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[B-203462]

Federal Procurement Regulations—Orders Under ADP Schedule—Synopsis in *Commerce Business Daily*—Options to be Exercised—Lease-Purchase Agreements

Federal Procurement Regulation sec. 1-4.1109-6 requirement that agency publish Commerce Business Daily announcement of agency's intent to convert Automated Data Processing Equipment from lease to purchase under General Services Administration schedule contract is a necessary prerequisite to the exercise of a purchase option for such equipment.

Matter of: Suba II, Inc., December 3, 1981:

Suba II, Inc. protests the Army's exercise of an option to purchase certain installed computer equipment which the Army had been leasing from IBM under its General Services Administration (GSA) schedule contract No. GS-00C-02542. Suba asserts that the Army failed to publish a synopsis of the intended purchase in the Commerce Business Daily (CBD) before the purchase in sufficient time for potential suppliers to respond. Suba contends that identical equipment was readily available from other sources and that a competitive procurement would have saved the Government $20,000. We sustain the protest.

Federal Procurement Regulations (FPR) § 1-4.1109-6, 46 Fed. Reg. 1205 (1981), provides:

(d) * * *
Orders placed against ADP schedule contracts for the conversion from lease to purchase of installed ADPE are subject to the following:
(1) The intent to place a purchase order, with a net value * * * in excess of $50,000, is synopsized in the CBD at least 15 calendar days before placing the order * * *.

* * * * * * *

(g) * * *
(2) When a response(s) to the CBD notice is received from a nonschedule vendor for an item(s) that meets the user's requirement, the contracting officer shall * * *:
(i) Document the procurement file with an evaluation which indicates the nonschedule item(s) would not meet the requirement, or that the schedule provided the lowest overall cost, or
(ii) When the evaluation indicates that a competitive acquisition would be more advantageous to the Government, the Contracting Officer normally should issue a formal solicitation. * * *

The Army admits that the contracting activity—Fort Richardson, Alaska—did not comply with the regulation since the synopsis in this case was mailed on May 12, 1981, and published on May 27, 1981, only 2 days before the purchase order was issued to IBM.* The Army ad-

*The regulation became effective January 15, 1981. The contracting activity reports it only became aware of the regulation on May 12, at which time the contracting officer immediately prepared and mailed a synopsis to the CBD. FPR Temporary Regulation 46, 40 Fed. Reg. 40015, September 8, 1979, provided that the use of ADP schedule contracts for the conversion from lease to purchase of installed ADPE must be synopsized in the CBD "sufficiently in advance of placing the order to permit potential suppliers to demonstrate their ability to satisfy the Government's requirement * * *." Thus, even the prior regulation required the activity to synopsize the intended purchase, and the activity should have sent a synopsis to the CBD sufficiently before June 1 to permit its publication at a reasonable time for potential suppliers to respond.

vises us that the need to comply with the regulation has been brought to the activity's attention, but no corrective action is possible since payment has already been made.

Nonetheless, the Army suggests that no substantial impropriety occurred in this case because the purchase option was evaluated in the original competition for the lease of the equipment. The Army cites our decision *KET, Incorporated*, 58 Comp. Gen. 38 (1978), 78-2 CPD 305, to support its proposition. The *KET* case is inapposite to the present situation because *KET* concerned the exercise of an option for non-schedule items or services, for which there is no express CBD notification requirement specified by regulation.

In this case, the option exercise without the prescribed CBD notice and the attendant contracting officer's evaluation of the responses received as a result of the notice were clearly improper. *CF. Federal Data Corporation*, 59 Comp. Gen. 283 (1980), 80-1 CPD 167 (a case dealing with the requirements of Temporary Regulation 46).

Since payment has already been made, we agree with the Army that no corrective action is feasible in this case.

The protest is sustained.

[B-202670]

Officers and Employees—Transfers—Real Estate Expenses—Foreclosure Sale—Litigation Expenses

Employee of the Forest Service sold residence within 1 year of transfer in a sheriff's sale under court order following foreclosure. Employee may not be reimbursed under 5 U.S.C. 5724a(a)(4) for costs assessed by the court in connection with foreclosure and sale since Federal Travel Regulations para. 2-6.2c specifically precludes reimbursement for costs of litigation.

Matter of: Reimbursement of Real Estate Expenses—Foreclosure Sale, December 4, 1981:

The Department of Agriculture's National Finance Center has requested a decision on the propriety of certifying an employee's voucher for expenses incurred in connection with the foreclosure sale of her residence at her old duty station. The agency questions whether a foreclosure sale is a residence transaction for which real estate expenses may be reimbursed under 5 U.S.C. § 5724a(a)(4). While the fact that title was transferred other than by the usual real estate sale transaction does not preclude reimbursement, the implementing regulations prohibit reimbursement of those costs associated with the judicial process of foreclosure.

The particular employee, who was transferred from Grants Pass, Oregon, to Eugene, Oregon, in September 1979, was unsuccessful in

her attempts to sell her Grants Pass residence. When the employee defaulted by failing to make timely payment under the land sales contract by which she had purchased the property, the seller foreclosed. On August 18, 1980, the property was sold at sheriff's sale pursuant to a writ of execution and order for summary judgment by the Circuit Court of the State of Oregon for Josephine County. The expenses for which the employee claims reimbursement are the following costs and disbursements allowed under Chapter 20 of the Oregon Revised Statutes incident to the judgment on sheriff's sale:

Attorney Fees	$750.00
Costs and Disbursements	52.50
Clerk's Fee	2.00
Registered Letters	7.46
Publication Costs	164.18
Sheriff's Fee	62.50
Total Expenses Claimed	$1,038.64

Reimbursement of real estate expenses incurred in connection with a Federal employee's change of duty station is governed by chapter 2, Part 6 of the Federal Travel Regulations (FPMR 101–7, May 1973) (FTR). Paragraph 2–6.1 of the FTR provides that to the extent allowable "the Government shall reimburse an employee for expenses required to be paid by him in connection with the sale of one residence at his old official station * * *." We have recognized that the regulation permits reimbursement of certain expenses incurred for the purpose of transferring title by other than the usual sale or purchase transaction. See B–173652, October 27, 1971, and B–166419, April 22, 1969.

The fact that title to the employee's former residence was transferred by sheriff's sale as the consequence of foreclosure does not itself preclude reimbursement under FTR chapter 2, Part 6. However, FTR para. 2–6.2c specifically precludes reimbursement for costs of litigation. We have held that the term "litigation" as used in the Federal Travel Regulations means a contest in a court of law to enforce a right, a judicial controversy, a suit at law, an action before a court. See 48 Comp. Gen. 71 (1968); B–181983, March 25, 1976; B–174315, November 15, 1971. In the instant case the expenses claimed by the employee were assessed incident to the judicial process of foreclosure—an action before a court. As such, they are costs of litigation that may not be reimbursed.

Accordingly, the employee's claim is disallowed.

[B-195753]

General Accounting Office—Jurisdiction—Contracts—Disputes—Contract Disputes Act of 1978—Money Damage Claims

Claim for money damages arising out of agency cancellation of post-March 1, 1979, contract on basis that award was erroneous is for resolution under Contract Disputes Act of 1978 and, therefore, cannot be considered by General Accounting Office (GAO).

General Accounting Office—Jurisdiction—Contracts—Disputes—Contract Disputes Act of 1978—Criteria of GAO Review

GAO will not review procedures leading to award of contract to the terminated contractor where claimant has not requested review and there is no possibility of corrective action by way of reinstating terminated contract since contract requirement has been fully performed.

Matter of: Wall Irrigation Service, December 8, 1981:

Wall Irrigation Service (Wall) has submitted a claim concerning the cancellation of contract No. 14-16-0006-79-071, for well rehabilitation at the Hastings Wetland Management District, issued by the Department of the Interior, Fish and Wildlife Service (Interior).

Interior issued a notice of award of the contract to Wall by letter. Subsequent to the award, Interior forwarded the bid to its solicitor's office for review. The solicitor found that a note in Wall's bid qualified the bid rendering it nonresponsive and recommended that the contract be canceled. Based on the solicitor's recommendation, Interior notified Wall by letter that the well rehabilitation contract was "terminated as an erroneous award." The award was then made to the next lowest bidder and the contract has been fully performed. Wall submitted an itemized list of damages totaling $4,078 which it contends it has incurred because of the cancellation. Wall contends that these costs were incurred because of Interior's delay both in discovering that the bid was nonresponsive and in notifying Wall that the award was terminated.

Wall's original claim to our Office was dismissed after Wall failed to express continued interest in our consideration of the matter when requested to do so. Wall has again requested our decision.

Wall's claim, relating to the alleged improper cancellation of a post-March 1, 1979, contract (the contract was awarded July 5, 1979), is required to be processed under the Contract Disputes Act of 1978, 41 U.S.C. § 601-613 (Supp. III, 1979) and we recently have held may not be considered by our Office. See *Arm-Ben Corporation*, B-204930, October 19, 1981, 81-2 CPD 318. As stated in section 6(a) of the act:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.

We recognize that it is appropriate in some circumstances for us to review the validity of the procedures leading to award of the con-

tract to the terminated contractor. See, for example, *Evergreen Helicopters, Inc.*, B–202962, September 28, 1981, 81–2 CPD 252; *Advanced Energy Control Systems, Inc.*, B–201249, May 20, 1981, 81–1 CPD 392; *New England Telephone and Telegraph Company*, 59 Comp. Gen. 746 (1980), 80–2 CPD 225. However, in the cited cases the protesters requested a review of the validity of the agency procurement procedures with a view towards a possible GAO recommendation of corrective action by way of reinstating the terminated contracts. By contrast, Wall's submission is for monetary relief only; further, performance under the contract awarded to the next lowest bidder was completed in 1979. Therefore, there is no possibility of corrective action under this procurement.

Under the circumstances, the claim is dismissed.

[B–201648]

Compensation—Overtime—Fair Labor Standards Act—Traveltime—Nonworkday Travel—Employee *v.* Agency Scheduling

Two Army employees, nonexempt under the Fair Labor Standards Act (FLSA), were authorized privately owned vehicle use as advantageous to the Government. They drove to temporary duty station on a Sunday and returned on a Saturday, their nonworkdays. The employees are entitled to credit for hours of work under FLSA for time they spent driving. The Army allowed employees to schedule travel and may not subsequently defeat employees' entitlement to overtime compensation by stating that travel should not have been scheduled in the manner the employees chose.

Compensation—Traveltime—Hours of Work Under FLSA—Passenger in Privately Owned Vehicle

Employees who travel as passengers on their nonworkdays during hours which correspond to their regular working hours are entitled to have such traveltime credited as hours of work under FLSA.

Compensation—Overtime—Fair Labor Standards Act—Fair Labor Standards Act *v.* Other Pay Laws

Fact that employees are not entitled under 5 U.S.C. 5542 to overtime compensation for certain traveltime has no bearing on whether they are entitled to overtime under the Fair Labor Standards Act, FLSA. Where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. 5542, the employee is entitled to the FLSA benefit.

Matter of: Mary Joyce Lynch and Darlene I. Drozd—Entitlement to Overtime Pay for Travel to Training—Fair Labor Standards Act, December 8, 1981:

This decision is at the request of Captain R. N. Freckleton, Finance and Accounting Officer for Fort Indiantown Gap, Annville, Pennsylvania. It concerns the entitlement of two Department of the Army employees to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), for travel on nonworkdays

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to and from a training assignment. The claim may be paid in accordance with the explanation that follows.

Ms. Mary Joyce Lynch and Ms. Darlene I. Drozd, nonexempt employees under FLSA, travelled from their respective homes near their official duty station, the Army Support Element, Oakdale, Pennsylvania, to Harrisburg, Pennsylvania, on a temporary duty assignment. Both employees were authorized privately owned vehicle (POV) use as being advantageous to the Government. The travel authorizations stated that travel should commence on May 11, 1980, a Sunday.

Ms. Lynch departed her home on May 11, 1980, at 1245, arrived at McKees Rocks at 1330 and apparently departed with Ms. Drozd at 1400 arriving in Harrisburg at 1930. On completion of the temporary duty assignment Ms. Lynch and Ms. Drozd departed Harrisburg on May 17, 1980, a Saturday, at 1110 and arrived at McKees Rocks at 1645. Ms. Lynch left McKees Rocks at 1915 arriving back at her home in Venetia at 2000. Ms. Lynch and Ms. Drozd both claim 6 hours of overtime for travel on May 11, 1980, and 6 hours of overtime for travel on May 17, 1980. Their duty hours are Monday through Friday, 0745 to 1615.

Ms. Lynch claimed mileage from Venetia to McKees Rocks and return, 35 miles each way for a total of 70 miles. Ms. Drozd claimed mileage from McKees Rocks to Harrisburg and return, as well as local mileage in the temporary duty area. Therefore, since Ms. Lynch did not claim mileage from McKees Rocks to Harrisburg and return, it appears that the two employees travelled together for that portion of the trip and that Ms. Lynch travelled on her own between McKees Rocks and her residence.

The accounting officer states that the overtime was justified by the approving official on the basis of Federal Personnel Manual (FPM) Letter 551–10, April 30, 1976, and a Department of the Army letter entitled "Overtime Pay in Conjunction With Travel to and From Training Courses," dated April 8, 1977. The latter two references outline conditions under which traveltime is considered hours of work under FLSA. The accounting officer questions this approval of the overtime because there is no indication that the performance of work was required while traveling, or that the agency could not possibly have scheduled the temporary duty assignment so as to allow travel during regular duty hours. In this regard he refers to 5 U.S.C. § 5542 (b) (2) (1976) and FPM Supplement 990–2, Book 550, S1–3.b, April 7, 1972.

Section 5542 of title 5, United States Code, and the Office of Personnel Management's instructions in FPM Supplement 990–2, Book 550, S1–3.b, should not be confused with overtime compensation under

FLSA. The two employees here are covered by the overtime provisions of both § 5542 and FLSA, but separate determinations must be made to ascertain whether the employees are entitled to overtime compensation under either law. The fact that Ms. Lynch and Ms. Drozd are not entitled to overtime compensation for their travel under 5 U.S.C. § 5542 and FPM Supplement 990–2, Book 550, S1–3.b, has no bearing on whether they are entitled to overtime compensation under the FLSA's separate criteria. We have held that where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. § 5542, the employee is entitled to the FLSA benefit. *Dian Estrada*, B–199360, May 5, 1981, 60 Comp. Gen. 434; 54 Comp. Gen. 371, 375 (1974).

In determining whether the traveltime in question is hours of work under FLSA, the following instructions are pertinent if a nonexempt employee:

> (1) performs work while traveling (including travel as a driver of a vehicle), * * * or (3) travels as a passenger on nonworkdays during hours which correspond to his/her regular working hours. FPM Letter No. 551–10, April 30, 1976.

There is no question that the Army authorized the travel on May 11, 1980, a Sunday. Moreover, the Army did not direct the employees to return on a day other than May 17, 1980, a Saturday. We have held that where an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkway, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. *Dian Estrada*, cited above.

Therefore, under the above rules the employees' entitlement for credit of traveltime as hours of work under FLSA is as follows.

On May 11, 1980, Ms. Lynch travelled for 3 hours, 1245–1330 and 1400–1615, during her corresponding duty hours and she is entitled to credit for that time as hours of work. The 3 hours and 15 minutes she spent travelling outside her corresponding work hours are not hours of work unless she drove during that time. Assuming Ms. Drozd did all of the driving from McKees Rocks to Harrisburg on May 11, Ms. Drozd is entitled to credit for 5½ hours of work from 1400 to 1930.

On May 17, 1980, Ms. Lynch travelled for 5 hours and 5 minutes, from 1110 to 1615, during her corresponding work hours and is entitled to credit for such time as hours of work. Of the traveltime after her corresponding work hours, it appears that Ms. Lynch drove only 45 minutes, from 1915 to 2000, on her return to Venetia from McKees Rocks, for which she is entitled to credit for hours of work. The total hours of work for Ms. Lynch for May 17, therefore, is 5 hours 50 minutes. Again assuming Ms. Drozd drove her car from Harrisburg

to McKees Rocks, she is entitled to credit for 5 hours 35 minutes of driving time as hours of work (1110 to 1645).

The above computation, of course, assumes that each employee did the driving which we have constructed from their separate claims for mileage. If Ms. Lynch were to have shared the driving between McKees Rocks and Harrisburg, then any time she drove after her corresponding duty hours would be credited to her as hours of work. See Note 2, Table 3, Attachment to FPM Letter 551–10. By the same token, any time spent by Ms. Drozd as a passenger after corresponding work hours would not be creditable hours of work. The computation also assumes the travel was between home and lodgings at the temporary duty station and return. See Attachment to FPM Letter 551–11(4), Table 2A, October 4, 1977.

The Army has not supplied us with the time of the two employees' lunch periods. We note, however, that bona fide meal periods are deducted from hours of work. Attachment to FPM Letter 551–10(8), Table 3, Note 1. If, therefore, the employees' lunch periods cut across any of the above time periods found to be hours of work, such time must be deducted from the total creditable hours of work.

If, after considering the above, it is found that any hours of work for the time spent travelling exceeds 40 in a week for either employee, the employee should be paid overtime for such traveltime under FLSA.

[B–204125]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Mistake Claims—Protest Status

Although claims for equitable relief from an alleged mistake in bid filed after award have not been subject to timeliness requirements of General Accounting Office (GAO) Bid Protest Procedures, protest seeking bid correction and award properly is subject to timeliness rules as effectiveness of remedy is dependent on prompt resolution of the matter.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Initial Adverse Agency Action Date—Mistake Correction Before Award

Protests initially filed with contracting agency must be subsequently filed with GAO within ten working days of protester's receipt of agency's denial or they will be dismissed as untimely and protester's attempt to continue protest with agency does not toll the period for filing with GAO.

Bids—Mistakes—Unit Price *v.* Extension Differences—Rule

Discrepancy between unit price and extended price, where bid would be low only if extended price governed, is not correctable as clerical error since it cannot be ascertained from bid which price was actually intended.

Bids—Mistakes—Intended Bid Price Uncertainty—Correction Inconsistent With Competitive Bidding System

Agency properly refused to consider bidder's work papers and to allow correction of bid where there was discrepancy between unit and extended price, bid would be low only if extended price governed, and intended bid was not apparent from bid, since applicable regulation does not allow correction of mistake in bid when another bidder would be displaced as low bidder by the correction, unless intended bid can be determined from bid itself.

Matter of: Western Equipment of Oregon, December 8, 1981:

Western Equipment of Oregon protests the award of a contract for a 35-ton crane to McDonald Industries by the U.S. Army Corps of Engineers, under IFB No. DACW57–81–B–0031. Western contends the Army improperly refused to permit correction of a typographical error which would have made Western's bid lower than that of McDonald Industries. We believe that the protest is untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981); it is therefore dismissed.

The solicitation required the bidder to provide unit and extended prices for each of the four line items as well as a total price and it stated that in case of a discrepancy between the unit price and the extended price the unit price would govern, subject, however, to correction to the same extent and in the same manner as any other mistake. Western bid a unit price of $290,935 and an extended price of $260,935 for the major line item, no charge for the other line items, and a total price of $260,935. McDonald Industries bid $277,148. In light of the discrepancy in Western's bid, a contract specialist called Western for verification and was told that the $260,935 price was the intended bid. The contract specialist prepared an abstract of bids listing Western's price as $260,935 and Western received a copy.

The agency then determined that the unit price should prevail. Western was informed of this change and during the next several weeks was informed that no award decision had been made but its bid was being evaluated as $290,935. McDonald was subsequently awarded the contract. Western then protested to the agency, contending the $290,935 price was the result of a typographical error provable by reference to its work sheets and asking that it be permitted to correct this mistake.

The Army's initial reaction to Western's bid was based on the assumption that an apparent clerical mistake had been made and that it was correctable under Defense Acquisition Regulation (DAR) § 2–406.2. The regulation provides for the correction of an apparent clerical mistake in a bid prior to award if that mistake is obvious on the face of the bid. After Western verified that its unit price was erroneous and its extended price was its intended price, the Army re-

versed itself and concluded that the error was not a clerical one which was correctable under DAR § 2-406.2, but rather one that could be corrected only if the conditions of DAR § 2-406.3(a)(3) were met. That section permits correction of other mistakes in appropriate circumstances.

By letter of June 18, which was received by Western on June 22, the Army refused to allow correction of Western's bid. Western attempted to pursue the matter further with the Army and it was not until July 23 that our Office received a telegram from Western protesting the rejection of its bid.

Our Bid Protest Procedures establish timeliness standards for the filing of protests. *See* 4 C.F.R. § 21.2. The timeliness rules are intended to provide for expeditious consideration of objections to procurement actions without unduly delaying the procurement process and to permit effective corrective action when appropriate. *Davey Compressor Company*, B-195425, November 14, 1979, 79-2 CPD 351. We have not applied these timeliness standards to post-award claims for equitable relief from an alleged mistake in bid (see *Guy F. Atkinson Co., et al.*, 55 Comp. Gen. 546, 554 (1975), 75-2 CPD 378; *Galion Manufacturing Division, Dresser Industries, Inc.*, B-193335, June 19, 1979, 79-1 CPD 436; B-176760, January 22, 1973) because the procurement process would not have been interrupted or delayed and the interests of the competitors would not have been prejudiced by any delay in the resolution of the claims. However, where bid correction is sought in order to obtain an award the availability of that remedy, if it is warranted, depends largely upon prompt resolution of the matter. In such instances, delay can render competitors' prices increasingly obsolete as well as prevent the agency from obtaining delivery of needed items on schedule. Therefore, we believe the interests of all parties would be best served if complaints of an agency's failure to permit bid correction before award are treated as protests, rather than as claims, and are made subject to the timeliness rules contained in our Procedures.

Our Procedures provide that protests initially filed with the contracting agency will be considered subsequently by our Office only if they are filed within 10 working days of the protester's learning of initial adverse agency action. *Adams Bros. Interiors*, B-201048, November 12, 1980, 80-2 CPD 360. In the case at hand, the agency's written denial of Western's protest was clearly adverse agency action and should have been protested to our Office within 10 working days of June 22 when Western received the letter. The fact that Western continued to pursue its protest with the agency after the agency's denial did not toll the period for filing with our Office as prescribed in our Bid Protest Procedures. *Kings Electronics Co., Inc.*, B-198799, May

22, 1980, 80–1 CPD 354. Therefore, as its protest telegram was not received until July 23, Western's protest is untimely and will not be considered on its merits.

We point out, for the protester's information, however, that the Army's position appears to be correct. To be correctable as a clerical error under the provisions of DAR § 2–406.2, a mistake must be obvious on the face of the bid and the contracting officer must be able to ascertain the intended bid from the face of the bid. *Armstrong & Armstrong Inc.* v. *United States*, 356 F. Supp. 514 (E.D. Wash. 1973), *affirmed*, 514 F. 2d 402 (9th Cir. 1975); *G. S. Hulsey Crushing, Inc.*, B–197785, March 25, 1980, 80–1 CPD 222. In this case, neither the $290,935 unit price nor the $260,935 extended and total price is illogical or grossly out of line with the $277,148 bid of the awardee and the intended bid cannot otherwise be determined from the bid alone. Thus, Western's mistake is not correctable as a clerical error under DAR § 2–406.2.

DAR § 2–406.3(a)(3) permits correction of a mistake when its existence and the bid actually intended can be established by clear and convincing evidence. When correction would result in the displacement of a lower bid, however, the regulation requires that the bid actually intended be "ascertainable substantially from the invitation and the bid itself." This requirement applies to situations, such as this one, where there is a discrepancy between unit and extended prices and the bid would be low only if either the unit or extended price was correct. 51 Comp. Gen. 283 (1971). The reason for the rule is that it would be unfair to other bidders to allow the bidder the opportunity to decide, after bid opening, which price to support and thus whether to remain in contention for award. As indicated, it cannot be ascertained from Western's bid whether the unit price or the extended/total price was actually intended, since either could have been reasonably intended.

[B–203607]

Sales—Lottery—Multiple Drawings—Subsidiary Bids—Unfair Advantage Consideration—Natural Gas Sales

Statutory requirement that all interested persons be afforded a full and equal opportunity to acquire petroleum products is not satisfied when two subsidiaries of the same parent corporation participate separately in a lottery sale. Distinguished by B–204821, March 16, 1982.

Sales—Lottery—Multiple Drawings—Subsidiary Bids—New Lottery Recommended

Recommendation is made that Department of Energy conduct a new lottery, which includes the prior unsuccessful bidders who are still interested in obtaining an

award under the solicitation, but only one of the two subsidiaries of parent corporation which participated in the previous lottery. If the previously successful subsidiary is not selected, its contract should be terminated for the convenience of the Government.

Matter of: Atlantic Richfield Company, December 9, 1981:

The Department of Energy (DOE) issued invitation for bids (IFB) No. DE–FB01–81RA32124 for the sale of natural gas from Naval Petroleum Reserve No. 1, Elk Hills, California, for 1 year. The sale was divided into two line items. Under line item No. 1, the maximum number of awards was seven; for line item No. 2 the maximum number was two. The IFB permitted bidders to bid discounts from a price control ceiling, i.e., the "maximum legal price," set by the Federal Energy Regulatory Commission. Award was to be to the highest bidder. In the event of a tie involving more than seven bidders for line item No. 1, or two bidders for line item No. 2, awardees were to be determined by lottery. Ten bids were received for line item No. 1 and nine for line item No. 2. Each bid, under the respective line items, was for the maximum price and a lottery was conducted.

Atlantic Richfield Company (ARCO) has protested the DOE's award of two contracts—one from each line item—to Southern California Gas Company (Southern).

For the reasons which follow, the protest is sustained.

DOE issued the IFB under the Naval Petroleum Reserves Production Act (Reserves Act), 10 U.S.C. § 7420, *et seq.* (1976). Subsection 7430(b) of the Reserves Act requires such sales to be made "at public sales to the highest qualified bidder." Subsection 7430(d) adds that sales made under the authority of the Reserves Act must be "so structured as to give full and equal opportunity for the acquisition of petroleum by all interested persons, including major and independent oil producers and refiners alike." The IFB stated that sales made under the Reserves Act were subject to the Federal price controls created by the Natural Gas Policy Act.

At bid opening ARCO, a bidder for line item Nos. 1 and 2, informed DOE's contract specialist who supervised the opening that two of the bidders, Southern and Pacific Lighting Gas Supply Company (Gas Supply), were commonly owned and controlled by Pacific Lighting Corporation (Pacific). (Pacific owns 100 percent of Gas Supply's voting stock and 93 percent of Southern's.) ARCO requested that, for the purposes of the lottery, both Gas Supply's bid and Southern's bid be treated as one bid. The contract specialist denied ARCO's request and included both of the companies as separate bidders in the drawing.

ARCO submits that DOE's decision gave Pacific an unfair advantage since it allowed it to submit two bids through its subsidiaries. ARCO believes that the practical effect of permitting both subsidiaries

to participate in the lottery as independent bidders was to provide the parent company with two chances out of 10 in the drawing for line item 1 and two chances out of nine for line item 2, as compared with the other bidders' one chance. ARCO asserts that DOE's action unfairly prejudiced the other bidders. This prejudice could only be remedied, in ARCO's view, by conducting a new lottery in which "each bidder has the correct (and equal) mathematical probabilities for success." ARCO argues that Pacific, Southern and Gas Supply are clearly a single "person," and the activities and basic business policies of the latter two companies are controlled by the former. It is ARCO's position that:

> [i]t cannot be seriously maintained that permitting one bidder in a lottery twice as many chances as any other constitutes the giving of all parties a "full and equal opportunity" to purchase the gas.

ARCO emphasizes that it does not object to the filing of bids by affiliated companies in a truly competitive sale.

In this regard, DOE argues it did conduct a competitive sale, not a lottery, because any bidder could have bid a discount from the maximum legal price. Thus DOE contends that the sale was competitive.

DOE's argument, that this should be viewed strictly as a competitive sale is simply not persuasive. All 10 bidders for line item 1 and all 9 bidders for line item 2 bid the maximum legal price. This result was predictable since potential bidders need not speculate as to how high opponents might bid—the IFB tells them. Nor can we conceive of any rational reason to bid less than the maximum legal price, in the context of this sale to the highest bidder. The participants of this sale reached similar conclusions. For example, Mobil Oil Corporation, a successful bidder, described this procurement as a:

> * * * situation where the product being offered for sale [wa]s not sold in a free market to the highest bidder. Here, every bidder knew all it had to do was bid the maximum lawful price for the maximum volume being offered to insure being a participant in the drawing process.

Clearly, the practical objective of the serious bidder was to participate in the drawing process.

DOE argues that in any event Pacific, Southern and Gas Supply are separate "juridical persons," each of which is entitled to bid and receive an award under the provisions of the IFB. DOE points out that section 7430(d) of the Reserves Act speaks only in terms of "interested persons" and argues that each of these three corporations must be treated as a separate and distinct corporate entity. DOE submits that although Pacific owns 93 percent and 100 percent of the voting stock of each subsidiary, the parent corporation is a "mere holding company" and the subsidiaries are independent, regulated utilities. In this regard, DOE argues that our decisions stand for the proposition that bids submitted

by two commonly owned companies need not be rejected by reason of that circumstance alone.

We agree. Bids submitted by commonly owned companies should not be rejected unless an unfair advantage may be gained by permitting such bids.

For example, in 39 Comp. Gen. 892, 894 (1960), while we found no objection to the submission of multiple bids, we stated:

> Of course, a contracting officer would be justified in rejecting more than one bid submitted by a person, or by two or more affiliated companies, where such bidding was resorted to for the purpose of circumventing the requirements of a statute * * *; where an unfair advantage may be gained in cases of an award through the drawing of lots; or in any other instance where multiple bidding is prejudicial either to the United States or to other bidders.

The language of 39 Comp. Gen., *supra*, clearly applies to this case.

Similar opinions have been reached in cases involving the Mineral Leasing Act, 30 U.S.C. § 181, *et seq.* (1976), which authorizes the sale of oil and gas leases on public lands on the basis of lottery drawing. *Schermerhorn Oil Corporation*, 72 I.D. 486 (1965); *June Oil & Gas, Inc.* v. *Andrus*, 506 F. Supp. 1204 (1981). In *Schermerhorn*, one offeror in the lottery owned 29 percent of another offeror's stock; in *June Oil*, offers for the same drawing were received from a husband and wife and also from a trust established by them for the benefit of their children. In both cases it was held that the relationship between the offerors created an unfair advantage.

DOE attempts to distinguish these Mineral Leasing Act cases on the basis that the lottery was the sole criterion for selection; that, unlike the instant case, a regulation prohibited related applicants from applying for a single lease of land, and that in this case the only relationship between the two bidders was their common owner, who did not even submit a bid.

We are not persuaded by DOE's arguments. As stated above, we think that the award selections in this case primarily were decided by lottery drawings. The regulation governing the leasing cases (43 C.F.R. 3123.3, now 43 C.F.R. § 3112.6–1 (1981)) prohibits relationships between participants in a lottery which would give either, or both, a greater probability of successfully obtaining a lease in the public drawing. DOE's statutory duty under section 7430(d) of the Reserves Act to give interested parties an equal opportunity to acquire petroleum imposes a similar standard.

As to DOE's final distinction, while it is true that Southern and Gas Supply are only related because of their common ownership, we think this relationship gave both of them an unfair advantage in the drawing. In fact, we note that DOE will no longer permit bidders such as Southern and Gas Supply to participate in DOE drawings

without regard to their common ownership. On August 26, 1981, DOE issued another IFB (No. DE–FB01–81RA32162) for the sale of natural gas pursuant to the Reserves Act. This IFB provided that only one bid of affiliated bidders will be eligible for inclusion in the lottery conducted to break tie bids, and that a preliminary lottery to select the representative for the affiliated bidders will be conducted. The term "affiliate" is defined in the IFB as "a person who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with another specified person." Under this IFB, Southern and Gas Supply would not have been allowed to participate in the lottery because of their common ownership. In our opinion DOE's August 26 solicitation correctly implements the requirement of the Reserves Act that sales be structured to provide a full and free opportunity to all interested parties.

We recommend that DOE, with regard to each of the contracts awarded to Southern, conduct a new lottery among those bidders who were unsuccessful in the first solicitation and are still interested in obtaining an award under this solicitation, including a single representative of the interests of Pacific. If Southern is not selected, in either lottery, the remainder of the respective contract with Southern should be terminated for the convenience of the Government, pursuant to clause L–4 of the contract. Given the nature of the performance required by this IFB, i.e., a sale, we anticipate that termination costs to the Government will be minimal. The other awards would be left undisturbed, even though those companies were not given a full and equal opportunity, since they were not prejudiced by DOE's actions.

Since our decision contains a recommendation for corrective action, we are furnishing copies of it 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 those committees concerning action taken with regard to our recommendations.

Protest sustained.

[B–204615]

General Accounting Office—Jurisdiction—Contracts—Disputes—Contract Disputes Act of 1978—Applicability to Assignees' Claims

Contracting officer forwarded assignee's claim to General Accounting Office (GAO) for resolution because he lacked jurisdiction to resolve it. Claimant then appealed that decision to the agency's board of contract appeals, but nevertheless requested and received suspension of board proceedings pending GAO decision, reserving the right to pursue the appeal if GAO denies the claim.

GAO, however, will not consider the claim unless the board first affirms the contracting officer's conclusion, since otherwise the claimant inappropriately would have two chances at a favorable administrative resolution.

Matter of: Department of Energy—Request for Decision, December 9, 1981:

A contracting officer in the Department of Energy (DOE) requests a decision regarding a claim for $114,187 submitted to him by G.B.L. Services, Inc. (GBL). That amount represents the proceeds of DOE contract No. DE-AC01-80AD65625 received by Mail America, the contractor, but claimed by GBL as assignee to the contract under the Assignment of Claims Act, 31 U.S.C. § 203 (1976).

We will not consider the matter.

GBL submitted its claim to the DOE on March 30, 1981, under the provisions of the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* (Supp. III 1979). The contracting officer, however, concluded that he lacked the authority to decide the claim under the Contract Disputes Act. The reason for his conclusion was that the claims over which a contracting officer has jurisdiction under the statute are those brought by "a party to a government contract," 41 U.S.C. §§ 601(4), 605, and in his view GBL, as an assignee, does not come within that definition. Therefore, the contracting officer forwarded GBL's claim to this Office for resolution under 31 U.S.C. § 71 (1976), which authorizes the General Accounting Office (GAO) to settle and adjust claims against the Federal Government.

After the submission to our Office, GBL appealed the contracting officer's decision to the DOE Board of Contract Appeals. While the firm stated that it believed that the contracting officer, not the GAO, should decide the claim, it nevertheless requested and received from the Board a suspension of proceedings for 60 days to enable this Office to render a decision. GBL intends to proceed with the appeal if it receives an adverse ruling on the merits of its claim from this Office.

We decline to consider the contracting officer's request for a decision on GBL's claim at this time. In requesting a suspension of the Board's proceedings on its appeal, GBL stated that it "reserves the right to reactivate its appeal if a favorable result is not reached by the General Accounting Office within a reasonable time." The effect of that reservation is to give GBL two chances at a favorable administrative resolution of its claim which we do not believe is appropriate. Therefore, we are closing our file on the matter so that the Board can decide GBL's appeal on the jurisdictional issue and, if appropriate, the merits of the claim.

If the Board agrees with the contracting officer that GBL's claim

does not come within the Contract Disputes Act, we will reopen our file at the parties' request.

[B-197400]

Appointments—Administrative Errors—Ineligibility of Employee—Subsequent Appointment to Same Position—Retroactive Application Precluded

Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended.

Matter of: Thomas C. Collins—Improper Appointment, December 10, 1981:

This is in response to a request from Mr. Brad Womack, an authorized certifying officer with the National Finance Center, United States Department of Agriculture, for an advance decision concerning the claim of Mr. Thomas C. Collins. The issue in this case is whether Mr. Collins should be compensated as if he were a GS-9 for the period he was improperly appointed at that grade and for the period he was subsequently separated until proper reappointment to the GS-9 position. We hold that Mr. Collins may receive annual and sick leave benefits for the periods of employment and a refund for his retirement contributions made while he was employed, but his other claims for backpay are denied.

Mr. Collins was appointed by the Salmon National Forest, Department of Agriculture, as a Wildlife Biologist, GS-9, on April 8, 1979. The appointment was found to be improper soon after he entered on duty. At the time he was initially hired on April 8, 1979, the selecting official believed that Mr. Collins was eligible for reinstatement due to previous employment with the U.S. Postal Service. In a letter accompanying his application for the position, Mr. Collins reported that the Office of Personnel Management (OPM) Regional Office in Cheyenne, Wyoming, had informed him that he appeared to be eligible for reinstatement. However, officials at the Salmon National Forest received Mr. Collins' Official Personnel Folder after his appointment was effective, and discovered that his employment with the Postal Service was temporary rather than career-conditional. The Personnel

Officer at the Salmon National Forest wrote to OPM and was informed that Mr. Collins did not have reinstatement eligibility. Mr. Collins was terminated on June 20, 1979, but on July 1, 1979, he was appointed to a temporary GS–7 Wildlife Biologist position. After he had served 2 weeks in that position, the Forest Service determined that Mr. Collins was within reach on an OPM register, and he was properly given a career-conditional appointment to the GS–9 Wildlife Biologist position on July 15, 1979.

Mr. Collins states that the above described events occurred through no fault of his own and caused him to lose compensation and other benefits which he would have received had he been properly appointed in the first place. He claims a lump-sum payment of 22 hours for accrual of annual leave for the period from April 8, 1979, to July 1, 1979. He also claims a lump-sum payment for accrual of sick leave for the same period. Mr. Collins also claims reimbursement for retirement contributions he would have made if he were a GS–9 employee for the period from April 8, 1979, to July 15, 1979. Further, Mr. Collins argues that he is entitled to reimbursement for the delay in the receipt of his step increase as his creditable service for step increase purposes begins on July 15, 1980, and not April 8, 1980, when he was originally improperly appointed. Finally, Mr. Collins seeks the difference between a GS–7 and GS–9 salary for July 1 through July 14, 1979, when he was temporarily appointed as a GS–7. We will rule on each of Mr. Collins' claims in the order in which he has presented them.

As to his claim for annual and sick leave, on August 17, 1977, we issued *Victor M. Valdez, Jr.*, 58 Comp. Gen. 734, in which we set forth a new rule regarding individuals who have received improper appointments as follows:

> * * * in those cases where a person has been appointed to a position by an agency and the appointment is subsequently found to have been improper or erroneous, the new rule is that the employee is entitled to receive unpaid compensation and to credit for good faith service for purposes of accrual of annual leave and lump-sum payment for unused leave upon separation unless—
> (1) the appointment was made in violation of an absolute statutory prohibition, or
> (2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.

Mr. Collins' appointment was not in violation of a statutory bar nor is there any evidence that he was guilty of fraud or that he deliberately misrepresented or falsified a material matter in order to receive his appointment. Furthermore, it appears that he served in good faith with no knowledge of the impropriety of his appointment.

In accordance with *Valdez*, therefore, Mr. Collins is entitled to a lump-sum payment for his accrued annual leave and to service credit for leave accrual purposes for the period of his improper appointment.

We have held that employees who are separated and then reemployed by another agency prior to the processing of the lump-sum leave payment may be paid for that portion of leave which expired during the interval between appointments, and have the remaining leave transferred to the new agency. 34 Comp. Gen. 290 (1954). Accordingly, we hold that Mr. Collins is entitled to a lump-sum payment for the leave he accrued but did not use from April 8, 1979 to June 20, 1979, the period of his erroneous appointment. This leave would have expired in the interval between Mr. Collins' appointments so that none would have remained to be recredited to his account when he was appointed to the temporary GS–7 position. He has no entitlement to a lump-sum leave payment for the period June 20, 1979, through July 1, 1979, as he was not employed with the Government during that time. In this regard see our holding below concerning backpay.

Mr. Collins is also entitled to a recredit of the sick leave he accumulated but did not use during the period of his erroneous appointment. He is not entitled to a lump-sum payment for sick leave. Paragraph 630.502(s)(1) of Title 5, Code of Federal Regulations (1979) provides that:

> * * * an employee who is separated from the Federal Government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia, without a break in service of more than 3 years.

Just as we held in *Valdez* that an improperly appointed employee may be considered to have accrued annual leave for purposes of a lump-sum payment, we believe that Mr. Collins may be considered to have accrued sick leave for the purpose of recrediting that leave to his account pursuant to the above-quoted regulation. There is no basis, however, for Mr. Collins to receive any credit for sick leave for the period during which he was not employed by the Forest Service. Therefore, the portion of his claim representing the period from June 20 to July 1 must be denied.

Mr. Collins' third claim is for retirement contributions made during his erroneous appointment and contributions which would have been made if he had been continuously employed in the GS–9 position. It may be that Mr. Collins is entitled to service credit for retirement purposes for the period of his erroneous appointment but matters concerning retirement credit are within the jurisdiction of the Office of Personnel Management. The question of whether Mr. Collins is entitled to such credit should be referred to OPM. 5 U.S.C. § 8347(b). If OPM denies service credit for retirement purposes, Mr. Collins would be entitled to a refund of the retirement deductions made from his salary during the period of the erroneous appointment, less any necessary social security deductions. See 57 Comp. Gen. 565 (1978).

However, Mr. Collins' claim for the retirement deductions that would have been made had he been a GS–9 for the period he was not employed and the period when he was employed in the GS–7 position cannot be allowed. Mr. Collins is requesting that he be treated as if he were a GS–9 throughout this period. It should be remembered that Mr. Collins was initially improperly appointed to the GS–9 position and his entitlement to payment for this period extends only because he provided the Government with his services. *Valdez, supra.* There is no basis on which Mr. Collins may be paid for retirement contributions he did not make.

Mr. Collins' claim with regard to his step increase and his claim for the difference between GS–7 salary and GS–9 salary for the period of July 1 to July 15 are similar in nature to his claim for retirement deductions which would have been made if he were a GS–9. He would be entitled to service credit and to that difference in salary only if the GS–9 appointment could be made retroactive. This is not possible. Mr. Collins' entitlement to a retroactive appointment would exist only under the Back Pay Act, 5 U.S.C. § 5596, and that Act allows retroactive appointments and backpay only where the individual has a vested right to employment status by virtue of statute or regulations. 59 Comp. Gen. 62 (1979) and decisions cited therein. Our Office has permitted such a remedy in situations where an agency has violated a statutory right of reemployment, violated a mandatory policy on effecting appointments without a break in service following retirement, improperly restrained an employee from entering upon the performance of his duties, or violated a nondiscretionary policy to appoint attorneys and law clerks at a certain grade level. See 54 Comp. Gen. 1028 (1975); 54 Comp. Gen. 69 (1974); B–175373, April 21, 1972; and B–158925, July 16, 1968.

In this case, when the Forest Service violated the regulations in appointing Mr. Collins it did not take away a benefit to which he was entitled, but rather it granted him one to which he was not entitled at that time. Similarly, Mr. Collins had no right to be retained after OPM advised the Forest Service that he did not have reinstatement eligibility. Although the Forest Service could have requested OPM to grant a variation under section 5.1(b) of Civil Service Rule V, there is no requirement that an agency do so, and there is no certainty that OPM would have granted such a variation.

Accordingly, the Back Pay Act does not apply in Mr. Collins' case and as a result, there is no basis upon which Mr. Collins' reappointment may be made retroactive. When Mr. Collins was appointed to the GS–7 position he had no right to any other position at the time and he was entitled only to the salary of the position to which he was appointed. *Dianish* v. *United States*, 183 Ct. Cl. 702 (1968). Mr. Collins is therefore not entitled to the pay of the GS–9 position for other than the

period when he was serving under the initial appointment and from the date he was properly reappointed to that position.

[B-204923]

Contracts—Grant-Funded Procurements—General Accounting Office Review—Finality of Administrative Determinations—Grant Administration Matters—Minority Subcontracting Goals

General Accounting Office (GAO) will not review the merits of a potential subcontractor's complaint against a grantee's determination that the complainant was not an eligible minority business enterprise. This is a matter of grant administration cognizable by the grantor agency, not GAO. 60 Comp. Gen. 606 is extended.

Matter of: L & L Electrical Service, Inc., December 14, 1981:

L&L Electrical Service, Inc. (L&L), complains against the determination made by the Metropolitan Atlanta Rapid Transit Authority (MARTA) that L&L is not an eligible minority business enterprise (MBE) for purposes of a subcontract award on project No. CN 430. Since the project is funded in part by a grant from the Department of Transportation, Urban Mass Transportation Administration (UMTA), L&L requests that our Office review MARTA's determination in accord with our public notice entitled, "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. Since UMTA has an established procedure under which L&L may seek review of MARTA's determination and L&L's appeal is pending before the proper forum, we will not review the merits of L&L's complaint.

For prior MARTA projects, L&L had been certified by MARTA as eligible to participate as an MBE. For project No. CN 430, involving earthwork and construction of a certain tunnel line, L&L and another electrical contracting firm, acting in joint venture, submitted a subcontract bid to one of the bidders, Granite City Construction (Granite). MARTA determined that Granite submitted the low, responsive bid but that Granite was not eligible for award unless Granite replaced L&L because, in MARTA's view, L&L did not qualify as an MBE. Specifically, MARTA concluded that L&L was not minority controlled. Granite found an MBE acceptable to MARTA and replaced L&L. MARTA made the award to Granite.

L&L requested MARTA to reconsider its determination, requested UMTA's review of MARTA's determination, and requested that our Office review both MARTA's and UMTA's actions. However, L&L withdrew its request that its complaint be resolved prior to award to Granite.

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UMTA's regulations, 49 C.F.R. part 23 (1980), set forth eligibility standards which must be used by grantees in determining whether a firm is owned and controlled by minorities and, thus, whether the firm is eligible to be certified as an MBE. UMTA's regulations provide that a business aggrieved by an adverse grantee determination may appeal to the Department of Transportation (DOT). L&L's appeal is pending with DOT.

UMTA's regulations also provide that the denial of an MBE certification by a grantee is final for that contract and other contracts then being let by the grantee. The regulations permit MBE's and joint ventures to correct deficiencies in control only for future procurements. While an appeal is pending, the regulations also permit the Secretary of Transportation to deny the firm eligibility to participate as an MBE on all DOT-funded projects. Here, the Secretary of Transportation has not denied L&L eligibility to participate as an MBE on other DOT-funded projects while L&L's appeal is pending. In fact, since MARTA's determination, the Houston Transit Authority certified L&L as an eligible MBE for participation in one of its transit projects.

Our Office reviews complaints against the award of contracts under grants in order to foster compliance with grant terms, agency regulations, and applicable statutory requirements. It is not our intent to interfere with the function and responsibility of grantor agencies in administering grants. For example, in *Paul N. Howard Company—Reconsideration*, 60 Comp. Gen. 606 (B-199145.2, July 17, 1981), 81-2 CPD 42, we stated that the bidder's unconditional certification to comply with the solicitation's minority subcontractor requirements makes the bid responsive on that point. We also stated that the manner in which the bidder carries out its obligation is a matter of contract and grant administration within the purview of the grantee and grantor, respectively. Thus, our reviews have not extended to examining whether a particular potential subcontractor has or has not been properly certified as an eligible MBE.

Complaint dismissed.

[B-186348]

Vietnam—Evacuation—Loss of Currency, etc.—Appropriation Chargeable—Piasters Abandoned or Left on Account

Loss of approximately $1,070,000 of piaster currency abandoned in Vietnam may be charged to Gains and Deficiencies Account, 31 U.S.C. 492b, since piasters were acquired and held for exchange transaction operations and became worthless when South Vietnamese Government fell. To extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled.

Appropriations—State Department—Reimbursement—Overseas Services to Other Agencies—Vietnam Evacuation Effect

Checks issued by United States Disbursing Officer before April 1975 evacuation of South Vietnam should be charged against State's fiscal year 1975 appropriations since the accounting records that would have shown the agency appropriations against which the checks would have been charged were lost.

Matter of: Transactions and losses involving Vietnam piaster currency, December 15, 1981:

This responds to a State Department request for reconsideration of that part of our decision at 56 Comp. Gen. 791 (1977), which held that piaster currency left in Vietnam should be considered a physical loss of funds under 31 U.S.C. § 82a–1 and should be charged against the State Department's then current appropriations available for the expenses of the various accountable officers. The State Department also asks whether checks issued prior to April 1975 in the total amount of $3,781,237.47 ($3,178,757.47 in dollars and $602,480 dollar equivalent in piasters) but not identified to chargeable appropriations are proper charges against fiscal year 1975 appropriations of the agencies using the United States Disbursing Officer services.

For the reasons given below, we now find that the loss of approximately $1,070,000 of piaster currency left in Vietnam may be charged to the Gains and Deficiencies account, pursuant to 31 U.S.C. § 492b. To the extent our decision at 56 Comp. Gen. 791 is inconsistent, it is overruled. We also conclude that the checks written prior to April 1975 should be charged against State's fiscal year 1975 appropriations rather than against fiscal year 1975 appropriations of the agencies that were using the United States Disbursing Officer's services.

The questions raised by the State Department, both in this case and in 56 Comp. Gen. 791, were provoked by the circumstances surrounding the American evacuation from South Vietnam in late April 1975. During that evacuation, quantities of dollars were burned and Vietnamese piasters belonging to the United States were both abandoned and left in accounts with the Treasury of Vietnam and the National Bank of Vietnam. In our earlier decision we held that the piasters left on account should be charged to the Gains and Deficiencies account created under 31 U.S.C. § 492b (56 Comp. Gen. at 798–99), but that the dollars and abandoned piasters should be treated as physical losses under 31 U.S.C. § 82a–1 (56 Comp. Gen. at 796–98).

In addition to the losses considered in our first opinion, the State Department now indicates that some $3,781,237.47 in checks issued prior to April 1975 cannot be identified to chargeable appropriations presumably because the supporting records have been lost. State estimates that the total loss in the Disbursing Officer's account, including

the checks which cannot be charged to a particular appropriation, amounted to $7,891,365.61. State further indicates that it sought a supplemental appropriation to cover the loss but that Congress denied its request.

1. Piasters Left in Vietnam

The piasters left in Vietnam were obtained from Americans, and from local and third-country nationals to provide the Disbursing Officer with currency needed for final payments of leases, contracts and other piaster liabilities. Further, the Disbursing Officer accepted piasters in exchange to allow authorized personnel to obtain a limited amount of dollars prior to departure from Vietnam. The piasters initially were purchased with dollar currency. Subsequently, Treasury checks were used for the purchases, and during the last few days in Saigon, due to the volume of transactions being conducted, receipts were given for piasters for which checks were later issued. State estimates that approximately 807,000,000 piasters were abandoned when the Disbursing Officer departed from Vietnam. At the rate of exchange in use before the fall of the South Vietnamese Government in April 1975—755 piasters to the dollar—this would amount to about $1,070,000.

Although at the time of our earlier decision State did not dispute the Treasury Department's conclusion that piasters abandoned in Vietnam should be treated as a physical loss under 31 U.S.C. § 82a–1, it now asks that we find that the loss "* * * be regarded as having resulted from exchange transaction operations * * * and should be charged to the Gains and Deficiencies account, pursuant to 31 U.S.C. 492b." State says that the difference in treatment is important since losses under section 82a–1 must be charged to the current appropriation available for the expense of the accountable officer function.

In support of its request for reconsideration, State asserts that at the time of the evacuation, all South Vietnamese piasters had already become valueless because of the fall of the Saigon Government, and that this event "which caused the currency on deposit to lose its value also caused the loss of value to the piasters on hand." State maintains that this was the reason the piasters were not destroyed as were the dollars. Accordingly, State concludes there occurred a physical abandonment of worthless paper rather than a physical loss of valuable currency.

The Gains and Deficiencies account was established, under the authority of 31 U.S.C. § 492b, to handle gains and losses resulting from authorized exchange transactions. The operations covered by 31 U.S.C. §§ 492a through 492c are exchanges of currency for official or accommodation purposes. Section 492b allows the Treasury to charge the general

fund for losses resulting from operations permitted by those sections. In the event of a net deficiency in a fiscal year, Treasury requests an appropriation in the amount of the deficiency to adjust the accounts of the United States Disbursing Officer.

The facts show that the piasters that were later abandoned were obtained through exchanges of dollars, Treasury checks and receipts for which checks were later issued. One of the main purposes of the exchanges was to provide the United States Disbursing Officer with currency necessary for final payments of leases, contracts and other piaster liabilities. Accordingly, we find that the piasters were acquired in exchange transactions pursuant to 31 U.S.C. § 492a.

Although we assumed this finding in our earlier opinion, we agreed with Treasury that the abandoned piasters should be treated as a physical loss because the loss did not result from exchange operations but rather from the abandonment of the currency. On the other hand, we held that the piasters in bank accounts could be charged to the Gains and Deficiencies account because their loss (1) could be regarded as having resulted from exchange transaction operations since the piasters were held for the purpose of these transactions; and (2) could not be treated as a physical loss since the actual piasters remained in the accounts where they were deposited despite their loss of value.

Upon reconsideration, we conclude that the abandoned piasters should be treated in the same manner as the piasters on account. The facts show that the abandoned piasters, like those on deposit, were acquired in exchange transactions and were held for exchange transaction operations, *i.e.*, for making final payments on leases, contracts and other piaster liabilities. Moreover, like the piaster bank deposits, the abandoned piasters became valueless when the South Vietnamese Government fell, prior to the final American evacuation.

Therefore, the loss was caused by the total devaluation of the piasters rather than by their abandonment. This "* * * decline in value of currency held for purposes of exchange transactions under 31 U.S.C. § 492a is the kind of loss covered by 31 U.S.C. § 492b." B–197708, April 8, 1980. Accordingly, we conclude that the $1,070,000 loss of the abandoned piasters may be charged to the Gains and Deficiencies account pursuant to 31 U.S.C. § 492b.

2. Accounting Loss

The State Department's second question concerns the proper accounts to be charged for certain checks issued by the United States Disbursing Officer in Saigon before the evacuation in April 1975 and paid from Treasury monies. State has informed us that as a result

of the evacuation, the accounting records that would have shown the appropriations against which the checks should have been charged were lost. The total amount of checks that cannot be identified to chargeable appropriations is $3,781,237.47—$3,178,757.47 in checks made out in dollars and 454,872,488 in piasters ($602,480 dollar equivalent). State notes that since most of the checks issued by the Disbursing Officer have been paid, Treasury does not anticipate that these figures will change significantly. State also suggests that the checks should be charged against the fiscal year 1975 appropriations of the agencies that were using the United States Disbursing Officer's services.

We find that the checks written prior to the evacuation in April 1975 should be charged against State's fiscal year 1975 appropriations rather than against fiscal year 1975 appropriations of the agencies that were using the United States Disbursing Officer's services. We do so on the basis that the records were lost and that the checks cannot be related to particular agencies. *See* 37 Comp. Gen. 224, 226 (1957). However, should the balance in the pertinent M account be insufficient to cover the charge, the charge could be satisfied from restorations from unobligated appropriation balances in the merged surplus to the extent such balances are available. *See* 31 U.S.C. § 701(a)(2).

[B-201172]

Officers and Employees—Transfers—Miscellaneous Expenses—Tuition Forfeiture

Employee of Department of Housing and Urban Development who transferred from New York to Washington, D.C., in July 1978 is not entitled to reimbursement of school tuition deposit for his child's education which he forfeited when the child withdrew from school because of employee's change of permanent station. Tuition forfeiture is not within "miscellaneous expenses" reimbursable under the Federal Travel Regulations (FTR). This decision was extended by 61 Comp. Gen. ——— (B-205614, Apr. 13, 1982).

Officers and Employees—Transfers—Real Estate Expenses—Condominium Dwelling—Sale of Ownership Interest—Carrying Charge Reimbursement

Employee who transferred fom New York to Washington, D.C., in July 1978 claims relocation expenses in the form of carrying charges deducted from his equity refund in connection with the sale of his cooperative apartment. In the absence of evidence clearly establishing different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the FTR. Since carrying charges in a cooperative usually contains items such as interest and principal payments on the mortgage, insurance, utilities, cost of management and maintenance, they cannot be considered a cost incident to the sale of a residence for which reimbursement is authorized under the FTR.

Officers and Employees—Transfers—Miscellaneous Expenses—Maintenance Costs—Condominium Dwelling—Sale

Expenses for repairs, maintenance, cleaning, and painting in connection with owner's sale of cooperative apartment may not be allowed as reimbursable relocation expenses under paragraph 2-6.2d of the FTR. Claim for stock transfer tax may be allowed under this authority.

Matter of: Zera B. Taylor—Relocation—Tuition Forfeiture—Cooperative Apartment Carrying Charges, December 15, 1981:

Ms. Lena M. Jones, an authorized certifying officer with the Department of Housing and Urban Development (HUD), has asked us to determine whether Mr. Zera B. Taylor may be reimbursed for a forfeited school deposit as well as for certain expenses incurred in the sale of a cooperative apartment. These costs were sustained in connection with Mr. Taylor's transfer of official duty station from New York, New York, to Washington, D.C., in July of 1978.

FORFEITED SCHOOL DEPOSIT

Mr. Taylor's child attended a private school in New York which required a deposit in advance of the next school year as a condition of enrollment. Mr. Taylor paid a $500 deposit for the 1978–1979 school year, but did not claim a return of the deposit before June 15, 1978, the school's cut-off date for a refund. He therefore forfeited the amount of the deposit when the child left the school upon his transfer.

We have held that forfeiture of tuition incident to a transfer is not the kind of expense considered reimbursable as "miscellaneous expenses" under paragraph 2-3.1b of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973). *John A. Lund, Jr.*, B-192471, January 17, 1979. Since there is no existing provision in the law or the applicable travel regulation which contemplates reimbursement for a forfeited school deposit in these circumstances, Mr. Taylor's claim for such an expense is denied.

COOPERATIVE APARTMENT CARRYING CHARGES

A. Generally

Mr. Taylor claims a total of $1,380.96, representing carrying charges due through March 7, 1979, on his cooperative apartment in New York City. This amount was deducted by the housing corporation from the refund of equity paid to Mr. Taylor on May 4, 1979.

Our first concern is whether Mr. Taylor's relationship to the residence is that of an owner-cooperator claiming miscellaneous real estate transaction expenses under paragraph 2-6.2d of the FTR, or that of a renter-lessee claiming lease termination expenses under paragraph

2–6.2h of the FTR. Our case law precedents provide some divergent interpretations on the essence of cooperative apartment arrangements which we shall resolve here.

In one approach represented by our decisions B–178013, May 29, 1973, followed by B–179979, March 7, 1974, we have held that participating in a cooperative apartment and maintaining an equity interest in a particular housing corporation did not require that the employee be treated as an owner of the residence within the meaning of the entitlement authorities. Rather, we held that, for purposes of reimbursing the employee, the cooperative apartment arrangement should be treated as a lease because the occupancy agreements and other evidence were for specified limited periods, had the features of a lease, and the parties were referred to as the lessor and lessee. As a result, costs of settling an unexpired lease at the employees' duty station incident to official transfers were reimbursable in accordance with paragraph 2–6.2h of the FTR.

More recently, however, our approach has consistently viewed cooperative apartment arrangements as vesting purely ownership interests in connection with the employee's relationship with the cooperative unit. Thus, where the employee claiming reimbursement does not specifically claim and adequately document that the cooperative arrangement is predominantly a lease relationship, we treat the employee's interest as one of ownership.

For example, in B–177947, June 7, 1973, an employee claimed reimbursement for carrying charges in connection with the sale of a membership in a cooperative housing project. The membership entitled the employee to occupy one of the units in the project as a residence. Our review of the record indicated that carrying charges required to be paid to the cooperative by the employee were his share of the cooperative's expenses for the period after he was transferred until the settlement date for the sale. We held that the expenses of the cooperative included in the carrying charges are items such as interest and principal payments on the mortgage, insurance, utilities, cost of management, and maintenance. Regardless of the form of ownership held in a residence, expenses of this type cannot be considered a cost incident to the sale of a residence for which reimbursement is authorized under controlling regulations.

This "pure ownership" rationale was firmly established as precedent in our decisions in *Royce R. Newcomb*, B–183812, May 4, 1976; and *Virginia M. Armstrong*, B–188265, November 8, 1977, where we held that an interest in a cooperatively owned building, which is specifically referred to in paragraph 2–6.1c of the FTR, is a form of owner-

ship in a residence for which real estate expenses may be reimbursed as provided for in paragraph 2–6.2.

In the most recent statement of this "pure ownership" approach, *Irwin Kaplan*, B–190815, March 27, 1978, the employee transferred to a new duty station and claimed rent which he paid for a period after he vacated a cooperative apartment. We held that the employee's interest in the cooperative apartment was that of an owner, thus precluding consideration of the payments as lease termination expenses under paragraph 2–6.2h of the FTR. We also stated that there was no basis for payment of Mr. Kaplan's claim for "rent" as a miscellaneous expense under para. 2–6.2f of the FTR since the charge did not appear to be one customarily paid by the seller of a residence at the old official station. Rather, the charge was analogous to the mortgage payment the seller of a residence pays after he has vacated his residence but before he has gone to settlement.

B. Mr. Taylor's Case

In essence Mr. Taylor contends that under his cooperative arrangement he was both an owner and a lessee. He owned capital stock in the housing corporation which owned and operated the apartment building. At the same time he leased his own apartment from the housing corporation and made monthly payments characterized as rent under the following excerpt from paragraph 3 of the Subscription Agreement:

> (3) The Subscriber hereby applies for a non-proprietary lease of the aforesaid apartment, which lease will fix the payments on account of rent to be made thereunder * * *. After thirty (30) days' notice by the Housing Company to the effect that the apartment is available for occupancy, or upon acceptance of occupancy by the Subscriber, whichever is earlier, the Subscriber shall make a payment for Carrying Charges covering the unexpired balance of the month. Therefore, the Subscriber shall pay Carrying Charges in advance on the first day of each month.

However, without the actual Occupancy Agreement, By-Laws of the corporation, or other evidence more fully documenting the nature of Mr. Taylor's equity interest, we are not persuaded that the limited evidence offered in support of Mr. Taylor's contention shows that the cooperative arrangement was predominantly a lease relationship. Hence, under *Irwin Kaplan*, cited above, and our other recent cases on this subject, we will treat Mr. Taylor's interest in the cooperative apartment as one of ownership.

In an effort to augment the administrative record we contacted the Department of Housing and Urban Development and requested its views on the nature of carrying charges in connection with cooperative apartments. The department forwarded a copy of the Housing and Urban Development Model Form of Occupancy Agreement for hous-

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ing cooperatives (FHA Form No. 3237, Revised September 1970). In accordance with this document "Monthly Carrying Charges" include but are not limited to the following items:

(a) The cost of all operating expenses of the project and services furnished.
(b) The cost of necessary management and administration.
(c) The amount of all taxes and assessments levied against the project of the Corporation or which it is required to pay, and ground rent, if any.
(d) The cost of fire and extended coverage insurance on the project and such other insurance as the Corporation may effect or as may be required by any mortgage on the project.
(e) The cost of furnishing water, electricity, heat, air conditioning, gas, garbage and trash collection and other utilities, if furnished by the Corporation.
(f) All reserves set up by the Board of Directors, including the general operating reserve and the reserve for replacements.
(g) The estimated cost of repairs, maintenance and replacements of the project property to be made by the Corporation.
(h) The amount of principal, interest, mortgage insurance premiums, if any, and other required payments on the hereinafter-mentioned insured mortgage.
(i) Any other expenses of the Corporation approved by the Board of Directors, including operating deficiencies, if any, for prior periods.

This listing is consistent with our decisions construing carrying charges in a cooperative as usually containing items such as interest and principal payments on the mortgage, insurance, utilities, cost of management and maintenance. As a result, on the basis of the record before us, expenses of the type represented by his claim for carrying charges cannot be considered a cost incident to the sale of a residence for which reimbursement is authorized under chapter 2, Part 6 of the FTR. Accordingly, Mr. Taylor's claim for carrying charges is denied.

STOCK TRANSFER TAX

Mr. Taylor claims $2.95 for a "stock transfer tax." Under paragraph 2-6.2d of the FTR, transfer taxes and similar fees and charges are reimbursable with respect to the sale of a residence if such cost is customarily incurred. In Mr. Taylor's case this expense was incurred to transfer his equity interest in the housing corporation and was occasioned directly by his official change of station. This is an example of an expense entitlement directly related to Mr. Taylor's ownership interest, and may be reimbursed accordingly.

REPAIRS, MAINTENANCE, ETC.

Mr. Taylor claims itemized expenses for repairs, maintenance, cleaning and painting in connection with his vacating his cooperative apartment incident to his official transfer. These expenses may not be allowed.

Under paragraph 2–6.2d of the FTR, operating and maintenance expenses are not reimbursable in connection with the sale of a residence. And, since such charges for reconditioning of a cooperative apartment are maintenance costs which are expressly precluded by paragraph 2–6.2d of the FTR, they may not be reimbursed as part of the miscellaneous expense allowance. See *Irwin Kaplan* and FTR para. 2–3.1c.

[B–202358.2]

Contracts—Small Business Concerns—Awards—Review by GAO—Procurement Under 8(a) Program—Contractor Eligibility

Whether management agreement between 8(a) firm and large business removes management and control over daily operations from 8(a) firm so that firm would not be eligible for 8(a) assistance under statutory criteria is matter within reasonable discretion of Small Business Administration.

Matter of: AMF Wyott, Inc.—Reconsideration, December 15, 1981:

AMF Wyott, Inc. requests reconsideration of our decision, B–202358, March 17, 1981, 81–1 CPD 205, concerning the Small Business Administration's (SBA) proposed award of a subcontract to A&S Tribal Industries under the 8(a) program. We dismissed AMF's contention that A&S was ineligible for award under the 8(a) program without requesting an agency report on the basis that this Office will not question SBA's eligibility determinations absent a showing of fraud or bad faith.

The basis for protest is that A&S does not meet the statutory criterion that an eligible 8(a) firm's management and daily operations be controlled by socially and economically disadvantaged individuals. In this regard, AMF notes that the top management officials of A&S have been obtained from the Brunswick Corporation through a management agreement between Brunswick and A&S. Consequently, the protester believes that the SBA's inclusion of A&S in the 8(a) program is inconsistent with the law and therefore "amounts to bad faith and suggests fraud."

SBA reports that in 1974 it determined A&S eligible for the 8(a) program and approved the management agreement between A&S and the Brunswick Corporation. At that time eligibility for the 8(a) program was governed by SBA Standard Operating Procedure 60–41 which provided that 8(a)-eligible firms "must be owned and controlled by a disadvantaged person." Subsequently, in October 1978, section 8(a)(4) of the Small Business Act, 15 U.S.C. § 637(a)(4) (Supp. III 1979), was enacted. This section authorizes 8(a) awards

to firms which are at least 51 percent owned by socially and economically disadvantaged individuals and whose "management and daily business operations" are controlled by such disadvantaged persons.

SBA states that it is currently reviewing all its 8(a) firms approved prior to October 1978 to determine whether they meet the new stricter eligibility requirement and that it has not yet completed its review of A&S. The agency argues that until A&S is determined ineligible it is entitled to receive awards under the 8(a) program. Further, SBA notes that A&S cannot be formally terminated from the 8(a) program until that firm is afforded a hearing on the record pursuant to 15 U.S.C. § 637(a)(9), which provides that no firm previously deemed eligible for 8(a) assistance shall be removed without such a hearing.

While AMF may be convinced that the management agreement entered into between A&S and Brunswick transferred the control and day-to-day management of A&S' business to Brunswick, SBA has not indicated it shares AMF's view. On the other hand, SBA has yet to determine that A&S is an eligible 8(a) firm under the 1978 statutory criteria. Even though AMF characterizes the issue as concerning SBA's authority to subcontract with a firm that does not meet the statutory requirements for inclusion in the 8(a) program, it is our view that it is still within SBA's reasonable discretion to determine whether the management agreement disqualifies A&S from the 8(a) program or from the award of this particular subcontract. We do not believe that our Office should become involved in the substance of such determinations merely because the protester contends that the agency's action "suggests fraud." The protester must submit proof that agency officials had a malicious and specific intent to injure it. *JWM Corporation*, B-200070.2, May 29, 1981, 81-1 CPD 422. We see no such proof here.

Nonetheless, by separate letter of today to the Administrator of SBA, we are recommending that SBA determine as quickly as possible A&S's eligibility to participate in the 8(a) program in view of the 1978 law so that SBA will not run the risk of going beyond the mandate of the Act should it make any award to A&S. See *Computer Data Systems, Inc.*, 61 Comp. Gen. 79 (1981), 81-2 CPD 393.

[B-202508.2]

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Certificate of Competency—Scope of Factors for Consideration

Where contracting agency determined that small business concern lacked certain elements of responsibility relating to bidder's technical capability and past per-

formance and, upon referral to Small Business Administration (SBA) for Certificate of Competency (COC), SBA's independent review disclosed additional areas of concern regarding bidder's financial capacity, SBA's denial of a COC based upon all factors in record is unobjectionable. Protester's argument that 13 C.F.R. 125.5 (a) (1981) restricts SBA's right of review to those elements referred by the contracting agency is not persuasive since it would result in SBA's having to issue a COC to a firm which it believes cannot perform the contract, a result inconsistent with the intended purpose of the COC program.

Contracts—Small Business Concerns—Awards—Review by GAO—Scope—Certificate of Competency Requirement

While General Accounting Office (GAO) will generally not review SBA decision to issue a COC absent a *prima facie* showing of fraud or that information vital to responsibility determination was willfully disregarded, GAO will consider protest that SBA has disregarded its published regulations concerning its right to review elements of responsibility other than those referred to SBA by procuring agency. However, general rule applies to protest against SBA judgmental determination that protester lacked elements of responsibility relating to quality control and other issues referred to SBA by contracting agency.

Matter of: Skillens Enterprises, December 15, 1981:

Skillens Enterprises protests the Small Business Administration's (SBA) denial of a Certificate of Competency (COC) in connection with Skillens' bid submitted under IFB No. F08650–81–B–0040 issued by the Eastern Space and Missile Center, Patrick Air Force Base, Florida. Skillens contends that SBA improperly considered its financial condition in denying its application for a COC. We believe the SBA acted properly and deny the protest.

The subject solicitation, a small business set-aside, sought custodial and "clean room" services for approximately 200 buildings at the Cape Canaveral complex. This work involved both routine janitorial services and the specialized cleaning of high bay air locks, calibration laboratories, and similar sensitive areas. Skillens submitted the lowest responsive bid received by the Air Force.

The contracting officer, based on a preaward survey by the Defense Contract Administration Services (DCAS) which concluded that Skillens' technical capability, quality assurance capability and performance record were unsatisfactory, determined Skillens to be nonresponsible. The matter was then submitted to SBA for possible issuance of a COC in accordance with 15 U.S.C. § 637(b)(7) (Supp. III 1979) and 13 C.F.R. § 125.5 (1981). As part of this review process, SBA's industrial specialist conducted another on-site survey of Skillens' facilities. This independent survey confirmed that Skillens did not possess the necessary skills in the areas noted by DCAS.

This report was then considered by an SBA Region VII Review Committee which concurred with the SBA independent survey and unanimously recommended that the COC be declined. Although the Review Committee noted that the COC referral was based solely on Skillens' capability to perform, it considered a complete financial

analysis of Skillens because the proposed contract was for an amount over $250,000. The Review Committee concluded that Skillens did not have adequate credit to perform the contract and that the firm was in fact insolvent.

Consequently, by letter dated May 29, SBA informed Skillens that its application for a COC had been denied. The letter stated:

> We have carefully reviewed all information and data supplied and find no sufficient reason for disagreeing with the decision of the procuring agency. The COC Review Committee was in unanimous agreement that serious production, quality, and financial difficulties would accrue to you should you be awarded the contract.

The letter went on to list three of the areas where difficulties could be expected: production, quality control and financial. Under production, the letter explained that Skillens would run into financial trouble because of the successor clause of an existing union contract at the facility. The letter further explained that Skillens did not have the experience to meet the exacting quality assurance procedures incorporated into the solicitation and contained a detailed explanation of the SBA's views on Skillens' lack of financial resources.

Skillens contends that the reasons given by the SBA for declining to issue a COC "boil down to finances" and that SBA's failure to issue a COC on this basis was improper because the Air Force had not questioned Skillens' financial capacity and SBA regulations at 13 C.F.R. § 125.5(a) limit SBA's consideration in a COC proceeding to the specific elements of responsibility referred to it by the contracting agency.

We do not generally review matters involving SBA decisions to issue or not to issue a COC since by statute SBA has conclusive authority to rule on the responsibility of a small business bidder. 15 U.S.C. § 637 (b)(7). We will do so, however, where a protester presents a *prima facie* showing of fraud or bad faith or where information vital to the responsibility determination has not been considered. *JBS Construction Company*, B-187574, January 31, 1977, 77-1 CPD 79. We also think it is appropriate to consider COC situations in which it appears that SBA may not have followed its own published regulations, just as we consider SBA's alleged failure to follow its regulations involving the section 8(a) program. See, e.g., *Orincon Corporation*, 58 Comp. Gen. 665 (1979), 79-2 CPD 39. Consequently, we will consider this protest.

13 C.F.R. § 125.5(a) states the following:

> Government procurement officers and officers engaged in the sale and disposal of Federal property, upon determining and documenting that a small business lacks certain elements of responsibility, including but not limited to competency, capability, capacity, credit, integrity, perseverance, and tenacity, notify SBA of such determination. Award is withheld * * * in order to permit SBA to investigate the elements referred and certify as to the bidder's responsibility with respect to the elements referred.

The protester emphasizes the words "elements referred" in support of its position that SBA may not consider any aspect of responsibility other than what is specifically referred by the procuring activity. SBA, on the other hand, states that the regulation was not intended to limit its COC review process and that to interpret it as the protester does would result in SBA's having to issue a COC to a firm which it believes cannot perform the contract.

We agree with SBA. We previously have recognized that "the COC procedure is not limited to a consideration of the deficiencies found by the contracting officer * * * [and] that SBA may refuse to issue a COC for a reason different from the contracting officer's determination of nonresponsibility." *ALS Electronics Corp.*, B-179033, February 22, 1974, 74-1 CPD 92. While the current language of 13 C.F.R. § 125.5 (a) was not in SBA's regulations at that time, section 125.5(a) does not purport to limit what SBA can do when a COC referral is made. Rather, the section merely recites what normally happens when a small business bidder is found not to be responsible by a contracting officer. Such a recitation does not automatically impose legal limitations such as the protester suggests, and SBA's continuing practice strongly suggests that its adoption of the current regulatory language was not intended to curtail what it could do in a COC procedure.

Moreover, to read the regulation as the protester does would subvert the COC process because it would require SBA, after it concluded that a bidder is wanting in one area encompassed by a responsibility determination, to certify the bidder as responsible simply because the procuring agency didn't also specify that area as a reason for referral. We do not believe that SBA reasonably could have intended such a result. Finally, it is a well-settled legal axiom that an agency's interpretation of its own regulation "must be accorded the greatest deference," even where the agency interpretation "is merely one of several reasonable alternatives." *Allen W. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F.2d 261, 265 (5th Cir. 1971).

In any event, we do not think the record supports Skillens' conclusion that SBA denied Skillens a COC solely because of its financial condition. It is clear from the report of the SBA investigator, the record of the SBA Review Committee meeting and, most significantly, from the May 29 notice, which states that the SBA could "find no sufficient reason for disagreeing with the decision of the procuring agency,"[1] that the SBA's decision was based, in large part, on the elements raised by the DCAS report and adopted by the procuring agency.

[1] The record shows and, in fact, the protester admits in its June 12 submission that the agency's nonresponsibility determination was "[b]ased solely upon the preaward survey conducted by the Defense Contract Administration Services * * *."

The protester bases its position that Skillens' financial condition caused SBA to reject its COC application to a great degree on the three elements specifically listed in the May 29 notice letter. It does not appear from that notice letter, however, that these three elements were intended to be a complete list of SBA's reasons for rejecting Skillens' COC application. They are referred to in the notice as "some of the specific areas of almost certain difficulties * * *." One of the elements, quality control, of course, appears to have little direct relation with finances. Skillens dismisses concern with quality control as a "nullity" because it views SBA's conclusion in this regard as clearly erroneous. This is a judgmental matter for SBA, however, and absent evidence of bad faith, we cannot take exception to the conclusion. See *Dan's Janitorial Service & Supply*, B-200360, January 22, 1981, 81-1 CPD 36. In short, we find it clear that more than financial considerations played a part in SBA's decision to deny a COC.

The protest is denied.

[B-157802, B-200768, B-200850]

American Chemical Society—Contracting With Government—Profit Prohibition

Prohibition in Federal incorporation charter regarding compensation prevents American Chemical Society (ACS) from receiving normal cost-plus-fixed-fee contract to give ACS *reasonable return* on work for Government. In view of Court of Claims decision in *American Chemical Society* v. *United States*, 438 F.2d 597 (1971), prior decisions (45 Comp. Gen. 638, B-157802, Feb. 24, 1967 and July 7, 1967) holding that ACS could not be paid mortgage interest under Federal contracts will no longer be followed.

Matter of: American Chemical Society, December 16, 1981:

The American Chemical Society (ACS) has asked us to reconsider our prior position concerning whether, under the provisions of ACS's Federal Incorporation Statute, it may receive a fee or a profit on its contracts with the Federal Government.

Our attention has been called to two contracts ACS currently has with the United States Environmental Protection Agency (EPA) and the National Library of Medicine, Department of Health and Human Services (HHS), respectively. In both instances the agency took the position that ACS's charter precluded the payment of any profit to ACS under these contracts.

A review of the background relating to this matter is helpful. On April 19, 1966, we issued decision B-157802 (45 Comp. Gen. 638) in response to a request by the then Secretary of Health, Education, and Welfare concerning a request by the ACS for an amendment to a contract with the National Institutes of Health. ACS, during negotia-

tions, had requested payment of a fee of $7,400 or, in the alternative, reimbursement for mortgage interest on a building owned by ACS in which the contract was to be performed. The $7,400 figure was the approximate cost of mortgage interest over the contract period on that portion of the building to be used for the contract work.

In advising the Secretary that we did not believe such a payment was proper, we cited the ACS's Federal incorporation statute which states:

> That the American Chemical Society shall, whenever called upon by the War or Navy Department, investigate, examine, experiment, and report upon any subject in pure or applied chemistry connected with the national defense, the *actual expense* of such investigations, examinations, experiments, and reports to be paid from appropriations which may have been made for that purpose by Congress, but *the society shall receive no compensation whatever for any services to the Government of the United States* * * *. [Italic supplied.]

We found this charter of incorporation to preclude payment of more than *actual expenses* to ACS. We pointed out that while the interest was an expense to the ACS, it was not so related to the contract work in question as to constitute part of the "actual expense" of the work. Moreover, we held that the prohibition applied to all agencies of the Government, not merely the War or Navy Departments.

Subsequently, the National Science Foundation (NSF) requested our views as to the applicability of the April 19, 1966, decision to a contract which it had with the ACS under which it was making a fee payment representing an allocated share of mortgage interest. In B–157802, February 24, 1967, we held the prior decision applied to the NSF contract. The February 24 decision was affirmed upon reconsideration on July 7, 1967. ACS refunded the fee payment under protest and commenced an action in the United States Court of Claims to recover the fee.

On February 19, 1971, the Court of Claims decided the matter in *American Chemical Society* v. *United States*, 438 F. 2d 597 (1971), and found that ACS was entitled to the funds it had refunded. The court found that the portion of the mortgage interest allocable to the contract constituted an actual expense under generally acceptable accounting principles and that the fee paid merely represented such interest and nothing for profit. The court further concluded that, while under the Federal Procurement Regulations (FPR) interest normally is not a reimbursable cost, contractors recover interest on borrowing out of the profit margin on contracts. For these reasons, the court held that the inclusion of the mortgage interest as a fixed fee was permissible.

ACS has interpreted the Court of Claims decision as allowing ACS to negotiate a fee on its contracts with the Government to permit

ASC a reasonable return or profit and requests our concurrence in this interpretation. This we cannot do.

The issue of a fee representing a reasonable return or profit to the ACS was not before the Court of Claims in the above-cited decision. In the decision, the court noted:

> * * * Their testimony is entirely consistent on the intent of the parties during the negotiation, execution and performance of this contract. That intent was that mortgage interest was recognized as an actual expense to plaintiff; that the fixed fee was negotiated to correspond to a proportionate share of that mortgage interest, and not as a profit; that both parties at all times intended that plaintiff recover the proportionate share of morgage interest allocable to this contract; and that the Society in accordance with its long-standing policy had in no way attempted, even remotely, to realize, nor had it realized, any profit from performance of this contract.

Further, the court stated:

> In this case, as the facts clearly demonstrate, the fee was specifically negotiated to represent mortgage interest expense, and nothing else. The fee is completely absorbed by mortgage interest expense, and includes nothing for profit.

We believe this shows the issue of a fee, as the term is normally used in Government contracting, was never decided by the court. Therefore, while ACS, under the Court of Claims decision may negotiate a fee which represents its actual expenses incurred, including mortgage interest, it may not negotiate an unrestricted or blanket fee which may include an element of profit. We note this view is consistent with that expressed by EPA and HHS in its comments to our Office on the matter. To the extent our earlier decisions are inconsistent with the Court of Claims decision, they will no longer be followed.

ACS also contends that its charter restrictions should only apply to defense work and not to work performed for other agencies of the Federal Government. As noted above, in our April 19, 1966, decision we found that the prohibition applied to all agencies, including nondefense agencies where the Society elects to render services for such agencies, and we find nothing advanced now by ACS which requires altering our finding. The only distinction we found between defense and nondefense services of ACS was that, under the charter, defense related services were mandatory but the Society had an election as to whether it would perform work for other agencies. We believe ACS's argument is answered by the concluding phrase of the quoted section 4, "* * * any services to the Government of the United States," which we find all inclusive regarding the profit issue.

EPA and HHS, however, have both contended that this matter is untimely as a protest under our Bid Protest Procedures because ACS had already entered into recent modifications or extensions of its basic contracts with the agencies, while it should have raised the matter prior to execution of the contracts. We do not view this matter as

a protest under our Procedures because no award of a constract is involved. We view this matter as the interpretation of ACS's charter in light of GAO and Court of Claims decisions, a recurring problem, which should be resolved.

Finally, while ACS argues that its relationship with the Government has changed since 1937 when its incorporation statute was passed by Congress, we do not find this alters the above opinion. While the Government's involvement with the ACS may have changed from a mere user of ACS's facilities to a contracting party for which designated tasks are performed, the statute remains in effect. For ACS to receive the type of fee which it requests, the statute would have to be amended by Congress to allow such an unrestricted fee.

[B-201985]

Transportation—Dependents—Immediate Family—Grandchildren—Legal Guardianship Status—State Law Requirements

Grandchildren who are not under the legal guardianship of an employee of the Department of Defense or of his spouse may not be considered that employee's dependents for the purposes of establishing entitlement to travel and transportation allowances under the Joint Travel Regulations or overseas allowances under the Department of State Standardized Regulations even though those grandchildren reside with the employee at his overseas station. Status of legal guardianship is determined by applicable state law.

Matter of: Kern K. Neiswander, December 16, 1981:

The question in this case is whether grandchildren living with a Federal civilian employee stationed overseas may be recognized as the employee's "dependents" for the purpose of establishing entitlement to travel and transportation allowances for them under Volume 2 of the Department of Defense Joint Travel Regulations (2 JTR) and for the purpose of establishing the employee's entitlement to overseas allowances under the Department of State Standardized Regulations. Since we find that the grandchildren are not under the legal guardianship of the employee or his spouse, they cannot be considered dependents under the JTR or Standardized Regulations. Therefore, the employee is not entitled to travel and transportation allowances for them under the JTR nor could they be the basis for certain of the overseas allowances paid the employee under the Standardized Regulations.

The Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) presented the question which was assigned Control No. 81-3 by the Per Diem, Travel and Transportation Allowance Committee, Department of Defense.

Background

A severe automobile accident incapacitated the grandchildren's mother in 1978. As a result she made arrangements for the children to travel from Colorado, where she and her children resided, to Europe in June 1979 to live with their grandparents, the Army employee, Mr. Kern K. Neiswander, and his wife. The grandchildren's mother executed a document in June 1979 in which she stated she was relinquishing all custody and parental control to the Neiswanders. However, when the Neiswanders applied with this document to the Civilian Personnel Office in Mannheim, Germany, to have the grandchildren listed as their dependents so the grandchildren would be eligible for enrollment in the military school system on a tuition-free basis, they were told by the Civilian Personnel Office that they needed a court order establishing their guardianship. Upon being advised by the Neiswanders to obtain a court order, the grandchildren's mother executed a Special Power of Attorney under the Colorado Revised Statutes (C.R.S.), 1973, § 15–14–104, on July 31, 1979, which delegated most of her parental powers to the Neiswanders until May 31, 1980, or at the revocation of the mother. She sent this Special Power of Attorney to the Neiswanders with an accompanying statement from a Colorado attorney explaining the lack of a court order in these words: "There is no known procedure in the Colorado law to obtain a court order appointing the above grandparents temporary guardians of the above minor children except to proceed on the basis that they are dependent and neglected children."

The Neiswanders did not wish to pursue custody of their grandchildren on the basis that they were dependent and neglected children. They contended that the Special Power of Attorney, which could have been extended as necessary, was all that was required to establish their legal guardianship over the grandchildren in order to qualify them as their "children" for JTR and Standardized Regulations purposes. The Mannheim Civilian Personnel Office disagreed, but referred the question to higher headquarters for resolution, and the question was subsequently referred here.

Discussion and Conclusion

The applicable statute, 5 U.S.C. 5724 (1976), provides that under regulations prescribed by the President, an employee and his "immediate family" shall have their travel and transportation expenses paid by the Government when the employee is transferred. The President delegated the issuance of these regulations to the General Services Administration, and these regulations are further defined for Department

of Army employees in the JTR. There is nothing in the legislative history of 5 U.S.C. 5724 to indicate whether dependent grandchildren were meant to be included within the term "immediate family," but the JTR, following a revision in the Federal Travel Regulations by the General Services Administration now includes within the term "immediate family": "The term children shall include natural offspring; stepchildren; adopted children; and grandchildren, legal minor wards, or other dependent children who are under legal guardianship of the employee or employee's spouse." 2 JTR, Appendix D.

Pursuant to 5 U.S.C. 5921 *et seq.* (1976), certain overseas allowances and differentials are provided to an employee stationed overseas for "his family" or "dependents" under regulations prescribed by the President. The President delegated the issuance of the regulations to the Department of State which included them in the Standardized Regulations. There is nothing in the legislative history of the statutes to indicate whether grandchildren were meant to be included within the terms "his family" or "dependents," but the Standardized Regulations, after initially excluding grandchildren, now include within those terms "* * * those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age * * *." Standardized Regulations, sec. 040.

Thus, both the JTR and the Standardized Regulations now allow dependent grandchildren under the "legal guardianship" of an employee or his spouse to be considered family for purposes of establishing entitlement to the provided benefits. In this case the determination of whether legal guardianship has been established is to be made under Colorado law. Therefore, the question to be resolved is whether the Special Power of Attorney executed by the grandchildren's mother under C.R.S. 1973, § 15–14–104, creates legal guardianship.

The Colorado statute authorizes a parent to delegate most, but not all, of his parental powers for a period not exceeding 9 months. Although the grandchildren's mother properly delegated parental powers to the Neiswanders, under that provision, we do not find that the delegation amounted to a creation of legal guardianship under Colorado law.

Legal guardianship of a child in Colorado means the authority to make major decisions affecting a child, including authority to consent to marriage or adoption. This authority can only be vested by court action or by testamentary appointment upon death of a parent. C.R.S. 1973, §§ 15–14–201 and 19–1–103(16). The Colorado law which authorized the Special Power of Attorney involved in this case specifically prohibits a parent from delegating the power to consent to the

child's marriage or adoption and limits the period for which parental authority may be delegated. Therefore, the Neiswanders are not the legal guardians of the grandchildren for payment of travel and overseas allowances under the JTR and the Standardized Regulations.

Although the grandchildren may not be considered the Neiswander's immediate family under the JTR or the Standardized Regulations, they may qualify as dependents or family under other regulations and thus permit certain benefits to accrue. For example, it appears that they would qualify under Department of Defense Instruction 1342.10 dated May 4, 1970, defining eligibility criteria for tuition-free education of minor dependents in overseas areas.

[B-198717]

Compensation—Overtime—Fair Labor Standards Act—Retroactive Benefits—Exemption Status—Erroneous Agency Determination

Department of Energy (DOE) questions retroactive entitlement of Power Systems Dispatchers to overtime under Fair Labor Standards Act (FLSA). Employees were considered exempt by prior agency (Interior) but determined to be nonexempt by DOE in 1979. Retroactive payments based on DOE's determination of nonexempt status may be made to the extent Office of Personnel Management (OPM) determines duties of dispatchers were nonexempt throughout retroactive period. *Meat Graders*, B-163450.12, Sept. 20, 1978, modified.

Compensation—Overtime—Fair Labor Standards Act—Statute of Limitations—Retroactive Payments

Prior decision in *Meat Graders*, B-163450.12, Sept. 20, 1978, is modified to remove bar to retroactive payments of FLSA overtime where employee was erroneously classified as exempt by employing agency and should properly have been nonexempt under published OPM guidance. However, where employing agency raises issue that there was a possible change in employees' duties over 5-year period, OPM should determine status of employees for all of the retroactive period in question and employees are entitled to retroactive pay only for such period they are properly in nonexempt status. Claims for retroactive payment are subject to 6-year statute of limitations. See 31 U.S.C. 71a and 237.

Matter of: Department of Energy Power Systems Dispatchers—Entitlement to FLSA Overtime, December 21, 1981:

This decision is in response to a request from Mr. Don W. Shinkle, Assistant Administrator for Management Services, Western Area Power Administration, Department of Energy (DOE). The issue in this decision is whether or not certain Power Systems Dispatchers employed by the Department of Energy are entitled to retroactive payment of overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). We hold that a change in the classification of employees from exempt to nonexempt under the FLSA is not limited to prospective application but may be retroactively effective under certain circumstances.

BACKGROUND

In 1977 the power marketing functions under the Department of the Interior were transferred to DOE. Power Systems Dispatchers were considered by Interior to be exempt from coverage under the FLSA, and the report from DOE states that DOE did not question this determination. However, after an employee filed a complaint in 1978 concerning his exempt status and after DOE reviewed a determination by the Office of Personnel Management (OPM), San Francisco Region, holding that Hydro-Electric System Controllers employed by Interior were nonexempt under the FLSA, DOE determined that Power Systems Dispatchers were nonexempt under the FLSA. Prospective FLSA overtime payments were begun on October 9, 1979, but no retroactive payments have been made in view of our decision in *Department of Agriculture Meat Graders*, B–163450.12, September 20, 1978.

In the *Meat Graders* decision we considered the situation of agricultural commodity graders, GS–1980, who were specifically identified in Federal Personnel Manual (FPM) Letter 551–1, May 15, 1974, as being in "administrative occupations" and therefore exempt under the FLSA. Further exemption guidelines were issued in FPM Letter 551–7, July 1, 1975, and, on July 6, 1976, the Civil Service Commission (CSC) (now Office of Personnel Management) ruled that meat graders were nonexempt or covered by the FLSA. In response to a request from Agriculture concerning the retroactive effect of the nonexempt determination, we held that the meat graders were not entitled to retroactive payments since the initial determination on coverage was not clearly wrong or based on erroneous information and since the employing agency was not on notice of possible FLSA overtime entitlement prior to July 6, 1976. *Meat Graders*, *supra*.

In the present case, DOE argues that our *Meat Graders* decision is controlling. The agency points out that the Power Systems Dispatchers position had been "repeatedly" analyzed by Interior and determined to be exempt from the FLSA based on the guidelines of FPM Letter 551–7. DOE further argues that the duties and responsibilities of the dispatcher position may have changed during the lapse of time between Interior's determination of exempt status and DOE's determination of nonexempt status.

We note that claims have been filed by DOE Power Systems Dispatchers with both the San Francisco and Rocky Mountain Regional Offices of OPM, but both OPM offices have stayed any decision on these complaints pending our review of DOE's request on retroactive entitlement under the FLSA. It appears that no decision has been reached by OPM as to when these positions should have been considered non-

exempt, and the only guidance we have before us is OPM's determination on the entitlement of Hydro-Electric System Controllers, GS–301–10, employed by the Department of the Interior, Central Valley Project. In that determination dated May 3, 1979, OPM held that those positions (Hydro-Electric System Controllers, GS–301) did not meet the administrative exemption and were therefore nonexempt under the FLSA with retroactive entitlement to May 1, 1974.

In view of the authority of the Office of Personnel Management under 29 U.S.C. § 204(f) (1976), to administer the FLSA with respect to Federal employees, we requested OPM's views on this matter. The report from OPM focuses on our *Meat Graders* decision and argues that since FPM Letter 551–7 explicitly cancelled and superseded FPM Letter 551–1, an agency could not in good faith assert reliance upon instructions and guidance contained in FPM Letter 551–1. Further, OPM argues the present case may be distinguished from our *Meat Graders* case since DOE has determined that the dispatchers' exempt classification was incorrect and retroactive entitlement to FLSA overtime would not conflict with a previous determination by OPM.

DISCUSSION

On prior occasions we have been asked by OPM to reconsider our *Meat Graders* decision but we declined since the claimants in that case took the issue before the Court of Claims. See *Adams* v. *United States*, Ct. Cl. Civil Action No. 204–79C. We have been informed, however, that the Department of Justice is presently settling the *Adams* case. Since we think our position in the *Meat Graders* decision is partially in error and since our new position does not conflict with Justice's posture in *Adams* and will assist the settlement of many other outstanding FLSA complaints, it is appropriate that we now modify the rule in the *Meat Graders* decision. Of course, our modification of the rule stated in the *Meat Graders* decision has no impact on the meat graders claims, the disposition of which will be left to the court.

As noted above, we held in our *Meat Graders* decision that where the meat graders were specifically exempted from FLSA coverage by FPM Letter No. 551–1 but were held non-exempt by a subsequent CSC determination, there was no retroactive entitlement to FLSA overtime prior to the CSC determination. Upon reconsideration we now believe that FPM Letter 551–7 contained sufficient notice to the Department of Agriculture that their meat graders were improperly classified as exempt from FLSA and that Agriculture should have redesignated their meat graders as nonexempt effective July 1, 1975.

The exemption guidance in FPM Letter 551–1 was explicitly described as interim. The subsequent instructions in FPM Letter 551–7 expressly cancelled and superseded the interim exemption instructions

in FPM Letter 551–1 and provided revised instructions for applying the exemption provisions of the FLSA. Therefore, the specific exemption of various job classifications in FPM Letter 551–1 was cancelled by FPM Letter 551–7 and agencies were placed on notice by FPM Letter 551–7 that they should apply the exemption criteria as stated in FPM Letter 551–7 in determining anew whether or not their employees were exempt.

The Department of Agriculture, however, relied on paragraph 3b of FPM Letter 551–7 which stated that: "The other exemption criteria are essentially the same as those reflected in FPM Letter 551–1 * * *" to justify its continued exemption of meat graders. It should be noted that paragraph 3b of FPM Letter 551–7 continued as follows:

> However, [the exemption criteria] are presented in substantially greater detail and have been extended to cover problem areas that were not adequately treated in the interim instructions. Exemption determinations resulting from application of the attached instructions, except those discussed in paragraph a. above are effective as of May 1, 1974. * * *

Furthermore, paragraphs 3c and d dealt specifically with the retroactive status of employees who were found exempt or nonexempt under FPM Letter 551–1 but who, under the guidance in FPM Letter 551–7, were found to hold a different exemption status. Paragraphs 3c and d stated that the newly determined exemption status should be applied retroactively. It is evident, therefore, that the criteria for exemption determinations in FPM Letter 551–7 are not entirely the same as those in FPM Letter 551–1 and agencies were on notice to apply the new exemption criteria to their employees. Therefore, we now modify our *Meat Graders* decision and hold that if an agency improperly applied FPM Letter 551–7, corrections in erroneous exemption determinations may be made retroactive to July 1, 1975. However, we continue to maintain that if the employees were listed as exempt under FPM 551–1, there is no basis for the employees to be redesignated as nonexempt prior to the issuance of FPM Letter 551–7. We continue to believe that published CSC (now OPM) instructions under the FLSA should not retrospectively change prior published instructions to the contrary.

The above modification in the *Meat Graders* decision does not provide a definitive answer in the present case. In this case, the position of Power Systems Dispatcher, GS–301, was not listed in FPM Letter 551–1 as exempt under an administrative occupation. Accordingly, there is no prior inconsistent OPM determination barring retroactive nonexempt status for the dispatchers. However, we believe the record before us does not contain sufficient information to determine the retroactive entitlement of these DOE Power Systems Dispatchers.

The report from DOE questions whether the duties of these employees have changed between 1974 and 1979. We are not aware that

either DOE or OPM has decided that the FLSA coverage should be retroactive to May 1, 1974. In fact, the only guidance we have in the record before us is a copy of OPM's decision dated May 3, 1979, holding that Hydroelectric System Controllers, GS–301, employed by Interior are entitled to FLSA overtime retroactive to May 1, 1974. While the job series (GS–301) is the same for both positions (Power Systems dispatchers were changed in 1980 from GS–301 to GS–303 series), that cannot be relied upon as the sole determinant of exemption status. See FPM Letter 551–7, Attachment, para. C.2.d.

The question of the retroactive effect of nonexempt status under the FLSA for Power Systems Dispatchers depends on whether or not the dispatchers duties have changed significantly since they were found nonexempt by OPM. This question should be remanded to OPM for its determination in light of our holding of today modifying our *Meat Graders* decision. Retroactive effect of the dispatchers' nonexempt status may be extended back to the point where OPM determines the dispatchers were properly exempted. If OPM determines the dispatchers were never properly exempted, then they should be declared nonexempt retroactive to May 1, 1974.

We must also point out, however, that any claims for retroactive payments of FLSA overtime are subject to the 6-year statute of limitations contained in 31 U.S.C. §§ 71a and 237 unless the claims have been previously filed in our Office. *Paul Spurr*, 60 Comp. Gen. 354 (1981); and *Transportation Systems Center*, 57 Comp. Gen. 441 (1978).

[B–198761]

Officers and Employees—Transfers—Government *v.* Employee Interest Merit Promotion Transfers—Relocation Expense Reimbursement—Absence of Agency Regulations

Eugene R. Platt, 59 Comp. Gen. 699 (1980), held that when an agency issues a vacancy announcement under its Merit Promotion Program such action is a recruitment action and when an employee transfers pursuant to such action the transfer should normally be regarded as being in the interest of the Government in the absence of agency regulations to the contrary. The Commission on Civil Rights requested a review of this decision. On reconsideration, we affirm *Eugene R. Platt*. The Commission did not have regulations on this subject and the job vacancy announcement was unrestricted as to reimbursement, contained no limitations on geographic area of consideration, and did not differentiate between Commission employees and others as to entitlements.

Officers and Employees—Transfers—Government *v.* Employee Interest—Merit Promotion Transfers—Relocation Expense Reimbursement—Issuance of Agency Regulations

Eugene R. Platt, 59 Comp. Gen. 699 (1980) was silent on the question of how agencies may effectuate a policy as to when to authorize reimbursement of relocation expenses pursuant to merit promotion transfers. However, our decision

does not preclude the General Services Administration, the Office of Personnel Management, or the employing agency from issuing regulations on relocation expenses and merit promotions stating conditions and factors to be considered in determining whether a transfer is in the interest of the Government. Payment of relocation expenses need not automatically be tied to the existence of a vacancy announcement issued pursuant to a Merit Promotion Program.

Matter of: Eugene R. Platt—Reconsideration—Relocation Expenses—Merit Promotion Transfer, December 23, 1981:

This decision involves a reconsideration of *Eugene R. Platt*, B–198761, September 2, 1980, (59 Comp. Gen. 699). There, the United States Commission on Civil Rights had posted a vacancy announcement for an editor-writer pursuant to its merit promotion plan. Mr. Eugene R. Platt, then an employee of the Department of the Interior in New Orleans, Louisiana, applied for the position, and was later selected. The agency's offer of employment to Mr. Platt specified that he would not be reimbursed for relocation costs. Mr. Platt accepted with no qualifications or conditions. He reported for duty in Washington, D.C., having traveled from New Orleans at his own expense and without travel orders. He subsequently filed a claim of relocation expenses.

In essence, we held that, when an agency issues an announcement of an opening under a merit promotion program, such action is a recruitment action. When an employee transfers pursuant to such a recruitment action the agency will normally regard such transfer as being in the interest of the Government. We found that the fact that an employee seeks the position as a result of a vacancy announcement is not in itself a proper basis to conclude that the transfer is primarily for the convenience of the employee. The decision also reaffirmed our previous position that budget constraints alone do not justify the denial of relocation expenses on transfers in the interest of the Government. We concluded by requesting the Commission on Civil Rights to make a new determination in the case, taking cognizance of our view that, in the absence of some other basis than theretofore advanced by the Commission, the appropriate determination under the facts of the case should be that the transfer was in the interest of the Government.

REQUEST FOR RECONSIDERATION

The United States Commission on Civil Rights has requested us to reconsider our decision. The Commission bases its request for reconsideration on several grounds. It questions whether it is realistic, in view of current personnel practices, to define every merit promotion announcement as a "recruitment" for the purposes of reimbursement of a relocation expenses. The Commission notes that merit promotion

is the most common method of announcing job vacancies and that in fact all positions within its employee union bargaining unit are subject to its Merit Promotion Program. Further, the Commission says its announcements are disseminated by commercial services resulting in announcements reaching thousands of persons, and often result in hundreds of applications. The Commission maintains that it would be unrealistic to conclude that the initiating agency should be held to have recruited all these resulting applicants.

The Commission points out that contractual agreements between agencies and unions may contain provisions, similar to its own, that require all filling of vacancies within the bargaining unit to be processed under the agency's merit promotion procedures.

The Commission urges that *Platt* be modified to allow the Government to consider all of the relevant factors involved in employee selection, including budget constraints, labor market conditions, and grade and skill level of the applicants in determining whether the selection of an individual is, in fact, in the best interest of the Government for purpose of paying relocation costs.

The Commission recognizes that in our decision *David C. Goodyear*, 56 Comp. Gen. 709 (1977), we held that budget constraints cannot form the basis for denying expenses if a transfer has been found to be in the Government's interest. However, it suggests that the implementation of that decision may have unsound results because the budgetary implications are clearly more adverse for small agencies than for the Department of the Navy, the agency involved in the *Goodyear* case.

In conclusion, the Commission predicts that the combined impact of *Platt* and *Goodyear* will be to force agencies to consider nonmerit related factors before issuing vacancy announcements which will result in a larger proportion of geographically restricted vacancy announcements. Such limitations will result in a smaller labor pool, which will reduce the agencies' access to a broader range of qualified candidates. Alternatively, the Commission believes that agencies will have to consider the geographical location of all applicants as a factor in the selection process, even though the Commission feels that would be contrary to merit principles and the Civil Service Reform Act of 1978.

We have solicited the views of both the Office of Personnel Management and the General Services Administration in response to the Commission's request for reconsideration and have carefully considered their comments.

VIEWS OF OFFICE OF PERSONNEL MANAGEMENT

The Office of Personnel Management (OPM) provided our Office with a memorandum which states that "[t]he main problem with the

Platt decision is that it ties payment of relocation expenses to the existence of a merit promotion vacancy announcement and thus takes away all of an agency's discretion in such cases." The OPM reports that it has reviewed agency reaction to the *Platt* decision and found that of the agencies that have problems with the decision for what OPM considers sound reasons, those "reasons were directed at the fact that because of union agreements and other reasons, selections are increasingly being made under merit promotion procedures even when the move is in reality at the request and for the convenience of the employee." In light of these concerns, OPM indicates that it would prefer an amended decision that would leave an agency some discretion in determining whether a merit promotion transfer is primarily in the interest of the Government based on the totality of factors in each case.

The OPM states that there may be employment situations in which it would not be in the interest of the Government to pay relocation expenses even though the selection was made pursuant to merit promotion procedures. For example, if the local labor market could produce sufficient qualified candidates, yet someone from another geographic location wants the job and is willing to pay relocation expenses, the option to hire that candidate without incurring an obligation to reimburse relocation expenses should be available. Similarly, if an employee is primarily motivated to transfer in order to accompany a spouse across country, payment of relocation expenses might not necessarily be in the interest of the Government. The OPM also states that for some lower grade levels, it is not cost effective to pay for relocation.

However, OPM believes that any agency decision not to authorize reimbursement of relocation expenses should be clearly communicated in advance and in writing to all applicants, preferably by a statement on the vacancy announcement. In this way, employees who apply for a vacancy would understand that relocation expenses will not be paid.

The OPM concluded by expressing its belief that there is a valid distinction to be made between an agency's obligation to its own employees and those transferring from another agency. Since an agency has broad authority to direct the reassignment of its employees, OPM points out that the obligation to pay relocation costs is commensurately greater than for employees from another agency, over whom the agency exercises no authority or control.

VIEWS OF GENERAL SERVICES ADMINISTRATION

The Director of the Federal Travel Management Division, General Services Administration (GSA), expresses the view that merit pro-

motion policies and practices should not be the controlling factor in determining whether a transfer is in the interest of the Government, nor should budget constraints be a controlling factor. The Director also expresses concern "with the ability of an employee to accept a transfer on the basis that no relocation allowances will be paid and then after the fact, claim and receive reimbursement."

Notwithstanding the above reservations, the Director does not object to our reconfirming the decision of September 2, 1980, in view of the present travel regulation provisions and our decisions interpreting these provisions. He is less concerned with the particular case than with the long-term impact of the decision. He recognizes that the current Federal Travel Regulations do not provide agencies with guidelines as to what factors should be considered in determining whether a transfer is in the interest of the Government. The Director, after noting both the widespread interest in this matter and the increasing restrictions on travel funds, states that GSA will evaluate whether there is authority under the present statutory provisions to revise the Federal Travel Regulations to provide guidelines giving agencies discretion to recruit under merit promotion systems without the present requirement to pay relocation allowances.

DISCUSSION

We shall first discuss Mr. Platt's entitlement to relocation expenses and then discuss the general concerns expressed by the Commission, OPM, and GSA.

Mr. Platt's Entitlement to Relocation Expenses

We have been advised that the Commission on Civil Rights does not have any agency regulations on the subject of relocation expenses and merit promotion transfers, nor are we aware of any Commission policy that would require it to treat merit promotion transfers as having been accomplished for the convenience of the employee. We have examined the Commission's job vacancy announcement number 79-65, dated September 11, 1979, to which Mr. Platt responded. We find that the announcement contained no restrictions on the reimbursement of relocation expenses and no limitation on the geographic area of consideration. In fact, the announcement expressly stated that the area of consideration was to be both within and outside the agency. The announcement in question did not make any statement regarding differences in entitlement between the Commission's employees and other applicants. Additionally, the record shows that the Commission's decision not to reimburse Mr. Platt was made after the closing date of the vacancy announcement as a result of an

Office of Management and Budget direction to agencies to cut back travel expenditures.

The record reveals that the first notice given to Mr. Platt of the Commission's intention not to reimburse came after the agency had selected him for the position. Even though Mr. Platt accepted the job offer with knowledge of the Commission's decision not to make relocation allowances available, he is not barred from claiming relocation expenses which he is otherwise legally entitled to receive. See *James F. Hansard*, B–201732, June 30, 1981. We do not believe that the Commission's decision, made after the closing date of the vacancy announcement and without the employee's knowledge until after his selection, is a proper means of reducing travel costs. The Commission has not shown any proper basis to deny relocation expenses to Mr. Platt.

In the absence of guidance in the Federal Travel Regulations or in OPM regulations or the Federal Personnel Manual, and in the absence of agency regulations on the subject, we find that Mr. Platt's transfer was in the interest of the Government and he is entitled to the relocation expenses allowable under the Federal Travel Regulations.

General Considerations

In light of the general concerns expressed by the Commission, OPM, and GSA, we have reexamined the matter, and recognize that some misunderstanding exists with regard to our prior *Platt* decision. While we addressed the matter of merit promotion transfers in the absence of agency regulations in *Platt*, we did not deal with the question of how agencies may effectuate a policy of not authorizing reimbursement of relocation expenses pursuant to a merit promotion announcement when the totality of circumstances leads the agency to determine that any resulting transfer is not primarily in the interest of the Government.

Reimbursement of travel and relocation expenses upon an employee's change of station under 5 U.S.C. §§ 5724 and 5724a (1976) is conditioned upon a determination by the head of the agency concerned or his designee that the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee or at his request. In this connection, para. 2–1.3, Federal Travel Regulations (FPMR 101–7) (May 1973), also provides that when a change of official station for permanent duty is authorized by the head of the agency concerned or his designee, transportation expenses and applicable allowances are payable provided that the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee or at his request.

We have allowed relocation expenses on merit promotion transfers

where an agency's own regulations provided that such transfers are in the Government's interest. *Stephen P. Szarka*, B–188048, November 30, 1977. Further, in *Donald P. Fontanella*, B–184251, July 30, 1975, we stated that if the agency recruits or requests an employee to transfer to a different location it will normally regard such transfer as being in the interest of the Government. Absent an agency policy to the contrary, our view, as stated in *Platt*, is that when an agency issues an announcement of an opening under its Merit Promotion Program such action is a recruitment action within the scope of *Fontanella*.

We are not, however, aware of any statute or regulation which would prohibit the General Services Administration, Office of Personnel Management, or the employing agency from issuing regulations concerning relocation expenses and merit promotions which would provide guidelines as to the conditions and factors to be considered in determining whether a particular transfer pursuant to a vacancy announcement would be in the interest of the Government for purposes of the reimbursement of relocation expenses.

Any regulation should state the specific conditions and factors which would be considered in making the determination in any particular case. These might include, but are not limited to, labor market conditions and cost effectiveness. Additionally, any regulations issued in accordance with the guidance given above should require that such information be clearly communicated in advance and in writing to all applicants, preferably by a statement on the vacancy announcement. If this is done, each person who applies will do so with an understanding of the conditions under which relocation expenses will or will not be paid, and acceptance of an offer would be tantamount to accepting a condition of employment which the person could not successfully contest unless it was shown to be arbitrary or capricious, or contrary to the decisions of this Office.

[B–201052]

Fees—License, Permit, etc. Fees—Incidental to Training Programs—Appropriation Availability—Instructor Training—Department of Defense

Prohibition of 5 U.S.C. 5946 does not apply to payments authorized by 5 U.S.C. 4109. Payment of licensing fee is necessary expense directly related to training since, without payment of the membership fee, AMETA instructors will not have access to training materials, nor will their trainees be eligible for certification as practitioners.

Matter of: Department of Defense—Payment of Training Instructors' Licensing Fees, December 23, 1981:

The General Counsel of the Department of Defense (DOD) has requested an advance decision on whether the Army Management

Engineering Training Agency (AMETA) may pay the licensing fees for its Methods Time Measurement (MTM) instructors. For the following reasons, we hold that the payment of licensing expenses is permissible.

According to the submission, MTM is a non-profit corporation which conducts research in human motions and biomechanics, and trains and certifies practitioners and instructors in the use of the techniques which it has developed. MTM classifies its clients as members of the MTM Association, and collects a membership fee from each. Companies which are members of the MTM Association ordinarily have one or more employees who are trained in MTM techniques and licensed by that organization as instructors. Instructors who are certified by MTM are eligible for instructor memberships which allow the various companies to receive training materials for the purpose of conducting in-house MTM training for all levels of personnel. Absent payment of the instructor licensing fee, clients cannot obtain the necessary instructional materials. (The submission indicates that the control of these materials by MTM "stems in part from copyrights and other legally protected interests * * *.") In addition, MTM refuses to certify individuals not trained by licensed instructors. Without such certification, trainees are not eligible to receive updated materials on the most efficient use of MTM techniques.

The General Counsel asks whether the prohibition in 5 U.S.C. § 5946 against paying membership fees in a society or organization for individual Government employees applies to the instructor licensing fees. This section provides:

> Except as authorized by a specific appropriation, by express terms in a general appropriation, or by sections 4109 and 4110 of this title, appropriated funds may not be used for payment of—
> (1) membership fees or dues of an employee * * * in a society or association * * *.

However, by its terms, the prohibition of 5 U.S.C. § 5946 does not apply to payments authorized by 5 U.S.C. § 4109 (1976). Section 4109 provides:

> (a) The head of an agency, under the regulations prescribed under section 4118(a)(8) of this title and from appropriations or other funds available to the agency, may—
>
> * * * * * * *
>
> (2) pay, or reimburse the employee for, all or part of the necessary expenses of the training, without regard to section 529 of title 31, including among the expenses the necessary costs of—
>
> * * * * * * *
>
> (C) tuition and matriculation fees;
>
> * * * * * * *
>
> (b) The expenses of training do not include membership fees except to the extent that the fee is a necessary cost directly related to the training itself. * * *

The submission states:

> * * * Because instructors must first be trained and certified by the MTM Association before they can train others, the licensing fee is directly related to the training of instructors and hence, to the personnel of DOD.

We agree with this rationale and thus conclude that the payment of the fee is "a necessary cost directly related to the training itself" within the contemplation of 5 U.S.C. § 4109(b), *supra*.

We further note that this is not, in our view, a situation in which the employee could reasonably be expected to have obtained the necessary licensing as a prerequisite to applying for the job. On this ground, we distinguish our previous decisions (e.g. 6 Comp. Gen. 432 (1926); B–171667, March 2, 1971) in which the payment of licensing fees has been denied on the theory that the fees involved were "personal to the employee as an incident to qualifying for the position for which engaged * * *." 6 Comp. Gen. 432 (1926). Furthermore, the individual MTM instructor does not derive any benefit in terms of increased personal employment marketability for payment of the MTM Association membership fee, since, according to the submission, AMETA is seeking to have its employees licensed as "Class A" instructors who will be restricted to training DOD employees. Thus the instructors will not be able to use their membership in the MTM Association for other than DOD purposes.

For the foregoing reasons, we hold that payment of MTM Association instructor membership fees with AMETA funds is permissible.

[B–205187]

Transportation—Household Effects—Time Limitation—Beginning and End of Period—Administrative Intent

A transferred employee, whose claim for shipment of household goods was denied by the agency in accordance with para. 2–1.5a(2) of the Federal Travel Regulations because the shipment took place more than 2 years after the effective date of the transfer, may not be reimbursed. The employee reported to his new duty station before travel authorization was signed but later date may not be used for computation of 2-year period for regulations define effective date of transfer as date employee reports to new duty station (see FTR para. 2–1.4) and agency's clear intent was to transfer employee on the earlier date.

Matter of: James E. Wallace—Reimbursement for Shipment of Household Goods, December 23, 1981:

This decision is in response to a request for an advance decision from Mr. Marvin E. DeMoss, Assistant Director for Administration, Department of Energy, Region VI. Mr. DeMoss has asked whether a reclaim voucher submitted by Mr. James E. Wallace for reimbursement of the cost of shipping his household goods may be certified for payment. Mr. DeMoss reports that Mr. Wallace's claim for $300.74 was

previously disallowed because the shipment of the household goods did not take place within 2 years from the date he reported to his new duty station as required by paragraph 2–1.5a(2) of the Federal Travel Regulations (FPMR 101–7, May 1973). Mr. Wallace makes several arguments that his shipment should be considered to have occurred within the 2-year period. However, for the reasons explained below, we find that Mr. Wallace's claim must be denied.

Mr. Wallace's claim arose as the result of his transfer from Little Rock, Arkansas, to Eldorado, Arkansas. The travel authorization was dated July 10, 1978, but Mr. Wallace actually reported for duty on June 18, 1978. He did so apparently as the result of a letter dated June 9, 1978, from the Director of the Southwest District, Office of Special Counsel, which confirmed an earlier telephone conversation establishing that his appointment would be effective June 18, 1978. The file shows that Mr. Wallace's household goods were shipped on July 24, 1980. He states that this shipment should be considered to have occurred within 2 years after his transfer because another form entitled "Trip Authorization" was signed on July 24, 1978, and he assumes the travel authorization, although dated July 10, 1978, was also signed on July 24, 1978. He encloses a copy of a guide to Government regulations concerning moving expenses which provides that an authorization for moving expenses should be signed before an employee incurs moving expenses. He argues that in light of this instruction, his transfer date should be considered to be the date of the authorizing official's signature, that is, July 24, 1978. Mr. Wallace also points out that he was at his new duty station for only one day before traveling to New Orleans on a temporary duty assignment which lasted until about the middle of July. Finally, in arguing for reimbursement, Mr. Wallace states that he requested an extension of the 2-year period to August 31, 1980, which he says the agency approved on June 20, 1980.

Paragraph 2–1.5a(2) of the FTR prescribes the time limitation for the shipment of household goods as follows:

> All travel, including that for the immediate family, and transportation, including that for household goods allowed under these regulations, shall be accomplished as soon as possible. The maximum time for beginning allowable travel and transportation shall not exceed 2 years from the effective date of the employee's transfer or appointment. . . .

The effective date of an employee's transfer or appointment is defined by paragraph 2–1.4j as "The date on which an employee or new appointee reports for duty at his new or first official station." In accordance with this definition, the effective date of Mr. Wallace's transfer is June 18, 1978, and, therefore, the time period for shipment of his household goods expired before July 24, 1980, the date Mr. Wallace shipped his household goods.

Although an employee ordinarily should not incur expenses for

relocation until after he has received transfer orders, we have allowed reimbursement to an employee notified of a transfer by less formal means if the expenses were incurred after a clear expression of administrative intent to transfer him. *Joan E. Marci*, B–188301, August 16, 1977, and *Samuel V. Britt*, B–186763, October 6, 1976, and March 28, 1977. It seems clear that the administrative intent here was to transfer Mr. Wallace effective June 18, 1978. He received a letter and apparently a phone call directing him to report on that date. In addition, the travel authorization, under the heading "Remarks," provides that Mr. Wallace was officially assigned to his new duty station as of June 18, 1978. The "Trip Authorization" provides that his departure date was June 18. Thus, although Mr. Wallace's transfer papers were issued after he reported to his new duty station, that fact does not change the effective date of his transfer in light of the agency's clear intent to transfer him as of June 18, 1978.

We have consistently held that the time limitation established by FTR paragraph 2–1.5a(2) may not be waived or modified by either our Office or by an agency. *Edward B. Connors*, B–190202, August 14, 1978; *Peter E. Donnelly*, B–188292, July 8, 1977. Although Mr. Wallace states his request for an extension of the time limitation was approved, such approval would not be effective in view of the above holdings of this Office. See B–179908, June 24, 1976. We need not address Mr. Wallace's argument that the period of temporary duty should affect the running of the 2-year period since, even with the additional time, the shipment of household goods would not have begun within the prescribed 2-year period.

Although it appears that Mr. Wallace's household goods were picked up and delivered on the same day, July 24, 1980, we would like to point out that in connection with computing the 2-year period, the beginning of the transportation of household goods is the time when the mover receives the goods with an order to forward them to a particular destination. *Peter E. Donnelly*, *supra*, and *Virgil G. Trice*, B–181360, January 22, 1975. Thus, if Mr. Wallace delivered his goods to the movers on or before June 18, 1980, his claim would properly be for consideration. However, on the basis of the facts presented we must hold that his reclaim voucher may not be certified for payment.

[B–201384]

Contracts—Payments—Past Due Accounts—Payment Date Determination—Payment by Mailed Check—Absence of Statute or Contract Provision

The date of issuance of a Government check does not constitute the date of payment for late payment and prompt payment discount purposes. We confirm that B–107826, July 29, 1954, overruled 31 Comp. Gen. 260 and 18 *id.* 155. Government

has an obligation to at least issue and mail its checks sufficiently in advance to assure their receipt by the vendor, in the regular course of the mails, on or before the delinquency date or the final discount date, respectively, to avoid liability for properly authorized late payment charges or to obtain the benefit of the vendor's discount, unless a Federal statute or the parties by contract provide otherwise. The parties should establish in the contract what constitutes the effective date of payment.

Contracts—Payments—Past Due Accounts—Payment Date Determination—Rule in *Foster* Case—Applicabiliy to Late Payment Cases

For purposes of determining the effective date of payment, late payment cases should be treated the same as prompt payment discount cases since the former is assessed and the latter offered because of the time value of the money to vendors. B-107826, July 29, 1954, is extended.

Contracts—Payments—Past Due Accounts—Late Charges—Government Liability—Contract Provisions

Veterans Administration (VA) is obliged to pay the Gas Service Company late payment charges on the invoices submitted since (1) the contract between VA and Gas Service incorporates by reference Gas Service's rules and regulations on file with the Kansas Corporation Commission; (2) these regulations provide for the assessment of late payment charges when payment is not received by the company by the delinquency date; and (3) although the Government's checks were issued and mailed before the delinquency dates, they were not received by Gas Service until after such dates.

Matter of: Effective date of payment in determining liability of U.S. Government for late payment charges, December 29, 1981:

The Veterans Administration (VA) asks whether the Gas Service Company, Topeka, Kansas, is entitled to aggregate late payment charges of $598.12 on bills paid by Government checks, which were issued and mailed before, but not received by Gas Service until after, the delinquency date for payment. Several other vouchers have been submitted by the VA illustrating similar payment problems with other vendors.

For the reasons given below, we conclude that the contract between the VA and Gas Service obligates the VA to pay late payment charges to Gas Service when payment of VA gas bills is not received by the delinquency date provided in the contract. In this instance payment is allowable for late payment charges assessed in such amounts as are administratively determined to be due, in accordance with this decision.* We also conclude as a general rule that absent a Federal statute

*There is some ambiguity in the record as to the appropriate amount of the late payment charges. It appears the $598.12 aggregate figure may include late payment charges on unpaid previous late payment charges. We have no specific information in the record authorizing such charges. We note that absent statutory authorization, the Government can be bound to pay service charges for late payment only if provision for the specific charge is included in the contract or notice of the specific charge is included in the terms of a delivery receipt accepted by the Government. B-199915. September 8, 1980. *See also*, B-186494, July 22, 1976. Otherwise the charges would be construed as unauthorized interest charges against the Government. *See* 28 U.S.C. § 2516(a); *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431-32 (1951), *cert. denied* 343 U.S. 977 (1952). However, in light of the ambiguity in the record and the apparently small amount involved, we have not addressed this issue in the opinion.

of contractual expression about the effective date of payment, to avoid liability for properly authorized late payment charges the Government has an obligation to issue and mail its payment checks sufficiently in advance to assure their receipt by the vendor, in the regular course of the mails, on or before the delinquency date.

The record shows that on several occasions in 1979 Gas Service assessed late payment charges against the VA in situations where the Government check was issued before but not received by Gas Service until after the delinquency date. In reliance on our decision at 31 Comp. Gen. 260 (1952), the VA has not paid these assessments on the theory that effective payment occurs when a Government check is issued rather than when received by the vendor. On the other hand. Gas Service contends that terms of payment are governed by company rules and regulation, and orders of the Kansas Corporation Commission, which provide for late payment charges on payments not received before the delinquency date.

The issue of when payment is effected as the United States Government disburses its funds in paying its debts is a matter governed by Federal law, and absent an applicable Act of Congress it is for the Federal Courts to determine the applicable rule. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943); *United States* v. *Philadelphia National Bank*, 304 F. Supp. 955, 956 (E.D. Pa. 1969). Early Federal cases uniformly held that the date of issuance of a Government check was the date of payment. See *Lloud-Smith* v. *United States*, 71 Ct. Cl. 74, 80 (1930); *American Potash Co.* v. *United States*, 80 Ct. Cl. 160, 165 (1934); *Morgenthan* v. *Fidelity & Deposit Co. of Maryland*, 94 F.2d 632, 635 (D.C. Cir. 1937). That was the position of this Office as well. 31 Comp. Gen. 260, 261 (1952); 18 Comp. Gen. 155, 157 (1938).

However, in 1954 the Court of Claims changed this rule, at least in the context of prompt payment discounts. *The Foster Co.* v. *United States*, 128 Ct. Cl. 291 (1954). In *Foster*, the Government checks were issued, that is, written and mailed, at Washington, D.C., within the 10-day discount period but were not received by the vendor in New Orleans within that period. The court found:

> In these circumstances, a party to a private agreement containing a discount provision would not be entitled to the discount. We are not willing to make a special rule for the Government, as contractor and as litigant, which would set it apart from its citizens in this regard. If it is not practicable for it to send its payments so that, in the regular course of the mail, they will reach its creditors within ten days, it must stipulate in its contracts for a longer discount period. Id. at 293.

The court also said, however:

> * * * We do not decide whether putting the checks in the mails at such times as would, in the ordinary course of the mails, have brought them to the plaintiff

within the ten day period would have entitled the Government to the discounts.* * * *Id.*

Soon thereafter in B–107826, July 29, 1954, this Office followed *Foster* stating:

Since the Court's [Court of Claims'] decision represents a judicial precedent precisely in point on the question, the position of this Office to the effect that the date of issuance and mailing of the Government's check constitutes the date of payment for discount purposes is no longer tenable. Thus, it will be necessary to make refunds of discounts in cases wherein the claimants are able to prove that the checks issued in payment of their invoices were not mailed sufficiently in advance to assure their receipt by the payees, in the regular course of the mails, on or before the final discount date.

We confirm that decision overruled 31 Comp. Gen. 260 (1952), relied on by the VA, as well as 18 Comp. Gen. 155 (1938).

Although we find that the *Foster* standard is now applicable, it governs only in the absence of a contract provision setting forth the effective date of payment. In this regard, we think it preferable that the Government establish that date in contracts with its vendors. Thus, consistent with *Foster*, in B–107826, July 29, 1954, we recommended that the standard discount clause appearing on bid forms prescribed by the General Services Administration be amended by adding a sentence in substance reading: "The date of mailing of the Treasury check will be considered the date of payment."

We are not aware of a basis for distinguishing prompt payment discount from late payment cases for purposes of determining when payment occurs. A vendor's interest in the time value of money is substantially the same in both. Vendors offer prompt payment discounts to induce customers to pay cash balances due so that vendors will have earlier use of the monies. 60 Comp. Gen. 255 (1981). Similarly, vendors impose late payment charges because they are deprived of the use of monies they normally would receive by the delinquency date. Therefore, we extend the holdings in *Foster* and B–107826, July 29, 1954, which relate to prompt payment discounts, to late payment cases as well. In addition, we again emphasize that in late payment cases as well as prompt payment discount cases the question of when payment occurs is best remedied by express contractual provisions.

In the specific situation submitted for decision, we find that the contract between the VA and Gas Service, executed August 13, 1973, and still in effect by renewals, specifically provides for terms of payment in "accordance with the Company's Rules and Regulations on file with the Kansas Corporation Commission." The pertinent company rules and regulations read as follows:

All bills for gas service are due and payable upon receipt in the net amount thereof. A bill shall be deemed delinquent *if payment* thereof *is not received by the Company*, or its authorized agent, *on or before the date stated on the bill*

which date shall be * * * the fifteenth (15th* day after date of billing. When a bill becomes delinquent, a late payment charge in an amount equal to two percent (2%) of the delinquent amount owed for current gas service will be added to the customer's bill and collection efforts by the Company shall be initiated. [Italic supplied.]

In view of the specific reference in the contract, we find the VA is bound by the Company rules and regulations. They provide that payment occurs upon receipt by Gas Service of monies due rather than on issuance and mailing of the Government's check. Since provision is also made for a late charge of 2 percent to be assessed on payments not received by the delinquency date and the Government checks in the instances referred to us for decision were not received by Gas Service on or before the delinquency dates, the VA is obliged to pay the late payment charges. Accordingly, payment is allowed for late payment charges assessed in such amounts as are administratively determined to be due in accordance with this decision.

[B-203034]

Farm Credit Administration—District Retirement Plans—Examination and Audit Requirements—Employee Retirement Income Security Act of 1974—Applicability

Since Farm Credit district retirement plans must be submitted for prior approval of Farm Credit Administration, FCA employees cannot thereafter be viewed as independent for purposes of performing audits required by section 103 of the Employee Retirement Income Security Act of 1974, as amended.

Matter of: Farm Credit district retirement plans, December 29, 1981:

This decision responds to a letter from the General Counsel of the Farm Credit Administration concerning the independence of the Farm Credit Administration's (FCA) audit of Farm Credit district retirement plans. The General Counsel contends that the examination and audit of a plan by the Chief Examiner of the FCA satisfies the requirement of an independent audit imposed by section 103 of the Employee Retirement Income Security Act of 1974, (ERISA), as amended, 29 U.S.C. § 1023. We disagree. Since district retirement plans must be submitted for the prior approval of the FCA, we do not believe FCA employees can thereafter be viewed as "independent" for purposes of performing the audit.

Section 121(a) of the Accounting and Auditing Act of 1950 (1950 Act), as amended, 31 U.S.C. § 68a (Supp. III, 1979), provides in relevant part that:

(a) Notwithstanding any other provision of law or any administrative de-

*The vouchers reveal that the 17th day after date of billing was the delinquency date in at least a portion of 1979.

termination to the contrary, each Federal Government pension plan and each plan described in section 123(b) * * *, shall be deemed to be subject to the provisions of section 103 of the Employee Retirement Income Security Act of 1974 in the same manner as an employee pension benefit plan to which such section applies * * *.

Farm Credit District Retirement plans are specifically listed in section 123(b). (31 U.S.C. § 68c(b)(4).)

Section 103(a)(3)(A) of ERISA, as amended, 29 U.S.C. § 1023 (a)(3)(A), requires that:

Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, *an independent qualified public accountant*, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable to the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by *the independent qualified public accountant.* * * * [Italic supplied.]

The General Counsel argues that an examination and audit (with opinion) of a district retirement plan by the Farm Credit Administration's Chief Examiner constitutes the independent audit required by section 103 of ERISA, as amended, 29 U.S.C. § 1023. He cites as support for this position section 5.20 of the Farm Credit Act of 1971, as amended, 12 U.S.C. § 2254, which provides:

Except as provided herein, each institution of the System, and each of their agents, at such times as the Governor of the Farm Credit Administration may determine, shall be *examined and audited* by farm credit examiners under the direction of an *independent* chief Farm Credit Administration examiner, but each bank and each production credit association shall be examined and audited not less frequently than once each year. Such examinations shall include objective appraisals of the effectiveness of management and application of policies in carrying out the provisions of this Act and in servicing all eligible borrowers. If the Governor determines it to be necessary or appropriate, the required examinations and audits may be made by independent certified public accountants, certified by a regulatory authority of a State, and in accordance with generally accepted auditing standards. Upon request of the Governor or any bank of the System, farm credit examiners shall also make examinations and written reports of the condition of any organization, other than national banks, to which, or with which, any institution of the System contemplates making a loan or discounting paper of such organization. For the purposes of this Act, examiners of the Farm Credit Administration shall be subject to the same requirements, responsibilities, and penalties as are applicable to examiners under the National Bank Act, the Federal Reserve Act, the Federal Deposit Insurance Act, and other provisions of law and shall have the same powers and privilege as are vested in such examiners by law. [FCA.]

He asserts that "[a]s an 'agent' of a Farm Credit institution, a pension trust covering the employees of that institution is subject to a mandatory examination and audit by FCA which Congress contemplated would be independent."

We agree that Congress intended that the Farm Credit Administration's Chief Examiner and his subordinates would be independent of the banks and associations which they examine. 12 C.F.R. 601.130 in fact requires that Farm Credit examiners:

> * * * refrain from action or conduct which may result in, *or create the appearance of*, obligating them to or causing them to be influenced by any of the officers or employees of the institutions supervised by the Farm Credit Administration. [Italic supplied.]

However, we are concerned not merely with the independence of Farm Credit examiners vis-a-vis the institutions which they audit. We are concerned in addition with the independence of the FCA with regard to the district retirement plans. 12 C.F.R. 612.2310 provides that:

> The district boards and the bank boards shall provide retirement benefits for their employees who are not under the Civil Service Retirement Act. * * * Any such retirement plans, including thrift or savings plans, and any amendments thereto, shall be submitted for the prior approval of the Farm Credit Administration. * * *

Since this regulation contemplates that the FCA will participate in the formulation of district retirement plans, we believe that the subsequent examination of these plans by FCA personnel does not constitute an "independent" audit.

We note that GAO's "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions (1981 Revision)" (Standards), in dealing with the question of independence, sets as the second general standard for Government auditing the following:

> In all matters relating to the audit work, the audit organization and the individual auditors, whether government or public, must be free from personal or external impairments to independence, must be organizationally independent, and shall maintain an independent attitude and appearance. See Standards, p. 6.

This standard places upon auditors and audit organizations the responsibility for maintaining independence so that opinions will be impartial and will be viewed as impartial by knowledgeable third parties. Standards, p. 17–18. Among personal and organizational impairments, which in our opinion might affect auditors' ability to be impartial or be viewed by knowledgeable third parties as impartial, are:

> Previous involvement in a decisionmaking or management capacity that would affect current operations of the entity or program being audited. See Standards, p. 18.

Additionally, we note that the second general standard of the American Institute of Certified Public Accountants (AICPA) provides:

> In all matters relating to the assignment, an independence in mental attitude is to be maintained by the auditor or auditors. AU § 220.01.

The AICPA has interpreted this standard by stating, in part:

> * * * Independent auditors should not only be independent in fact; they should avoid situations that may lead outsiders to doubt their independence. * * * Public confidence * * * might * * * be impaired by the existence of circumstances which reasonable people might believe likely to influence independence. * * * [T]o be recognized as independent, he [the independent auditor] must be free from any obligation to or interest in the client, its management, or its owners. * * *

Thus, if we apply these standards, we note that the FCA may be viewed by knowledgeable third parties or reasonable people as having an "obligation to," as well as an "interest in," the Farm Credit district retirement plans in that FCA is charged by law with approving the plans. In addition, FCA has supervisory control over all member bank activities, particularly with respect to certain personnel-related activities. Consequently, FCA examiners may lack the appearance of independence on the bases that they may not be viewed as free from the personal impairment mentioned in the GAO standards or as in compliance with the AICPA interpretations of its second general standard.

Furthermore, the FCA examiners may appear to knowledgeable third parties or reasonable people not to be free of FCA administrative control. If so, there may be further appearance of lack of independence by FCA examiners.

While we recognize that neither of these standards specifically applies to the audits of Farm Credit Banks and institutions, our Office's standards have been generally accepted by all levels of Government as well as by the accounting profession. Furthermore, the AICPA standards and pronouncements which for the most part technically apply only to AICPA members engaged in the practice of accounting have also been generally accepted by the accounting profession and others as authoritative support for auditing matters and as guidance where other guidance does not exist.

In the present case there is nothing in the law or its legislative history indicating what constitutes an "independent audit" for the purposes of section 103(a)(3)(A) of ERISA, although it does indicate that audit by an independent qualified public accountant was anticipated. See section 121(a)(6) of the 1950 Act, as amended, 31 U.S.C. § 68a(a)(6). In these circumstances, then, we think it is appropriate to refer to the standards laid down by GAO and AICPA in order to assist us in determining whether or not the Farm Credit Administration audit meets the requirement for "independence" under the law.

Therefore, since an audit of the Farm Credit District Retirement Plan by employees of the same authority responsible for approving the plan, notwithstanding the organizational "independence" of

FCA's examiners, may lead reasonable persons to doubt the independence of the examination performed, it is our opinion that the requirement for an independent audit would not be satisfied by this procedure. Instead, we believe that engaging a private firm to conduct the audit (as contemplated by the Act) would be necessary to satisfy this requirement.

[B-200354]

Fair Labor Standards Act—Overtime—Fair Labor Standards Act *v.* Other Pay Laws

An employee's entitlement to overtime compensation may be based on either title 5, U.S. Code, or the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, or both. Employees to whom both laws apply are entitled to overtime compensation under whichever one of the laws provides the greater benefit.

Compensation—Overtime—Fair Labor Standards Act—Early Reporting and/or Delayed Departure—Duty-Free Lunch Period—Setoff

Civilian nurses who received 30-minute duty-free lunch break during 8-hour and 15-minute shift are not entitled to overtime compensation under either title 5 or the Fair Labor Standards Act. The duty-free lunch period should be set off against the shift schedule resulting in an actual working time of 7 hours and 45 minutes.

Debt Colections—Waiver—Civilian Employees—Compensation Overpayments—Overtime—Waiver *v.* Setoff

Although the practice was stopped in November 1978, civilian nurses received compensation for 30 minutes of overtime when they worked through their lunch breaks. In actuality, they worked only 8 hours and 15 minutes and therefore would have been entitled to only 15 minutes of overtime. If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interests of the United States. However, if the indebtedness exceeds the amounts now payable, any such overpayments should be considered for waiver under 5 U.S.C. 5584.

Compensation—Overtime—Fair Labor Standards Act—Early Reporting and/or Delayed Departure—Lunch Period Not Duty-Free—Nurses

Civilian nurses are entitled to overtime compensation under either title 5 or the Fair Labor Standards Act, whichever is applicable, on those occasions when they reported 15 minutes early and worked through lunch without receiving any prior overtime compensation.

Compensation—Premium Pay—Sunday Work Regularly Scheduled—Not Overtime Duty

Civilian nurses who worked a part of Sunday during their regularly scheduled 8-hour period of service on each of 2 scheduled working days are entitled to premium pay for both shifts under 5 U.S.C. 5546(a). However, the nurses are

entitled to premium pay for only 1 day when the part worked on the second scheduled workday is considered overtime.

Compensation—Overtime—Fair Labor Standards Act—Evidence Sufficiency

Fact that official time and attendance records reflect only standard 8-hour day with occasional overtime would not necessarily defeat employee's claim for overtime compensation. Where accurate records have not been maintained, it is sufficient for employee to prove she has in fact performed overtime work for which she was not compensated under the FLSA, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Other forms of evidence or documentation are also acceptable. Here, it is undisputed that the work schedules required the nurses to regularly report 15 minutes early and their schedule either began or ended on a Sunday.

Matter of: Civilian Nurses—Overtime and Sunday Premium Pay Entitlement, December 31, 1981:

This is in response to a request by 1st Lieutenant Alan K. W. Young, an authorized certifying officer, Department of the Air Force, Beale Air Force Base, California, for an advance decision concerning payment of the claims of Maxine M. Alexander and eight other civilian nurses similarly situated for overtime and Sunday premium pay. The claims may be paid in certain circumstances as outlined below.

As a matter of long practice, and extending to April 1979, duty schedules for civilian nurses at the Beale Air Force Base Hospital required them to report for duty 15 minutes prior to their scheduled shift resulting in a workday of 8 hours and 15 minutes. The practice developed from the necessity to provide an overlap between shifts to review patient reports. The 15-minute early reporting time was approved by the Hospital's Civilian Personnel Branch, which apparently had approval authority, on three separate occasions in 1972, 1975 and 1979. The time and attendance cards, however, continued to reflect a standard 8-hour shift.

In addition to asking whether overtime pay may be authorized for the 15-minute early reporting time, the submission questions whether Sunday premium pay may be authorized for 2 days instead of 1 when the nurses worked a part of Sunday on each of 2 scheduled working days. In this regard the record shows that prior to May 1976, the civilian nurses at Beale received a single Sunday premium although they worked a weekend schedule beginning at 10:45 p.m. Saturday to 7 a.m. Sunday, and again from 10:45 p.m. Sunday to 7 a.m. Monday. After May 1976 the weekend schedules were shifted to begin at 11:45 p.m. Saturday to 8 a.m. Sunday, and 11:45 p.m. Sunday to 8 a.m. Monday. The nurses claim that by working a part of Sunday on each of 2 scheduled working days they are entitled to Sunday premium pay for 2 days instead of 1.

The submission states that doubt arises for several reasons on whether the claims should be paid. First, while it is not disputed that the civilian nurses' schedules required them to report 15 minutes early, the time and attendance records reflect only a standard 8-hour shift with occasional overtime, and do not reflect if any leave time was taken. Secondly, although the work schedules resulted in 8-hour and 15-minute shifts, a one-half hour meal break was included in that shift resulting in an actual work time of 7 hours and 45 minutes. Thus, it appears as a matter of practice that a full half hour meal break was treated as a compensated duty-free meal. In addition, during those times the nurses could not take their meal breaks due to the workload, they were authorized and paid 30 minutes of overtime. This practice was stopped in November 1978 when the nurses were informed that they were not entitled to 30 minutes of overtime pay for working through lunch.

The certifying officer submits the following questions:

a. Are the claimants entitled to payment for the extra quarter hour at the overtime rate under the provisions either of 5 U.S.C. 5542(a) or the FLSA, 29 U.S.C. 207 even though the quarter hour was not reflected on the related certified Time and Attendance Records?

b. If the answer to question a is affirmative, to what degree, if any, should the overtime be offset against the thirty minute compensated meal period? Would corrected Time and Attendance Cards be required?

c. If the answer to question b is negative, how is the excess duty-free mealtime to be treated?

d. Is an additional payment for Sunday Premium Pay resulting from the requirement for early reporting authorized either for the period prior to May 1976 or for the period thereafter?

e. In view of the fact that documentary evidence is to a large extent not available, to what extent may employee entitlements be inferred from administrative statements, residual records, and employee statements?

Overtime for Federal employees is authorized by title 5, United States Code, and by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), for employees who are not exempt from the FLSA. An employee's entitlement to overtime compensation may be based on title 5 or the FLSA, or both. Employees to whom both laws apply may be entitled to overtime compensation under whichever one of the laws provides the greater benefit. 54 Comp. Gen. 371 (1974).

Section 5542 of title 5, United States Code (1976), provides that:

(a) * * * hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * *.

Only that overtime which is ordered or approved in writing or affirmatively induced by an official with authority to order or approve overtime is compensable. See *Winton Lee Slade*, B-186013, Septem-

ber 13, 1976, and *Baylor* v. *United States*, 198 Ct. Cl. 331, at 359, 360 (1972). Additionally, excused absences with pay (leave, holiday) are "hours worked" under this law.

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA to Federal employees. The FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1976).

Under the provisions of 29 U.S.C. § 204(f) (1976), the Office of Personnel Management is authorized to administer the provisions of FLSA. See B-51325, October 7, 1976. Under the FLSA, a nonexempt employee becomes entitled to overtime compensation for hours of work in excess of 40 hours a week for all work which management "suffers or permits" to be performed. For purposes of this law, excused absences with pay are not considered hours worked. See Federal Personnel Manual (FPM) Letter No. 551-1, para. 3c, and Attachment 4, May 15, 1974.

The Air Force informs us that four of the nurses involved are classified as nonexempt and five of the nurses are classified as exempt from the FLSA. If any questions arise concerning the proper FLSA status of these nurses, they should be directed to the Office of Personnel Management which has the authority to make final determinations as to whether Federal employees are covered by the various provisions of the Act. See B-51325, previously cited.

Those nurses who are exempt from FLSA are entitled to compensation for the overtime work, if at all, only under the provisions of title 5. Those nurses who are nonexempt from FLSA are entitled to overtime compensation either under title 5 or FLSA, whichever law provides the greater benefit. While it appears the nurses regularly reported 15 minutes early, they are entitled to overtime compensation only in certain instances.

On those occasions when the nurses reported 15 minutes early and received a 30-minute duty-free lunch period, the duty-free lunch period should be set off against the shift schedule of 8 hours and 15 minutes, resulting in an actual working time of 7 hours and 45 minutes. This setoff applies to both exempt and nonexempt status nurses. See 47 Comp. Gen. 311 (1967); *Frank E. McGuffin*, B-198387, June 10, 1980; and Attachment 4 of FPM Letter No. 551-1, May 15, 1974. Thus, there is no entitlement to overtime compensation during the time setoff is available. It would appear the nurses received duty-free luncheons unless they claimed otherwise on the time and attendance records.

Thus, the only time the nurses would be entitled to overtime compensation under the circumstances presented are those times when they reported 15 minutes early and worked through lunch without receiving any overtime compensation. The overtime compensation should be computed either under title 5 or under FLSA, whichever is applicable in the individual's case.

Prior to 1978, the nurses apparently were overpaid when they were authorized 30 minutes of overtime when they worked through their lunch breaks. They worked only 8 hours and 15 minutes, and therefore would have been entitled to only 15 minutes of overtime a day at most. As noted, the practice stopped in November 1978, when it was determined that overtime compensation was not permitted. Thus, the question arises whether the overpayments should be waived under the authority of 5 U.S.C. § 5584 (1976), or offset against the amounts now claimed.

Waiver is authorized only where the collection would be against equity and good conscience and not in the best interests of the United States. In B–168323, December 22, 1969, we considered a case where both overpayments and underpayments resulted from the same misconception on the part of the employing activity as to the proper method of payment for the time worked. Since the employee had filed a claim for additional overtime compensation and there was a net benefit to him even after deducting the amounts owed by him from the additional compensation to which he was entitled, we did not consider that collection of the indebtedness by way of offset would be against equity or good conscience and not in the best interests of the United States. We held that where the overtime payable exceeds the overpayment, which would be collected by offset, no waiver should be granted. However, where the overpayment exceeds the overtime payable there appeared to be an adequate basis for waiving the indebtedness of the employee provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. See also 59 Comp. Gen. 246 (1980).

If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay (see discussion that follows) exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interest of the United States. However, if the indebtedness exceeds the amounts now payable to the nurses, any such overpayments should be considered for waiver. Under 4 C.F.R. § 91.4(b) (1981), waiver may be granted by the head of the agency or the Secretary concerned when the amount is not more than $500.

In regard to whether Sunday premium pay may be authorized for 2 days instead of 1, an employee's entitlement to Sunday premium pay is governed by 5 U.S.C. § 5546(a) (1976), which provides:

> An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.

The nurses worked a part of Sunday on each of 2 regularly scheduled working days. They are therefore entitled to premium pay for both shifts except when the part worked on one of the Sunday shifts is considered overtime. As the language of the statute plainly states, only that time which is not overtime can be compensated as Sunday premium pay. See *James E. Sommerhauser*, 58 Comp. Gen. 536 (1979). As previously stated, the only time the nurses would be entitled to overtime would be on the days that they worked through lunch. Therefore, they would not be entitled to Sunday premium pay on those days.

Although the official time and attendance records reflect only a standard 8-hour day with occasional overtime, this would not necessarily defeat the nurses' claims for overtime compensation. The courts have constructed and consistently applied a special standard of proof for FLSA cases in which the employer has failed to discharge his statutory duty to maintain accurate records. Under such circumstances, it is sufficient for the employee to prove that she has in fact performed overtime work for which she was not compensated, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. It is then incumbent upon the employer to produce evidence to negate that produced by the employee. *Christine D. Taliaferro*, B–199783, March 9, 1981.

Additionally, we have held that while claims against the Government must be predicated, if at all possible, upon official records, we will accept other forms of evidence or documentation where agency action has precluded official records from reflecting overtime. *Christine D. Taliaferro*, B–199783, *supra*. In this case it is undisputed that the nurses were regularly required to report 15 minutes earlier than their scheduled shift and that their work schedules began or ended on Sunday. Therefore, their time and attendance records, work schedules, and other documents contained in the record present sufficient evidence to support their claims. Thus, no corrective action is required on the time and attendance cards.

Additionally, we note that Maxine M. Alexander's claim was received by this Office on August 25, 1980, while the other nurse's claims were received on July 18, 1980. Section 71a of title 31, United States Code, states that all claims cognizable by the General Accounting Office (GAO) must be received by GAO within 6 years after the date the claim first accrued or be barred from consideration. Thus, any claim by Ms. Alexander prior to August 25, 1974, and any claim by the other eight nurses prior to July 18, 1974, cannot be considered.

Accordingly, the voucher is returned for action consistent with the above.

[B-202054]

Husband and Wife—Divorce—Military Personnel—Transportation of Stored Property—Husband's Elections—Overseas Assignment

The permanent change-of-station transportation and storage of household goods entitlements are personal to the member of the uniformed services. Whether to release household goods in storage to a divorced ex-spouse or to use his transportation entitlement to ship household goods to his divorced spouse at an alternate location are matters primarily for the member to decide, considering any property settlement agreement or court order.

Transportation—Household Effects—Military Personnel—Shipment to Divorced Wife—Excess Cost Liability

Any excess charges incurred by a service member as a result of using his transportation entitlement to ship household goods to his divorced spouse at an alternate location must be borne by the member.

Storage—Household Effects—Military Personnel—Time Limitation—Divorce Effect—Property Awarded to Ex-Wife

Nontemporary storage at Government expense of a service member's household goods should be terminated as soon as practicable after a State court awards the stored property to the member's ex-spouse and the member declines to use his transportation allowance to ship the goods to his divorced spouse. However, the goods may be retained in storage for a reasonable time, not to exceed the member's entitlement period, while the ex-spouse arranges for the disposition of the goods.

Transportation—Household Effects—Military Personnel—Shipment to Divorced Wife—Dual Entitlements—Supplementation Agreements

It is a matter for the service member to decide whether to use his transportation entitlement to ship household goods to his divorced spouse at an alternate destination. That the ex-spouse is also a service member does not change this. While each member is allowed his transportation entitlement in his own right as a member, if one member agrees to use his entitlement to supplement the other member's entitlement incident to dividing the household goods upon divorce, he may do so.

Transportation—Household Effects—Military Personnel—Shipment to Divorced Wife—Authorization Propriety—Property Awarded to Ex-Wife

When household goods are awarded to an ex-spouse of a service member incident to their divorce, the member may authorize shipment of the ex-spouse's household goods under the member's transportation entitlement at Government expense one last time since, although legally the property would no longer be the member's or his dependent's property, it is recognized that ordinarily such property has been shipped to its present location by the Government and is often commingled with goods belonging to or to be used by the member's children.

Matter of: Shipment and Storage of Household Goods for Divorced Service Members, December 31, 1981:

INTRODUCTION

The Assistant Secretary of the Navy (Manpower, Reserve Affairs, and Logistics) has requested a decision answering questions regarding the shipment and storage of household goods for divorced members of the uniformed services under certain conditions. Our decision is sought in anticipation of adding guidance in this area to Volume 1 of the Joint Travel Regulations (1 JTR) to assist transportation officers in administering the relevant entitlements. The request has been assigned Control No. 80–32 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary states that generally members' entitlements to transportation and/or storage for the dependents' household goods are clearly prescribed, though one area is not addressed: whether a member is still owner of the household goods when a divorce is involved and whether the household goods may be shipped at Government expense to the ex-spouse not residing with the service member who has the transportation entitlement.

The determinative fact in these cases is that the transportation and storage entitlements are the member's, not his dependents'. These entitlements are available only under certain conditions.

The specific questions asked were:

a. Under what circumstances must the member immediately release property which is in storage at Government expense to a divorced spouse?

b. If a member has a shipping entitlement under current permanent change-of-station orders, can the member be forced by court order to involuntarily use that entitlement to deliver the property to a divorced spouse at a distant location either at the member's or Government's expense?

c. If the answer to question b is in the affirmative, would it be proper

to bill the member for excess charges where shipping/storage entitlements are exceeded?

d. If the answer to question b is in the negative, should nontemporary storage at Government expense be terminated when the court awards the property to the spouse and the member declines to use his shipping entitlement to deliver the property?

e. Where two members married to one another are divorced, can the senior member be forced to use a portion of his or her weight allowance to supplement the weight allowance of the junior member when the junior member's share of the property exceeds his or her authorized weight allowance?

f. Is it proper for a member to sign DD Form 1299 (Application for Shipment and/or Storage of Personal Property) for shipment of property subsequent to the date the property was awarded to a divorced spouse? Is the determining factor whether or not dependent children are involved?

ANALYSIS

Under the provisions of 37 U.S.C. § 406 (1976), a member who is ordered to make a permanent change of station is entitled to transportation and storage of his and his dependents' household goods. These entitlements are subject to implementing regulations, prescribed by the Secretaries of the respective services, which are found in chapter 8, 1 JTR.

Under the applicable statutes and regulations transportation of a member's personal property is an entitlement that is personal to the member. B-193430, February 21, 1979. The storage entitlement is likewise personal to the member. Therefore, generally, as to whether such property is to be released or shipped to the divorced spouse (questions a and b) are matters for the member to decide. Ordinarily, it would appear advisable for the member to comply with the terms of a property settlement entered into incident to a divorce. Also, the member may be held in contempt by a State court if he violates a State court order to release such property to his divorced spouse. However, that is a matter primarily between him, the spouse and the court.

Concerning whether the member is liable for excess costs of storage or shipment of household goods (question c), weight allowances are established at paragraph M8003 of 1 JTR, and members are authorized to ship household goods to alternate destinations by 1 JTR, paragraph M8009. The regulations provide that the member is to bear all transportation costs arising from shipment in more than one lot, for distance in excess of that between authorized places, and for weights in excess of the established weight restrictions. 1 JTR, paragraph M8007-2. This would apply to the situation where a member uses his trans-

portation allowance to ship household goods to his divorced spouse at an alternate destination.

As to whether nontemporary storage should be terminated when a State court awards the property to the ex-spouse and the member declines to use his transportation allowance to ship the household goods to his divorced spouse (question d), the storage entitlement is limited to the member's and his dependents' household goods. Where household goods in storage at Government expense are awarded to a person who is no longer the member's dependent, then the member is no longer entitled to such nontemporary storage. Generally, it should be terminated as soon as practicable. We recognize, however, that at the time the goods were placed in storage they qualified under the member's entitlement. Therefore, we would not object to their remaining in storage at Government expense for a short time, in no case exceeding the member's authorized period of storage, while the ex-spouse arranges for their disposition.

It should be noted that the transportation and storage of household goods entitlements for returning former dependents and their household goods to the United States when they are located outside the United States are somewhat different than those of dependents located in the United States. The entitlement to return of such an ex-spouse and the ex-spouse's household goods from outside the United States are authorized pursuant to 37 U.S.C. § 406(h) by paragraphs M7104 and M8303-3 of 1 JTR, and may be exercised even though the marriage is terminated before the member is eligible for return transportation. See 53 Comp. Gen. 960 (1974). The regulations establish time limits within which such transportation must be completed: within 1 year after the effective date of the final divorce decree or 6 months after the date of relief of the member from the overseas duty station, whichever occurs first. These time limitations manifest the intention that a member's ex-spouse under these circumstances be given adequate time to arrange for such transportation.

As to the situation involving a divorce between two members married to each other and the question of whether one member may be forced to use a portion of his or her transportation entitlement to supplement the other member's entitlement (question e), as noted above, the transportation entitlement is personal to the member. It is a matter for the member to decide whether to use his transportation allowance to ship household goods to his divorced spouse at an alternate destination; that the ex-spouse is also a member does not alter this conclusion.

Finally, as to whether it is proper for a member to sign DD Form 1299 for shipment of property subsequent to the date the property

was awarded to the ex-spouse (question f), the same type of analysis would apply as was made in answering question d above. The member's entitlement is limited to the shipment and storage of the member's and his dependents' household goods, and the form requires the member to certify that the property belongs to the member. Where the property is awarded to a divorced spouse, it then legally becomes that spouse's property. However, we recognize that the property in most cases will have been shipped to its present location by the Government as the member's or his dependents' property. In many cases, after divorce some of the property to be shipped will be property belonging to the member's children commingled with that of the ex-spouse. Therefore, we would not object to the member using his transportation entitlement to ship such property one final time incident to dividing it as a result of a divorce. The next time the DD Form 1299 is revised, consideration should be given to modifying its language to specifically cover these types of cases.

[B-202222]

Appropriations—Fiscal Year—Availability Beyond—Contracts—Modification—Performance Extension

Department of Interior entered into contract for necessary facilities and staff to operate nonresidential project camps for youth. In last month of fiscal year 1980, Interior executed modifications to this contract extending period of performance of contract from Oct. 1, 1980, to May 31, 1981, and providing for a new service to be performed by contractor during extension period. As Interior did not have a *bona fide* need for services provided by modifications until they were performed in fiscal 1981, they are chargeable to Interior's 1981 appropriation. 31 U.S.C. 712a permits use of annual appropriations only for expenses serving the needs of the year for which the appropriation was made. Fact that supplemental agreements modified basic contract which itself was properly charged to 1980 appropriation does not change this result. Only modifications within scope of original contract may be charged to same appropriation as original contract.

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—Contracts—Modification

Antideficiency Act, 31 U.S.C. 665(a), forbids incurring of obligations in advance of appropriations. A renewal option which extends performance of services for an additional fiscal year may only be exercised when funds for the new fiscal year have been made available.

Matter of: Department of the Interior—Fiscal Year Appropriation Chargeable for Contract Modifications, December 31, 1981:

The Assistant Secretary of Interior for Policy, Budget and Administration, requests our decision on the fiscal year appropriation, 1980 or 1981, to be charged for the costs of modifications to a contract with the Chico Unified School District, Chico, California (Chico). Essentially, these modifications, entered into in the last month of fiscal year

1980, were for services to be performed by Chico during fiscal year 1981. We conclude that only Interior's 1981 appropriation may be charged for the costs of these supplemental agreements, and that the supplemental agreements themselves were not properly made until the 1981 appropriation was enacted.

As stated in the submission, the contract and the modifications provided for the necessary facilities and staff to operate nonresidential project camps, each of which were to be eight weeks in duration, for youth under the Youth Conservation Corps Act of 1970, as amended, 16 U.S.C. § 1701 *et. seq.* Under the terms of the original contract, Chico was to provide the necessary facilities and staff for the program's camps from January 1, 1980, to September 30, 1980. In a modification entered into on September 26, 1980, the contract was extended until May 31, 1981. Additionally, on September 29, 1980, the parties entered into another modification which provided that Chico would perform the payroll services, previously performed by the Water and Power Resources Services' Administrative Services Center, for the duration of the contract. Interior contends that these modifications should be charged to its 1980 appropriation.

Before determining whether Interior's 1980 appropriation can be charged for these modifications, we must determine the availability period of this appropriation. Section 1706 of title 16 of the United States Code states that funds appropriated for carrying out the purposes of the Youth Conservation Corps Act are to remain available for obligation for 2 fiscal years. However, the Department of the Interior and Related Agencies Appropriation Act, fiscal year 1980, Pub. L. No. 96–126, 93 Stat. 954, provides:

> That the following sums are appropriated * * * *for the fiscal year ending September 30, 1980* * * *:*
>
> * * * * * * *
>
> For expenses necessary to carry out the provisions of the Act of August 13, 1970, as amended by Public Law 93–408, $54,000,000 * * *. [Italic supplied.]

The appropriation act further provides, in section 306: "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year *unless expressly so provided herein.*" 93 Stat. 980 [italic supplied]. Since these provisions are the latest expression of Congressional intent on the availability of this appropriation, they override the language in 16 U.S.C. § 1706. *See* 58 Comp. Gen. 321, 323 (1979).

Section 712a of title 31 United States Code permits use of annual appropriations only for expenses serving the needs of the year in which the appropriation was made. Therefore, Interior can only use funds from its 1980 appropriation for obligations incurred during fiscal year 1980 which will fulfill a *bona fide* need arising within this period of

availability. *See* 44 Comp. Gen. 399, 401 (1965); 33 *id.* 57, 61 (1953). While the modifications in question were executed during fiscal year 1980, they may be properly charged to Interior's 1980 appropriation only if Interior had a *bona fide* need for them in fiscal year 1980.

Determination of what constitutes a *bona fide* need of a particular fiscal year depends primarily upon the facts and circumstances of a particular case. 44 Comp. Gen. *supra*. Generally, contracts for services may only be made for the duration of the appropriation period because a *bona fide* need for a particular service usually only arises at the time the services are to be performed. *See* B–187881, October 3, 1977; B–174226, March 13, 1972. The period of performance of service contracts can extend beyond the duration of an appropriation period only where the portion of the contract to be performed after the expiration of the appropriation period is not severable from the portion performed during this period. *See* 60 Comp. Gen. 219 (1981).

The modification entered into between Interior and Chico which provided that Chico perform payroll services in the subsequent fiscal year is clearly not such a nonseverable service contract. Interior had no need for the payroll services to be provided by Chico on September 29, 1980, the date this modification was executed. Interior's need for these services only arose when these services had to be performed, *i.e.*, between October 1, 1980, and May 31, 1981, when the employees of these camps had to be paid.

Furthermore, insofar as the modification executed on September 26, 1980, provided that Chico continue to supply staff for the operation of the camps during fiscal year 1981, this modification also may be characterized as a service contract. Interior's need for staff to operate the camps did not arise on September 26, 1980. Only at the beginning of each 8-week camp period did Interior have any need for staff to operate the camps. The performance of this modification was thus severable from the performance of the underlying contract.

Consequently, although Interior executed both these modifications at the end of fiscal year 1980, it did not have a *bona fide* need for these services until fiscal year 1981, the fiscal year in which Chico was to perform these services. Therefore, as Interior's 1980 appropriation was only available during fiscal year 1980, Interior could not charge this appropriation for the costs of these services. Instead, Interior's 1981 appropriation should be used to fund these services, both of which commenced on October 1, 1980, under the terms of the modifications. *See* 44 Comp. Gen. *supra*, at 401–402; B–187881, *supra*.

Even if the modification of September 26, 1980, is not considered a service contract but rather one to provide facilities from October 1, 1980, to May 31, 1981, for the operations of the camps, with the pro-

vision to provide staff merely incidental to the one providing facilities, this modification still may not be charged to the fiscal year 1980 appropriation. Interior did not have a *bona fide* need for these facilities until the beginning of each eight week camp period. Since the time for performance of the modification did not begin until fiscal year 1981, Interior clearly did not have a need for these facilities when it executed the contract at the end of fiscal year 1980. Therefore, the cost of this modification can only be charged to Interior's 1981 appropriation.

It must be emphasized that these modifications are not chargeable to Interior's 1980 appropriation merely because they modify a contract properly chargeable to this appropriation. Only modifications which provide for additional work within the scope of the original contract may be charged to the same appropriation as the original contract. *See* 44 Comp. Gen., *supra*, at 401–402. These modifications executed in September 1980 are not additional work within the scope of the original contract. Rather, they are more properly classified as separate, albeit related, contracts and as such they must be charged to Interior's fiscal year 1981 appropriation according to the rules discussed above.

Finally, we note that the Antideficiency Act, 31 U.S.C. § 665(a), forbids the incurring of obligations in advance of available appropriations to pay for them. B–198574, February 2, 1981. By attempting to extend performance of a contract into a subsequent fiscal year before appropriations for that year had become available, Interior violated the Act. To provide for continued performance in a subsequent fiscal year, Interior may include in its service contracts renewal options which would enable it, solely at its discretion, to extend the period of performance of these contracts through the following fiscal year. However, Interior may only exercise these options when the appropriation for the subsequent fiscal year becomes available for obligation.

[B–202965]

Contracts—Negotiation—Offers or Proposals—Signatures—Authority Questioned—Time for Establishing

Where an agency questions authority of individual signing offer to bind the offeror firm, it must allow that firm an opportunity to provide proof of signatory authority after closing time for receipt of proposals. This decision extends 49 Comp. Gen. 527.

Contracts—Negotiation—Offers or Proposals—Manual Signature—Photocopies—Acceptability

Where the proposal submitted is a photocopy of a complete, manually signed original, it is a binding, properly executed offer.

Matter of: Cambridge Marine Industries, Inc., December 31, 1981:

Cambridge Marine Industries, Inc., protests the rejection of its low offer as being nonresponsive under Request for Proposals (RFP) N00104–81–R–ZA21 issued by the Department of the Navy. The RFP called for the manufacture and delivery of a quantity of stuffing tubes for use in nuclear submarines. The Navy found that the Cambridge offer was nonresponsive because, in the contracting officer's view, it was improperly executed. In this regard, the contracting officer determined that the signature on the offer was not that of a person designated to contractually bind Cambridge. Furthermore, the Navy found the signature to be deficient because the Cambridge offer consisted of two photocopies of a completed and signed RFP with no original copy submitted.

For the following reasons, we believe the Navy erred in its determination that the Cambridge offer was nonresponsive.

Agent's Authority To Bind Cambridge

The Navy reports that the Cambridge offer was signed by Peter J. Plaxa, and that the contracting officer reviewed the contracting activity's company files on Cambridge and Herley Industries, a Cambridge affiliate, and found no "Bidder's Mailing List Application" (Standard Form 129) or any other documentation which indicated that Mr. Plaxa was authorized to sign offers on behalf of Cambridge. Additionally, the contracting officer concluded that going back to Cambridge after the closing date for receipt of proposals to obtain evidence of Mr. Plaxa's authority would give that company an unfair advantage over other offerors because, in the Navy's view, such an action would give Cambridge "the opportunity of affirming or denying the authority of the person signing the offer on its behalf."

Cambridge disputes the Navy's claims that it had no Standard Form 129 or other documentation on file which authorized Mr. Plaxa to contractually bind the company. During the course of this protest Cambridge has submitted to the Navy and to our Office documents, including a Standard Form 129, which contain Mr. Plaxa's name and which, Cambridge asserts, were on file with the contracting agency at the time of the closing date for receipt of proposals. The Navy denies having any of this evidence on file prior to the closing date for receipt of proposals.

It is unnecessary to resolve this factual dispute, since we believe that the Navy should have permitted Cambridge to submit evidence of Plaxa's authority after the date set for the receipt of initial proposals.

Since 1970 our Office has held that in advertised procurements a bidder may furnish proof of agency, that is, of an individual's authority to sign offers on behalf of a company or other bidding entity, subsequent to bid opening and that the failure to furnish such information at bid opening will not render a bid nonresponsive. 49 Comp. Gen. 527 (1970). In that case we stated:

> If a principal should establish that a bid was submitted on its behalf by an individual not authorized to enter into contracts for him, the Government would have a possible cause of action against such unauthorized individual. * * * Therefore, it can be expected that any false disavowals would not go unchallenged by the agent. In any case, the Government has ample means to protect itself against fraudulent practices by bidders.

We do not believe the rule should be more strict in a negotiated procurement. In this respect, the Navy recognizes our prior holding and somewhat inconsistently implies that it would have accepted evidence of Plaxa's authority from Cambridge after the proposal due date but that none was submitted. The Navy cites *New Jersey Manufacturing Company, Incorporated*, B–179589, January 23, 1974, 74–1 CPD 25, for the proposition that a bidder [offeror] will be allowed only a reasonable amount of time after bid opening in which to submit evidence of a questioned agency after which time the bid may be declared nonresponsive. The holding in that decision, however, reasonably assumes the fact that the bidder or offeror, at the very least, was on notice of the agency's concern and was offered an opportunity to provide the necessary evidence of authority. In the instant case, Cambridge was not informed by the Navy that Mr. Plaxa's agency was questioned before the proposal was rejected, and, therefore, Cambridge had no reason to submit any evidence, especially since it believed that this evidence was already on file with the Navy.

Based on the evidence submitted to the Navy and to our Office by Cambridge with the protest, we believe that Mr. Plaxa was in fact authorized to sign the offer in question.

Photocopy Signature

Cambridge reports that it prepared and signed its offer, made two photocopies of the complete signed offer and submitted both photocopies to the Navy. Cambridge states that it has been its normal practice to submit an original offer and one photocopy, but that in this case it inadvertently mailed both photocopies while keeping the original for its files.

In rejecting the Cambridge offer as nonresponsive, the Navy made the following determination:

The offer submitted by Cambridge Marine is Xeroxed and the offer does not contain a manual signature. Nothing accompanied the offer indicating an intention to be bound thereto by Cambridge Marine. The contracting officer has examined the company files of Cambridge Marine and Herley Industries * * * and found nothing contained in either file indicating an intention to be bound by a Xerox signature * * *. To accept a Xerox signature without any substantiating evidence that such is the formal policy of the company would, in effect, be giving Cambridge Marine the proverbial "two bites at the same apple." They could affirm or disaffirm the policy which would give them the options of allowing their offer to be accepted or rejected. The test in cases where the offer is not manually signed should be whether the offer as submitted will result in a binding contract upon the acceptance thereof without resort to further communication to ascertain the offeror's intention.

In making this determination, Navy analogized this circumstance to "unsigned bid" situations in which we have held that such a bid is nonresponsive because the contracting officer has no assurance that the bid was submitted by someone with authority to bind the bidder. For that reason, acceptance of such a bid would not have automatically obligated the named bidder to perform the contract advertised. B–160856, March 16, 1967. In this regard, for example, we have held that an unsigned bid stamped with a facsimile of the bidder's signature could not be considered for award. *Id.* Also, a bid with the typewritten or rubber-stamped name of the bidder, but without any signature, is nonresponsive. *See, e.g.*, B–160125, November 25, 1966.

We believe this offer was legally binding and that the Navy's analogy to our cases dealing with unsigned bids is inappropriate since it is clear that the Cambridge offer was in fact manually signed. The offer submitted was, in effect, a duplicate of the original, and we doubt that Cambridge would be in a position to disavow the binding effect of its offer if it later chose to do so. This is not the same as a rubber-stamped "signature" which can be affixed by anyone having access to the stamp. Rather, it was the actual signature of the party authorized to sign offers on the firm's behalf. In our view, the offer should have been accepted.

Award was made to the second low offeror, Sayco, Ltd. In these circumstances, we ordinarily would recommend that the Navy terminate the Sayco contract and award to Cambridge if otherwise proper. The Navy, however, has advised us that Sayco's production of the basic quantity is 85 percent complete and that production of an option quantity has been underway for several months. We do not believe it to be in the Government's best interest to recommend that the Navy terminate the Sayco contract because a change in contractors at this time could delay deliveries of essential nuclear submarine components. However, by letter of today, we are bringing this decision to the attention of the Secretary of the Navy with our recommendation that steps be taken to preclude recurrence of the procurement deficiencies noted in this decision.

The protest is sustained.

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Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended 127

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Fact that official time and attendance records reflect only standard 8-hour day with occasional overtime would not necessarily defeat employee's claim for overtime compensation. Where accurate records have not been maintained, it is sufficient for employee to prove she has in fact performed overtime work for which she was not compensated under the FLSA, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Other forms of evidence or documentation are also acceptable. Here, it is undisputed that the work schedules required the nurses to regularly report 15 minutes early and their schedule either began or ended on a Sunday---------- 174

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Under Customs overtime provision at 19 U.S.C. 267 Customs inspector who worked 8¼ hours on Sunday was paid 2 days' extra compensation for Sunday work of up to 8 hours. He is not entitled to additional overtime compensation under 19 U.S.C. 267 for 15-minute period he worked in excess of 8 hours on a Sunday. Regulations at 19 C.F.R. 24.16(g) require employee to perform overtime services of at least 1 hour to be entitled to overtime compensation under 19 U.S.C. 267 33

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Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts 85

Indian low-income housing
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Ambiguous bid

Basic principles of Federal competitive bidding require that all bidders be treated fairly and equally and that bidder be precluded from deciding after bid opening whether to assert that its lump-sum price or its inconsistent individual item prices are correct. Thus, Indian housing authority which was required to adhere to Federal competitive bidding principles acted improperly in accepting bid based on bidder's post-bid opening explanation of intended bid where bid was subject to two reasonable interpretations and was low only under interpretation proffered by bidder 85

Preference to Indian concerns

Housing authority's failure to make award to Indian-owned enterprise whose bid was eight percent higher than low bid from non-Indian owned firm was proper since solicitation required award to low bidder and neither it nor HUD regulations or Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450e(b), required preference be granted to Indian-owned firm in particular procurement 85

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Where award date was unavoidably delayed so as to shorten contract performance period by one month, award to bidder evaluated as low under performance period specified in solicitation is not improper even though awardee would not be low under evaluation based on shorter actual performance period, since competition was fair, prices had been exposed, and probable cost of resolicitation would exceed difference in prices bid by protester and awardee 48

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When complainant has not shown what actual bid price would have been under revised specifications, complainant has not shown that it had substantial chance for award, entitling it to bid preparation costs. This decision extends 60 Comp. Gen. 414 6

Competitive system

Compliance

Award with intent to materially modify contract performance conditions

Contracting officer may not make award which he knows is not based on conditions under which performance will occur, since such action undermines integrity of competitive procurement system and deprives Government of lower or better terms which it might otherwise obtain. This decision extends 60 Comp. Gen. 414 6

Scope of General Accounting Office review

Grantor-agency decisions

General Accounting Office review of grantor agency decision on complaint regarding grantee procurement will be limited to whether decision was reasonable, in light of agency regulations encouraging free and open competition. This decision extends 60 Comp. Gen. 414 6

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Minority subcontracting goals

General Accounting Office (GAO) will not review the merits of a potential subcontractor's complaint against a grantee's determination that the complainant was not an eligible minority business enterprise. This is a matter of grant administration cognizable by the grantor agency, not GAO. 60 Comp. Gen. 606 is extended 131

Modification of contract

Scope of modification

General Accounting Office will consider complaint regarding contract modification when it is alleged that modification changed scope of contract and therefore should have been subject of new procurement. This decision extends 60 Comp. Gen. 414 6

Protest timeliness

Non-solicitation impropriety allegations

Reasonable-time standard

In future, grant complaints regarding matters other than alleged solicitation deficiencies must be filed with GAO within reasonable time, and 4 months after adverse decision by grantor agency will not be considered reasonable time. This decision extends 60 Comp. Gen. 414 6

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Mistakes
Allegation before award. (*See* **BIDS, Mistakes**)
Modification
Appropriation availability beyond fiscal year. (*See* **APPROPRIATIONS, Fiscal year, Availability beyond, Contracts, Modification**)
Beyond scope of contract
Options exercised
Purchase changed to lease
New competition recommended Page
A modification which converts a contract for the acquisition of disk drives from a purchase, with virtually no post-acquisition Government right to assure equipment performance, to a 5-year lease-to-ownership plan, with expansive rights in the Government to enforce newly added performance requirements over the full term of the lease, so substantially alters the rights of the parties as to be beyond the scope of the original contract and results in a contract substantially different from that for which the competition was held. Therefore, a new competition should be conducted 42
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Specifications
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Detailed requirements Page

Specification which describes with particularity the performance objectives of the telephone call distributing system being procured, including the manner and sequence for accomplishing specific functions, will not be questioned by GAO when protester does not show that contracting agency has no reasonable basis for imposing detailed requirements of this type 35

Restrictive
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Options
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Payments
Past due accounts
Late charges
Government liability
Contract provisions

Veterans Administration (VA) is obliged to pay the Gas Service Company late payment charges on the invoices submitted since (1) the contract between VA and Gas Service incorporates by reference Gas Service's rules and regulations on file with the Kansas Corporation Commission; (2) these regulations provide for the assessment of late payment charges when payment is not received by the company by the delinquency date; and (3) although the Government's checks were issued and mailed before the delinquency dates, they were not received by Gas Service until after such dates 166

Payment date determination
Payment by mailed check
Absence of statute or contract provision

The date of issuance of a Government check does not constitute the date of payment for late payment and prompt payment discount purposes. We confirm that B–107826, July 29, 1954, overruled 31 Comp. Gen. 260 and 18 *id.* 155. Government has an obligation to at least issue and mail its checks sufficiently in advance to assure their receipt by the vendor, in the regular course of the mails, on or before the delinquency date or the final discount date, respectively, to avoid liability for properly authorized late payment charges or to obtain the benefit of the vendor's discount, unless a Federal statute or the parties by contract provide otherwise. The parties should establish in the contract what constitutes the effective date of payment 166

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Although claims for equitable relief from an alleged mistake in bid filed after award have not been subject to timeliness requirements of General Accounting Office (GAO) Bid Protest Procedures, protest seeking bid correction and award properly is subject to timeliness rules as effectiveness of remedy is dependent on prompt resolution of the matter 118

New issues
Unrelated to original protest basis

Timeliness of protest depends upon timeliness of specific bases of protest. Information submitted in support of timely raised bases of protest will be considered. However, where protester in its initial protest complains that several specific solicitation provisions are restrictive and later in its comments on the agency report alleges that a different provision is restrictive, allegation contained only in report comments is untimely. Similarly, specific arguments first raised in protester's report comments are untimely where protester first contended in the report comments that specific portions of the specification describe a competitor's product, but only contended in its initial protest that the specification was generally limited to one product 35

Interested party requirement
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A potential competitor for equipment which has been the subject of a contract modification is an "interested party" to challenge the modification as a change beyond the scope of the contract requiring a new competition 42

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Procurement under 8(a) program
Contractor eligibility

Whether management agreement between 8(a) firm and large business removes management and control over daily operations from 8(a) firm so that firm would not be eligible for 8(a) assistance under statutory criteria is matter within reasonable discretion of Small Business Administration. 141

Scope
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While General Accounting Office (GAO) will generally not review SBA decision to issue a COC absent a *prima facie* showing of fraud or that information vital to responsibility determination was wilfully disregarded, GAO will consider protest that SBA has disregarded its published regulations concerning its right to review elements of responsibility other than those referred to SBA by procuring agency. However, general rule applies to protest against SBA judgmental determination that protester lacked elements of responsibility relating to quality control and other issues referred to SBA by contracting agency 142

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Where contracting agency determined that small business concern lacked certain elements of responsibility relating to bidder's technical capability and past performance and, upon referral to Small Business Administration (SBA) for Certificate of Competency (COC), SBA's independent review disclosed additional areas of concern regarding bidder's financial capacity, SBA's denial of a COC based upon all factors in record is unobjectionable. Protester's argument that 13 C.F.R. 125.5(a) (1981) restricts SBA's right of review to those elements referred by the contracting agency is not persuasive since it would result in SBA's having to issue a COC to a firm which it believes cannot perform the contract, a result inconsistent with the intended purpose of the COC program 142

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DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Overtime
Waiver *v.* setoff

Although the practice was stopped in November 1978, civilian nurses received compensation for 30 minutes of overtime when they worked through their lunch breaks. In actuality, they worked only 8 hours and 15 minutes and therefore would have been entitled to only 15 minutes of overtime. If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interests of the United States. However, if the indebtedness exceeds the amounts now payable, any such overpayments should be considered for waiver under 5 U.S.C. 5584 174

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EXPERTS AND CONSULTANTS
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Not for application
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Since contract U.S. Advisory Commission on Public Diplomacy entered into with private law firm was on independent contractor basis, statutory limitation in 22 U.S.C. 1469, which only applies when services are procured from individuals as employees, was not applicable and did not limit amount of compensation that could be paid to law firm..... 69

FAIR LABOR STANDARDS ACT
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Traveltime. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act, Traveltime**)
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FARM CREDIT ADMINISTRATION
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Applicability
Since Farm Credit district retirement plans must be submitted for prior approval of Farm Credit Administration, FCA employees cannot thereafter be viewed as independent for purposes of performing audits required by section 103 of the Employee Retirement Income Security Act of 1974, as amended..... 170

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Bids. (*See* **CONTRACTS, Grant-funded procurements**)

FEDERAL COMMUNICATIONS COMMISSION
Ship radio inspectors
Holiday *v.* regular overtime compensation
Federal Communications Commission employee performed ship inspection duties on Saturday, Nov. 11, 1978 (Veterans Day)—a holiday. Pursuant to 5 U.S.C. 6103(b)(1) (1976), employee had received Friday, Nov. 10, 1978, as a paid holiday off. Employee is not entitled to 2 days' additional holiday pay for work on Saturday because meaning of term "holiday" in controlling agency regulation requires reference to 5 U.S.C. 6103 to determine established legal public holidays and section 6103(b)(1) provides that instead of a holiday that occurs on Saturday, the Friday immediately before is a legal public holiday..... 3

FEDERAL GRANTS, ETC.
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FEDERAL PROCUREMENT REGULATIONS
Orders under ADP Schedule
Synopsis in *Commerce Business Daily*
Options to be exercised
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Federal Procurement Regulation sec. 1–4.1109–6 requirement that agency publish Commence Business Daily announcement of agency's intent to convert Automated Data Processing Equipment from lease to purchase under General Services Administration schedule contract is a necessary prerequisite to the exercise of a purchase option for such equipment 111

FEES
License, permit, etc. fees
Incidental to training programs
Appropriation availability
Instructor training
Department of Defense

Prohibition of 5 U.S.C. 5946 does not apply to payments authorized by 5 U.S.C. 4109. Payment of licensing fee is necessary expense directly related to training since, without payment of the membership fee, AMETA instructors will not have access to training materials, nor will their trainees be eligible for certification as practitioners 162

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Disputes
Contract Disputes Act of 1978
Applicability to assignees' claims

Contracting officer forwarded assignee's claim to General Accounting Office (GAO) for resolution because he lacked jurisdiction to resolve it. Claimant then appealed that decision to the agency's board of contract appeals, but nevertheless requested and received suspension of board proceedings pending GAO decision, reserving the right to pursue the appeal if GAO denies the claim. GAO, however, will not consider the claim unless the board first affirms the contracting officer's conclusion, since otherwise the claimant inappropriately would have two chances at a favorable administrative resolution 125

Criteria of GAO review

GAO will not review procedures leading to award of contract to the terminated contractor where claimant has not requested review and there is no possibility of corrective action by way of reinstating terminated contract since contract requirement has been fully performed 114

Election effect

Contractor under pre-March 1, 1979, contracts has filed "constructive change" claim originally made to contracting officer in March 1980. If, regardless of filing, contractor has made conscious election to proceed under Contract Disputes Act of 1978, General Accounting Office (GAO) may not consider claim since consideration would give contractor a forum it would not otherwise have under Act. Alternatively, if contractor has elected to proceed under disputes clause of its contracts, GAO may not consider claim because claim involves a question of fact 1

GENERAL ACCOUNTING OFFICE—Continued
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Contracts—Continued
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Contract Disputes Act of 1978—Continued
Money damage claims Page
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Grants-in-aid. (*See* **CONTRACTS, Grant-funded procurements, General Accounting Office review)**
Modification
Although protests against contract modifications usually are matters of contract administration which we will not review, we will consider protests which contend that a modification went beyond the scope of the contract and should have been the subject of a new procurement------ 42
Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards, Review by GAO)**
Small business matters
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Labor-management relations
Civil Service Reform Act effect
Grievance not filed
Rights not solely based on agreement
Civilian employee of Dept. of Army was detailed to higher-grade position for period of 42 days. Collective bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate, GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective bargaining agreement and no grievance has been filed---- 20

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Labor-management relations—Continued
Civil Service Reform Act effect—Continued
Grievance procedure elected
Party objection to GAO review Page

Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with General Accounting Office (GAO) pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. 7101–7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures---------- 15

Grievance *v.* claims' settlement
Jurisdictional policy differences

The jurisdictional policies established in this case for claims filed with GAO under 4 C.F.R. Part 31 involving matters of mutual concern to agencies and labor organizations differ from those established in 4 C.F.R. Part 22 (1981). The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under title 31 of the United States Code and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135---------- 20

Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards, Review by GAO**)

GRANTS
Grant-funded procurements. (*See* **CONTRACTS, Grant-funded procurements**)

HOLIDAYS
Created by Executive Order
Inspectional services
Compensation rate
Ship radio inspectors

Federal Communications Commission employee performed ship inspection duties on Monday, Dec. 24, 1979, which was considered a holiday by Executive order for purposes of pay and leave of specified Federal employees. Express limitation of Executive order to executive branch employees precludes consideration of Monday, Dec. 24, 1979, as a holiday within the meaning of 47 C.F.R. 83.74(a)(4) (1979), and 5 U.S.C. 6103, which limit the term "holiday" to Government recognized legal *public* holidays and other designated *national holidays*. We conclude for purposes of applying the ship inspection overtime provisions that days which are declared to be holidays for Government employees by Executive order are not to be considered holidays which would entitle the employee to the special pay. 26 Comp. Gen. 848 (1947)---------- 3

HUSBAND AND WIFE
Divorce
Military personnel
Transportation of stored property
Husband's elections
Overseas assignment Page

The permanent change-of-station transportation and storage of household goods entitlements are personal to the member of the uniformed services. Whether to release household goods in storage to a divorced ex-spouse or to use his transportation entitlement to ship household goods to his divorced spouse at an alternate location are matters primarily for the member to decide, considering any property settlement agreement or court order 180

Real estate expenses incident to transfer. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses, Husband and wife divorced, etc.**)

Validity
Foreign
Acceptance criteria
Military pay and allowances

The General Accounting Office will not question the validity of the divorce and subsequent remarriage of a Navy petty officer, notwithstanding that the divorce was rendered by a foreign court, where it appeared that the petty officer had long resided in the foreign country on a permanent duty assignment; the foreign court had jurisdiction over the subject matter of the divorce; and the foreign divorce decree would be recognized as valid by American State courts 104

JOINT TRAVEL REGULATIONS
Proposed amendments
Military personnel
Overseas
Return transportation of ex-family members
Time limitation extension

Proposed amendment to the Joint Travel Regulations, to increase from 6 months to 1 year after relief of uniformed services member from his overseas duty station during which transportation of ex-family members must take place, should not be implemented. Any extension of time for travel beyond that currently allowed may be authorized only if justified on an individual case basis when it can be shown that the return took place as soon as reasonably possible after the divorce and departure of the member from the overseas station 62

LEAVES OF ABSENCE
Lump-sum payments
Rate at which payable
Increases
Prevailing rate employees
Separation after effective date of increase

Lump-sum annual leave payments made to prevailing rate employees may be adjusted to reflect the increase in new rates of pay commencing after the effective date of Public Law 96–369 only if the employee performed service after the effective date of the act as required by subsection 114(c) of the act 94

LEAVES OF ABSENCES—Continued
Sick
Recredit of prior leave
Break in service
What constitutes
Service with Federally funded private, etc. organizations Page

Employee who had a break in Federal service of over 3 years seeks recredit of sick leave on basis that he was employed by various organizations and instrumentalities that receive Federal funding. Employee contends that such employment avoids a break in service in excess of 3 years. Under 5 C.F.R. 630.502(b)(1), a recredit of sick leave is permitted when an employee's break in service does not exceed 3 years. Since service with private organizations or state instrumentalities that receive Federal funding does not constitute Federal service, employee may not have sick leave recredited ---------- 83

MARRIAGE
Divorce. (*See* **HUSBAND AND WIFE, Divorce**)

MILITARY PERSONNEL
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Household effects
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OFFICERS AND EMPLOYEES
Appointments. (*See* **APPOINTMENTS**)
Consultants. (*See* **EXPERTS AND CONSULTANTS**)
Contracting with Government
Public policy objectionability
Exception
Unwarranted

Agency did not act improperly in rejecting low bid from concern owned by employee of Federal Government because, while such contracts are not expressly prohibited by statute, except in certain situations not present here, they are undesirable and should not be authorized except where Government cannot otherwise be reasonably supplied. Fact that service would be more expensive from other sources provides no support for determination that service cannot be reasonably obtained except from concern owned by employee of the Government ---------- 65

Downgrading
Saved compensation. (*See* **COMPENSATION, Downgrading, Saved compensation**)
Hours of work
Traveltime
Travel inseparable from work
Federal Aviation Administration employees
Uncommon tours of duty

Federal Aviation Administration employees assigned to remote radar site at Sawtelle Peak, Idaho, are entitled to be compensated for travel time to and from Ashton, Idaho, where employees are required to pick up and return Government vehicles and other special purpose vehicles necessary to negotiate route to radar site. This duty is an inherent part of and inseparable from their work and is compensable as hours of work under 5 U.S.C. 5542(b)(2) ---------- 27

OFFICES AND EMPLOYEES—Continued

Pay retention

Downgrading. (*See* **COMPENSATION, Downgrading, Saved compensation**)

Relocation expenses

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers**)

Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)

Transfers

Expenses

Relocation, etc.

Erroneous separations

Back Pay Act applicability Page

Employee's claim for relocation expenses which he would have received but for an improper personnel action may be paid under the Back Pay Act, 5 U.S.C. 5596. Therefore, he may be paid travel expenses of his dependent and transportation of household goods to his new official station. He may also be paid temporary quarters subsistence allowance at the new station which is within the United States, but he is not entitled to a house-hunting trip or expenses of purchase and sale of residences because his old station is not within the United States, its territories or possessions, Puerto Rico, or the Canal Zone..... 57

Government *v.* employee interest

Merit promotion transfers

Relocation expense reimbursement

Absence of agency regulations

Eugene R. Platt, 59 Comp. Gen. 699 (1980), held that when an agency issues a vacancy announcement under its Merit Promotion Program such action is a recruitment action and when an employee transfers pursuant to such action the transfer should normally be regarded as being in the interest of the Government in the absence of agency regulations to the contrary. The Commission on Civil Rights requested a review of this decision. On reconsideration, we affirm *Eugene R. Platt*. The Commission did not have regulations on this subject and the job vacancy announcement was unrestricted as to reimbursement, contained no limitations on geographic area of consideration, and did not differentiate between Commission employees and others as to entitlements.... 156

Issuance of agency regulations

Eugene R. Platt, 59 Comp. Gen. 699 (1980) was silent on the question of how agencies may effectuate a policy as to when to authorize reimbursement of relocation expenses pursuant to merit promotion transfers. However, our decision does not preclude the General Services Administration, the Office of Personnel Management, or the employing agency from issuing regulations on relocation expenses and merit promotions stating conditions and factors to be considered in determining whether a transfer is in the interest of the Government. Payment of relocation expenses need not automatically be tied to the existence of a vacancy announcement issued pursuant to a Merit Promotion Program..... 156

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Miscellaneous expenses
Maintenance costs
Condominium dwelling
Sale Page

Expenses for repairs, maintenance, cleaning, and painting in connection with owner's sale of cooperative apartment may not be allowed as reimbursable relocation expenses under paragraph 2-6.2d of the FTR. Claim for stock transfer tax may be allowed under this authority. This decision was extended by 61 Comp. Gen. —— (B-205614, Apr. 13, 1982) ---------- 136

Tuition forfeiture

Employee of Department of Housing and Urban Development who transferred from New York to Washington, D.C., in July 1978 is not entitled to reimbursement of school tuition deposit for his child's education which he forfeited when the child withdrew from school because of employee's change of permanent station. Tuition forfeiture is not within "miscellaneous expenses" reimbursable under the Federal Travel Regulations (FTR). This decision was extended by 61 Comp. Gen. ——. (B-205614, Apr. 13, 1982) ---------- 136

Real estate expenses
Condominium dwelling
Sale of ownership interest
Carrying charge reimbursement

Employee who transferred from New York to Washington, D.C. in July 1978 claims relocation expenses in the form of carrying charges deducted from his equity refund in connection with the sale of his cooperative apartment. In the absence of evidence clearly establishing different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the FTR. Since carrying charges in a cooperative usually contain items such as interest and principal payments on the mortgage, insurance, utilities, cost of management and maintenance, they cannot be considered a cost incident to the sale of a residence for which reimbursement is authorized under the FTR. This decision was extended by 61 Comp. Gen. —— (B-205614, Apr. 13, 1982) ---------- 136

Foreclosure sale
Litigation expenses

Employee of the Forest Service sold residence within 1 year of transfer in a sheriff's sale under court order following foreclosure. Employee may not be reimbursed under 5 U.S.C. 5724a(a)(4) for costs assessed by the court in connection with foreclosure and sale since Federal Travel Regulations para. 2-6.2c specifically precludes reimbursement for costs of litigation ---------- 112

OFFICES AND EMPLOYEES—Continued

Transfers—Continued

Real estate expenses—Continued

Husband and wife divorced, etc.

House sale Page

Transferred employee sold her interest in residence to former husband. Although sale of interest in residence constitutes residence transaction within meaning of 5 U.S.C. 5724a(a)(4) and Federal Travel Regulations (FTR) para. 2-6.1, broker's fee paid may not be reimbursed absent showing that employee was legally obligated to make such payment to brokerage firm under law of state where residence was located. Employee may be reimbursed legal and advertising costs, but since she held title to residence with person not a member of immediate family at the time of the sale, as defined in FTR para. 2-1.4d, reimbursement is limited to extent of her interest in residence..... 96

Relocation expenses

Miscellaneous expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Miscellaneous expenses**)

Time limitation

Transportation of household effects. (*See* **TRANSPORTATION, Household effects, Time limitation**)

Temporary quarters

Absences

Effect on subsistence expenses reimbursement

After reporting to his new duty station in Albuquerque, New Mexico, and beginning occupancy of temporary quarters, employee and family moved to Aberdeen, South Dakota, for balance of authorized 30-day period. Employee was also on temporary duty and annual leave for several days during this period. The fact that the employee was away from both his old and new duty stations and that he was on annual leave is not determinative of his entitlement. He may be paid temporary quarters expenses for the days he was on annual leave, provided the agency determines that his taking leave did not cause an unwarranted extension of the period of his occupancy of temporary quarters..... 46

Transportation

Dependents. (*See* **TRANSPORTATION, Dependents**)

PAY

Readjustment pay ment to reservists on involuntary release

Recoupment

Retirement

Bankruptcy effect

An Air Force officer who received readjustment pay upon discharge subsequently enlisted and completed 20 years of active duty for retirement. Upon retirement, the member's retired pay was withheld until an amount equal to 75 percent of his readjustment pay was recouped as is required under 10 U.S.C. 687(f). Although the member received a discharge in bankruptcy effective shortly after he retired, this did not entitle him to receive the retired pay withheld under section 687. Deduction from retired pay in the amount of 75 percent of readjustment pay is not a debt and, therefore, it is not discharged by an adjudication of personal bankruptcy..... 67

PERSONAL SERVICES
Contracts
Compliance with Federal procurement, etc. statutes Page
When agency contracts under authority of 5 U.S.C. 3109 with consultant on independent contractor basis, it is still required to follow formal contracting procedures and otherwise comply with the applicable statutory and regulatory provisions governing Federal procurements and the recording of obligations. Although the U.S. Advisory Commission on Public Diplomacy did not follow proper procedures in this respect in contract it entered into with private law firm we do not object to payment of contract claim in this case because the Advisory Commission has authority to contract and because the law firm satisfactorily performed its obligations under the contract. Also, the parent agency—the International Communication Agency—has indicated its willingness to pay the claim---------- 69

REGULATIONS
Joint Travel. (*See* **JOINT TRAVEL REGULATIONS**)

RETIREMENT
Farm Credit district plans
Examination and audit requirements. (*See* **FARM CREDIT ADMINISTRATION, District retirement plans, Examination and audit requirements**)

SALES
Lottery
Multiple drawings
Subsidiary bids
New lottery recommended
Recommendation is made that Department of Energy conduct a new lottery, which includes the prior unsuccessful bidders who are still interested in obtaining an award under the solicitation, but only one of the two subsidiaries of parent corporation which participated in the previous lottery. If the previously successful subsidiary is not selected, its contract should be terminated for the convenience of the Government. Distinguished by B–204821, March 16, 1982---------- 121

Unfair advantage consideration
Natural gas sales
Statutory requirement that all interested persons be afforded a full and equal opportunity to acquire petroleum products is not satisfied when two subsidiaries of the same parent corporation participate separately in a lottery sale. Distinguished by B–204821, March 16, 1982--- 121

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Contract awards. (*See* **CONTRACTS, Small business concerns, Awards, Small Business Administration's authority**)
Contracts
Contracting with other Government agencies
Procurement under 8(a) program
Award validity
Adverse size determination after award
Award of 8(a) contract is not affected by adverse size determination made by SBA subsequent to award---------- 79

SMALL BUSINESS ADMINISTRATION—Continued
Contracts—Continued
Contracting with other Government agencies—Continued
Procurement under 8(a) program—Continued
Contractor eligibility
Termination Page

Small Business Administration (SBA) regulations which interpret Small Business Act as requiring full hearing prior to termination from 8(a) program of firm found to be a large business are to be accorded great deference, and will be accepted where the protester has not shown interpretation to be unreasonable 79

STATUTES OF LIMITATION
Claims
Date of accrual
Relocation expenses
Erroneous separation
Back Pay Act applicability

Employee was mistakenly returned to California from Vietnam in 1973 for separation. About 1½ months later he was reemployed in Washington State. After a timely appeal of the separation the Civil Service Commission, in 1978, found that he had been improperly separated. The separation action was canceled and he was retroactively shown in a pay status during the 1½ month interim period. His claim for relocation expenses from California to Washington did not accrue until the CSC determination was made; therefore, it was not barred by the 6-year time limit on filing claims (31 U.S.C. 71a) when filed in GAO in 1980 57

STORAGE
Household effects
Military personnel
Time limitation
Divorce effect
Property awarded to ex-wife

Nontemporary storage at Government expense of a service member's household goods should be terminated as soon as practicable after a State court awards the stored property to the member's ex-spouse and the member declines to use his transportation allowance to ship the goods to his divorced spouse. However, the goods may be retained in storage for a reasonable time, not to exceed the member's entitlement period, while the ex-spouse arranges for the disposition of the goods 180

SUBSISTENCE
Actual expenses
Maximum rate
Reduction
Meals, etc. cost limitation
Lodging cost not incurred

Employee on temporary duty assignment questions agency's authority to issue guidelines limiting reimbursement for meals and miscellaneous expenses to 46 percent of the maximum rate for actual subsistence expenses when traveler incurs no lodging expenses. Agency may issue guideline alerting employees that the maximum amount considered reasonable under ordinary circumstances is 46 percent of the statutory maximum, but it should also provide that amounts in excess of 46 percent may be paid if adequate justification based on unusual circumstances is submitted 13

SUBSISTENCE—Continued

Per diem

Actual expenses. (*See* SUBSISTENCE, Actual expenses)

TELEPHONES

Contract for automatic distributing system. (*See* COMMUNICATION FACILITIES, Contracts, Automatic call distributing systems)

TRANSPORTATION

Dependents

Immediate family

Grandchildren

Legal guardianship status

State law requirements

Grandchildren who are not under the legal guardianship of an employee of the Department of Defense or of his spouse may not be considered that employee's dependents for the purposes of establishing entitlement to travel and transportation allowances under the Joint Travel Regulations or overseas allowances under the Department of State Standardized Regulations even though those grandchildren reside with the employee at his overseas station. Status of legal guardianship is determined by applicable state law 149

Household effects

Military personnel

Shipment to divorced wife

Authorization propriety

Property awarded to ex-wife

When household goods are awarded to an ex-spouse of a service member incident to their divorce, the member may authorize shipment of the ex-spouse's household goods under the member's transportation entitlement at Government expense one last time since, although legally the property would no longer be the member's or his dependent's property, it is recognized that ordinarily such property has been shipped to its present location by the Government and is often commingled with goods belonging to or to be used by the member's children 180

Dual entitlements

Supplementation agreements

It is a matter for the service member to decide whether to use his transportation entitlement to ship household goods to his divorced spouse at an alternate destination. That the ex-spouse is also a service member does not change this. While each member is allowed his transportation entitlement in his own right as a member, if one member agrees to use his entitlement to supplement the other member's entitlement incident to dividing the household goods upon divorce, he may do so 180

Excess cost liability

Any excess charges incurred by a service member as a result of using his transportation entitlement to ship household goods to his divorced spouse at an alternate location must be borne by the member 180

TRANSPORTATION—Continued
Household effects—Continued
Storage. (*See* **STORAGE, Household effects**)
Time limitation
Beginning and end of period
Administrative intent Page

A transferred employee, whose claim for shipment of household goods was denied by the agency in accordance with para. 2–1.5a(2) of the Federal Travel Regulations because the shipment took place more than 2 years after the effective date of the transfer, may not be reimbursed. The employee reported to his new duty station before travel authorization was signed but later date may not be used for computation of 2-year period for regulations define effective date of transfer as date employee reports to new duty station (see FTR para. 2–1.4) and agency's clear intent was to transfer employee on the earlier date---------- 164

TRAVEL EXPENSES
Dependents. (*See* **TRANSPORTATION, Dependents**)

UNITED STATES ADVISORY COMMISSION ON PUBLIC DIPLOMACY
Authority
Contracting
Legal services. (*See* **ATTORNEYS, Hire, Independent-contractor basis, Advisory commission authority**)

VIETNAM
Evacuation
Loss of currency, etc.
Appropriation chargeable
Piasters abandoned or left on account

Loss of approximately $1,070,000 of piaster currency abandoned in Vietnam may be charged to Gains and Deficiencies Account, 31 U.S.C. 492b, since piasters were acquired and held for exchange transaction operations and became worthless when South Vietnamese Government fell. To extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled---- 132

WORDS AND PHRASES
Annual contributions contract

Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts---------- 85

"Management and control over daily operations"

Whether management agreement between 8(a) firm and large business removes management and control over daily operations from 8(a) firm so that firm would not be eligible for 8(a) assistance under statutory criteria is matter within reasonable discretion of Small Business Administration---------- 141

"Selective correction"

Where the low bidder, alleging two mistakes in bid before award, presents clear and convincing documentary evidence of mistake and intended bid with respect to only one error, correction is allowed as to that error, and waiver of second mistake due to omission of costs is allowed where record disclosures that "intended bid" would remain low-- 30

WORDS AND PHRASES—Continued

"Zone of active consideration for award"

Claimant is not entitled to recover proposal preparation costs because procuring agency's postaward, cost realism analysis indicates that claimant's proposal would not have been the best buy for the Government. Therefore, the claimant did not have a substantial chance of receiving the award and the claimant was not prejudiced or damaged.. 106

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