontractor is a "converter" of fabric (one who arranges for the production of gray goods into finished cloth), the costs of the converter's manufacturers rather than the administrative costs of the converter are required to be used by the clause in the invitation for bids to determine whether the bidder is eligible as a labor surplus area concern.

Matter of: Seagoing Uniform Corporation, April 6, 1982:

Seagoing Uniform Corporation (Seagoing) protests the award of a contract to Choctaw Manufacturing Co., Inc. (Choctaw), under invitation for bids (IFB) DLA100-81-B-1208 issued by the Defense Logistics Agency, Defense Personnel Support Center, Philadelphia, Pennsylvania (DLA).

The IFB, a total small business labor surplus area (LSA) set-aside, solicited bids for 161,456 pairs of white cotton polyester trousers. The IFB imposed a 5-percent evaluation on non-LSA concerns.

Bids were received from eight concerns. Seagoing was the lowest bidder and claimed to qualify as an LSA concern. However, Choctaw, the next lowest bidder, protested that Seagoing did not qualify as an LSA concern. DLA investigated the eligibility of both Seagoing and Choctaw as LSA concerns. DLA ruled that Choctaw qualified, but Seagoing did not. Accordingly, the 5-percent evaluation factor was added to Seagoing's bid. This raised Seagoing's bid above Choctaw's. Choctaw was awarded the contract as the low evaluated responsive, responsible bidder.

Seagoing protests that it was denied LSA concern eligibility because DLA erroneously excluded the $117,000 administrative costs of Putnam Mills, Inc. (Putnam), one of Seagoing's first-tier subcontractors. We conclude that DLA acted properly and, accordingly, deny the protest.

Clause LD5(3) of the IFB defines "Labor Surplus Concerns" as follows:

> The term "labor surplus area concern" means a concern that agrees to perform or cause to be performed a substantial proportion of a contract in labor surplus areas. A concern shall be deemed to perform a substantial proportion of a contract in LSA if the aggregate costs that will be incurred by the concern *or its first tier subcontractors* on account of manufacturing or production performed in labor surplus areas amount to more than 50 percent of the contract price. [Italic supplied.]

Seagoing contends that it qualified as an LSA concern because 51 percent of the aggregate costs incurred by itself and its first-tier subcontractors, including Putnam, would be incurred in LSA's. If Putnam's costs are excluded, the costs incurred in LSA's would only amount to 44.4 percent. The issue is whether Putnam's costs were properly excluded.

DLA and Seagoing agree that Putnam is a "converter" that has subcontracted to provide Seagoing with the basic cloth it needs to manufacture trousers. A converter purchases gray goods from a mill and arranges for the production of the goods into finished cloth. Putnam's business offices are located in New York City, an LSA. Although Putnam would incur administrative costs, the actual manufacturing would be done by two separate concerns which have subcontracted with Putnam. Both of Putnam's subcontractors are located in non-LSA's. Nevertheless, Seagoing contends that insofar as Putnam's business offices are located in an LSA, the $117,000 administrative costs that Putnam would incur as a result of overseeing its subcontractors must be credited as "manufacturing" and "production" costs for purposes of determining Seagoing's eligibility as an LSA concern.

DLA determined that insofar as Putnam is a "converter," clause L51, which incorporates deviation 78-14 to Defense Acquisition Regulation § 1-801.1 (1976 ed.), requires that the costs of Putnam's

subcontrators be used instead of Putnam's administrative costs for purposes of determining Seagoing's LSA eligibility under clause LD5(3). Clause L51 provides:

> The definition of "Labor Surplus Area Concerns" which appears in Clauses L25, L26, L27, L28, L29, L30, *LD5*, LD6, LD7, or LD8 as applicable is revised by adding the following: Additionally, if a "converter" is a first tier subcontractor, *aggregate costs incurred by the converter's first tier subcontractors* on account of manufacturing or production performed in labor surplus areas *will be used to determine eligibility as a Labor Surplus Area Concern.* [Italic supplied.]

Seagoing admits that Putnam is a converter but does not believe that clause L51 is applicable to the instant case. Seagoing contends that L51 is an explanation of the procedures to be followed when the issue is whether the converter itself is eligible as an LSA concern rather than when the converter's expenses are used to qualify a concern with which the converter has subcontracted.

We disagree. The clause operates as a deviation from the general rule stated in clause LD5(3) (Labor Surplus Areas). Thus, when the first-tier subcontractor is not a converter, clause LD5(3) requires the manufacturing and production costs incurred by the first-tier subcontractor in an LSA to be credited to the bidder's eligibility. However, when a first-tier subcontractor is a coverter (as Putnam is), clause L51 requires that the aggregate manufacturing and production costs incurred by the *converter's* first-tier subcontractors be utilized for purposes of determining the bidder's eligibility. In the instant case, Putnam's status as a converter triggers the operation of clause L51. Thus, the costs incurred by Putnam's subcontractors are utilized for purposes of determining Seagoing's eligibility. Insofar as those costs would be incurred in non-LSA's, Seagoing falls below the 50-percent requirement and was properly designated a non-LSA concern.

We recognize that the sentence in clause L51, requiring the aggregate manufacturing and production costs incurred by the converter's first-tier subcontractors to be utilized in determining labor surplus area eligibility, is introduced by the word "Additionally." However, since a converter is not in the business of manufacturing or producing, it would not qualify as a first-tier subcontractor under clause LD5(3). Therefore, the use of the term "Additionally" makes clause L51 additive only in the sense that it permits going beyond the first-tier subcontractor, when it is a converter, to determine labor surplus area eligibility.

Accordingly, the protest is denied.

[B-204551]

Compensation—Boards, Committees, and Commissions—Boards of Contract Appeals—Supergrade Positions—Contract Disputes Act of 1978—Appointments Prior to Enactment

Individuals designated to serve on Department of Agriculture's board of contract appeals prior to Mar. 1, 1979, the effective date of the Contract Disputes Act of 1978, claim backpay from Mar. 1 through Aug. 12, 1979, when they were promoted to supergrade positions. While subsection 8(b)(1) of Disputes Act provides that members of agency boards are to be compensated at supergrade rates, that subsection contemplates appointment to the respective supergrade positions. Claim is denied since individuals were not promoted until Aug. 12, 1979, following allocation of four supergrade positions to the Department pursuant to 5 U.S.C. 5108(c).

Matter of: Department of Agriculture Board of Contract Appeals, April 7, 1982:

The Deputy Assistant Secretary for Administration, Department of Agriculture, has requested an advance decision as to whether Mr. Paul H. Rapp, Ms. Jewel F. Lewis, and Mr. Sean Doherty, the chairman, vice chairman and a member of the Department's board of contract appeals, may receive backpay from the effective date of the Contract Disputes Act of 1978, March 1, 1979, to August 12, 1979, the date they were promoted from grade GS-15 to supergrade positions. The board members claim that because they were designated to serve on the Department's board of contract appeals prior to March 1, 1979, their entitlement to the higher rates of compensation arises on the effective date of the Disputes Act (41 U.S. Code 607) by virtue of subsection 8(b)(1) thereof. For the reasons set forth below, we are unable to agree with the claimants' construction of subsection 8(b)(1) and we hold that they are not entitled to backpay for the period prior to their promotions on August 12, 1979.

Effective March 1, 1979, section 8 of the Disputes Act, 92 Stat. 2383, established a statutory basis for agency boards of contract appeals which had previously been constituted under agency regulation. Subsection 8(a)(1) provided for the establishment of an agency board of contract appeals as follows:

> * * * an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator [for Federal Procurement Policy], determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties.* * *

Subsection 8(i) required existing agency boards to develop workload studies for approval by the agency head as specified in subsection 8(a)(1).

The Disputes Act gave the Administrator for Federal Procurement Policy duties in addition to those specified in subsection 8(a)(1), above. Subsection 8(h) authorizes the Administrator to issue guidelines with respect to criteria for the establishment, functions and procedures of the agency boards of contract appeals and subsection 14(g) gives the Administrator responsibility for the alloca-

tion of seventy supergrade positions specifically authorized for those boards. In particular, subsection 14(g) of the Disputes Act amended 5 U.S.C. § 5108 by adding the language now codified in subsection (c)(4) as follows:

> the heads of executive departments and agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by this chapter, * * * may place additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load.

The seventy supergrade positions were authorized to accommodate the need for additional supergrade positions created by the following provision of subsection 8(b)(1) of the Disputes Act:

> * * * the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 of title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, [title 5] United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the numbers of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

By Policy Letter 79-2, sixty-one of the seventy supergrade positions established under subsection 14(g) were allocated to the various department and agency boards by the Administrator for Federal Procurement Policy on June 26, 1979. Four of those supergrade positions were allocated to the Department of Agriculture and thereafter, effective August 12, 1979, the three claimants were promoted to the appropriate supergrade positions.

The three board members claim that subsection 8(b)(1) establishes rates of pay for persons serving on agency boards of contract appeals after the effective date of the Disputes Act without regard to the actual promotion of incumbents and without regard to the allocation of supergrade positions by the Administrator for Federal Procurement Policy. This argument focuses on the next to last sentence of the subsection.

In support of their claim, the board members rely on the holding in *Selman* v. *United States,* 204 Ct. Cl. 675 (1974), in which the Court of Claims awarded backpay to two Navy captains serving as Assistant Judge Advocates General. They seek to draw an analogy between subsection 8(b)(1) and 37 U.S.C. § 202(*l*), the provision in issue in the *Selman* case, which authorized payment of the basic pay of a rear admiral to lower ranking officers "serving" as Assistant Judge Advocates General. They rely on the Secretary of Agriculture's memorandum dated January 29, 1979, as establishing their right to the higher rates of compensation. That memorandum

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confirmed Mr. Rapp's earlier designation as chairman of the agency board established under 7 C.F.R. 24.2 and, effective February 26, 1979, removed two part-time members and designated Ms. Lewis and Mr. Doherty as vice chairman and a board member, respectively. The Secretary's January 29th memorandum supplemented a memorandum dated 7 months earlier by which he had designated the membership of the administratively established agency board.

Having reviewed the statutory language in issue, we are unable to agree that the question of backpay is controlled by *Selman.* Rather, we find that the applicable principle, confirmed in *Testan* v. *United States,* 424 U.S. 392 (1975), and *Peters* v. *United States,* 208 Ct. Cl. 373 (1975), is that a Government employee is entitled only to the rights and salary of the position to which he has been appointed.

Unlike 37 U.S.C. § 202(*l*) which authorized payment of the salary of a higher rank to a lower ranking officer "serving" in a particular position, subsection 8(b)(1) contemplates the selection and appointment of members of agency boards of contract appeals. The language of the next to the last sentence of subsection 8(b)(1) must be read in the context of the entire subsection which makes it clear that payment of the rates of compensation thereby authorized is dependent upon appointment to the respective positions. As distinguished from 37 U.S.C. 202(*l*), subsection 8(b)(1) is not addressed exclusively to the subject of pay. It is the authority by which members of agency boards of contract appeals are appointed.

The last sentence of subsection 8(b)(1) and its implicit reference to subsection 14(g) support this interpretation, for both would be largely superfluous if we were to adopt the claimants' view that entitlement to the higher pay is not dependent upon appointment to the position. As amended by subsection 14(g) of the Disputes Act, 5 U.S.C. § 5108(c) gives the heads of departments and agencies authority to place up to seventy positions in GS–16, GS–17 and GS–18 for the purpose of staffing the boards of contract appeals. Those positions are in addition to the supergrade positions that may be established under 5 U.S.C. § 5108(a) and are to be allocated by the Administrator for Federal Procurement Policy. If subsection 14(g) is to have any meaning, it must be viewed as limiting an agency's authority under subsections 8(a)(1) and 8(b)(1) of the Act to appoint members to boards of contract appeals.

The Administrator did not allocate positions to the various departments and agencies until June 26, 1979, by the issuance of Policy Letter 79–2. Since there is nothing in the record to suggest that supergrade positions otherwise allocated to the Department of Agriculture were made available to staff its board no action could have been taken to appoint members to the board in January 1979, or on the effective date of the Disputes Act. As in the case of Government employees generally, their entitlement to the salaries of

those higher grade positions is dependent upon their having been appointed to the positions. As evidenced by the Forms AD-350, "Notification of Personnel Action," appointments of the members of the Agriculture Department's contract appeals board did not occur until August 12, 1979.

For the reasons stated above, the backpay claims of the three board members are denied.

[B-204938]

Subsistence—Per Diem—Temporary Duty—At Former Permanent Duty Station—Prior to Reporting to New Duty Station—What Constitutes Reporting

Employee who traveled to his new duty station on a house-hunting trip prior to the date scheduled for his transfer, and on the day before his scheduled transfer date received temporary duty orders for duty at his old station, may not be paid per diem and mileage at the old duty station unless it is determined that he did, in fact, report for duty at the new duty station before returning to the old duty station. 54 Comp. Gen. 679 is distinguished.

Matter of: Melvin J. Augenstein, April 7, 1982:

This action is in response to a request for a decision concerning Mr. Melvin J. Augenstein's claim for per diem and transportation expenses while attending a conference at the Tobyhanna Army Depot, Pennsylvania. The employee's entitlement is questioned because he was being transferred from Tobyhanna to Cameron Station, Alexandria, Virginia, and had not moved his residence before the conference was held. For the reasons stated we find that the claim may not be paid unless the Department determines that the employee reported for duty by rendition of services at the new duty station before returning to the old duty station. The questions were raised by the Finance and Accounting Officer of the Defense Logistics Agency and were forwarded by the Per Diem, Travel and Transportation Allowance Committee under Control Number 81-26.

On August 13, 1980, Mr. Augenstein, a civilian employed at the Tobyhanna Army Depot, was issued permanent change of station orders reassigning him to Cameron Station. The orders authorized relocation expenses including a house-hunting trip and specified a reporting date of August 26, 1980. The record indicates that on Thursday, August 21, 1981, the employee and his wife traveled from Waverly, Pennsylvania, the location of his residence in the Tobyhanna area to Alexandria for the purpose of locating a residence in the area of his new duty station. While there, Mr. Augenstein was issued a travel order directing him to temporary duty at the Tobyhanna Army Depot for the purpose of attending a conference. The travel orders were issued August 25, 1980, and the record indicates that Mr. Augenstein and his wife returned to their residence in Waverly on that date. While attending the conference,

Mr. Augenstein stayed at his Waverly residence which he had not yet sold. He claimed per diem while staying in Waverly but did not include lodgings costs for purposes of computing his per diem entitlement. However, he has claimed round trip mileage for travel between his residence and the Tobyhanna Army Depot for the period involved in lieu of lodgings costs.

The Finance and Accounting Officer asks whether the per diem claim may be paid in view of the fact that neither Mr. Augenstein nor his wife had vacated their Waverly residence or established a new residence in Alexandria before this period of temporary duty. Under these circumstances and in view of the fact that his travel orders did not specifically authorize a mileage allowance for travel between the location of the conference and his residence, the Finance and Accounting Officer also questions the validity of Mr. Augenstein's mileage claim.

We have not required an employee to maintain a residence at his permanent duty station in order to qualify for per diem while on temporary duty away from that station. *Matter of Economy,* B-188515, August 18, 1977. Also, we have held that when an employee assigned to temporary duty realizes an overall savings in travel expenses by obtaining lower cost lodgings outside the immediate vicinity of the temporary duty station, the additional transportation costs incurred (or mileage for use of a privately owned vehicle) may be reimbursed in an amount not to exceed the expense had he obtained lodgings at the temporary duty station. *Matter of Groder,* B-192540, April 6, 1979.

However, the Certifying Officer's concern in this case may stem from the fact that it does not appear that Mr. Augenstein had changed his duty station prior to his return to the Tobyhanna area.

Under 5 U.S.C. 5702 and paragraph C4550-3 of Volume II of the Joint Travel Regulations (2 JTR), per diem may not be allowed at an employee's permanent duty station. As defined at 2 JTR, Appendix D, the effective date of a change of duty station is the date on which an employee reports for duty at his new permanent duty station. These provisions when construed together constitute a requirement that an employee must actually report for duty at his new duty station before it is regarded as his permanent duty station so as to entitle him to per diem while on duty at the former duty station. *Matter of Sherman,* B-203371, February 9, 1982.

In this particular case, Mr. Augenstein's entitlement depends, in the first instance, upon whether he effected a permanent change of station. In this regard, we have long held that a transfer is not consummated by the fact that an employee travels to his new duty station. He must in fact report for duty at the new station. 32 Comp. Gen. 280 (1952) and B-128219, June 29, 1956.

The submission states that Mr. Augenstein reported for duty at Cameron Station on August 25, 1980. The record, however, does not necessarily substantiate that conclusion. While he and his wife

traveled to Alexandria on August 21, their time in Alexandria from August 21 to August 24 appears to have been spent looking for a residence. The travel voucher he submitted for his wife's house-hunting travel indicates that they checked out of their hotel in Springfield, Virginia, at 8 a.m. on Monday, August 25, 1980. The voucher he has submitted for his own travel to Tobyhanna indicates that they departed from Cameron Station shortly after noon on that day and returned to their residence in Waverly, Pennsylvania, that evening. Under these circumstances, it appears that Mr. Augenstein did visit Cameron Station, but the record suggests that he did so en route to duty in Tobyhanna and primarily for the purpose of picking up the travel orders which had been initiated 3 days earlier. A visit to the Cameron Station for that purpose is not a reporting for duty. There must be a rendition of actual services at the new duty station. It is noted also that his change of station orders provided a reporting date of August 26.

If upon review of the facts it is determined that Mr. Augenstein did not in fact report for duty by actual rendition of services at Cameron Station prior to his return to his old duty station he should be considered as having changed his permanent duty station only after he returned from the conference in Tobyhanna, and the claims for per diem and mileage should be disallowed. If Mr. Augenstein rendered actual services at Cameron Station on August 25, 1980, his claims for per diem and mileage while attending the conference at Tobyhanna Depot should be allowed, if otherwise correct, provided the services were not solely for the purpose of creating a right to otherwise unauthorized per diem at Tobyhanna. *Cf.* 54 Comp. Gen. 679, where we authorized per diem without a change of duty station because, by the Government's action, the employee's subsistence situation had significantly changed.

[B-199780]

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Actual Expense Shipment—Computation Formula

An employee whose household goods shipment exceeds his authorized weight must reimburse the Government in accordance with paragraph 2-8.3b(5) of the Federal Travel Regulations for the cost of transportation and other charges applicable to the excess weight. Since there is no way to discern which charges are applicable to the authorized weight and which charges are on account of the excess weight, the regulation provides a formula based on a ratio of excess weight to total weight as a proportion of the total charges. Accordingly, the net amount actually paid by the Government is for use in determining the pro rata portion of shipping charges for collection as excess weight charges.

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Actual Expense Shipment—Weight Certificate Invalid

Employee authorized to move 11,000 pounds under actual expense method claims that error was made in weighing his household goods because gross weight of shipment (44,050 pounds) exceeded the rated capacity of the scale (30,000 pounds) used to weigh shipment, thus invalidating weight certificate and placing accuracy of weight in reasonable doubt. Although employee has established that error was made in obtaining weight certificate for actual weight (14,800 pounds) of shipment, he is not relieved of liability for charges on 3,800 pounds of excess weight. To correct error, constructive weight of 15,169 pounds computed in accordance with paragraph 2-8.2b(4) of FTR is substituted for incorrect actual weight of 14,800 pounds. However, there is no additional liability for resulting increase in excess weight since Government incurred expenses on only 14,800 pounds.

Matter of: William A. Schmidt, Jr.—Transportation of household goods—Excess weight, April 8, 1982:

Mr. William A. Schmidt, Jr., has requested reconsideration of that part of our decision B-199780, February 17, 1981, which established his liability for excess costs incurred in the transportation of his household goods in connection with his official change of station. We are affirming our disallowance of Mr. Schmidt's claim.

BACKGROUND

As a Department of Energy employee, Mr. Schmidt was officially transferred to a position in the Office of the Chief Counsel, Oak Ridge Operations, in July 1978. In connection with this transfer Mr. Schmidt shipped 14,800 pounds of household goods on Government Bill of Lading No. K-1106932 (actual expense method) from Gaithersburg, Maryland, to Concord, Tennessee, at a total cost to the Government of $2,461.30. Applying the 11,000 pound limitation set out in 5 U.S.C. § 5724(a)(2) and the procedure prescribed by paragraph 2-8.3b(5) of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973) for computing the charges payable by an employee for excess weight charges, we concurred with the agency's determination that Mr. Schmidt was liable to the Government in the amount of $631.96, for 3,800 pounds of excess weight. In so concluding we found that the agency had correctly applied the provisions of paragraph 2-8.3b(5) of the FTR in computing Mr. Schmidt's excess weight charges. We also held that the fact that the scales used to weigh his shipment were rejected by state officials 15 months after his move did not establish clear error in the weight of Mr. Schmidt's shipment, and was, therefore, of insufficient probative value to relieve him of his liability for the excess weight charges.

COMPUTING EXCESS WEIGHT CHARGES

In paragraph 2-8.3b(5) of the FTR a procedure is prescribed for determining the charges payable by the employee for excess weight

when the actual expense method of shipment is used. That paragraph reads as follows:

> (5) *Excess weight procedures.* When the weight of an employee's household goods exceeds the maximum weight limitation, the total quantity may be shipped on a Government bill of lading, but the employee shall reimburse the Government for the cost of transportation and other charges applicable to the excess weight, computed from the total charges according to the ratio of excess weight to the total weight of the shipment.

Applying the formula to the facts of Mr. Schmidt's claim—using 14,800 pounds as the total weight, 3,800 pounds as the excess weight and $2,461.30 as the total charges—resulted in an excess weight charge of $631.96, computed as follows:

$$\text{Step 1: } \frac{\text{Excess weight}}{\text{Total weight}} = \text{Ratio to be applied}$$

Step 2: Ratio $\times$ Total charges = Employee's share

$$\text{Step 1: } \frac{3{,}800}{14{,}800} = 0.2567$$

Step 2: $0.2567 \times \$2{,}461.30 = \$631.96$

Mr. Schmidt questioned this result stating that the computation failed to subtract those expenses which would have been incurred by the Government irrespective of the actual weight of the shipment, such costs incurred bearing no relationship to the weight of the shipment included a "per-shipment charge" of $39; a piano handling charge of $15; a washer charge of $10; and an origin surcharge of $74.

Our decision B-199780, February 17, 1981, emphasized that the excess weight charge computation provided in paragraph 2-8.3b(5) of the FTR is predicated on the actual net excess weight as a percentage of the *total weight* of the shipment multiplied by the *total charges.* Thus, since the Federal Travel Regulations have the force and effect of law, the provision may not be waived or modified by the employing agency or the General Accounting Office regardless of the existence of any extenuating circumstances. We then concluded that we were unaware of any additional authority which would permit the agency to prorate transportation charges, origin charges, or other shipment charges.

On appeal, Mr. Schmidt contends that our reading of paragraph 2-8.3b(5) of the FTR and, thus, our method of computing excess weight charges is incorrect. Mr. Schmidt frames his argument as follows:

5 U.S.C. 5724(a) applies the 11,000 lb. weight limitation to only "the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking . . . household goods and personal effects." Please note that none of these terms appear to cover expenses which by their nature bear *no* relationship whatsoever to the weight of the shipment, e.g., a "pershipment" charge, a piano handling charge, a washer appliance charge (take down and set up), and an origin surcharge. Morever, the implementing regulation, FTR 2-8.3b(5) in addressing the computation of excess weight likewise states that: " . . . the employee shall reimburse the Government for the cost of *transportation* and other charges applicable to the excess weight, computed *from* the *total* charges according to the ratio of the excess weight to the total weight of the shipment." Here again, the regulation separates weight-related expenses of transportation and other charges (such as packing and unpacking) from those charges which are not related, by the use of the phrase "applicable to the excess weight" and the phrase "computed from the total charges." If it was not the intent of the drafters of this regulatory language to so separate weight-related charges from nonweight-related charges, there was no need for the phrase "computed from the total charges." The formula applied by the subject decision utilizes *total* charges and ignores the clear language of the regulation "computed from the total charges." Accordingly, it would appear appropriate that in computing employee liability that the expenses which are not related to the actual weight of the shipment should not be included in the formula or equation. In my particular case, this amounts to a dollar reduction from the total charges of $138.00 comprised of $39.00 for a "per shipment charge," $15.00 for a piano handling charge, $10.00 for the washer appliance charge, and $74.00 for an origin surcharge * * *. [Italic supplied.]

We believe the express provision of 5 U.S.C. § 5724(a)(2) precludes favorable consideration of Mr. Schmidt's contention. The statute provides for reimbursement of the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking of an employee's household goods and personal effects not in excess of 11,000 pounds net weight. The piano handling charge, washer appliance charge, per-shipment charge and origin surcharge were all expenses incurred by the Government to pack, transport and unpack Mr. Schmidt's household goods and personal effects. Such expenses are ordinarily and customarily incurred by the Government under the actual expense method in the knowledge that utilizing the actual expenses method of shipment (Government Bill of Lading) in the given case will nevertheless result in costs to the Government substantially lower than the commuted rate. See for example *Alan Lee Olson,* B-191518, October 10, 1978.

Under the actual expenses method an employee whose household goods shipment exceeds the maximum of 11,000 pounds has the option of shipping the excess weight on his own or to allow it to be shipped on a GBL together with the 11,000 pounds authorized and reimbursing the Government for the excess weight using the formula as prescribed in paragraph 2-8.3b(5) of the FTR. Under the formula the employee must reimburse the Government for the cost of transportation *and other charges* applicable to the excess weight. Since there is no way to discern which charges are applicable to the authorized 11,000 pounds, and which charges are on account of the excess weight, the regulation provides an equitable estimation based on the ratio of the excess weight to the total weight as a proportion of the total charges. The net amount actually paid by the Government is for use in determining the pro-rata proportion of shipping charges for collection from Mr. Schmidt and, as $2,461.30

was paid for packing, transporting and unpacking his household goods and personal effects, that amount should be used in determining the excess cost. See 22 Comp. Gen. 2 (1942). Mr. Schmidt's appeal on this issue is not meritorious.

VALIDITY OF THE WEIGHT CERTIFICATE

In connection with our initial consideration of his claim Mr. Schmidt contended that because the scales used for determining the weight of his household goods shipment were themselves inspected in October 1979 and failed to meet specifications and tolerances, the determination of the weight of his shipment in July of 1978 was clearly in error. As a result, Mr. Schmidt concluded, since the Government did not have substantiation or evidence to support its contention that his household goods exceeded 11,000 pounds, he was not liable for any excess weight charges.

In our February 17, 1981 decision in Mr. Schmidt's case, we held that the question of whether and to what extent authorized weights have been exceeded in the shipment of household effects is a question of fact primarily for administrative determination and ordinarily will not be questioned in the absence of evidence showing it to be clearly in error. Absent other sufficient evidence that the agency's reliance on a valid weight certificate in determining excess weight was clearly in error, the fact that the scales used were found to be inaccurate 15 months after the employee's shipment was of insufficient probative value to relieve the employee of liability for excess weight charges.

In so holding we compared specific findings presented in the record and reasoned in part as follows:

> By his own account Mr. Schmidt's contention turns on a scale discrepancy that was detected 15 months after the shipment of his household goods. We do not believe that such evidence is dispositive of whether the scales were defective at the time of his shipment. Moreover, the administrative record shows that in response to Mr. Schmidt's allegation the carrier prepared a computation of the constructive weight of Mr. Schmidt's shipment by listing the items from the packing inventory on a cube sheet and multiplying the cubic feet by 7 pounds. See paragraph 2-8.2b(4) of the FTR. The resulting cubed weight was 15,169 pounds as compared to the weight charged of 14,800 pounds. This computation is also not dispositive of Mr. Schmidt's allegation; but, it does reflect a form of consistency that appears to indicate that the weight established by the scales at the time of Mr. Schmidt's shipment in July 1978 was not grossly inflated upward.

Mr. Schmidt renews his initial contention on appeal and has submitted a range of documentation and analysis challenging the validity of the weight certificate used to establish the weight of his household goods shipment in July 1978. In essence Mr. Schmidt points out that the rated capacity of the scales used to weigh his household goods shipment was 30,000 pounds, yet the purported gross weight of his shipment was 44,050 pounds as indicated on the weight certificate. Citing pertinent provisions of the Tennessee Code Annotated and incorporating a letter from Tennessee's Super-

visor of Weights and Measures, Mr. Schmidt persuasively establishes that no accurate determination could be made from weights that exceed the particular scale's specified rated capacity. This inaccuracy goes directly to the weight certificate, which itself cannot be considered evidence of the accuracy of the weights shown. Thus, Mr. Schmidt concludes, and we concur with his analysis, that the discrepancy created by using a scale to weigh a load, the value of which exceeded the rate capacity of the scale, serves to invalidate the weight certificate and place the accuracy of the weight of the material weighed in reasonable doubt.

However, resolution of the issue of the validity of the weight certificate in Mr. Schmidt's favor is itself not ultimately dispositive of whether and in what amount he is liable for excess weight charges. Mr. Schmidt would argue that the agency's reliance in reimbursing the mover on such an improper weight certificate was clearly in error and he should not be bound by the agency's determination made on such a basis. Thus, he should be relieved from any liability for an alleged excess in the weight of his household goods shipment

Here, we do not agree. Where an error has been committed in determining the net weight of household goods shipped by the actual expense method under a Government Bill of Lading, a constructive shipment weight should be obtained based on 7 pounds per cubic foot as provided for by paragraph 2-8.2b(4) of the Federal Travel Regulations. See *Charles Gilliland,* B-198576, June 10, 1981. To correct the error, the constructive weight of the misweighed shipment should be computed and substituted for the incorrect actual weight.

As we noted in the analysis quoted from our February 17, 1981 decision, the carrier prepared a computation on the constructive weight of Mr. Schmidt's shipment by listing the items from the packing inventory on a cube sheet and multiplying the cubic feet by 7 pounds in accordance with paragraph 2-8.2b(4) of the FTR. The resulting cubed weight was 15,169 pounds as compared to the weight charged of 14,800 pounds.

As a result, Mr. Schmidt's total net weight would be increased by 369 pounds, and applicable excess weight charges would be increased commensurately. However, since the Government only paid the carrier on 14,800 pounds as specified on the transportation voucher, there is no reason to now extend Mr. Schmidt's liability beyond the amount of $631.96 for excess weight charges on 3,800 pounds. That amount must be recovered by the Government.

[B-204459]

Contracts—Negotiation—Competition—Competitive Range Formula—Technical *v.* Cost Consideration—Technically Superior Offer Excluded

The principle that price or cost may become determinative where two proposals are essentially equal technically, notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria, does not justify elimination of the highest technically rated proposal from the competitive range resulting in a competitive range of one. Moreover, the record does not support a finding that the proposals were regarded as essentially equal technically.

Contracts—Negotiation—Best Advantage to Government—Exclusion From Competitive Range Unjustified—Corrective Action Recommended

Where a solicitation clearly places primary emphasis on technical factors, the elimination from the competitive range of an offeror who is rated 10 percent higher technically but has proposed costs 40 percent higher than the offeror ranked second technically, on the basis that the cost proposal is so out of line that meaningful negotiations are precluded, resulting in a competitive range of one, is inconsistent with the use of negotiation procedures to obtain the most advantageous contract for the Government.

Contracts—Negotiation—Requests for Proposals—Evaluation Criteria—Failure to Apply—Competitive Range Establishment

Where the evaluation criteria set forth in a solicitation place greatest emphasis on technical factors, eliminating all but the lowest cost, technically acceptable proposal from the competitive range is inconsistent with criteria which stress technical excellence rather than mere technical acceptability.

Matter of: ICF, Inc., April 13, 1982:

ICF, Inc. protests its exclusion from the competitive range under Request for Proposals (RFP) Nos. WA81-B074 and WA81-B050, issued by the Environmental Protection Agency (EPA). RFP No. WA81-B074 solicited proposals for analyses of toxic programs integration policy issues and RFP No. WA81-B050 solicited proposals for analyses of chemical control options; both contemplated award of a cost-plus-fixed-fee, level of effort contract.

In each case, ICF contends that its highest rated technical proposal was improperly eliminated from the competitive range on the basis of cost, which was secondary to technical factors under the evaluation schemes set forth in the RFPs. We sustain the protest.

The RFPs provided that selection of an offeror for negotiation and award would be accomplished in accordance with the EPA Source Evaluation and Selection Procedures, which were available upon request. These procedures, which are similar to the four-step procedures employed by the National Aeronautics and Space Administration and the Department of Defense, involve a limited use of discussions until final contractor selection is made. See *Roy F. Weston, Inc.*, B-197866, B-197949, May 14, 1980, 80-1 CPD 340. In accordance with these procedures, the RFPs stated that:

The competitive range will be determined based upon the scoring of the technical proposal, the evaluation of price and the consideration of other factors. * * * The purpose of discussions is to clarify or to substantiate uncertainties in the solicitation or proposal. However, discussions shall not involve identification of proposal deficiencies. * * *

Both RFPs contained the following language concerning the relative weights of technical and cost considerations in the evaluation of proposals:

EPA primarily seeks technical excellence in its acquisition programs. Accordingly, unless price or cost is set forth in the evaluation criteria as a factor to be evaluated and scored, price or cost is secondary to technical quality.

Price was not set forth as a factor to be evaluated and scored in either RFP.

RFP No. WA81-B074

EPA received ten proposals in response to RFP No. WA81-B074, which was issued on May 11, 1981. The technical scores (out of a possible 100 points) and proposed costs of each offeror were as follows:

Offeror	*Rating*	*Proposed cost*
ICF, Inc	90	$1,956,843.00
ABT Associates, Inc	82	1,407,624.00
Offeror C	60	1,968,108.00
Offeror D	58	1,578,179.00
Offeror E	57	1,818,290.00
Offeror F	56	2,072,782.00
Offeror G	42	1,447,926.00
Offeror H	35	1,523,282.00
Offeror I	33	1,299,216.00
Offeror J	31	1,371,950.00

The contracting officer eliminated every offeror but ABT from the competitive range. Contract award was made to ABT on September 29, 1981.

In view of the regulatory preference for competition, we have stated that a proposal must be considered to be within the competitive range as to require discussions unless the proposal is so technically inferior or out of line as to price that any discussions would be meaningless. *Art Anderson Associates,* B-193054, January 29, 1980, 80-1 CPD 77. Our Office closely scrutinizes agency determinations that leave only one proposal in the competitive range. *Audio Technical Services, Ltd.,* B-192155, April 2, 1979, 79-1 CPD 233; *Comten-Comress,* B-183379, June 30, 1975, 75-1 CPD 400.

EPA argues that ICF's exclusion from the competitive range was justified because after analyzing the scores and technical evaluation narratives, the contracting officer determined that ICF's and ABT's proposals were technically equal. Under the EPA Source Evaluation and Selection Procedures, neither ICF nor ABT had any uncertainties to be discussed, and the contracting officer states that therefore it was most unlikely that technical scores would change as a result of a request for best and final offers.

ICF recognizes that it has been the consistent position of this Office that where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration in making an award notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria. See, *e.g., Applied Financial Analysis, Ltd.,* B-194388.2, August 10, 1979, 79-2 CPD 113. ICF argues, however, that a determination that the proposals were technically equal has not been adequately justified.

Based on our examination of the competitive range determination contained in the record, we conclude that it does not adequately support a finding that the proposals were essentially equal. Rather, the record shows that ICF's proposal was recognized as technically superior to that of ABT but the source selection official decided that because of the difference in the proposed costs, award to ICF was not justified. In this regard, the determination of competitive range states that "the higher score received by ICF is not worth the additional $550,000 it would cost the Government * * *." Nowhere is it stated that the two proposals are regarded as technically equal.

Further, as ICF suggests, the principle that price or cost may become determinative where proposals are essentially equal technically is generally applied in making award decisions, not in competitive range determinations. The principle does not provide an appropriate rationale for eliminating a higher technically rated but higher priced proposal from the competitive range, particularly where it leaves only one offeror in the competitive range, since the very purpose of the flexible negotiation procedures is to secure the most advantageous contract for the Government, price and other factors considered. 47 Comp. Gen. 279 (1967); *id.* 29 (1967). The fact that technical ratings are not likely to change because there are no technical matters for discussion does not change the situation since, as ICF points out, proposed costs may indeed be reduced as a result of cost discussions and a request for best and final offers. *Bell Aerospace Co.,* 55 Comp. Gen. 244 (1975), 75-2 CPD 168; *Global Graphics, Inc.,* 54 Comp. Gen. 84 (1974), 74-2 CPD 73; 47 Comp. Gen. 29, *supra.*

In this regard, EPA argues that ICF's exclusion from the competitive range was proper in any event because its costs were so out of line as to preclude the possibility of meaningful negotiations. ICF

argues, however, that this was not consistent with the evaluation factors set forth in the RFP, which placed primary emphasis on technical matters.

ICF's proposed costs were approximately 40 percent higher than ABT's while its technical score was only 10 percent higher. However, the RFP did state that EPA primarily sought technical excellence and that, unless price was set forth as a factor to be evaluated and scored, it would be of secondary importance. Consequently, an offeror could reasonably assume that cost was not a major concern to EPA in this procurement. While EPA argues that even in such circumstances a cost proposal can be so out of line as to preclude meaningful negotiations, we do not think such a determination is warranted where it results in eliminating the highest ranked proposal from the competitive range and leaves only one other proposal in it unless it is very clear that meaningful negotiations are precluded.

Here, EPA asserts that based on past experience it considered any significant reduction unlikely and that any such reduction would have resulted in a reduction of technical score as well. In that connection, however, ICF believes it could have reduced its direct labor costs (which largely accounted for its higher costs) by changing the mix of personnel it proposed. EPA states that this would result in a reduction in technical score since better qualified (and therefore more highly salaried) personnel result in a higher technical rating. However, ICF argues that while the RFP required it to propose personnel at a specified level of expertise (labor category) for a specified number of hours, its proposed personnel within each such labor category would nevertheless consist of various individuals who might have various compensation rates reflecting their individual experience or expertise, even though they all fell within the general level of expertise specified. Since it was only required to quote an average labor rate for each category and was not required to specify how many of the total hours would actually be performed by each proposed individual in that category, its average labor rate could be reduced and the same personnel still be proposed by simply reducing the number of hours of work to be performed by the more highly compensated individuals within each category.

Moreover, even if a cost reduction would have resulted in a diminution of ICF's technical rating, its initial higher technical score provided something of a "cushion" for that possibility, and ultimately the selection official simply might have been faced with the need to make the appropriate cost/technical trade-off between two competitive proposals. See, *e.g., Grey Advertising, Inc.*, 55 Comp. Gen. 1111, 1118-21 (1976), 76-1 CPD 325.

Finally, we note that EPA has attempted to portray the award in this case as having been made on an initial proposal basis under FPR § 1-3.805-1(a). EPA points out that no technical discussions

were held with ABT, and that only final negotiations were conducted with it for the purpose of definitizing the contract. However, the record shows that ABT's proposed cost-plus-fixed-fee was reduced as a result of these negotiations, and consequently, we find no basis to conclude that award was made on an initial proposal basis in this case. See *University of New Orleans,* 56 Comp. Gen. 958 (1977), 77-2 CPD 201; *National Health Services, Inc.,* B-186186, June 23, 1976, 76-1 CPD 401.

RFP No. WA81-B050

EPA received eight proposals in response to this RFP, which was issued on May 14, 1981. Award is being withheld pending our decision on this protest and therefore we will not discuss the precise technical scores received and the costs proposed by each offeror.

The record shows that there were three offerors, including ICF, who received higher technical scores than the one offeror, Enviro Control, Inc., whose proposal was included in the competitive range by EPA. Among these offerors, Enviro Control's proposed costs were the lowest. ICF received the highest technical rating, and it also proposed the highest costs of any offeror. ICF's proposed costs were substantially higher than those of Enviro Control, but the difference between its proposed costs and those of the offeror ranked second technically was considerably less significant.

We believe that the emphasis EPA placed on proposed costs to establish the competitive range in this case was inconsistent with the evaluation criteria set forth in the RFP. These criteria clearly placed greatest emphasis on technical factors, but the record shows that the source selection official in effect chose to eliminate all but the lowest cost, technically acceptable offeror from the competitive range.

In this regard, the determination of competitive range states as follows:

> Enviro Control is recommended for selection for negotiations because of the good rating it received during the evaluation, coupled with its attractively low price. * * *
>
> * * * [E]nviro Control submitted a very good proposal and one that will certainly meet the Government's needs.
>
> The other factor that causes Enviro Control to stand out * * * is its low price as compared to other offerors. ICF, Inc. submitted an excellent proposal but their costs were entirely too high. [With regard to the other two more highly rated offerors it is stated, in effect, that the differences in technical scores do not support the additional costs associated with them.] The four remaining offerors received technical scores that were lower than Enviro Control's. All but three of them offered costs that were higher than Enviro Control. * * * the one company that did submit a lower price also scored substantially lower than Enviro Control. * * *

Thus, contrary to the evaluation factors set forth in the RFP, EPA made proposed costs the determinative factor in establishing the competitive range in this case and did so on the basis that Enviro Control's proposal would meet the Government's needs. That is inconsistent with the evaluation criteria which stress tech-

nical excellence rather than merely adequately meeting the Government's needs. We therefore conclude that the decision to eliminate all but one offeror from the competitive range was unreasonable.

Recommendation

WA81-B074

Since the contract was awarded approximately 6 months ago, we believe it would be impractical to reopen discussions and to consider changing contractors at this point in the contract term. We do not believe that either the costs associated with such a remedy or the disruption of EPA's operations can be justified where any award would necessarily be for an abbreviated time period. We are recommending, however, that the contract options for additional quantities and for future years' services not be exercised, and that any such needs be met by issuing a new competitive solicitation.

WA81-B050

EPA should include ICF in the competitive range, conduct discussions, and seek best and final offers as promptly as possible. The two other offerors who were also ranked higher technically than Enviro Control should be contacted and, if still interested, included in the competitive range as well.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

The protest is sustained.

[B-205614]

Officers and Employees—Transfers—Real Estate Expenses—Condominium Dwelling—Purchase of Ownership Interest

Employee transferred from Cincinnati, Ohio, to Detroit, Michigan, in May 1981, claims certain real estate transaction expenses in connection with the purchase of a cooperative apartment at the new duty station. Following the rule established in *Zera B. Taylor,* 61 Comp. Gen. 136 (1981), in the absence of evidence clearly establishing a different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the Federal Travel Regulations (FTR). This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451.

Officers and Employees—Transfers—Real Estate Expenses—Condominium Dwelling—Purchase of Ownership Interest—"Applicaiton Fee"

In *Herbert W. Everett,* 60 Comp. Gen. 451 (1981), we held that membership fees in cooperatively owned apartments are part of the purchase price, having no relationship to any expense required for the purchase of the property. In the present case "application fee" and "lottery (unit selection) fee" may be distinguishable as incidental charges made for required services in connection with the purchase of a cooperative for which reimbursement may be further considered under para. 2-6.2f of the FTR. However, $200 claimed as an application fee must be further explained to adequately differentiate it from a membership fee.

Officers and Employees—Transfers—Real Estate Expenses—Condominium Dwelling—Purchase of Ownership Interest—Mortgage Services

Claims for expenses of "mortgage service," "insurance," and "legal service" in connection with employee's purchase of a cooperative apartment at the new official station must be further explained and itemized to enable the agency to ascertain qualifying mortgage expense and insurance entitlements under para. 2-6.2d of the FTR, and qualifying legal expenses under para. 2-6.2c of the FTR. Expenses for "marketing and advertising" extend only to the sale of the residence at the old duty station under para. 2-6.2b of the FTR and may not be reimbursed in connection with the purchase of a residence at the new duty station. Expenses for "real estate tax" and "operating reserve" are specifically precluded from reimbursement under para. 2-6.2d of the FTR.

Officers and Employees—Transfers—Real Estate Expenses—Condominium Dwelling—Purchase of Ownership Interest—Costs Includable in Purchase Price

Transferred employee claims his "10% downpayment" and "security deposit" as reimbursable expenses incurred in the purchase of his cooperative apartment. Both of these monetary outlays are credited against the purchase price of the residence. Neither 5 U.S.C. 5724a nor the FTRs contemplate the Government's taking a real property interest in an employee's new residence. As the downpayment and security deposit are part of the purchase price and not a part of the cost or expenses of purchasing, they are not reimbursable as relocation expenses.

Matter of: Nathaniel E. Green—Relocation—Real Estate Expenses—Interest in a Cooperatively Owned Building, April 13, 1982:

In our recent decision *Zera B. Taylor,* 61 Comp. Gen. 136 (1981), we analyzed an employee's entitlement to expenses incurred in the *sale* of a cooperatively owned apartment incident to an official transfer. Here, in Mr. Green's case, we extend our analysis to those expenses which are reimbursable in connection with the *purchase* of a cooperatively owned apartment at the employee's new official duty station.

Mr. Nathaniel E. Green, an employee of the Internal Revenue Service, claims certain real estate transaction expenses he incurred in acquiring a residence at the new duty station in connection with his official transfer from Cincinnati, Ohio, to Detroit, Michigan, in May 1981. Mr. Green's housing and financing were obtained by

stock purchase in a cooperative which owned and operated the apartment building in which his new residence was located.

In the *Zera B. Taylor* case, cited above, we first evaluated whether Mr. Taylor's relationship to the residence was that of an owner-cooperator claiming miscellaneous real estate transaction expenses under paragraph 2-6.2d of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973), or that of a renter-lessee claiming lease termination expenses under paragraph 2-6.2h of the FTR. In reviewing our case law precedents we recognized that participating in a cooperative apartment and maintaining an equity interest in a particular housing corporation did not always require that the employee be treated as an owner of the residence within the meaning of the entitlement authorities. We also noted that more recently we have held that an interest in a cooperatively owned building, which is specifically referred to in paragraph 2-6.1c of the FTR, is a form of ownership in a residence for which real estate expenses may be reimbursed as provided for in paragraph 2-6.2. As a result, our approach has more consistently viewed cooperative apartment arrangements as vesting purely ownership interests in connection with the employee's relationship with the cooperative unit. Thus, where the employee claiming reimbursement does not specifically claim and adequately document that the cooperative arrangement is predominantly a lease relationship, we treat the employee's interest as one of ownership for which real estate transaction expenses may be reimbursed under controlling regulations.

Having established that Mr. Green's residence transaction generally qualifies for reimbursement of expenses required to be paid by him under 5 U.S.C. § 5724a (1976), and Part 6, Chapter 2, FTR, we turn now to an evaluation of the specific expenses and charges for which he is claiming reimbursement.

APPLICATION FEE AND LOTTERY FEE

Mr. Green claims $200 for an "application fee to cooperative" and $25 for a "lottery fee (for selection of position for choice of cooperative apartment)." In our decision *Herbert W. Everett,* 60 Comp. Gen. 451 (1981), we held that membership fees in condominium or cooperatively owned homes or apartments are regarded as items of added value continuing to benefit the purchaser. As such, they are considered a part of the purchase price and not a part of the cost or expenses of purchasing. In Mr. Everett's case, the membership fee had no relationship to any expense or charge for services required for the purchase of the property. It was a requirement for occupancy and participation in the management of the cooperative development. Accordingly, such membership fee is not reimbursable as a relocation expense under the Federal Travel Regulations. Mr. Green's expenses under consideration here are potentially distinguishable.

The application fee and the lottery (unit selection) fee were required payments when Mr. Green applied to become a member of the cooperative. We presume that in part these fees represent administrative expenses and service charges for the preparation and processing of necessary documents as well as the performance of reference and credit checks that were prerequisites to cooperative ownership. As one-time nonrefundable expenses, we find that in principle the application fee and the lottery (unit selection) fee were "incidental charges made for required services" in connection with Mr. Green's purchasing his new residence which may be further considered for reimbursement under paragraph 2-6.2f of the FTR.

However, while we approve of reimbursement of these fees in principle, only the lottery (unit selection) fee may be certified for payment in the $25 amount claimed. The $200 amount claimed as an application fee remains inexplicably high in comparison to FHA or VA application fees. As a result, Mr. Green should provide verification regarding what the $200 amount claimed actually covered, thereby resolving existing speculation that the "application fee" is in other words a "membership fee" which is a nonreimbursable expense as outlined in our *Everett* case, cited above.

Moreover, following informal consultations with officials of the Department of Housing and Urban Development, we are advised that a relatively high application fee, such as the $200 amount claimed here, often includes specified "mortgage services" and "legal services" which appear as separate and additional claims on Mr. Green's schedule of expenses. For the reasons outlined above, the lottery (unit selection) fee may be reimbursed in the $25 amount claimed. The application fee may be further considered for reimbursement by the agency following clarification of its purpose and coverage in the particular circumstances of Mr. Green's claim.

MORTGAGE SERVICE AND LEGAL SERVICE

Mr. Green claims $95.32 for "mortgage service" and $223.21 for "legal service" in connection with his acquisition of the cooperative residence. To the extent that such items of expense are not otherwise covered by the application fee, and following further appropriate itemization, these service charges may be considered for reimbursement in whole or in part under the following analysis.

Paragraph 2-6.2d of the FTR provides that FHA or VA fees for loan application, costs of preparing credit reports, mortgage and transfer taxes, State revenue stamps, and similar fees and charges are reimbursable with respect to the purchase of a residence at the new official station if they are customarily paid by the purchaser and to the extent they do not exceed amounts customarily paid in the locality of the residence. However, interest on loans, points, and mortgage discounts are not reimbursable, and, no fee, costs, charge, or expense is reimbursable which is determined to be a

part of the finance charge under the Truth in Lending Act, Title I, Public Law 90-321 (15 U.S. Code 1601 notes), and Regulation Z issued pursuant thereto by the Board of Governors of the Federal Reserve System.

Under this authority a cooperator's allocated portion of mortgage interest (exclusive of service charges) would not be reimbursable as a customary expense incurred incident to the acquisition of the cooperative residence. At the same time, charges in connection with preparing credit reports and drawing up documents would qualify for reimbursement. Accordingly, Mr. Green should further clarify his "mortgage service" claim to enable the agency to ascertain qualifying mortgage expense entitlements.

Similarly, Mr. Green must provide additional information regarding his claim for "legal services" in connection with his residence transaction.

Under paragraph 2-6.2c of the FTR and considering our opinion in *George W. Lay*, 56 Comp. Gen. 561 (1977), necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by the purchaser of a residence at a new official station may be reimbursed provided that the costs are within the customary range of charges for such services within the locality of the residence transaction. And, as with other residence transaction claims, paragraph 2-6.3c of the FTR directs that technical assistance in determining the reasonableness of an expense within the customary range for legal services should be obtained from the local office of the Department of Housing and Urban Development.

As a result, where the entitlement authorities differentiate between those specific legal services customarily incurred by purchasers and sellers, Mr. Green's generalized claim for "legal services" is an insufficient explanation on which the agency may appropriately certify this portion of his real estate expense entitlement. Again, clarifying itemization is required.

MARKETING AND OTHER FOR ADVERTISING

Mr. Green claims $196.42 for "marketing and other for advertising" expenses in connection with the purchase of his cooperative residence.

The provisions of paragraph 2-6.2b of the FTR which allow certain costs of advertising, appraisal and marketing extend only to the sale of the residence at the old official station. As such, Mr. Green has no marketing or advertising expense entitlement for the purchase of a residence at the new duty station.

REAL ESTATE TAX AND OPERATING RESERVE

Mr. Green's claim for $829.93 for "real estate tax" as well as the claim for $372.02 for "operating reserve" may not be allowed under

the specific provision of paragraph 2-6.2d that property taxes and operating or maintenance costs are not reimbursable.

INSURANCE

Mr. Green's claim for $117.68 for "insurance" also requires additional explanation, but would appear to be reimbursable—if at all—as a "mortgage service" expense discussed above. This follows from the specific wording of paragraph 2-6.2d of the FTR that "[T]he cost of a mortgage title policy paid for by the employee on a residence purchased by him/her is reimbursable but costs of other types of insurance paid for by him/her, such as an owner's title policy, a 'record title' policy, mortgage insurance, and insurance against damage or loss of property, are not reimbursable items of expense."

10 PERCENT DOWNPAYMENT AND SECURITY DEPOSIT

Mr. Green claims his $2,120 "10% downpayment" and $330 "security deposit" as reimbursable expenses incurred in the purchase of his cooperative apartment. Both of these monetary outlays are credited against the stock purchase price which in effect representes the residence itself. Neither 5 U.S.C. § 5724a nor the Federal Travel Regulations contemplate the Government's taking a real property interest in an employee's new residence. As the downpayment and secuity deposit are part of the purchase price and not a part of the cost or expenses of purchasing, they are not reimbursable as a relocation expense under controlling legal authority.

Moreover, with reference to the *Taylor* case discussed above, the Occupancy Agreement and Cooperative Plan for Mr. Green's new residence set forth computational sums that are payable by the owner (Mr. Green) as "Carrying Charges" on a monthly basis. Included in this list are items such as taxes, administrative and operating expenses, insurance, operating reserves, maintenance, and mortgage and interest payments. In the *Taylor* case we observed that expenses of the type represented by his claim for carrying charges could not be considered a cost incident to the sale of a residence for which reimbursement is authorized under Chapter 2, Part 6, of the FTR. Here, in Mr. Green's case, we are no less persuaded that costs included in the monthly carrying charges are not reimbursable in connection with the purchase of a cooperative residence.

[B-204021]

Attorneys—Fees—Bar Admission Fees—Reimbursement—Incumbent Appeals Officers—Merit Systems Protection Board

Pursuant to a program to assist appeals officers meet a new requirement that they be bar-admitted attorneys, the Merit Systems Protection Board (the Board) seeks to

reimburse them for their initial bar admission fees. These fees are personal obligations of attorneys. They are not reimbursable, even though the requirement was later imposed on incumbent employees and the Board supports the reimbursement as part of an effort to avoid losing these employees by a reduction-in-force. B-187525, Oct. 15, 1976, is distinguished.

Attorneys—Fees—Bar Review—Reimbursement—Government Employees

Law school tuition and bar review course tuition are similarly necessary expenses incurred in order to qualify for a legal position. Therefore they, like bar admission fees, are personal to the employees and are not payable from appropriated funds. The Board should make no further payments under its bar assistance program and should recover tuition and fees already paid to its employees unless waiver is granted pursuant to 5 U.S.C. 5584.

Matter of: Use of agency funds for bar membership expenses, April 16, 1982:

Ms. Evangeline W. Swift, General Counsel of the Merit Systems Protection Board (Board), has requested our views on whether the Chairperson of the Board (Chairperson) may properly authorize the expenditure of Board funds for certain one-time bar membership fees for incumbent appeals officers who, as a result of a recent Board action, are now required to be bar-admitted attorneys. The General Counsel mentions in passing that the Board has already adopted a policy to reimburse incumbent officers for law school tuition, up to $1,000 for each fiscal year, and for the costs of their bar review courses prior to sitting for a bar examination. Although she asks specifically only about the propriety of bar membership fees, we conclude that all three types of expenditures from Board funds are unauthorized.

The Merit Systems Protection Board was established by the President's Reorganization Plan No. 2 of 1978, in implementation of the Civil Service Reform Act of 1978 (CSRA) (Pub. L. 95-454, 5 U.S.C. Code 1101 notes). A major statutory function of the Board, as was true also of its predecessor agency, the Civil Service Commission, is to provide a forum for the adjudication of certain appealable personnel actions within the Federal service. Prior to the reorganization, the Commission utilized GS-930 appeals officers to conduct many of the appeals hearings and these employees became Board employees by a mass transfer action after the reorganization.

The GS-930 series does not require bar membership, and many of the transferred appeals officers were not law school graduates, or, if they were, had not yet passed a bar examination. A spokesman for the General Counsel explained, informally, that some criticisms had been leveled at the lack of professional expertise with which hearings had previously been conducted, during the course of hearings on the bills which became the CSRA.

To meet these criticisms, on November 21, 1979, the Board established a new requirement that all appeals officers must henceforth

be bar admitted attorneys. Their positions were reclassified to the GS-905 (attorney-advisor) excepted service series. A reduction in force was instituted and the old GS-930 series was phased out. Incumbents were relieved of their duties as appeals officers and for the most part, assisted to find other positions within or outside the agency. The Board then undertook the above described program of financial assistance for those incumbent employees who were interested in qualifying for the new GS-905 positions by becoming attorneys. Approximately 10 employees took advantage of the offer. We understand that approximately $13,000 has been expended to date under the program, and at least two employees are still attending law school.

INITIAL BAR MEMBERSHIP FEES

As the General Counsel recognized in her letter, in prior decisions we have ruled that bar membership fees are personal obligations of attorneys and, therefore, not reimbursable. *See, e.g.*, B-187525, October 15, 1976; 22 Comp. Gen. 460 (1942). However, the General Counsel seeks to distinguish the present situation from the facts in those cases, thus warranting a different conclusion. The General Counsel points out that here bar admission was established as a condition of employment for appeals officers subsequent to the filling of these positions with non-bar member employees. The Board wishes to pay these costs in order to allow these employees to regain their positions as appeals officers. Also, the General Counsel argues, the Board itself is seeking to make these reimbursements, a factor she stated is missing in our previous cases.

We recognize that this is a difficult situation, but we do not see any meaningful basis on which to distinguish it from the others discussed in our cases. We have long held that each employee must bear the costs of qualifying him/herself for the performance of his/her official duties and that if a personal license is necessary, the employee must procure it. 22 Comp. Gen. 460 (1942). As we noted in a later case, "* * * the privilege to practice before a particular court is personal to the individual and is his for life unless disbarred regardless of whether he remains in the Government service.* * *" 47 Comp. Gen. 116 (1967) affirmed B-161952, June 12, 1978. See also 55 Comp. Gen. 759 (1961). This rule has been consistently enforced, even in cases involving other professions and even when the agency strongly favors using its appropriations for this purpose, 46 Comp. Gen. 695 (1967).

The Board further argues that payment of this one-time bar admission fee will promote the retention of current appeals officers who, though temporarily detailed to other positions, will be subject to reduction-in-force procedures if they do not meet the position's new qualifications. We do not question the fact that the Board might benefit from the admission of presently employed appeals of-

ficers to the bar so that they could be retained. However, it is up to the employees to qualify themselves. While an impending reduction-in-force makes it a somewhat harsher result, the desire of the agency to protect its employees' status is not sufficient to give it the discretion to make payments not otherwise authorized.

LAW SCHOOL TUITIONS AND BAR REVIEW COURSES

The Board assumed that the other two elements of its program—payment of law school tuition and of bar review course fees—were authorized and did not ask us concerning them. For the reasons discussed below, however, we feel that these elements are also not authorized.

As to the law school tuition, 5 U.S.C. § 4107(c)(1) specifically states that the Government Employees Training Act does not authorize reimbursement of the costs of training by a non-Government facility for "the purpose of providing an opportunity to an employee to obtain an academic degree in order to qualify for appointment to a particular position for which the academic degree is a basic requirement." This would prohibit reimbursement of any part of the incumbent employees' law school tuition, since the purpose is to provide them with an opportunity to obtain an academic degree in order to qualify for the newly established position of hearing officers in the GS-905 series.

Payment of the costs for bar review courses in these circumstances raises the same legal problem that is raised by agency payment of bar admission fees and law school tuition. These are expenses which enable or assist the individual to qualify for a position and therefore are personal to the employee. Personal, and not appropriated, funds should be used to pay these expenses. We made one narrow exception in B-187525, October 15, 1976, when we authorized the payment of the cost of attending a bar review course, though not the cost of initial bar membership, for an employee who was already admitted to the bar in another state which qualified him for his Federal employment as a regional attorney. Because of a new State court ruling, he needed to be admitted in the State of California in order to perform his Federal duties. In that case, however, the attorney had already qualified for the Federal position in which he was serving and the agency had neither changed the requirements nor reclassified the position in any respect. The additional bar membership requirement was imposed by the State and not the Federal Government. We are therefore unable to apply the exception to the employees in this case.

Accordingly, the Board may not pay the law school tuition, the bar review course tuition, and/or the bar admission fees of its former appeals officers in order to help them meet the new requirement that appeals officers be bar-admitted attorneys. No further payments should be made under the program. Payments

which have already been made should be recovered from the employees to whom or on whose behalf they were made. However, we call MSPB attention to the provisions of 5 U.S.C. § 5584 under which the Comptroller General may consider waiver of Government claims against employees for overpayment of pay and certain allowances when collection of the debt "would be against equity and good conscience and not in the best interests of the United States." See also the implementing regulations at 4 C.F.R., Part 91.

[B-203734]

Officers and Employees—Service Agreements—Overseas Employees—Failure to Fulfill Contract—Voluntary Retirement

The Federal Bureau of Investigation (FBI) may require that an employee posted overseas sign a service agreement which obligates the employee to repay the Government the cost of his transfer to the overseas post, if he elects to retire prior to the completion of the 12-month term of the service agreement. Likewise, the FBI may require that if an employee transferred overseas voluntarily retirees within a period of not less than 1 nor more than 3 years, prescribed in advance by the Director of the FBI, then the employee's return expenses shall not be allowed. It is within the FBI's discretion to make a determination that a voluntary retirement within the period of service agreement is not a separation beyond the employee's control.

Matter of: Federal Bureau of Investigation—Transfer overseas—effect of retirement on service agreement, April 23, 1982:

The Honorable William H. Webster, Director, Federal Bureau of Investigation (FBI), has requested our decision as to the FBI's authority to impose certain requirements on its employees being transferred overseas. The question is whether the FBI may include a clause in the written service agreement, which an employee signs upon relocation overseas, that would obligate the employee to reimburse the Government for the cost of his transfer if he elects to voluntarily retire prior to the completion of the term required by the service agreement. For the reasons set forth below, we have no objection to the proposed policy.

Mr. Webster states the reasons for the proposed policy as follows:

The FBI maintains Legal Attaches in thirteen (13) foreign countries providing the FBI with a continuous and prompt exchange of information and assistance with foreign law enforcement agencies. The individuals assigned to these duty posts are all highly qualified agents with a broad knowledge of the FBI's responsibilities, as developed through years of experience. As a result of requiring that Legal Attaches have such a broad knowledge and experience, the individuals chosen are often close to retirement eligibility.

This factor of being near or presently eligible for retirement creates a difficulty when considering employees for assignment to overseas posts. Due to budgetary limitations, it is not advantageous for the FBI, or for the Government as a whole, to transfer an individual overseas, only to have that individual opt for retirement prior to his term of service being completed. It is parenthetically noted that the problem is compounded by the fact that Special Agents of the FBI are eligible to retire at age 50, and must retire by age 55, *see,* Title 5, USC, Sections 8335(b) and 8336(c).

The Director states that section 5724(d) of title 5, United States Code, allows Federal agencies to pay the travel and transportation expenses of employees transferred overseas. The Director points out, however, that 5 U.S.C. § 5722(b) provides that the expenses incurred in travel to the overseas post of duty may be paid only if the employee agrees in writing to remain in the Government service for a minimum of 12 months unless he is separated for reasons beyond his control which are acceptable to the agency. If the employee violates the agreement, the travel expenses are recoverable from the employee as a debt due the United States. Likewise, 5 U.S.C. § 5722(c) requires that the return expenses from the overseas post of duty may not be paid if the employee has not served the minimum period of not less than 1 nor more than 3 years prescribed in advance by the head of the agency. The FBI, therefore, has implemented a policy which would require employees transferred overseas to sign a service agreement containing a clause that states that voluntary retirement within the period of the service agreement will not be acceptable to the FBI as a reason for not completing the required service. The Director states that employees who are or would be eligible to retire within or during the period of the service agreement will not be compelled to accept a transfer overseas.

In *Ralph W. Jeska,* B-193456, December 28, 1978, we held that an employee who retired prior to fulfilling his agreement to serve 1 year after his transfer was indebted for relocation expenses previously paid him incident to that transfer. In *Jeska,* the employee's agency had found that his retirement was voluntary and that there was a continuing need for his services. We stated that we had no basis to find that the agency's determination to hold the employee liable for the relocation expense payments made to him was unreasonable. Our decision in *Jeska* was based on our rule that the issue of whether an employee is separated for reasons beyond his control is one primarily for determination by the administrative agency concerned and we would question an agency's determination in that regard only if the agency had no reasonable basis therefor. See also B-165910, February 10, 1969. Although *Jeska, supra,* involved 5 U.S.C. § 5724(i) dealing with transfers within the continental United States, the pertinent language in that provision concerning service agreements is identical to the provision at issue here dealing with transfers overseas found in 5 U.S.C. § 5722(b). See 5 U.S.C. § 5724(d).

Accordingly, it is our view that the FBI may require that service agreements of employees transferred overseas state that if an employee voluntarily retires within 12 months of the date of his transfer, he will have to pay back any travel and transportation expenses already paid for the transfer to his overseas duty station. Likewise, the FBI may require that if an employee transferred overseas voluntarily retires within a period of not less than 1 nor

more than 3 years, prescribed in advance by the Director of the FBI, then the employee's return expenses shall not be allowed. Of course, this policy would not be applicable to any employee the FBI transfers who must retire within the period of the service agreement because of the mandatory retirement provision in 5 U.S.C. § 8335(b).

[B-206515]

Retirement—Civilian—Disability—Sick Leave Status on Approval Date—Separation Date—Right to Select

An employee on sick leave at the time his disability retirement was approved should be afforded the opportunity to select a separation date which is most advantageous to him in accordance with Office of Personnel Management regulations. He is also entitled to be credited with sick and annual leave accrued while on sick leave prior to his separation date. Section 402 of Public Law 96-499 does not affect an employee's right to holiday pay before his separation date.

Matter of: James Isaak—Terminal Leave—Accrual of Sick and Annual Leave, April 23, 1982:

The issues considered are whether an employee may continue on leave with pay after his disability retirement application has been approved and whether he accrues sick and annual leave during this period. Also, we are asked to decide whether such an employee is entitled to receive credit for holidays falling within the leave-with-pay period in view of section 402 of Pub. L. No. 96-499, 94 Stat. 2605, December 5, 1980, which eliminates payment for holidays that occur after an employee separates but within the period covered by the employee's lump-sum leave payment.

For the reasons stated below, we hold that an employee, whose disability retirement application has been approved by the Office of Personnel Management, is entitled to (1) remain on sick leave with pay in accordance with OPM regulations; (2) to continue to accrue annual and sick leave during such period; and (3) to receive pay for holidays during the same period.

These questions were presented in a letter of February 17, 1982, from the Chief, Payroll Branch, Bonneville Power Administration, Department of Energy, Portland, Oregon. The employee in question is Mr. James Isaak. Mr. Isaak suffered a heart attack on July 29, 1981, and has been on sick leave, except for 33 hours of annual leave, since that time. As of August 8, 1981, Mr. Isaak had 273 hours of annual leave and 2,663 hours of sick leave to his credit. On September 21, 1981, he applied for disability retirement which was approved by the Office of Personnel Management (OPM) on November 4, 1981. Mr. Isaak remains on sick leave not to exceed his last day of eligibility for paid leave.

The agency reports that Mr. Isaak's use of his sick leave in these circumstances does not explicitly serve the exigencies of the service and that it has not made a determination that an exigency existed

so as to confer an entitlement to terminal leave. The agency reports that it is, therefore, uncertain as to Mr. Isaak's entitlement to terminal leave, and the consequent calculation of his last day of pay.

It has long been the position of this Office that administrative authority to grant an employee terminal annual leave immediately prior to separation from the service, when it is known in advance that the employee is to be separated, is limited to cases where the exigencies of the service require such action. 54 Comp. Gen. 655, 658 (1975); 34 *id.* 61 (1954). The terminal leave rule is incorporated into the Federal Personnel Manual (FPM) provisions concerning employees who are granted disability retirement by OPM. However, there are special rules for such employees who have sick leave to their credit at the time when OPM notifies the employing agency that disability retirement is allowed. The provisions governing separation of an employee pursuant to the approval of a disability retirement are found in Federal Personnel Management Supplement 831-1, subchapter S10-11(a), which states in part:

(1) If the employee is on annual leave and has no sick leave, the employee will be separated as soon as practical, but usually not later than the end of the pay period in which the approval is received. If the employee is on annual leave and has sick leave to his or her credit, the agency shall consult with the employee to determine if the employee wishes to be placed on sick leave for any portion of that time to his or her credit or wishes to be separated immediately and have the sick leave used in the computation of annuity payments. There should be no delay in making the determination, as continuation on terminal leave is inappropriate (34 Comp. Gen. 61).

(2) If the employee is on sick leave, the agency shall consult with the employee who will select the date of separation which is most desirous or advantageous.

(3) If the employee is on duty, the agency shall consult with the employee who will select the date of separation which is most desirous or advantageous. The employee should either request that he or she be placed on sick leave immediately or separated usually not later than the end of the pay period in which the retirement approval is received.

Since Mr. Isaak was on sick leave at the time his disability retirement was approved, he should be afforded the opportunity to select a separation date which is most advantageous to him in accordance with the Federal Personnel Management Supplement provision quoted above.

In response to the question raised as to whether Mr. Isaak may be credited with sick and annual leave accruing in pay periods during which he is on sick leave after the approval date and prior to his separation date, leave may properly accrue to the credit of an employee in a terminal leave status. B-162875, December 19, 1967; B-121712, October 28, 1954.

The final question raised is whether section 402 of Pub. L. No. 96-499, the Omnibus Reconciliation Act of 1980, 94 Stat. 2599, has any effect on Mr. Isaak's right to receive credit for holidays falling within his leave period. Section 402 of the Act amends 5 U.S.C. § 5551(a) to eliminate payment for holidays that occur after an employee retires but within the period covered by the employee's lump-sum leave payment. The amendments provide that the period

of leave used for calculating the lump-sum payment shall not be extended due to any holiday occurring after the employee's separation. Section 5551 of Title 5, United States Code, had previously been interpreted to require payment for any holidays that occurred after the employee's separation and within the period covered by the lump-sum leave payment. Section 402 does not, however, affect an employee's right to holiday credit before the employee's separation date and while he is still in a paid leave status.

Accordingly, assuming that a later separation date is most advantageous to Mr. Isaak, he is entitled to remain on sick leave with pay not to exceed his sick leave eligibility period. During the period of sick leave, he continues to accrue both sick leave and annual leave to his credit and continues to be entitled to be paid for intervening holidays. When his sick leave account is exhausted, the agency is required, under the terminal leave rule cited above, to separate him as soon as practical. He is then entitled to be paid a lump-sum leave payment for his annual leave balance. Finally, under section 402 of Pub. L. No. 96-499 he is not entitled to pay for holidays during the period covered by his lump-sum leave payment.

[B-202123]

States—Federal Payments in Lieu of Taxes—Distribution to Units of Local Government—"Received" Revenue Status—Distribution to School Districts—County Supported

Where county is responsible for supporting schools and funds them with its own tax revenues, entire amount of Forest Service (16 U.S.C. 500) revenues expended for schools, regardless of whether such expenditure exceeds minimum required by State law, must be treated as received for purposes of computing county's payment under the Payment in Lieu of Taxes Act, 31 U.S.C. 1602. 58 Comp. Gen. 19 is amplified.

States—Federal Payments in Lieu of Taxes—Distribution to Units of Local Government—"Received" Revenue Status—Payments to Independent School Districts—Exceeding State's Minimum Requirements

Where county, which is required by State law to pass a certain portion of its Forest Service receipts on to politically and financially independent school districts, chooses to pass on sum which exceeds State-mandated minimum, amount by which county's expenditure exceeds minimum must be viewed as "received" for purposes of computing the Payment in Lieu of Taxes Act payment.

States—Federal Payments in Lieu of Taxes—Distribution to Units of Local Government—"Received" Revenue Status—Payments to Independent School Districts—Delegation of State's Distribution Authority

If no minimum payment is specified in State law, but instead the State delegates the right to determine the amount of the Forest Service receipts to pass on to the politically and financially independent school districts to the County Board of Supervisors, the entire payment to the schools may be regarded as the equivalent of a State-mandated minimum, and need not be deducted from the Payment in Lieu of Taxes Act payment. In case of Arizona, however, State statutes indicate that school

districts are not independent of county. Definitive interpretation of status of school districts is for Arizona authorities.

Matter of: Payment in Lieu of Taxes Act—Arizona School Districts, April 26, 1982:

The Acting Associate Solicitor for the Division of Energy and Resources, Department of the Interior, has asked for an interpretation of a provision of the Payment In Lieu of Taxes Act of 1976 (PILT), 31 U.S.C. §§ 1601–1607. Specifically, he asks what portion of Forest Service revenues paid by a state to a county must be considered to be "received" by the county (and therefore deducted from its PILT) where the county has disbursed approximately one-half the amount to school districts under a state law which does not specify how much must be distributed to school districts, but requires only that the county give the school districts an amount that will provide a "real benefit" to the schools.

We conclude that where a county is responsible for providing and supporting public schools and funds them with its own tax revenues, the entire amount of Forest Service revenues expended for the schools, regardless of whether such expenditure exceeds the minimum required by state law, must be treated as "received" for purposes of computing the county's 31 U.S.C. § 1602 payment. On the other hand, where a county which is required by State law to pass a certain portion of its Forest Service receipts on to politically and *financially* independent school districts chooses to pass on a sum which exceeds the state-established minimum, the amount by which the county's expenditure exceeds the minimum must be viewed as "received."

The Payment in Lieu of Taxes Act of 1976 authorizes and directs the Secretary of the Interior to make payments on a fiscal year basis to each unit of local government in which certain types of Federal lands are located. Section 2 of the Act, 31 U.S.C. § 1602, sets forth alternative formulae to be used in determining the amount of these payments:

> (a) The amount of any payment made for any fiscal year to a unit of local government under section 1601 of this title shall be equal to the greater of the following amounts—
>
> (1) 75 cents for each acre of entitlement land located within the boundaries of such unit of local government (but not in excess of the population limitation determined under subsection (b) of this section), *reduced (but not below 0) by the aggregate amount of payments, if any, received by such unit of local government during the preceding fiscal year under all of the provisions specified in section 1604 of this title,* or
>
> (2) 10 cents for each acre of entitlement land located within the boundaries of such unit of local government (but not in excess of the population limitation determined under subsection (b) of this section). [Italic supplied.]

Among the provisions specified in section 1604 is 16 U.S.C. § 500, which provides that:

> On and after May 23, 1908, twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State or Territory in which such national forest is situated, to be expended as the State or Territorial legislature may prescribe for

the benefit of the public schools and public roads of the county or counties in which such national forest is situated. * * *

Any Forest Service revenues which are "received" by a county thus serve to reduce the payment in lieu of taxes made to that county.

The submission notes that the issue presented arose when Navajo County, Arizona, protested the Bureau of Land Management's (BLM) determination of the amount due it under the Payment in Lieu of Taxes Act for fiscal year 1980. Arizona law provides that any forest reserve funds which are received by the state from the United States are to be apportioned among the counties according to the forest reserve acreage contained in each county (A.R.S. § 41-736), and that these funds are to be disbursed by the county "for the benefit of public schools and public roads of the county as the board of supervisors may direct." A.R.S. § 11-497. Navajo County's share of the forest reserve funds for the fiscal year preceding 1980 came to $777,951, and BLM treated this sum as the amount received by the county under 16 U.S.C. § 500. The county protested that only $316,854 should have been attributed to it, because that is the amount that it retained for its own use. Since the remainder of the $777,951 had been passed on to school districts, the county claimed that it was entitled to an additional $70,434.

On November 4, 1980, the Bureau of Land Management denied the country's protest on the basis that:

> Arizona law does not require the counties to pass the Forest Service payment to school districts. It leaves it up to the Board of Supervisors to determine how the revenue will be spent. Because State law does not require a minimum distribution of these funds, we must deduct the full amount of the Forest Service payment received by the counties each fiscal year.

The county appealed this decision to the Interior Board of Land Appeals. A short time later, the case was brought to the attention of Interior's Office of the Solicitor, which moved to have the appeal vacated and the case remanded to BLM for further consideration. The submission states that the reason for the Office of Solicitor's motion to vacate was that the county had brought to its attention an opinion by the Attorney General for the State of Arizona interpreting A.R.S. § 11-497, which concluded that the allocation of funds between public schools and roads must be "reasonably calculated to provide a *real* benefit to both schools and roads." The motion to vacate was granted by the Board of Land Appeals on February 5, 1981.

In 58 Comp. Gen. 19 (1978), we interpreted payments "received" by units of local government for purposes of 31 U.S.C. § 1602 as funds actually received and available to the counties for obligation and expenditure to carry out their *own* responsibilities, thereby alleviating the fiscal burdens imposed on local governmental units by the presence of tax-exempt Federal lands within their jurisdictions. We accordingly concluded that Congress did not intend that pay-

ments to local governments under the Act be reduced by amounts which, by virtue of State law, merely pass through these governments on the way to politically and financially independent school districts which are alone responsible for providing the services in question. On the other hand, we said, if a local government is, by State law, itself responsible for providing school services and collects taxes from local residents for that purpose, the Congress intended that "in lieu" tax payments under section 1602 be reduced by the amount of section 1604 revenues which the local unit received and passed through to the schools, since in the absence of "in lieu" payments, the total costs of providing school services would be borne by the local unit's tax revenues.

We are now asked an additional question: Are disbursements of Forest Service revenues by a local unit of government—for example, a county—which exceed the minimum level of spending for schools required by State law, to be viewed as "received" by the county, and therefore deducted from section 1602 payments?

As indicated above, we have already held that where a county itself is responsible for providing and funding the schools within its boundaries and taxes its citizens to raise funds to operate them, the amount of Forest Service revenues which the county disburses for schools must be viewed as "received" by the county and deducted from the county's "in lieu" payment. Otherwise, there would be an aggregate Federal payment in excess of the amount owed to the county in lieu of taxes for Federal lands within its jurisdiction. In other words, the Forest Service payment belongs to the county, as if it were part of its own tax revenues. It makes no difference in this situation whether the county passes on to the school district only a State required minimum or more than the State requires. All Forest Service revenues should be deducted from the county's "in lieu" entitlement, since the county has the responsibility both for the maintenance of county roads and also for financing the schools within its boundaries.

Where a county which is required by State law to pass a certain portion of its Forest Service receipts on to politically and financially independent school districts chooses to pass on an amount exceeding the minimum required by the State legislature, the county must deduct any moneys which it had the option of retaining for its own purposes from its "in lieu" entitlement. In a State which does not prescribe a minimum payment to politically and financially independent school districts but instead delegates that function to the County Board of Supervisors, the County Board's actual allocation is the equivalent of a State-authorized minimum, and need not be deducted from the PILT.

In the case of Arizona, on which the inquiry specifically focuses, the Bureau of Land Management states that "the county is solely responsible for one [roads] and the School Districts are solely responsible for the other [schools]." We do not know the basis for

that determination. Without attempting to rule on what is essentially a matter of State law, however, we note that according to the Arizona State statutes, the school districts receive at least a portion of their funding from the counties. A.R.S. § 15-992 authorizes the board of supervisors of each county, at the same time and in the same manner as other property taxes are levied, to "levy school district taxes on the property in any school district in which additional amounts are required." Taxes levied on property located within a particular school district are to be credited to the school fund of that school district. Likewise, when a school district decides to establish a high school, the County Board of Supervisors levies an annual tax on property in the district, the amount of which is estimated by the school board and certified to the county school superintendent. Section 15-994 provides that:

> The board of supervisors of each county shall annually, at the time of levying other taxes, levy a county equalization assistance for education tax on the property within the county. * * * The county treasurer shall apportion all monies collected from the county equalization assistance for education tax levy to the school districts within the county in accordance with section 15-971, subsection B * * *.

Moreover, the school boards do not appear to be independently responsible for determining the level of additional revenues required by their districts, nor do we see any authority for the school boards to impose and collect property taxes necessary to generate school revenues on their own initiative. A.R.S. Ch. 9, Arts. 5 and 6. A.R.S. § 15-991 provides that:

> B. The county school board superintendent, not later than July 10 each year, shall file, in writing, with the board of supervisors his estimate of the amount of school funds required by each school district for the ensuing year, based on the budgets adopted by the governing boards of the school districts. The estimate shall * * * contain an estimate of the total amount to be received for the year by each school district from the county school fund and the special county school reserve fund. The county school superintendent shall estimate the additional amounts needed for each school district from the primary property tax and the secondary property tax and certify such amounts to the board of supervisors in writing at the time of filing his estimate.

If it is determined by the State Attorney General, the Judiciary, or otherwise that under Arizona law, school districts are not politically and financially independent of the counties in which they are located, the payments of Forest Service receipts to the school districts must be regarded as fulfilling a county responsibility to support its schools, just as any payments for county roads from the amount retained by the Board of Supervisors fulfills a different county responsibility. Under these circumstances, the 16 U.S.C. § 500 receipts expended by counties for schools would have to be treated as received by the counties for purposes of computing payments under 31 U.S.C. § 1602.

[B-205418]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Not Apparent Prior to Bid Opening/Closing Date for Proposals

Fact that only one person would evaluate cost proposals was not clear from solicitation, and, therefore, protest filed after closing date for receipt of initial proposals is timely. However, composition of evaluation panel and procedures used to evaluate proposals are within discretion of contracting agency, and we see nothing inherently improper in having only one person evaluate cost. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished.

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Brooks Bill Applicability—Protest Timeliness

Postaward protest that procurement should have been conducted under Brooks Bill procedures for procuring architect-engineering services is untimely since solicitation indicated that procurement was not to be conducted as one for these services and alleged improprieties apparent from solicitation must be filed before closing date for receipt of initial proposals.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—Prior GAO Consideration of Same Issue Effect

Untimely protest alleging that certain services should be procured under Brooks Bill procedures is not significant issue and will not be considered on that basis.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Debriefing Conferences—Issues Providing Protest Basis

Protest based on grounds that were revealed in debriefing must be filed within 10 days of that debriefing. Protest filed 10 days after post-debriefing meeting at which same grounds were discussed is untimely even as to ground which protester states was not discussed until post-debriefing meeting. Under circumstances, agency's position that ground was discussed at debriefing is accepted.

Matter of: Nielsen, Maxwell & Wangsgard, April 26, 1982:

Nielsen, Maxwell & Wangsgard (NMW) protests the award of a contract to CH2M Hill Central, Inc., under request for proposals No. 40-S1637, issued by the Department of the Interior (Interior), Bureau of Reclamation. The contract is for the study and analysis of data concerning the salinity of the Price and San Rafael Rivers in Utah.

NMW has raised a number of issues concerning the evaluation of proposals. NMW argues that the cost evaluation was inherently arbitrary because only one person evaluated cost proposals and that Brooks Bill, 40 U.S.C. § 541, *et seq.* (1976), procedures for the procurement of architect-engineering services were not followed. The protester also contends that award was not made to the offeror with the highest rated technical proposal and the lowest estimated

cost and that it was improperly penalized for including a service charge in its cost proposal.

We deny one ground of protest and dismiss the others because they were not timely filed.

Timely Issue

Interior argues that it was obvious from the solicitation that only one person would evaluate cost and that this ground is untimely because it was not filed prior to the closing date for receipt of initial proposals. Interior points to the "evaluation process" section of the solicitation which states that a committee will evaluate technical proposals and that the contracting officer will then determine the competitive range. According to Interior, since this includes a consideration of cost, the solicitation implies that only one person, the contracting officer, will evaluate cost.

We do not think that this statement is sufficiently clear to put potential offerors on notice that only one person will evaluate cost. However, we see nothing inherently improper in having one person evaluate cost proposals, and we have consistently held that the composition of evaluation panels and the procedures used to evaluate proposals are matters within the discretion of the contracting agency. See, *e.g., Underwater Systems, Inc.,* B-199593, May 6, 1981, 81-1 CPD 350; *MAXIMUS,* B-195806, April 15, 1981, 81-1 CPD 285.

Untimely Issues

Section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21 (1981), requires that protests based on alleged, apparent solicitation improprieties be filed prior to the closing date for receipt of initial proposals. The solicitation indicated that the procurement was not being conducted as one for architect-engineering services. The basis of NMW's complaint that the Brooks Bill was not followed was, therefore, obvious from the solicitation. NMW did not file its protest, however, until long after the closing date for receipt of initial proposals. Therefore, this ground of protest is clearly untimely. See *Consulting Engineers Council of Metropolitan Washington,* B-199569, September 5, 1980, 80-2 CPD 180, in which the protester argued that certain services should have been procured under the Brooks Bill; we found the protest to be untimely because it was not filed prior to the closing date for receipt of initial proposals.

NMW admits that this ground is untimely, but argues that it presents an issue of widespread interest to the procurement community and, therefore, should be considered under the "significant issue" exception to our timeliness requirements. 4 C.F.R. § 21.2(c) (1981). In support of this contention, NMW cites our decision in *Association of Soil and Foundation Engineers,* B-199548, September 15, 1980, 80-2 CPD 196, in which we considered an untimely pro-

test concerning the application of the Brooks Bill under that exception.

In that case, however, the significant issue was whether the Brooks Bill applied *per se* to an entire class of procurements—all Department of Defense procurements for architect-engineering services. That question was one of first impression and resolution of the question had consequences that went far beyond the procurement. Here, on the other hand, the issue is merely whether the particular services being procured should be classified as architect-engineering services within the coverage of the Brooks Bill. Similar questions concerning the applicability of Brooks Bill procedures to a given procurement have been previously decided. See, *e.g., Association of Soil and Foundation Engineers,* B-199970, June 8, 1981, 81-1 CPD 455. Therefore, the issue raised by NMW is not significant. See *CSA Reporting Corporation,* 59 Comp. Gen. 338 (1980), 80-1 CPD 225.

Concerning the other issues, Interior argues that they also were not timely filed. Unsuccessful offerors were notified of the award of the contract on September 15, 1981. Debriefings were arranged on October 5, with NMW's debriefing planned for October 16. Interior states that "a formal telephone debriefing was conducted with * * * NMW on October 16, 1981." During this debriefing "NMW was given all the specific details of the procurement which formed the basis for [these other grounds of] protest." On October 23, NMW requested a meeting with the contracting officer to be attended by one of its vice-presidents to further discuss the procurement. That meeting was held on October 27. Interior states that it provided essentially the same information that it had provided on October 16.

Interior argues that NMW knew the basis for these other grounds of protest on October 16 and that since the protest was filed more than 10 working days after that date, it is untimely. We agree.

NMW admits that a telephonic debriefing occurred on October 16, but argues, generally, that there was not a "clear and complete disclosure of the methods of evaluation and other facts necessary for it to prepare a protest until the meeting of October 27."

We have held that a potential protester who learns that it has not been selected for award need not immediately protest, but may wait for a debriefing scheduled within a reasonable time. See, *e.g., Lambda Corporation,* 54 Comp. Gen. 468 (1974), 74-2 CPD 312. NMW was certainly justified in waiting until the October 16 debriefing before filing its protest. Once it knew the grounds of its protest it could not, however, wait until confirmation or further discussions with the agency before protesting. See, *e.g., Control Data Corporation,* B-197946, June 17, 1980, 80-1 CPD 423; *Storage Technology Corporation,* B-194549, May 9, 1980, 80-1 CPD 333.

While there is some conflict between the parties concerning the information provided NMW in its October 16 debriefing (specifically, NMW insists that the "use of [a] cost per-man-month" evaluation factor was not disclosed until October 27), in these circumstances, we will accept the recollections of the agency officials who participated in the debriefing. The telephone conversation of October 16 was not a random or unofficial contact, but rather was a scheduled formal debriefing arranged for the purpose of disclosing to NMW the reasons that it was not selected for award.

This case is similar to *Brandon Applied Systems, Inc.,* 57 Comp. Gen. 140 (1977), 77-2 CPD 486, in which the protester and the contracting agency disagreed over whether the agency had specifically stated the grounds of protest in a meeting between the parties. In resolving the conflict in favor of the agency, we stated:

> There is an obvious conflict between the Navy's view of the February 18 conference and Brandon's view. The allegedly contemporaneous written notes which Brandon cites as confirming its view of the conference have not been submitted to our Office, nor do we think that they are determinative of the outcome even if submitted. First of all, we have no way of determining whether in fact they were "contemporaneous"; secondly, we do not agree that allegedly contemporaneous notes should carry any greater weight than the actual recollections of the agency employees who participated in the conference. Under these circumstances, we must agree with the Navy's view that Brandon was specifically informed of Navy's intent to modify the contract in ways which were later made the subject of the March 31 protest to our Office.[2] *Reliable Maintenance Service, Inc.—request for reconsideration,* B-185103, May 24, 1976, 76-1 CPD 337. [Footnote omitted.]

In other circumstances, we have resolved certain types of disputes regarding timeliness in favor of the protester. For example, in *Development Associates,* B-188416, August 1, 1977, 77-2 CPD 64, and *Honeywell Information Systems,* 56 Comp. Gen. 505 (1977), 77-1 CPD 256, the protesters asserted that the critical fact or event occurred, or was learned, on a certain date which would make the protest timely, but could not prove their assertions. The agencies had no knowledge of the dates, but argued that the protesters must prove timeliness. We held for the protesters. Here, of course, both parties have equal knowledge of the critical event—the debriefing. Also, this case is unlike those cases in which there was some objective evidence favoring the protester's view of a disputed event or fact, which we turned to in resolving the dispute in the protester's favor. See, *e.g., Ikard Manufacturing Co.,* B-192578, February 5, 1979, 79-1 CPD 80. Here, there is no such objective evidence.

We deny one ground of the protest and dismiss the others.

[B-204099]

Mileage—Travel by Privately Owned Automobile—Administrative Approval—Official Business—Driving, etc. Services—Employee Injured on Temporary Duty

An employee was informed that another employee on temporary duty was in the hospital due to an automobile accident. The employee called her supervisor who told her to drive the injured employee back to her residence 90 miles away. Employee is

entitled to a mileage allowance since we hold that travel which is authorized or approved in order to return an injured employee on temporary duty to his or her home should be treated as necessary to carry out the agency's duty and therefore such travel is on official business. B-176128, Aug. 30, 1972, is overruled; 59 Comp. Gen. 57 is amplified; B-198299, Oct. 28, 1980, is distinguished.

Matter of: Patricia A. Bodi—Payment of mileage allowance—Transportation of injured employee, April 27, 1982:

Ms. V. G. Leist, an authorized certifying officer of the Internal Revenue Service, Department of the Treasury, requests our decision as to the entitlement of Ms. Patricia A. Bodi to reimbursement for mileage. The issue in this case is whether an employee may be paid a mileage allowance for transporting another employee, who was injured while on temporary duty, back to her residence. We hold that the employee, Ms. Bodi, in driving the injured employee back to her residence, was engaged in official business and is entitled to be paid a mileage allowance for her travel.

On Friday, March 20, 1981, Ms. Bodi, an employee of the Internal Revenue Service (IRS) in Columbus, Ohio, received a phone call that another IRS employee, Ms. Mary Derwich, who was on temporary duty in Columbus, had been in an automobile accident and was at a local hospital. Ms. Bodi then called her supervisor in Cincinnati and received instructions to drive the employee to her home in Dayton, Ohio. Ms. Derwich was released from the hospital but her doctor stated that she could not drive since she had suffered a concussion. Ms. Derwich would not have been able to drive home in her own car anyway since it was wrecked in the accident. Ms. Bodi drove Ms. Derwich back to Ms. Bodi's home in Columbus for the night and then drove Ms. Derwich to her home in Dayton on Saturday. Ms. Bodi claims reimbursement for mileage for both her round trip to the hospital and her round trip to Dayton.

Ms. Bodi also claims reimbursement for mileage for a trip to Dayton made on March 25, 1981. According to the submission, this was a regular visit which Ms. Bodi was required to make for official business. During that day Ms. Bodi made two departures from her regular schedule. First, she picked up an employee in Columbus and drove her to Dayton to fill in for an absent employee. Second, she drove about 6 miles from her post of duty to Ms. Derwich's house to have her fill out the necessary paperwork concerning the accident.

The IRS denied Ms. Bodi's claim for mileage for all three trips because the travel was not justified as being for official Government business. The IRS also relied on our decision *Charles E. Law,* B-198299, October 28, 1980, in denying Ms. Bodi's claim. In that case, Mr. Law, who was on temporary duty (TDY), remained at his TDY site after the TDY was completed in order to be with a follow employee assigned to the same TDY site who had become ill. Mr. Law incurred lodging, meals and other expenses while he remained at his TDY site. We held that Mr. Law could not be reimbursed for

these expenses since the decision to remain at the TDY station was a personal choice not connected with the performance of official business. Although the rule established in the *Law* case is pertinent, it does not control our decision concerning Ms. Bodi's claim because of the different factual situation.

The total claim for mileage for the three trips is $67.50. We shall discuss Ms. Bodi's claim for her trips on March 20 and 21, 1981, and then discuss her claim for the trip on March 25, 1981.

Payment of a mileage allowance to employees traveling on official business is authorized by 5 U.S.C. § 5704(a) (1976) which provides that "an employee who is engaged on official business for the Government" is entitled to a mileage allowance. However, we have held that an employee who uses his privately owned vehicle (POV) for the sole purpose of transporting other employees on official business is not performing official business away from his post of duty and, therefore, is not entitled to mileage under 5 U.S.C. § 5704(a). 28 Comp. Gen. 332 (1948); 22 *id.* 544 (1942). As an exception to the general rule stated above, we have allowed payment for mileage where no public transportation was available and where the administrative office determines it is advantageous to the Government. B-157035, June 29, 1965. We have also allowed mileage where an employee drove other employees in his vehicle instead of a Government vehicle. B-119607, May 21, 1954. Finally we have allowed mileage expenses when in addition to furnishing transportation, business matters were discussed. B-123205, May 9, 1955.

In a recent case we allowed reimbursement to an employee on temporary duty for payments to a private firm for transporting his privately owned vehicle back to his permanent duty station since injury prevented his operation of the vehicle for the return trip. *Richard L. Greene,* 59 Comp. Gen. 57 (1979). In that case we determined that 5 U.S.C. § 5702(b) and FTR paragraph 1-2.4 authorized the expenses of return of a vehicle to a permanent duty station when an employee is incapacitated.

The Federal Travel Regulations do permit reimbursement of travel expenses to an incapacitated employee for transportation from his TDY site back to his official duty station prior to the completion of his temporary duty assignment. FTR paragraph 1-2.4. Nevertheless, in a similar situation to this case, we did not allow mileage expenses to an employee who transported an injured employee home from a TDY site, but we held that the employee may be reimbursed actual expenses for travel, including gasoline, oil, tolls, etc., to the extent that they do not exceed the cost by common carrier. B-176128, August 30, 1972.

Part of B-176128 was overruled in 59 Comp. Gen. 57. We now overrule that part of B-176128 which denies a mileage allowance and limits reimbursements to actual expenses to an employee who transports an injured employee home from a TDY site. We do so partly because of the requirement in paragraph 1-4.1a of the FTR

that a mileage allowance be paid for authorized use of a POV and because of the administrative convenience of paying mileage for a POV as opposed to actual expenses. Therefore, we hold that travel which is authorized or approved in order to return an injured employee on TDY to his or her home should be treated as necessary to carry out the agency's duty under FTR paragraph 1-2.4 to provide return travel expenses for the injured employee. Hence, such travel is on official business and the necessary expenses thereof may be paid, including a mileage allowance when a POV is used.

Here, Ms. Derwich was on TDY while injured and was entitled to per diem and return transportation to her permanent duty station under FTR paragraph 1-2.4. Ms. Bodi was assigned by her supervisor to drive the injured employee home. Therefore, Ms. Bodi's trip was official business, and she is entitled to the use of her POV.

We shall now discuss Ms. Bodi's claim for mileage on March 25, 1981. From the record submitted, Ms. Bodi normally is reimbursed for mileage from her home in Columbus to the IRS office in Dayton. It appears that her two extra trips that day, to pick up one employee and to deliver forms to Ms. Derwich, were both incident to the performance of official business. Therefore, the total amount claimed for mileage on March 25, 1981, may be certified for payment.

Accordingly, the vouchers are being returned for action in accordance with this decision.

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