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[B-207335]

Contracts—Protests—Interested Party Requirement—Suspended, Debarred, etc. Contractors—Otherwise Eligible for Award

Protester, suspended from contracting with National Aeronautics and Space Administration, contending it was improperly suspended, is interested party under our Bid Protest Procedures because if protest is sustained the protester would be eligible for award.

Bidders—Suspension—After Bid Opening—Propriety—Evidence—Affiliate Status

Agency has reasonable basis for suspending company on basis of its being affiliated with previously suspended firm where ownership of company had been transferred by owner of suspended firm to his wife and the company is organized and managed by key employees of the suspended firm and uses facilities and personnel of that firm.

Matter of: ALB Industries, Incorporated, August 9, 1982:

ALB Industries, Inc. protests the rejection of its low bid submitted in response to invitation for bids 10-0067-2, issued by the National Aeronautics and Space Administration (NASA) for modifications to a platform and the vehicle assembly building at Kennedy Space Center, Florida.

NASA conducted a preaward survey on ALB as the apparent low bidder on this procurement and during the survey determined that ALB is an affiliate of New World Construction Company. New World and individuals involved with that firm, including Arthur L. Boschen, Jr., had been suspended by NASA on February 26, 1982, because of evidence that the firm and these individuals "committed irregularities of a serious nature in business dealings with the United States." On May 14, 1982, before any award was made, NASA suspended ALB from contracting with the agency because of the firm's affiliation with New World.

NASA contends that as a suspended bidder ALB is not eligible for award and therefore is not an interested party capable of pursuing a bid protest, 4 C.F.R. §21.1(a) (1982). Our Office has held that where a suspended bidder protests that the procuring agency followed improper procurement procedures, the protester is not an interested party, because if our Office determines that the challenged procedures are improper and sustains the protest, the protester would still be ineligible for award. See *Computer Sciences Corporation,* B-200755, March 6, 1981, 81-1 CPD 181. However, where a bidder for a particular procurement protests that it was improperly suspended by the agency after bid opening and would otherwise be eligible for and entitled to award of the procurement in question, as ALB does here, the protester is an interested party because it obviously has a direct stake in the outcome of the protest. Therefore, we will consider the protest. *See* 51 Comp. Gen. 703 (1972).

NASA's regulations provide generally that award shall not be made to a suspended firm. *See* NASA Procurement Regulation (PR) § 1.603(a)(4) (1981 ed.). Rejection of the protester's bid is predicated on the suspension. Consequently, we must consider the propriety of NASA's suspension action. We recognize that the regulations, NASA PR § 1.605-7, provide for a hearing upon request and we note that the protester has requested such a hearing from NASA. While it is not our intention to interfere with that hearing process, we believe our own review is appropriate to insure that the agency, in first suspending a bidder after bid opening, has not acted arbitrarily to avoid awarding a contract to that apparent low bidder.

Upon review of the record and of the applicable regulations, we are unable to find that NASA acted without a reasonable basis. We therefore deny the protest.

NASA regulations provide that business concerns are affiliates of each other when, either directly or indirectly, one concern or individual controls or has the power to control both. In determining whether or not affiliation exists, consideration is given to all appropriate factors, including common ownership, common management, and contractual relationships. NASA PR § 1.600(b).

NASA discovered that ALB was incorporated on October 8, 1980, by Mr. Boschen, the company's sole shareholder, officer, and director. On January 4, 1982, Mr. Boschen transferred all the shares of the company to his wife, Sharon L. Boschen, who became the company's president, treasurer, and director. NASA states that in determining who controls or has the power to control a concern, persons with an identity of interest, such as family members, may be treated as one person.

ALB responds that Mr. Boschen does not own, manage, or control the company. ALB maintains that NASA's treatment of family members as one person discriminates against a wife who controls her own business. ALB contends that this conclusion presumes that the husband controls the wife and that a finding of affiliation on this basis would not have been reached if the roles had been reversed and Mrs. Boschen had been suspended initially and her husband owned another company.

NASA maintains that since Mr. Boschen is the former sole shareholder and president of ALB and the husband of ALB's current sole shareholder and president, it is reasonable to believe that he has the power to control ALB since family members—here a married couple—generally have an identity of interest. We think this is a reasonable conclusion on NASA's part. Moreover, we note that ALB has not presented any evidence that Mr. and Mrs. Boschen do not in fact have an identity of interest, nor has it presented any actual evidence of discrimination on the basis of sex. Unfair or prejudicial motives cannot be attributed to the agency on the basis of interference or supposition. Since this allegation amounts only to speculation about possible bias or unfairness on the part of

NASA without any factual substantiation, we find this allegation is without merit. *Health Management Systems,* B-200775, April 3, 1981, 81-1 CPD 255.

Moreover, NASA discovered several other connections between the two firms other than the marital relationship of the Boschens. Mrs. Boschen was the Corporate Secretary for New World and as recently as April 1, 1982, represented New World in business discussions with NASA. The Vice President of ALB is also the Area Supervisor for New World and the Corporate Secretary of ALB is the Office Manager for New World. Furthermore, after bid opening, Mr. Boschen asked a NASA contracting official if New World could be a subcontractor to ALB. ALB then used New World office space for a preaward conference with NASA and, during that conference, Mrs. Boschen indicated that in performing the contract ALB intended to use welders employed by New World.

ALB argues that Mrs. Boschen and the employees of ALB who also work for New World are not key employees of New World because they never had the authority to bind New World. It also states that none of them has ever been an owner of New World. NASA's position, however, is simply that they are key employees because they report directly to Mr. Boschen and have positions of authority in the company. ALB does not deny that these individuals have such positions, nor that these employees of New World are now serving as officers or employees of ALB, which is a construction contractor like New World. As to the furnishing of assistance, ALB contends that it does not have a contractual relationship with New World. However, ALB has not refuted that ALB has used New World facilities and intends to use its workers.

Under the circumstances, it appears that NASA had a reasonable basis for taking the action it did. Therefore, the protest is denied.

[B-208274]

Officers and Employees—Senior Executive Service—Compensation—Aggregate Limitation—Inclusions—Bonus Payments

Employees who are members of the Senior Executive Service (SES) who were awarded bonuses under 5 U.S.C. 5384 in December 1981, and whose base pay and physician comparability allowance if received in full during the remainder of the fiscal year will cause them to be paid in excess of the Executive Schedule level I pay rate, are not entitled to any pay in excess of the rate for level I. Subsection 5383(b) of title 5 specifically precludes such payment during a fiscal year if it exceeds the rate of pay for level I at the end of such fiscal year.

Officers and Employees—Senior Executive Service—Compensation—Overpayments—Waiver—Erroneous Payment Requirement

Employees who are members of the SES who were awarded bonuses under 5 U.S.C. 5384 in December 1981, and whose base pay, bonuses, and physician comparability allowance if received in full during the remainder of fiscal year 1982 will exceed the maximum amount they are authorized to be paid (level I of the Executive Schedule) prescribed by 5 U.S.C. 5383(b), are not entitled to waiver of the excess under 5 U.S.C. 5584, since only erroneous payments may be waived and the payments involved here were proper when made.

Matter of: Overpayments of Pay for Senior Executive Service Members, August 9, 1982:

This decision responds to the request of the Assistant Secretary for Personnel Administration, Department of Health and Human Services, for a waiver of overpayments which will be made to 13 physicians, who are members of the Senior Executive Service of that agency, as a result of the payment of salary, allowances and awards in excess of the statutory aggregate limit. After careful consideration of the questions and issues of this case, we have concluded that payments in excess of the statutory limit may not be authorized by this Office, and that a grant of waiver under 5 U.S.C. § 5584 in the circumstances presented would not be proper. This situation was precipitated by the circumstances that follow.

During fiscal year 1982, in addition to their basic pay, these senior executives received bi-weekly compensation in the form of a Physicians Comparability Allowance, based on their agreements negotiated with the agency prior to the beginning of the fiscal year, under the authority of 5 U.S.C. § 5948, as amended. They have also received in fiscal year 1982 (December 1981) a Senior Executive Service performance award authorized by 5 U.S.C. § 5384, which is statutorily required to be paid in a lump sum. However, on January 1, 1982, their basic pay was raised pursuant to the Executive Pay Increase as provided by the Act of December 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, which increased the maximum rate of basic pay for the Senior Executive Service from $50,112.50 to $58,500.

The increase in their rate of basic pay, when combined with the performance award and the physicians comparability allowance, results in an aggregate amount that will exceed $69,630 (the annual rate payable under Executive Schedule, level I, during fiscal year 1982) if the entire amount of unpaid basic pay is paid. However, 5 U.S.C. § 5383(b) provides that:

> (b) In no event may the aggregate amount paid to a senior executive during any fiscal year under sections * * * 5382, 5384, and 5948 of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

Assistant Secretary McFee states that the proximate cause of the future overpayments is the payment of the bonuses in December

1981, and that neither the individuals involved nor the agency knew that the pay cap would be raised. He indicates that if the agency had known, it would have adjusted the bonuses so the overpayments would not occur later. Thus, the Department of Health and Human Services is requesting a waiver of the amount of pay to these employees that would exceed the statutory limit.

Our authority to grant waiver, 5 U.S.C. § 5584, applies only to claims of the Government arising out of erroneous payments. The payments that have been made to these employees are statutorily authorized. Although the bonuses paid in December 1981 might have been reduced had the agency known that these employees would receive a pay raise in January, the record indicates that the total payments that have been paid to date do not exceed the aggregate limit. Since the payments that have been issued were legal and proper when made, there have been no erroneous payments and the waiver statute is not applicable in these circumstances. See *Matter of Tischer,* 61 Comp. Gen. 292 (1982), and *Matter of Edynak,* B-200113, February 13, 1981.

The agency contends that the awards were paid for employee performance in fiscal year 1981, and that to reduce the bonus or recoup overpayment at this time would be inequitable and "inconsistent with the spirit of the Senior Executive performance award" provision. The plain language of the statute provides no exception with regard to the aggregate amount of pay that may be paid to a senior executive within a fiscal year on the basis of the period of performance for which the employee receives an award. Furthermore, our review of the legislative history of the senior executive pay provisions indicates the specific intent of Congress to so limit the aggregate amount of compensation received by senior executives in salary, performance pay and physicians comparability allowance. See House Report No. 95-1403, 95th Cong., 2d Sess. 150 (1978), and House Report No. 96-683, 96th Cong., 1st Sess. 4 (1979). Moreover, subsequent to the enactment of the Senior Executive Service legislation, when the Federal Physicians Comparability Allowance Act was amended to include Senior Executive Service physicians, 5 U.S.C. § 5383 was also amended to include the payment of physicians comparability allowance in the aggregate limit. See Public Law 96-166, approved December 29, 1979, 93 Stat. 1273. Therefore, it is clear that Congress did not intend that employees receiving the payments these employees received would be allowed to exceed the level I limitation.

However, we recognize, as the Assistant Secretary points out, that to discontinue payment of basic pay when the pay limit is reached may cause a hardship to some of these employees. In this regard, 5 U.S.C. 5383(b) provides that the aggregate amounts payable in a fiscal year shall not "exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the *end* of such fiscal year." [Italic supplied.] We do not view this provision as

requiring an agency to wait until the end of a fiscal year to make a determination concerning the aggregate limitation, and ordinarily we would expect an agency to make appropriate reductions in pay well in advance to preclude exceeding level I. However, in the particular circumstances of this case where hardship may occur if the entire projected excess is collected in this fiscal year, we will not object to continued payments to those individuals with collection being made in installments continuing into the next fiscal year. See 5 U.S.C. 5514.

[B-203801]

Leaves of Absence—Civilians on Military Duty—Charging—Nonwork Days—Within Continuous Duty Period—More Than One Order

Advance party of several civilian employees of Carswell Air Force Base were issued two sets of orders for active military duty: one set of orders was for advance duty on Thursday and Friday, June 5-6, 1980, and the other set was for regular summer camp duty on June 7-21, 1980. However, after an audit, the Air Force computed military leave for those employees as if there was only one period of active duty and charged 1 day's annual leave in addition to 15 days' military leave. The union claims that military leave should have been computed for each tour of duty separately and no annual leave charged. Since the absence for military leave was continuous and the weekend of June 7-8 fell wholly within the period of absence, military leave must be charged for those days. The union's claim on behalf of its employees is denied.

Matter of: American Federation of Government Employees Local 1364—Military Leave or Annual Leave, August 13, 1982:

This decision is in response to a request for a decision filed by James M. Carter, President, American Federation of Government Employees (AFGE) Local 1364, on behalf of several civilian employees of Department of the Air Force. Pursuant to 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689-92, August 21, 1980), the Air Force was served with a copy of AFGE's request, but has filed no written comments or response.

The main issue in this case is whether employees must be charged military leave for nonworkdays at the beginning of a second tour of military duty when the second tour begins the day after the end of the first tour of military duty. We hold that the employees in question must be charged military leave for the nonworkdays at the beginning of the second tour of military duty under the circumstances described below.

Civilian Air Force Technicians of the 301st Tactical Fighter Wing at Carswell Air Force Base, Texas, were sent to Hill Air Force Base, Utah, for military duty at summer camp from Saturday, June 7 to Saturday, June 21, 1980. Management of the 301st asked for volunteers for an advance party to go to Hill Air Force Base on June 5-6, and assured the employees that they could use military

leave instead of annual leave during this time. Management issued two different sets of military orders for the employees who volunteered for the advance party. One set of orders was for advance duty on June 5-6 and the other set was for summer camp duty from June 7-21.

Other employees who were issued orders for June 7-21 only were charged military leave for 12 days from June 9 to June 20. They were not charged military leave for June 7, 8, and 21 because those days were nonworkdays at the beginning and end of military duty. Originally, the employees who served under both sets of orders were not charged military leave for June 7 and 8. However, after an audit, those employees who were on the advance party were charged military leave for Saturday and Sunday, June 7 and 8, pursuant to Air Force Regulation 40-631, July 6, 1973, which states in Paragraph 23e(1) as follows:

> e. How Military Leave is Charged: (1) Military leave granted under paragraph c(1) above is charged on a calendar day basis. No charge is made for nonworkdays at the beginning and end of a period of absence on active military duty. However, all intervening nonworkdays falling within the period of military duty must be charged to military leave. An employee cannot be granted more than 15 calendar days of military leave for any 1 period of active duty although the tour extends into another calendar year. * * *

The Air Force concluded after the audit that the advance party employees had actually served one continuous period of duty. Accordingly, pursuant to the quoted regulation, those employees were charged leave for each day beginning Thursday, June 5 until Thursday, June 19, a total of 15 days, including the intervening nonworkdays of June 7 and 8. Their absence on Friday, June 20, was charged to annual leave. No leave was charged for Saturday, June 21, since it was a nonworkday at the end of a period of absence on active military duty. The other employees who did not participate in the advance party were not charged military leave for June 7 and 8 and received no charge to annual leave.

The union contends that there were two different periods of active duty for the advance party since there were two sets of orders and, therefore, military leave should be charged by the following method pursuant to the regulations. The employees should be charged military leave for June 5 and June 6 in accordance with the first set of orders. Then, under the second set of orders, the employees should be charged military leave only for the period from Monday, June 9 until Friday, June 20. The union reasons that June 7 and 8 should not be charged to military leave since the regulation states that no charge is made for nonworkdays at the beginning and end of a period of absence on active military duty.

Employees must be charged military leave for any intervening nonworkday occurring during periods of ordered military training. 27 Comp. Gen. 245; B-133674, December 30, 1957. However, when an employee is issued three different sets of orders for military duty which cover three consecutive Monday to Friday periods, mili-

tary leave is not charged on the intervening weekends. The reason given for not charging military leave on those weekends was not that separate orders were issued but was that the employees were not on military duty during those weekends. An employee who is neither on military duty nor absent from civilian employment is not to be charged military leave. See B-171947, September 7, 1972; B-149951, November 23, 1962. But continuous military duty is not to be considered more than one period of military duty under the law and regulation because more than one order to military duty is involved.

In the present case, the employees in the advance party were continuously on military duty and the weekend of June 7 and 8 fell wholly within their period of duty. Accordingly, those days must be charged to military leave.

The second issue that the union raises is that the employees were incorrectly charged annual leave after the audit required the employees to be charged military leave for the disputed days. The union contends that the employees never requested leave nor initialed the leave cards. The union contends that the employees were on enforced leave and that procedural requirements were not followed in using such leave. Finally, the union contends that, since management made a mistake by informing employees that no annual leave would have to be taken, administrative leave should be granted to the employees.

We disagree with the union's contentions. We have ruled consistently that the granting of annual leave is within administrative discretion in respect to any period of time, and it is legally proper for an administrative office to charge an employee annual leave for periods during which he is absent from an official duty station. It is immaterial, in such cases, that the employee had not requested leave. See 31 Comp. Gen. 581 (1952; 40 *id.* 312 (1960; B-166469, September 25, 1969.

In view of these decisions, we conclude that management acted correctly in charging annual leave after the audit although annual leave was not requested. Accordingly, the union's claim for restoration of annual leave is denied.

[B-205114]

Contracts—Negotiation—Competition—Equality of Competition—Lacking—Evaluation of Proposals Improper

Offerors are not evaluated on equal basis where request for proposals requested cost proposals to provide fixed level-of-effort based on direct professional productive hours but awardee is permitted to count nonproductive professional time and thus submits a cost proposal based on a lesser amount of work than others were required to price.

Contracts—Negotiation—Offers or Proposals—Best and Final—Reductions in Level-of-Effort—Termination of Contract Recommended

Where awardee's best and final offer reduced number of hours of direct professional productive time required in solicitation and on which its costs proposal was initially based, agency should have either rejected best and final offer or reopened negotiations under an amended solicitation so that all offerors could compete on an equal basis. Awardee's best and final cost proposal affects entire proposal including the acceptability of its technical and management proposals.

Matter of: Analytics Incorporated, August 18, 1982:

Analytics Incorporated protests award to Calculon Corporation of a 48-month fixed level-of-effort cost-plus-fixed-fee contract under Department of the Army Request for Proposals (RFP) DAAK80-81-Q-0063. The contractor will provide systems engineering support services in connection with the development of specifications for the tactical C^3 (Army Command, Control and Communication) systems. The contract was awarded on September 30, 1981.

The protester presents three principal issues (1) did Calculon base its proposal on providing the level of work required in the RFP; (2) were proposals evaluated in accord with the evaluation criteria stated in the RFP; and (3) did the Army perform a meaningful evaluation of the cost realism of Calculon's proposal. We believe each of the protester's bases of protest has merit, and we sustain the protest.

Analytics does not believe Calculon can perform at the price stated in the contract because that price would be exceeded were Calculon to provide the anticipated level-of-effort at prevailing professional wage rates. In fact, Analytics contends, the contract as originally awarded to Calculon did not call for 83,200 direct professional productive labor hours, which Analytics states the RFP established as the basis for evaluation. Moreover, Analytics alleges, Calculon's proposed overhead rates are unreasonably low and it failed to properly account for travel costs. Analytics maintains that its technical and management proposals were superior to Calculon's but that the Army, disregarding the RFP evaluation criteria which gave technical and management factors greatest weight, improperly accepted Calculon's apparently low cost proposal without adequate evaluation.

In response, the Army admits that the Calculon contract as awarded provided for an estimated 73,280 hours of direct professional productive effort, not 83,200 hours. However, the Army says, this was merely a clerical mistake which has been corrected. According to the Army, Calculon did propose to furnish enough hours, but because a portion of the work was to be subcontracted and the subcontractor's hours were not carried forward when the contract was assembled, the total number of hours specified in the contract was erroneous.

Further, the Army says, RFP evaluation criteria were not disregarded. The Army states that the technical evaluation was performed by the Army's Center for System Engineering and Integration, which was not furnished any cost data, and that cost proposals were audited by the Defense Contract Audit Agency (DCAA), which prepared a cost analysis and which determined that the overhead rates proposed by Calculon were those being experienced by the concerned Calculon profit center and were acceptable.

Our review of the record shows that Calculon's best and final cost proposal was not based on the level-of-effort stated in the RFP.

Paragraph L.60.b of the RFP directs offerors to base their proposals on an approximate level-of-effort of 83,200 direct professional productive labor hours of various professional technical disciplines, labor categories and skill levels, supplemented by necessary support personnel. In subparagraph 1.a, paragraph L.60.b goes on to state that:

> Productive labor hours means on-the-job time spent working actively on objectives or tasks under any resulting contract. * * *

Subparagraph L.60.b.1.b states that any required support personnel effort should not exceed one hour for each four hours of professional personnel effort and includes the time of all non-professional, non-technical personnel "such as administrators, technical writers, illustrators, secretaries, typists, etc."

At 40 hours per week (2080 hours per year), 83,200 hours is exactly 40 manyears (10 manyears per year for the four years). Calculon's initial proposal stated that for purposes of computing level-of-effort:

> A productive manyear is equivalent to 1875 man-hours and is exclusive of fringe hours (sick/personal leave time, vacation and holiday time).

It initially proposed 83,200 hours of professional time based on an 1875 hour manyear. "Fringe hours" were listed as an additional cost category.

Calculon's best and final cost proposal states that it is offering 10 manyears per year of professional time. However, Calculon did not base its final cost proposal (DD Form 633) or the final DD Form 633 submitted for its subcontractor on 10 years at 1875 manhours per year.

Rather, Calculon's cost data was based on approximately nine annual direct productive professional manyears. It attributed 9,728 nonproductive professional hours to the contract. Of these hours, 7936 appear on Calculon's DD Form 633 as a portion of "fringe hours" which Calculon priced as a percentage of productive labor cost. The remaining 1792 hours are carried forward from Calculon's subcontractor's DD Form 633 where they were claimed as "overhead," which, as explained in a footnote on the DD Form 633, again "includes paid leave (vacation, sick, holiday) from fringe

pool." Thus, almost 10,000 professional hours "dropped out" of Calculon's proposal in its best and final offer.

The consequence of these entries is that in actuality Calculon based its cost proposal on a total of 73,472 direct professional productive hours consisting of 58,624 hours of Calculon and 14,848 hours of subcontractor direct professional productive time. Calculon's proposal meets the 83,200 hours only by adding nonproductive professional time (73,472 plus 9,728 hours equals 83,200 hours).

Calculon made other changes, in addition to its elimination of direct professional productive hours. Calculon changed its proposed organization of the work to be done eliminating some administrative personnel by relocating personnel and changing proposed profit centers. Travel costs were also significantly reduced. The effect on cost of all the changes made was to lower Calculon's proposed cost by approximately 50 percent of the cost it had proposed in its original proposal, from more than 4 to approximately 2 million dollars. On its face, Calculon's final proposed cost bore no relationship to the cost proposed by other vendors, including Analytics.

In similar circumstances, our Office has held that a low cost proposal submitted in response to an RFP for a cost reimbursement type contract may not be accepted at face value, since the Government will be obligated in any event to pay the contractor's actual, not its proposed costs. Proposed costs must be examined by the contracting activity to determine whether they are realistic. *Kirschner Associates, Inc.*, B-199547.2, August 26, 1981, 81-2 CPD 178.

Here, the contracting officer accepted Calculon's best and final offer largely at face value. He attributed the cost reduction to Calculon's proposed change of profit center and reduced administrative cost. He selected Calculon for award 2 days following the closing date for receipt of best and final offers, justifying this action on the basis that Calculon had received the highest combined rating on its technical and management proposals and had offered to perform at significantly lower cost than had any of the other offerors.

A meaningful cost realism analysis of the Calculon proposal was not performed. During the 2 days which intervened between closing and selection, the contracting officer: (1) submitted the best and final technical and management proposals to the technical evaluation panel (which reported no change in the scores they had assigned earlier), and (2) called DCAA to confirm that Calculon's new proposed overhead rates were appropriate to the profit center Calculon was proposing. The technical evaluation team was not told, insofar as the record shows, that Calculon had made significant changes in the level of manpower proposed, and DCAA was not provided any information from which it could have discovered that fact for itself. The Army contends, in defense of the protest, that DCAA performed a cost analysis, but we note that the analysis that was performed concerned Calculon's initial cost proposal. The changes which Calculon made rendered that analysis irrelevant.

With respect to travel costs proposed, it is our view an adequate cost analysis would have disclosed a $500,000 discrepancy between Calculon's and Analytics' proposed travel costs. The RFP states that the number of trips cannot be estimated but that the Government estimates that annual travel costs should not exceed $150,000. Analytics (and Calculon in its initial proposal) included an estimated $150,000 annual travel and subsistence expense in the cost proposal. In Calculon's best and final offer, Calculon reduced this figure to $25,000 per year, for a total apparent 4-year "savings" of $500,000 over Analytics' proposed costs for this item. The record does not disclose any basis which would justify concluding that such a difference in cost would be experienced during contract performance; as Analytics contends, the facilities it and Calculon proposed to use are located in the same geographical area so that both would be likely to incur similar travel costs under any contract.

It is fundamental, as Analytics points out, that offerors must be treated equally. If the Army were able to estimate the cost of travel, and thus evaluate Calculon's $25,000 per year proposed cost, it did not communicate the basis for such an evaluation to other offerors. If on the other hand such costs were speculative (as the RFP suggests), all similarly situated vendors should have had their costs normalized for this item if the proposals were to be fairly evaluated. See *Lockheed Propulsion Company; Thiokol Corporation*, 53 Comp. Gen. 977 (1974), 74-1 CPD 339.

Where multiple professional technical skill mixes and levels of experience are involved, an evaluation which compares one cost proposal based on the level-of-effort specified in the solicitation as well as reasonably assumed travel costs and another based on something substantially less is not reasonable. These proposals are simply not comparable. Offerors must be treated equally and be provided a common basis for the preparation of their proposals. *Motorola, Inc., Communications Group*, B-200822, June 22, 1981, 81-1 CPD 514.

We conclude, therefore, that the Army's evaluation of Calculon's proposal was deficient.

We next consider what consequences should have flowed from a proper analysis of Calculon's best and final offer.

First we point out that the RFP provided that, in evaluating cost realism, proposals which failed to present realistic costs would be penalized. Calculon's costs were not realistic inasmuch as the entire cost proposal is based on 9,728 fewer direct professional productive labor hours than the agency anticipated it required.

Second, any actual cost advantage achieved in contracting with Calculon should be significantly less than the contracting officer stated in justifying award to Calculon. Its relative standing with respect to cost is in error by $500,000 for travel costs alone. The cost impact of its failure to include estimated costs based on an 83,200

hour direct professional level-of-effort is substantial. Also, the best and final offer sets out quite different rates which apply if "support is required from other divisions [profit centers] of our corporation."

The impact on the Army's evaluation of Calculon's best and final offer, however, should not have been limited to cost which, indeed, was the least important of the three areas of evaluation.

Proposals were to be scored by assigning technical and management strength greatest weight, in that order, with cost receiving least weight. The evaluators found that the technical and management merit of Calculon's proposal collectively outweighed the combined technical and management merit of Analytics' proposal because, although Analytics' proposal was considered somewhat better with respect to management, Calculon outscored it technically. Calculon's primary strength was attributed to its greater familiarity with tactical C^3 systems.

From this record, however, it appears that the evaluators were assuming that Calculon was proposing the specified direct professional productive labor hours. The solicitation lists in order of importance five subfactors on which the technical portion of the evaluation was to be based, the second and third being, respectively: qualifications and experience of committed personnel, and commitment of personnel. Calculon's initial proposal included tables listing employees who would be assigned to the project. These tables showed how much time each was expected to contribute based on a total of 83,200 direct professional productive hours. However, Calculon's best and final cost proposal in effect, altered this commitment. As a result, Calculon's technical proposal was undermined, and the Army should have downgraded its evaluation of that proposal.

Finally, Calculon's reduction in the level-of-effort on which its cost proposal was based should have affected scoring of its proposal in the management area. Of the principal management subcriteria, the first listed and most important is management approach which, according to the RFP, was to involve:

> An assessment of the quoter's intended approach for organizing, staffing, administering, directing and controlling the work force * * *.

We believe that Calculon's staffing reduction made in its best and final offer left uncertain what its intended management approach really was.

The fact that the changes Calculon made in its best and final offer should have significantly altered the Army's evaluation of its proposal is sufficient to establish that the final evaluation was not reasonable or consistent with the solicitation's evaluation factors.

A reasonable evaluation then should have revealed to the contracting officer that he had essentially two choices left to him after the receipt of best and final offers—either reject the Calculon proposal because of its deficiencies, or reopen negotiations under an

amended solicitation so that all of the offerors could compete on an equal basis. We believe it is now simply too late to reopen negotiations, particularly in view of the extensive discussion of the cost proposals that were necessary to this decision. We also believe that it is not possible to attempt to normalize the Calculon best and final offer with the others because of the skill mixes involved. Such an adjustment would be a guess at best. We believe that the only reasonable course of action is to recommend that the contract awarded Calculon be terminated, that best and final offers of those firms that are still interested in the award of the contract be evaluated, that Calculon's proposal be rejected, and that a contract be awarded to whichever of the remaining firms is found to be in line for award.

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-206555]

Bids—Guarantees—Bid Guarantees—Assignment of Retainages, etc.—Acceptability—Firm Commitment at Bid Opening Requirement

An assignment of funds held by the Government as retainages or allegedly due the bidder under other Government contracts in lieu of a bid bond lacks the requisite obligation as of the date of bid opening because the amounts actually payable from the funds held are contingent upon a number of factors extraneous to the bid.

Matter of: Central Mechanical, Inc., August 18, 1982:

Central Mechanical, Inc. protests the rejection of its bid under Invitation for Bids (IFB) No. DACA63-82-B-0013 issued by the Fort Worth District Office of the Corps of Engineers (Corps). Central's bid was rejected because it did not include with its bid a bond duly executed by a bonding agent. Instead, Central attached to its completed bid bond form (Standard Form 24) a handwritten document purporting to pledge and assign as collateral all amounts which were due and payable or held as retainage under three identified ongoing Government contracts. We deny the protest.

The protester contends that its bid should be accepted because it met the definition of a bid guarantee set out in the Defense Acquisition Regulation (DAR) § 10-101.4 (1976 ed.) as explained in paragraph 4 of the Standard Form (SF) 22 which was included in the IFB.

SF 22, paragraph 4 states that:

A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, certain bonds or notes of the United States.

Central asserts that the above list is merely illustrative of the kind of security that is considered sufficient, that it is the substance of the guarantee which should control, and that in fact there is no more substantial guarantee that could be given than a firm commitment accompanying a bid permitting the Government to continue to hold money which already is in its possession. The protester says that there can be no doubt that its unqualified "pledge and assignment" of these funds to satisfy the bonding requirement was a firm commitment which entitled the Government to hold these funds as long as necessary to accomplish the purpose of the bonding requirement. Further, the protester says, the amount of the security given is sufficient because there were sufficient funds being held by the Corps' Fort Worth District Office, which were then due and payable, to cover the difference between the protester's and the next low offeror's bid.

The Corps, on the other hand, maintains that the purported "assignment" of funds would violate the Assignment of Claims Act, 31 U.S.C. §203 (1976). The Corps also asserts that the "assignment" actually does not involve funds which are "due and payable" insofar as the funds are held as "retainage" on an ongoing contract (*i.e.*, held as security to assure completion). In any event, the Corps contends, the "assignment" does not provide a firm commitment as envisioned under SF 22 because the monies, if withheld, would be subject to setoff to pay other debts that Central may owe the Government.

Further, the Corps maintains that insurmountable administrative difficulties would result if offerors were permitted to pledge funds due them, because it would be necessary for contracting agencies to determine the status of funds held by other agencies. Even within the Fort Worth District, the Corps says,

withholding contract funds for such a purpose * * * would leave the Government with the responsibility for record keeping and paperwork necessary for processing such a transaction and with potential liability for attendant errors and mistakes without Government consent to such responsibilities. Finally, it would necessitate an additional clearance through the Procurement and Supply Office for release of such [monies]. * * *

At the outset, we note that one of the three contracts listed in the protester's assignment was identifiable from its contract number as being a contract of the Fort Worth District Office—the office conducting the procurement. The sum of $56,484 was due and payable on that contract, and the contracting office had approved that amount for payment the day before bids on the disputed contract were opened, leaving routine processing by accounting and finance personnel before payment would be made. The $56,484 exceeds the difference between Central's and the next low base bid

(the Corps intends to award a contract only for the base quantity) and thus is sufficient in amount to cover that portion of the work. *Arch Associates, Inc.*, B-183364, August 13, 1975, 75-2 CPD 106.

We are nonetheless of the view that the purported assignment lacks the requisite firm obligation required of a bid guarantee, simply because the amounts payable to a contractor from funds held by the Government for final payment or as retainages under other Federal contracts are contingent upon a number of other factors. For example, as the Corps notes, these funds may be subject to set-off for debts owed to the Government; they may be subject to tax liens filed by the Internal Revenue Service; they may be subject to the claims of sureties or assignors; they may even have already been disbursed but not received by the contractor.

As of the time of bid opening, then, a contracting officer could not be certain if the funds are in fact available for their intended purpose, without further investigation as to their legal status. In our opinion it is therefore not possible to determine the legal sufficiency of the purported bid guarantee from the bid documents themselves *at the time of bid opening*—a factor which is crucial to determining the responsiveness of a bid. See *Clear Thru Maintenance, Inc.*, 61 Comp. Gen. 456 (B-203608, June 15, 1982), 82-1 CPD 581. On the other hand, other acceptable obligations, furnished with a bid in lieu of a bond, such as a certified check, are immediately available for a bid guarantee, because they are not subject to the same contingencies as the funds held by the Government under other contracts. *See* 45 Comp. Gen. 504 (1966). The fact that a sufficient amount of money for the purpose of the bid guarantee is ultimately found to be available does not cure the deficiency in the bid.

We find that Central's bid was properly rejected as nonresponsive. The protest is denied.

[B-208049]

Claims—Settlement by General Accounting Office—Contract Disputes Act of 1978 Effect—Claims Filed Under Act—Implied-Contract Basis

A claim by a real estate broker for damages arising from the Federal Communications Commission's failure to enter into a lease for office space located by the broker may be settled by the contracting officer under the Contract Disputes Act.

Certifying Officers—Responsibility—Contract Disputes Act of 1978 Effect—Claims Filed Under Act—Payment Conditions

Payment of proposed contract settlement must wait until the certifying officer has received a settlement agreement signed by both parties to the contract which sets forth a finding of legal liability by the Government and a statement of the amount owed.

Matter of: Federal Communications Commission—Request for Advance Decision, August 19, 1982:

Mr. Wayne B. Leshe, Chief Certifying Officer of the Federal Communications Commission (FCC), pursuant to 31 U.S.C. § 82d (1976), requests an advance decision regarding the propriety of the proposed settlement of a claim for $1,543,006, filed by Julien J. Studley, Inc., under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-603 (Supp. III, 1979). Specifically, Mr. Leshe asks whether the FCC contracting officer is authorized to settle the claim under the Contract Disputes Act. We find that the FCC contracting officer is authorized to settle this claim.

The relevant facts and circumstances of record follow. Beginning in the late 1970's, the FCC sought a location for its headquarters offices to consolidate scattered rental office space at various locations in the Washington metropolitan area. In order to facilitate this effort, FCC officials obtained the assistance of Studley, a commercial real estate broker.

On July 29, 1980, an arrangement was entered into between the FCC and Studley in the form of a letter signed by a representative of Studley and by an FCC official (an Assistant to the then FCC Chairman). The body of the letter provided (in its entirety) that:

> We hereby accept appointment as your exclusive real estate broker for a period of one year from the date hereof to locate and negotiate for space for you in the Washington Metropolitan area.
>
> As your exclusive broker, we shall select, analyze, evaluate and negotiate for all space under consideration, but make no commitment on your behalf.
>
> You shall refer all space offerings and solicitations you have on file or shall receive from owners, brokers, or others to us for action and evaluation.
>
> It is understood and agreed that there shall be no charge to you for our services and that we shall look to the building owners or their agents for brokerage commissions.
>
> Please indicate your approval and acceptance of this letter agreement by signing the enclosed copies and returning them to us for file.

The FCC referred all space offerings and solicitations for office space to Studley. In the fall and winter of 1980-81, Studley negotiated a lease for office space in two towers under construction in Rosslyn, Virginia. On February 24, 1981, the FCC submitted to the House Subcommittee on Public Buildings and Grounds a prospectus for leasing the Rosslyn buildings. The proposed leases were for terms up to 20 years totaling 375,000 square feet at an annual cost of approximately $6,387,000.

During a March 18, 1981, hearing on the proposed lease, the Subcommittee raised several objections to the FCC's proposed move out of the District of Columbia to Rosslyn. Thereafter, the FCC Commissioners voted to defer action on the proposed relocation to Rosslyn or any alternative location until a new Chairman was confirmed by the Senate.

On March 27, 1981, a letter was sent to Studley stating in part that:

On March 19, 1981, the Federal Communications Commission deferred any further action to relocate and consolidate its business offices pending the arrival of the next Chairman. This, of course, means we have no further need to continue the Agency's arrangement with your firm as its exclusive real estate broker as indicated in our agreement dated July 29, 1980.

* * * * * * *

Please accept our thanks for the excellent services your firm executed during our relationship.

On June 17, 1981, Studley protested the cancellation of the exclusive brokerage arrangement. Studley requested reinstatement as exclusive broker in securing other office space for the FCC. After a series of meetings, the FCC concluded that reinstatement was not possible. Subsequently, on December 7, 1981, Studley submitted an analysis of damages suffered as a result of the FCC's termination of the brokerage agreement.

On May 7, 1982, Studley filed a certified claim with the FCC pursuant to the Contract Disputes Act of 1978, in the amount of $1,543,006. Negotiations to settle the claim have resulted in a proposed settlement whereby the FCC would pay Studley $198,827.60 in full and final settlement of the claim.

However, the FCC certifying officer notes that a recent decision, *Contract Disputes Act of 1978*, 59 Comp. Gen. 232 (1980), 80-1 CPD 79, our Office distinguished claims filed and considered under the Contract Disputes Act from claims which were based on informal commitments where no contract is involved. In light of the referenced decision, our response to the following questions is requested.

1. May the Studley claim be considered and settled under the terms of the Contract Disputes Act of 1978, such that I may certify for disbursement the amount approved by the Commission's Contracting Officer? or,
2. If the Studley Claim may not be considered and settled as noted in 1 above will the General Accounting Office authorize this Commission to proceed with settlement of the claim?

It is clear that this claim may be settled under the Contract Disputes Act. The Act provides that all claims by a contractor against the Government relating to a contract shall be submitted to the contracting officer for a decision. 41 U.S.C. § 605(a). It provides that when a claim is submitted the contracting officer shall issue a decision on the claim stating the reasons for the decision reached. 41 U.S.C. *id.* The Act further provides that the contracting officer's decision shall be final and not reviewable unless appealed by the contractor. 41 U.S.C. § 605(b). As stated in 41 U.S.C. § 602(a), these provisions apply to all claims relating to any express or implied contract entered into by an agency for the procurement of property and services. Since the Act authorizes the FCC contracting officer to issue a decision on this claim, the contracting officer clearly is authorized to settle the claim. See, generally, *Paragon Energy Corp.* v. *United States*, 645 F. 2d 966 (Ct. Cl. 1981).

Our decision in 59 Comp. Gen. 232, *supra*, does not hold otherwise. There we held that vouchers for payment based on informal

commitments should continue to be sent to our Office for settlement notwithstanding the passage of the Contract Disputes Act. We stated that informal commitments by their very nature were not subject to the usual safeguards, as are express contracts, and therefore they should be referred to us for settlement to ensure compliance with appropriation and procurement requirements. Our holding, however, is limited to those situations where no dispute exists and the agency agrees that the claim should be paid. Where, as here, a claim has been submitted under the Act, the claim must be resolved as provided in the Act.

Our conclusion that the FCC contracting officer has authority to settle this claim under the Contract Disputes Act does not mean that this claim is now ripe for payment. Before payment may be made, there must be a written decision by the contracting officer setting forth a clear finding of legal liability. While our examination of the record fails to show a basis for a finding of clear legal liability on the part of the Government, as pointed out above, any such decision by the contracting officer would be final. In addition, before payment may be made, under 31 U.S.C. § 82c, it is the certifying officer's responsibility to ensure that the proposed payment is lawful under the appropriation or fund involved. In the instant case, the certifying officer's question is still hypothetical. In requesting our advance decision, he did not include a voucher or any similar document signed by an authorized official requesting certification of a specified sum, as required by 31 U.S.C. § 82d. (See GAO Policy and Procedures Manual, title 3, section 47, for a definition of a voucher and what it must include. *See also* B-179916, March 11, 1974, which discusses the necessary supporting documentation under 31 U.S.C. § 82c.) Payment must therefore wait until he has received, among other required documents, a written settlement agreement, signed by the contracting officer and by the claimant, setting forth a clear finding of legal liability on the part of the Government and a statement of the amount owed.

Accordingly, a voucher in the amount due may be certified if administratively authorized and supported by the contracting officer's determination of legal liability.

[B-206015.2, B-206015.3]

Bids—Ambiguous—Rejection—Qualified Products Procurement

Prior decision—in which General Accounting Office held a bid to be ambiguous and nonresponsive where bidder designated responsive qualified products list product by manufacturer's designation but a nonresponsive product by superseded qualified products list test number—is affirmed. Recommendation is made to terminate contract for convenience of Government, particularly where this is second recent procurement where protester has been deprived of contracts improperly awarded to another firm.

Matter of: Enterprise Chemical Coatings Company and General Services Administration—Reconsideration, August 25, 1982:

Enterprise Chemical Coating Company (Enterprise) and the General Services Administration (GSA) request reconsideration of our decision in *Chemray Coatings Corporation,* B-206015, May 3, 1982, 82-1 CPD 412 (Chemray II).

We affirm our decision.

In the decision, we held that the low Enterprise bid for the forest green camouflage paint portion of a requirements contract under GSA invitation for bids (IFB) No. 10PR-XMS-5083 was ambiguous and nonresponsive. Therefore, we sustained the protest of Chemray Coatings Corporation (Chemray), the second low bidder, against the GSA award to Enterprise, and we recommended that GSA consider the feasibility of terminating the contract for the convenience of the Government and awarding the contract to Chemray.

Our decision was based on the following. The IFB specified that the procurement was for paint manufactured in accordance with a military specification. The products of all bidders were required to have been tested and approved for inclusion on Qualified Products List (QPL) No. QPL-52798-5, which superseded QPL-52798-4. In the schedule of items, the Enterprise bid listed the paint by the correct QPL-52798-5 manufacturer's product designation, 900-G-002, but incorrectly listed QPL test number, TB-12, which refers to the paint formerly listed on the superseded QPL, a product which differed materially from the paint required by the IFB.

Enterprise argues that the product intended to be supplied was determinable from the correct product designation, together with the identification of the manufacturer and the applicable QPL specified in the solicitation; therefore, the designation of the wrong and meaningless QPL test number is a minor informality which may be waived, citing *D. Moody & Company, Inc., Astronautics Corporation of America,* 55 Comp. Gen. 1 (1975), 75-2 CPD 1. Enterprise distinguishes *Chemray Coatings Corporation,* B-201873, August 17, 1981, 81-2 CPD 146 (Chemray I), involving a prior solicitation for the same paint, in which we found an Enterprise bid was nonresponsive because the firm had inserted incorrect QPL product designation and test numbers.

Enterprise contends that termination of the contract with Enterprise and reaward to Chemray would interrupt contract coverage and maintenance of the necessary supply of this "never-out-of-stock critical item," seriously endangering our military supply commitment capabilities for this product. Enterprise finally alleges that termination will result in substantial costs and delays to the Government: Chemray's price is approximately $165,000 higher, and Enterprise has begun performance, is committed to the purchase of $2,000,000 worth of raw materials, and has already met 300 hours

of first batch testing, which would need to be repeated if the contract is reawarded.

GSA also contends that the QPL test number listed by Enterprise is without meaning because the QPL on which that product was listed, QPL-52798-4, was superseded by QPL-52798-5. Therefore, GSA argues, that the listing of a "meaningless" QPL test number is equivalent to omitting the number, and the *D. Moody* decision governs. GSA advises that termination does not appear to be in the Government's interest because of the costs involved and potential delivery delays.

Contrary to the contentions of GSA and Enterprise, the listing of the QPL test number of a product previously listed on a superseded QPL is not meaningless or equivalent to no listing. Rather, it is a specific reference to a sample of a paint. Although QPL-52798-4 has been superseded, there is no allegation that the product becomes nonexistent. Therefore, the Enterprise designation of two materially different products, one responsive to the IFB and the other nonresponsive to the IFB, properly resulted in our conclusion of nonresponsiveness.

The *D. Moody, supra,* decision is clearly distinguishable. There, the bidder failed to enter either the manufacturer's name or the QPL test number. We held that the QPL item intended to be offered could be determined by reference to other information in the bid. The bidder did list the manufacturer's designation number and, by reference to the applicable QPL, the manufacturer and the test number could be determined.

As we pointed out in *Chemray I, supra,* decision in *D. Moody, supra,* and in similar cases, excuse the failure of a bidder to insert relevant QPL information, such as a test number, so long as other information in a bid, or elsewhere, enables the agency to determine the intended product. Inherent in those decisions is the specific identification of the intended product incompletely identified in the bid. Here, however, the bid expressly designated two materially different products, one responsive and the other nonresponsive, and nothing else in the bid indicates the actual intended product. The bid of Enterprise, therefore, is ambiguous and nonresponsive and should not have been accepted.

The determination of whether an improperly awarded contract should be terminated and either recompeted or reawarded involves the consideration of several factors, including the seriousness of the procurement deficiency, the degree of prejudice to other bidders or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, and impact of a termination on the procuring agency's mission. See *United States Testing Company, Inc.*, B-205450, June 18, 1982, 82-1 CPD 604.

This protested procurement is the second recent paint procurement on which Chemray has been the low responsive bidder. In both cases, Enterprise has been nonresponsive as a result of similar

bid defects, Enterprise has received improper contract awards and Chemray has been deprived of contracts. This prejudice to Chemray and the integrity of the competitive bidding system significantly impacts on our consideration of whether to recommend termination of the contract with Enterprise and reaward to Chemray.

Enterprise has alleged that termination of the contract and reaward will cause serious interruption in the supply of this critical paint. The agency, however, has not alleged that termination would seriously disrupt supply of the paint, and Chemray has alleged that GSA can make exigency purchases under the contract during the relatively short reaward process.

Enterprise also alleges that it is now committed to substantial raw material costs. In connection with the investigation of the feasibility of terminating the contract as recommended in our prior decision, GSA estimated the value of the contract to be $2,800,000. We agree with Chemray that, while Enterprise may have commitments for costs representing a significant portion of the contract, these costs may not be recoverable due to the requirements nature of the contract. Also, the contract runs through January 31, 1983, and, as of June 29, 1982, Enterprise advises that only 17 percent of the annual estimated requirements have been ordered.

Further, GSA advises that the quantifiable cost of termination is well under 10 percent of the contract value. Finally, the agency has not indicated that Chemray's price is unreasonable and, for this reason, we find that the protester's higher price should not impact on termination since Chemray should have received the award, and the effect of the higher price has been diminished by Enterprise's ongoing performance. Even including the price differential would result in termination costs of only slightly above 10 percent of the contract value.

In view of these termination consequences and our opinion that the integrity of the competitive bidding system outweighs the expected cost to the Government to terminate the contract (see *Datapoint Corporation*, B-186979, May 18, 1977, 77-1 CPD 348), we recommend that the contract with Enterprise be terminated for convenience. This should be accomplished on the ending date of any purchase order current on the date of this decision and the contract be awarded to Chemray, if otherwise eligible for award.

As neither Enterprise nor GSA has established that our prior decision was based on an erroneous interpretation of either law or fact, we affirm our decision. *Little Harbor Boatyard Corporation—Reconsideration,* B-205027.2, January 4, 1982, 82-1 CPD 7.

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-202298]

Payments—Voluntary—No Basis for Valid Claim—Exception—Urgent/Unforeseen Circumstances—Payment in Government's Interest

No officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his personal funds which he is neither legally required nor authorized to pay. Employee reimbursement will not be authorized for such voluntary payments of Government obligations from personal funds. The only recognized exception to this voluntary creditor rule is where the personal expenditures were in the Government's interest and arose under urgent and unforeseen circumstances. *See* 60 Comp. Gen. 379 (1981) and B-195002, May 27, 1980.

Payments—Voluntary—Reimbursement Approved—Internal Revenue Service—Tax Lien Filing—Recording, etc. Fees

An employee of the Internal Revenue Service (IRS), Southwest Region, as part of his official duties, is required to pay recording fees associated with filing and releasing Federal tax liens against the property of delinquent taxpayers. Although these fees are undoubtedly obligations of the Government, the employee expended $236 of his personal funds on Federal tax lien fees. However, since formal IRS policy authorized payment of such fees with an employee's personal funds and contemplates that the employee will be reimbursed from agency appropriations, payment of these fees with personal funds did not render the employee a voluntary creditor. Accordingly, employee's claim for Federal tax lien fees may be properly certified for payment.

Payments—Voluntary—Reimbursement Not Approved—Internal Revenue Service—Tax Lien Filing—Check-Printing Charges

An employee of the IRS, Southwest Region, as part of his official duties, is required to pay recording fees associated with filing and releasing Federal tax liens against the property of delinquent taxpayers. Although alternative payment procedures were authorized, the employee effected payment by use of personal checks drawn on a special personal bank account for which he incurred $35.13 in check printing charges. IRS neither authorized nor approved reimbursement of its employees for expenses incurred for the printing of checks. Moreover, the evidence of record is that IRS would not have approved such expenses if the employee had sought advance agency approval, and does not demonstrate either urgent or unforeseen circumstances. Consequently, the employee acted as a volunteer. Under the voluntary creditor rule his claim for printing of these personal checks may not be properly certified for payment.

Matter of: Internal Revenue Service—Reimbursement for Federal Tax Lien Fees and for Printing of Special Personal Checks, August 30, 1982:

Ms. Elizabeth A. Allen, an authorized certifying officer with the Internal Revenue Service (IRS), Department of the Treasury, has requested an advance decision on whether she may properly certify for payment a $271.13 voucher submitted by Mr. Gary L. Collins on Standard Form 1164, Claim for Reimbursement for Expenditures on Official Business. Mr. Collins, an employee of IRS, Southwest Region, seeks reimbursement of $236 for payment of fees associated

with the recording of Federal tax liens and releases thereof, plus $35.13 for the printing of checks for a special personal Tax Lien Account he had established at a local bank, presumably to facilitate his work and to segregate these monies from his private account.

For the reasons discussed below, we conclude that Mr. Collins may be reimbursed $236 for the Federal tax lien and release fees paid. However, he may not be reimbursed from appropriated funds for the $35.13 expended for the printing of the checks or for other charges that may be associated with this special bank account. Therefore, only $236 of the voucher may properly be certified for payment.

According to the certifying officer's submission, Mr. Collins routinely files vouchers for reimbursement of lien recording fees and has not previously claimed the costs of printing of these special personal checks. Some appreciation of the process by which tax liens are filed is helpful in evaluating his claim. Basically, a Federal tax lien is filed against a taxpayer's property after a tax assessment has been made, payment has been demanded, and the taxpayer has neglected or refused to pay a liability for Federal taxes. *See* 26 U.S.C. § 6321 (1976). It establishes a Federal Government interest in the taxpayer's assets until the delinquent taxes are paid. The liens are filed with appropriate state, county or parish recording offices, and recording fees may be charged by the state and local governments for this service. IRS states that periodic billing arrangements for these recording fees have been made where permitted by state statutes and where accepted by local county or parish officials. However, some states, counties or parishes do not permit billing and require payment of recording fees at the time the lien is filed. In these instances, payment must be effected at the time of filing, either in cash or by an acceptable financial instrument. Mr. Collins chose to effect payment by use of checks drawn on his special personal Tax Lien Account. He seeks reimbursement from IRS for the amount of fees paid associated with recording and release of Federal tax liens as well as for the cost of the checks associated with his special account.

The central issue is whether Mr. Collins, by his actions, volunteered to become a creditor of the United States. Our decisions have long held that no officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his personal funds, which he is neither legally required nor authorized to pay. B-195002, May 27, 1980; B-129004, September 6, 1956. See also 60 Comp. Gen. 379 (1981); 33 Comp. Gen. 20 (1953); B-184982, October 13, 1976. "Voluntary payments of Government obligations from personal funds must be very strongly discouraged, and the general rule remains that reimbursement will not be authorized." 60 Comp. Gen. 379, 381 (1981); B-186474, June 15, 1976. We have recognized an exception only in the case where

the personal expenditures were in the Government's interest and arose under urgent and unforeseen circumstances. *Id.*

On the basis of these criteria we find that Mr. Collins may be reimbursed the $236 paid for Federal tax lien filing and release fees. Undoubtedly these fees were obligations of the Government, and Mr. Collins paid them on behalf of the United States. However, payment of these fees with personal funds did not render him a voluntary creditor of the United States within the meaning of the prohibition. Payment of tax lien filing and release fees with personal funds was authorized, and employee reimbursement contemplated, by formal IRS policy. *See*, for example, sections 5425.1(5) and 5444(3) of Internal Revenue Manual (IRM) 5400, Federal Tax Liens; sections 520(1)(f) and 540(3) and (5) of IRM 1724, Imprest Funds Handbook; IRS Memorandum from the Assistant Commissioner (Resources Management), Payment of Liens Fees, dated July 25, 1979; and sections E.2.a, E.2.d, E.2.e and E.5.a of Southwest Regional Commissioner Memorandum 17-82, CR 54-1, Payment of Tax Lien Fees, dated September 27, 1979.

On the other hand, Mr. Collins may not be reimbursed for the $35.13 expended for the printing of the checks for his special personal Tax Lien Account. This was not an expense IRS formally authorized its employees to incur. None of the formal IRS documents provided to us that were in force at the time Mr. Collins incurred this expense mentions payment of lien fees by personal check or reimbursement for associated bank service or check printing charges. IRS did, however, specifically approve use of other financial instruments. IRS authorized employee use of money orders or cashier's checks to pay Federal tax lien fees, as well as employee reimbursement for the costs associated with each. *See*, for example, section 5425.1(3) of IRM 5400, Federal Tax Liens; section 520(2) of IRM 1724, Imprest Funds Handbook; IRS Memorandum from the Assistant Commissioner (Resources Management), Payment of Lien Fees, dated July 25, 1979; and section E.2 of Southwest Regional Commissioner Memorandum 17-82, CR 54-1, Payment of Tax Lien Fees, dated September 27, 1979.

It is in the first instance up to the agency involved to determine whether a particular expenditure is in the Government's interest. The evidence of record is that IRS would not have approved reimbursement to Mr. Collins of costs associated with his special personal Tax Lien Account, if he had sought agency approval before he incurred the costs. The certifying officer states, in part, in her supplemental submission:

> * * * Under current procedures, * * * Employees may incur expenses for money order/cashier's check used in paying liens, but may *not* be reimbursed for any other bank charges such as checking accounts or check printing charges. [Italic in original.]

In addition, this preexisting IRS policy has since been formalized in writing in a revised Southwest Regional Commissioner Memoran-

dum 17-82, CR 54-1, Rev. 1, Payment of Tax Lien Fees, dated July 16, 1981, which specifically prohibits reimbursement for check printing charges.[1] In any event, the submission does not demonstrate that the check printing charges in question arose under urgent and unforeseen circumstances. Therefore, Mr. Collins does not satisfy the exception to the voluntary creditor rule. Consequently, when he paid these check printing charges from his personal funds, he did so as a volunteer and did not create any valid claim in his favor against the United States.

Accordingly, Mr. Collins' claim for $236 for payment of fees associated with the recording of Federal tax liens and releases may be properly certified for payment. However, his claim for $35.13 for the printing of the checks associated with his personal Tax Lien Account may not be properly certified for payment.

The voucher and supporting documents are returned for your action in accordance with this decision.

[B-206931]

Compensation—Removals, Suspensions, etc.—Damages, Loss, etc. Other Than Backpay—Relocation Expenses

An employee who successfully appealed his separation from the National Endowment for the Arts before the Merit Systems Protection Board (MSPB) contests the resulting backpay award. He contends he is entitled to reimbursement of moving and storage expenses associated with his separation and subsequent reinstatement, interest on the backpay, and, as compensatory damages, the severance pay which was deducted from his backpay award. Neither the Back Pay Act, 5 U.S.C. 5596 (Supp. III, 1979), nor any other authority provides for payment of interest or compensatory damages. Similarly, there is no provision for payment of incidental expenses such as moving and storage expenses, incurred by an employee as a consequence of an unjustified or unwarranted personnel action. The severance pay was properly deducted from the backpay award.

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[1] The revised Southwest Regional Commissioner Memorandum 17-82, *supra*, provides, in part:

D. *PROCEDURES FOR PAYMENT OF TAX LIEN FEES*

1. *General*

Regardless of the method of payment used, receipts are required for *all* filing or release fees irrespective of the amount of such fee. Receipts are required for the money order/cashier's check used in paying fees. * * *

a. Reimbursement may be made for the cost of money order/cashier's check used in making payment of lien fees.

b. *No* reimbursement can be made for any other bank service or check printing charges.

* * * * * * *

3. *Reimbursements to Employees for Payment of Tax Liens*

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C. Lien fees mailed to state and/or county/parish clerks should be paid by money order or cashier's check. While personal check may by used to pay lien fees, no reimbursement for any related bank charges can be made as indicated in section D.1.b. Lien fees handcarried to the state and/or county/parish recording offices may also be paid by money order/cashier's check or personal check if circumstances warrant the additional security. [Italic in original.]

Attorneys—Fees—Civil Service Reform Act of 1978—Merit Systms Protection Board Decisions—Adverse—Appeal

An employee who successfully appealed his separation from his agency before the MSPB claims reimbursement of legal fees. Since the legal fees claimed relate to the services of an attorney in connection with the appeal to MSPB and not General Accounting Office, payment of such fees is for consideration by MSPB under 5 U.S.C. 7701(g)(1) (Supp. III, 1979). Any appeal from an adverse decision by the MSPB would be to a Federal court. 5 U.S.C. 7703 (Supp. III, 1979).

Matter of: John H. Kerr—Backpay Computation, August 30, 1982:

This decision is in response to a request from Mr. John H. Kerr, an employee of the National Endowment for the Arts, for a review of our Claims Group's Settlement Certificate Z-2834995, dated February 9, 1982. By that settlement, our Claims Group informed Mr. Kerr that it had found no error in the computation of his backpay award. We concur in that determination.

Mr. Kerr was awarded backpay in connection with a decision of the Boston Field Office of the Merit Systems Protection Board (MSPB), ordering the National Endowment for the Arts to cancel Mr. Kerr's separation from that agency, which had taken place on August 31, 1979. The National Endowment for the Arts petitioned the MSPB for review, but, by a decision dated April 9, 1981, the MSPB denied that petition. By letter dated May 1, 1981, the MSPB informed Mr. Kerr that his claims concerning the amount of backpay or other amounts allegedly due were not within the jurisdiction of the MSPB, but should be directed to the General Accounting Office.

Mr. Kerr was awarded backpay for the period from September 1, 1979, to May 30, 1981, the date the Personnel Officer at the National Endowment for the Arts states his salary resumed. Mr. Kerr received $38,807.31 in backpay, an amount arrived at after deductions were made for retirement contributions, Federal and state income taxes, and the severance pay Mr. Kerr received at the time of his separation from service.

Mr. Kerr wrote to our Claims Group on October 28, 1981, claiming entitlement to reimbursement of legal fees incurred in connection with his appeal to the MSPB and moving and storage expenses incurred in connection with his separation and subsequent reinstatement. He also contended that he should receive interest on his backpay award and that his severance pay should not have been deducted from his backpay award but rather should have been awarded to him as compensatory damages. Our Claims Group responded that the computation of Mr. Kerr's backpay award appeared to be correct and that the Back Pay Act, 5 U.S.C. § 5596 (Supp. III 1979), does not provide for payment of interest, damages, or relocation expenses.

The Back Pay Act provides, generally, that an employee who is found by an appropriate authority to have undergone an unjusti-

fied or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay, allowances, or differentials is entitled to receive an amount equal to the pay, allowances, or differentials he normally would have received, less amounts earned by him elsewhere during the period.

Regulations implementing the Back Pay Act have been promulgated by the Office of Personnel Management in Title 5, Part 550, Subpart H, of the Code of Federal Regulations. These regulations provide that an agency shall compute for the period covered by the corrective action the pay, allowances, and differentials of the employee as if the unjustified or unwarranted personnel action had not occurred, but in no case will the employee be granted more pay, allowances, and differentials than he or she would have been entitled to if the unjustified or unwarranted personnel action had not occurred. 5 C.F.R. § 550.805 (a), (b) (1982).

It is clear that, in accordance with the above, it was proper for the National Endowment for the Arts to deduct Mr. Kerr's severance pay from his backpay award. See *Ernest E. Sargent,* 57 Comp. Gen. 464 (1978). With regard to his claim that such pay be treated as compensatory damages, we must point out, as did our Claims Group, that the Back Pay Act provides no authority for payment of damages, nor are we aware of any other authority providing for such payment. In this connection see 55 Comp. Gen. 564 (1975).

Similarly, with regard to the payment of interest on backpay awards, it is a well-settled rule of law that interest may be assessed against the Government only under an express statutory or contractual authority. See *Fitzgerald* v. *Staats,* 578 F. 2d 435 (D.C. Cir. 1978); *Gene A. Albarado,* 58 Comp. Gen. 5 (1978); 54 *id.* 760 (1975); and 45 *id.* 169 (1965). Neither the Back Pay Act nor any other applicable statute specifically provides for the payment of interest on retroactive awards of backpay resulting from an unjustified or unwarranted personnel action. Therefore, Mr. Kerr is not entitled to receive interest on his backpay award.

Mr. Kerr is not entitled to receive reimbursement for any moving or storage expenses. There is no provision in the Back Pay Act or its implementing regulations for the payment of incidental expenses incurred by an employee as a consequence of an unjustified or unwarranted personnel action. It is clear that the Act authorizes only payment of an amount the employee would have received if the erroneous personnel action had not occurred. Therefore, although the expenses for which Mr. Kerr claims reimbursement may have been due to his separation and subsequent reinstatement, they are not allowances Mr. Kerr would have received if he had not undergone the erroneous personnel action. See *Ernest F. Gonzales,* B-184200, April 13, 1976, and *David C. Corson,* B-182282, May 28, 1975.

The legal fees for which Mr. Kerr seeks reimbursement are for services performed by his attorney in connection with his appeal to

the MSPB. The MSPB is authorized to award attorney fees in accordance with 5 U.S.C. § 7701(g)(1) (Supp. III 1979) to employees who prevail on appeal in certain situations. We have been informed by the National Endowment for the Arts that the question of attorney fees is still before the MSPB. Although 5 C.F.R. § 550.806(a) also provides authority for the award of reasonable attorney fees, there is no basis upon which this Office can award attorney fees to Mr. Kerr since it appears he did not use the services of an attorney in connection with his appeal before this Office. Furthermore, we would like to point out that the only appeal from any determination the MSPB may make in this regard is to the United States Court of Claims or a United States Court of Appeals. See 5 U.S.C. § 7703 (Supp. III 1979) and *Cox and Hawes,* B-202849, March 9, 1982.

The determination of our Claims Group is hereby upheld.

[B-205556]

Contracts—Labor Stipulations—Nondiscrimination—Affirmative Action Requirements—Responsiveness *v.* Responsibility—Specific Commitment in Bid Requirement

When affirmative action requirements are imposed on a bidder as a matter of contract performance, and a specific commitment to them must be reflected in the bid, such requirements may be treated as involving responsiveness, rather than responsibility.

Contracts—Labor Stipulations—Nondiscrimination—Affirmative Action Requirements—Waiver—Failure to Qualify

When grantee solicitation provides that bidders may seek to qualify for a waiver of minority business enterprise utilization goal by providing with the bid a narrative of positive efforts and an explanation of why the goal cannot be met, and low bidder neither commits itself to the goal nor provides a narrative, while second-low bidder unequivocally offers to meet the goal at a reasonable price, grantee may presume that low bidder has not made sufficient effort and properly may reject the bid.

Matter of: E. H. Hughes Company, Inc., August 31, 1982:

E. H. Hughes Company, Inc. requests review of an Environmental Protection Agency decision regarding award of a contract for a wastewater treatment project by an EPA grantee, the town of Marengo, Indiana. Hughes contends that, contrary to the determination of the grantee and EPA's regional administrator, it submitted a responsive bid. We deny the complaint.

Background:

Marengo, a grantee under Title II of the Clean Water Act of 1977, 33 U.S.C. §§ 1281-1297 (Supp. III 1979), on May 21, 1981, advertised for bids on Division B of its wastewater treatment project. The solicitation incorporated EPA's Policy for Increased Use of Minority Consultants and Construction Contractors, 43 Fed. Reg. 60220 (1978) and EPA Region V's guidance on use of minority busi-

ness enterprise. The grantee stated that its goal for minority participation was 10 percent of the eligible cost of the project, and it required bidders who did not commit themselves to this goal to provide with their bids a narrative describing any "positive efforts" they had taken to encourage utilization of minority business enterprise or explaining why they were unable to achieve 10 percent minority participation. The solicitation specifically stated that failure to submit this information would cause rejection of a bid as nonresponsive.

At opening on July 28, Hughes was the apparent low bidder at $1,077,700, with Mitchell and Stark Construction Company, Inc. second low at $1,078,459. Hughes proposed a 4 percent level of minority participation and admittedly did not submit the required narrative; Mitchell and Stark proposed 10 percent minority participation. On August 6, Marengo's Board of Trustees rejected Hughes' bid as nonresponsive. Hughes protested this to the grantee by letter dated August 10 and received August 13; this protest was denied on September 1, and Hughes then appealed to EPA. On November 3, the regional administrator dismissed Hughes' protest, and its complaint to our Office followed.

EPA's Decision:

EPA dismissed Hughes' protest in part on grounds that it was untimely under the agency's regulation concerning grantee procurements, 40 C.F.R. § 35.939(b)(1) (1981), which requires bidders to file protests within one week after the basis for them is known or should have been known. According to the administrator, the basis of Hughes' protest was that the grantee improperly had made the minority business enterprise requirements a matter of bid responsiveness, rather than bidder responsibility. Since Hughes had notice of these requirements upon receipt of the May 21 solicitation, the administrator concluded, its failure to protest to the grantee until August 13, some 16 days after bid opening, rendered the protest untimely.

The administrator, however, also considered the substance of Hughes' protest. He found it without merit. Hughes had argued, among other things, that EPA's national policy on minority business enterprise related only to bidder responsibility. The administrator disagreed, stating that this policy described only minimum requirements and duties of grantees and bidders, and that rather than prohibiting imposition of additional responsiveness requirements, expressly permitted grantees to identify further more "positive efforts" which bidders might be required to take in order to meet goals for minority participation.

The administrator also based his decision on Federal court cases holding that requirements which are traditionally matters of responsibility may be made matters of responsiveness by the owner of a project, citing *Rossetti Contracting Company, Inc.* v. *Brennan,*

508 F.2d 1039 (7th Cir. 1975), and *Northeast Construction Company* v. *Romney,* 485 F.2d 752 (D.C. Cir. 1973).

In addition, the administrator rejected Hughes' argument that its failure to submit the required narrative was excused, either because the Indiana Office of Minority Business Enterprise had advised bidders that it was not aware of any firms who were interested in this particular project or because the town of Marengo had issued an addendum to the solicitation, reporting this lack of interest and thereby allegedly modifying the 10 percent goal. Nor did the administrator agree that the grantee should have waived Hughes' failure to provide the narrative as a minor informality; he found that minority business enterprise requirements were material because they had the potential to affect price, quality, quantity, and delivery of services; that they substantially affected the relationship between the grantee and bidders; and that they were essential to the achievement of EPA's objectives for use of minority business enterprise.

The administrator summarily dismissed Hughes' argument that the requirements were ambiguous, and found the contention that there were technical defects in Mitchell and Stark's bid "frivolous and without merit." The administrator concluded that the determination of the town of Marengo to reject Hughes' bid complied with EPA procurement regulations and had a rational basis, and that it therefore must be upheld.

GAO Analysis:

There is a definite distinction between matters related to bid responsiveness and those concerned with bidder responsibility. "Responsibility," as used in direct Federal procurement, refers to a bidder's ability or capacity to perform all of the contract requirements within the limits prescribed by the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide a product or services in total conformance with the material terms and specifications of the solicitation. While requirements bearing on responsibility may be met after opening, the determination of responsiveness—a concept generally limited to formally advertised procurements—must be made from bid documents at the time of opening. See *Devcon Systems Corporation,* 59 Comp. Gen. 614, 617 (1980), 80-2 CPD 46, in which we held that failure to include a small business subcontracting plan did not render a bid nonresponsive. Moreover, a matter relating to bidder responsibility cannot be treated as one of responsiveness merely because of a statement to that effect in a solicitation. *Id.* at 618.

Contrary to Hughes' arguments, however, not all matters relating to minority business enterprise requirements concern responsibility. As pointed out in *Northern Virginia Chapter, Associated Builders and Contractors, Inc.,* B-202510, April 24, 1981, 81-1 CPD 318, in cases where affirmative action requirements are imposed on

a bidder as a matter of contract performance, and a specific commitment to them must be reflected in the bid, such requirements are treated as involving responsiveness. See also *RGK, Inc.*, B-201849, May 19, 1981, 81-1 CPD 384, also treating minority business enterprise requirements as a matter of responsiveness by holding that an ambiguous commitment to meet stated goals could not be corrected after bid opening; *cf. Paul N. Howard Company—Reconsideration*, 60 Comp. Gen. 606 (1981), 81-2 CPD 42, defining commitment to a stated goal as a matter of responsiveness and how the goal was to be met as a matter of responsibility.

Here, the town of Marengo required bidders to commit themselves to a goal of 10 percent minority participation for performance of the contract. Alternatively, Marengo offered bidders who were unable to meet the 10 percent goal an opportunity to propose a lesser percentage if they also submitted, with their bids, a narrative documenting "positive efforts" they had taken to encourage utilization of minority business enterprise and explaining why the goal still could not be met. This, in effect, would permit Marengo to waive the 10 percent requirement if a bidder demonstrated that—despite these efforts—it could not commit itself to the stated goal.

We have recognized a grantee's authority to reject a low bidder which did not qualify for a waiver of minority business enterprise requirements. In *English Electric Corporation*, B-203098.2, January 4, 1982, 82-1 CPD 3, involving a procurement by an Urban Mass Transportation Administration grantee, the low bidder requested a waiver from requirements to subcontract at least 10 percent of the work to minority-owned firms and at least .1 percent of the work to women-owned firms; the second-low bidder agreed to meet these goals. The grantee denied the request for the waiver under an evaluation scheme in which it was "conclusively presumed" that if a reasonably priced bidder met its goals, another bidder who failed to meet them would be deemed not to have exerted sufficient efforts, as required by UMTA's regulations. We upheld award to the second-low bidder.

In this case, Hughes, which made no objection to the 10 percent goal or the solicitation provision relating it to responsiveness before bid opening, offered only 4 percent minority participation, but did not, with its bid, offer any explanation as to why it should qualify for a waiver of the goal. The price of the second-low bidder, which unequivocally offered to meet the goal, was only $759 higher than Hughes' price on a contract of well over $1 million. Under these circumstances, we think the town of Marengo could have reasonably presumed that Hughes had not made sufficient "positive efforts" to utilize minority business enterprise in performance of the contract and, in accordance with the express terms of its solicitation, could properly reject the bid.

The complaint is denied.

[B-206779]

Travel Expenses—Miscellaneous Expenses—Check-Cashing Costs—Travel Advances—Travel Within United States—Temporary Duty

Employees seek reimbursement of fees incurred in cashing travel advance checks for travel in the United States. Although para. 1-9.1c(2) of the Federal Travel Regulations specifically allows exchange fees for cashing Government checks issued for expenses incurred for travel in foreign countries, no such allowance exists for check cashing costs incurred incident to travel within the United States. The employees' check cashing costs may not be allowed.

Matter of: Wayne J. Henderson, et al.—Check cashing costs, August 31, 1982:

Ms. Betty Gillham, Chief, Travel Branch, Bonneville Power Administration (BPA), Department of Energy, has requested a decision as to whether the fees incurred by employees for cashing travel advance checks in the United States may be paid. We hold that the check cashing costs may not be paid because the Federal Travel Regulations only allow check cashing costs when travel in foreign countries is involved.

Ms. Gillham states that paragraph 1-9.1c(2) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), allows check cashing costs relating to travel in foreign countries. She notes that the payment of check cashing costs incident to temporary duty travel within the United States has not been provided for in the FTR. She asks, however, whether these costs may be certified for payment under the authority for miscellaneous expenditures in paragraph 1-9.1d of the FTR. Ms. Gillham points out that the BPA employees who have requested reimbursement of check cashing costs are in a continuous per diem status at temporary duty locations, and they infrequently return to their official duty stations or residences.

In a similar case involving the reimbursement of the cost of travelers checks incident to travel within the United States we held that since the regulations at that time specifically provided only for the reimbursement of such costs in connection with travel outside the continental United States, such costs could not be allowed for travel within the continental United States. We stated that the travel regulations had the force and effect of law, and could not be enlarged by construction. B-166894, May 27, 1969. See also *Joseph C. Hutchinson,* B-182013, May 14, 1975.

Since we have consistently held that the FTR cannot be expanded by construction, and FTR paragraph 1-9.1c(2) specifically limits reimbursement of check cashing costs to travel in foreign countries, we do not believe that FTR paragraph 1-9.1d providing for reimbursement of other expenses can be construed to permit reimbursement here.

We hold, therefore, that since reimbursement of check cashing costs incurred incident to travel in foreign countries is specifically provided for in the regulations (see FTR paragraphs 1-9.1c(2) and 1-11.5e(1)), such costs relating to travel within the United States may not be allowed in the absence of a specific provision therefor. Accordingly, the check cashing costs incurred incident to the temporary duty travel within the United States may not be certified for payment.

[B-208333]

Appropriations—Obligation—Advance of Appropriation Availability—Antideficiency Act—Presidential Appointees Exempt From Leave Act—Compensation

Upon passage of a supplemental appropriation, Commissioners of the Copyright Royalty Tribunal may be paid for the interim where the agency was without sufficient funds to pay them. Under 17 U.S.C. 802, the Commissioners are presidential appointees. They are also exempt from the provisions of the Annual and Sick Leave Act, 5 U.S.C. 6301 *et seq.* As such, they are entitled to compensation simply by virtue of their status as officers, regardless of the availability of funds. In other words, for the purposes of the Antideficiency Act, the Tribunal is authorized by law to incur Commissioners' salary expenses even in the absence of available adequate appropriations to liquidate the obligation.

Matter of: Copyright Royalty Tribunal—Commissioners' Pay During Funding Gap, August 31, 1982:

The Chairman of the Copyright Royalty Tribunal asks whether in the described circumstances, the Commissioners can be retroactively compensated for any period of time during which they worked without pay.

The Tribunal will exhaust its fiscal year 1982 appropriations by mid-August 1982. The Congress is currently considering a supplemental appropriation bill (H.R. 6863, 97th Cong., 2d Sess.), which, if enacted in its present form, will provide for the Tribunal's expenses, including Commissioners' salaries, for the remainder of the fiscal year. However, the Tribunal is concerned that this bill may not be enacted before the Tribunal exhausts its funds. The Chairman states that the Commissioners will continue in office in accordance with their commissions of office even in the absence of funds. However, she requests our decision as to whether they may be paid retroactively if the Congress provides sufficient funds to do so.

For the reasons discussed below, we conclude that payment to the Commissioners is authorized by law.

In general, the incurring of obligations, including those for employee compensation, in advance of appropriations is precluded by the Antideficiency Act, 31 U.S.C. § 655 (1976), which provides in subsection (a) as follows:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in

excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

This Act was interpreted in the context of a "funding gap" caused by the failure of enactment of appropriations act in an April 25, 1980 opinion of the Attorney General. The opinion stated that on a lapse of appropriations, Federal agencies may not incur obligations, including those of employees' salaries, unless such obligations are otherwise authorized by law. 43 Op. Atty. Gen. No. 24 (1980). In a subsequent opinion letter dated January 16, 1981, the Attorney General more fully analyzed the nature of the functions which may be carried out during a shutdown.

The Commissioners' terms of appointment are set forth in 17 U.S.C. § 802, which states in subsection (a) that:

> The Tribunal shall be composed of five commissioners *appointed by the President with the advice and consent of the Senate* for a term of seven years each * * *. Commissioners shall be compensated at the highest rate now or hereafter prescribe[d] for grade 18 of the General Schedule pay rates (5 U.S.C. § 5332). [Italic supplied.]

As presidential appointees in the legislative branch the Commissioners are exempt from the Annual and Sick Leave Act, 5 U.S.C. § 6301(2)(B)(xiii). Officers who hold their positions based on presidential appointments, and who are exempt from the Annual and Sick Leave Act, 5 U.S.C. § 6301 *et. seq.* (1976), are entitled to compensation based on their status as officers rather than for the performance of a function based on the amount of hours they spend engaged at their jobs. This distinction was clearly enunciated in *United States* v. *Grant,* 237 F.2d 511 (7th Cir. 1956), wherein the court held that failure to perform his duties did not deprive an officer appointed by the President with the advice and consent of the Senate, and exempt from the leave act, of his salary. He was entitled to compensation by virtue of his status as an officer.

Further, 5 U.S.C. § 5508 (1976) states that "officer[s] * * * [covered under the Annual and Sick Leave Act] are not entitled to the pay of the officers solely because of their status as officers." The importance of that section for our purposes is that as stated above the converse, that officers who are not so covered *are* entitled to compensation solely because of their status as officers, is also true.

Because the Commissioners are presidential appointees and are not covered by the Annual and Sick Leave Act, their salaries attach by virtue of their status as officers, regardless of the availability of funds at a given time. In other words, the incurring of obligations for the Commissioners' pay in the absence of sufficient available appropriations to liquidate them is authorized by law within the meaning of the Attorney General's Opinions.

Therefore, we conclude that the payment of the Commissioners for work performed in the absence of funds is permissible once the supplemental appropriation has been passed.

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