Decisions of The Comptroller General of the United States

VOLUME 61 Pages 227 to 278

FEBRUARY 1982

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300124000

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1982

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

ACTING GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

TABLE OF DECISION NUMBERS

Cite Decisions as 61 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-204450]

Bids—Invitation for Bids—Cancellation—Not Required, Warranted, etc.—Nonresponsive Bids—Mistake Procedure To Correct

Fact that bidder awarded contract used cumulative method of pricing additive bid items, while others used the additive method stipulated in the invitation for bids (IFB), does not constitute a compelling reason to cancel the solicitation and readvertise.

Bids—Mistakes—Nonresponsive Bids—Mistake Procedure To Correct—Additive *v.* Cumulative Pricing

Where a bidder's prices for one base and three additive items increased cumulatively, contrary to instruction for additive pricing in the IFB, agency's correction of the bid mistake and award to that bidder were proper, since the mistake and the bid prices actually intended are ascertainable from the submitted bid when compared to other bid prices and the Government estimate.

Mater of: Massee Builders, Inc., February 1, 1982:

Massee Builders, Inc. (Massee), protests an award to the Richard Walker Construction Co., Inc. (Walker), under invitation for bids (IFB) No. N68248-80-B-3019 issued by the Naval Facilities Engineering Command, Southern Division (Navy), for the construction of a housing, food preparation, dining, and entertainment complex at the Naval Submarine Support Base, Kings Bay, Georgia. For the reasons discussed below, we deny the protest.

The IFB provided that bids were to be submitted on four items. The first item was "the entire work complete in accordance with the drawings and specifications," but not including work specified under the other three items, which were "the addition of" certain further structures and improvements. Evaluation of bids was to be made, in accordance with clause 21 of the Instructions to Bidders, "Additive or Deductive Items," as follows:

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

The parties involved in this protest submitted the following bid prices:

	Bid Item 1	Bid Item 2	Bid Item 3	Bid Item 4
Walker	$4,362,760	$4,444,388	$4,629,369	$4,725,603
Massee	4,447,000	64,000	190,000	103,000

After bid opening, Walker informed the Navy that its bid prices for items 2, 3, and 4 were cumulative, rather than additive. In addi-

tive form, therefore, Walker's respective prices for the four bid items were as follows:

Bid item 1	Bid item 2	Bid item 3	Bid item 4
$4,362,760	$81,628	$184,981	$96,234

The Navy determined that Walker's error was obvious on its face and that the cumulative and additive tabulations were mathematically identical. Consequently, the Navy determined that Walker had submitted the lowest aggregate bid for the project and that Massee was the second low bidder, The Navy awarded the contract to Walker in reliance upon our decision, in *Bentley, Inc.,* B-200561, March 2, 1981, 81-1 CPD 156.

Massee protests the award on the alternative grounds that the IFB is defective and must be readvertised, and that Walker's bid is nonconforming and, therefore, nonresponsive. Massee further states that a determination by the agency that Walker had made an obvious error is tantamount to permitting Walker to adjust its prices after bid opening to the disadvantage of other bidders and in violation of the competitive bidding system.

As to Massee's first contention, the Navy's reliance on the above decision is correct. Invitations for bids may be canceled by the agency after bid opening only for "compelling" reasons. Defense Acquisition Regulation (DAR) § 2-404.1(a) (1976 ed.). In *Bentley, Inc., supra,* we held that the mere fact that bidders used different methods of bidding, i.e., both cumulative and additive, did not constitute a "compelling" reason for cancellation where intended prices for each item readily could be determined from the face of the bids. We could conceive of no reasonable construction of the submitted bids other than that some firms were bidding cumulatively and others additively. We conclude that this is the case here; the agency could not have reasonably concluded that Walker intended to submit an aggregate bid of $18,209,120 in response to an IFB with a stated estimated cost of between $2.5 million and $5 million.

Massee contends that, since Walker's method of bidding violated clause 21 of the IFB, the bid cannot be corrected and should be rejected as nonresponsive. This Office has rejected these contentions in similar circumstances involving clause 21 and a low aggregate bid on a cumulative basis. In this regard, we have sustained awards to bidders submitting cumulative bids clearly susceptible to specific computation, despite the fact that clause 21 does not contemplate cumulative bidding. See *Bentley, Inc., supra; Weathertrol Inc.,* B-188929, August 11, 1977, 77-2 CPD 113. In the latter case, the IFB

instructed bidders to submit a bid price for item 1 (the base bid) and a separate price for item 2 (an additive). A bidder contended that its bid price of $32,531 for item 2 was cumulative rather than additive, resulting in an item 2 price of $5,104. Other bidders submitted prices for item 2 ranging from $2,972 to $5,515. In our decision we held that a mistake in bid price was evident on the face of the bid when it was compared to other bids and to the Government estimate. We further held that the bid price actually intended for bid item 2 was ascertainable substantially from the bid itself, and that correction of the bid was proper under DAR § 2-406.3(a)(3) (1976 ed.). *See also* B-170450, November 13, 1970.

We deny the protest.

[B-203668]

Pay—Withholding—Debt Collection—Alimony and Child Support—Garnishment Order Overturned—Reclaim Denied

The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face.

Matter of: Technical Sergeant Harry E. Mathews, USAF, February 2, 1982:

This action is in response to an appeal by Technical Sergeant Harry E. Mathews, USAF, of our Claims Group's disallowance of his claim for reimbursement of amounts withheld from his pay and for other expenses he incurred pursuant to the garnishment of his Air Force pay during the period June 1976 through May 1980. The pay Sergeant Mathews is claiming was withheld by the Department of the Air Force pursuant to an order for child support issued by a Florida Circuit Court in March 1976. There is no authority to reimburse the claimant for pay garnished under an order which, at the time the pay was garnished, was valid on its face, nor is there authority to reimburse him for other expenses he incurred in connection with the garnishment.

In 1976, while Sergeant Mathews was assigned overseas, he received notice that, due to a lawsuit brought against him in Florida for child support, a Florida state court had issued a garnishment order against his pay. Under the order his pay was to be garnished until December 1992, and an arrearage of $1,150 was also to be collected. The Air Force determined that the order was valid on its face and began complying with it by withholding the required amounts from his pay. Contending that he had no prior notice of the lawsuit, and that it was based on fraud, Sergeant Mathews

sought help from the Government to challenge the order. However, since it was primarily a private matter, the Air Force advised him to seek civilian counsel to challenge the order in the Florida courts.

Sergeant Mathews contends that he encountered difficulty in securing civilian counsel. He also states that the hearing date on his Motion for Relief from Judgment was postponed several times and that, for an extended period of time, his file was missing from the appropriate court, causing further delay. Throughout this time, payments of $151.67 a month plus $50 a month in payment of the arrearage were garnished from his pay.

In May 1980, he was heard in the Florida court on a Motion for Relief from Judgment, and by order dated May 20, 1980, a judge of the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida, ordered the garnishment set aside. On the basis that this order indicates that the garnishment should never have taken place, Sergeant Mathews filed a claim with the Air Force for reimbursement of the amount paid during the period June 1976 through May 1980 as well as other expenses he indicates arose out of the matter. The Air Force Accounting and Finance Center, noting that it found no basis for reimbursement, sent the claim to our Claims Group which disallowed it on September 2, 1980.

The issue in this case is whether the Government is authorized to reimburse a service member for money garnished from his pay pursuant to a state court order to which the Government is subjected under 42 U.S.C. § 659, when the order has been overturned. The order in this case was set aside presumably due to insufficient personal jurisdiction by the court over the member.

Under the provisions of 42 U.S.C. § 659 (Supp. III, 1979) the Government has waived its sovereign immunity for the limited purpose of subjecting itself to state actions to garnish the pay of its employees and members of the Armed Forces but only when garnishment is to provide child support and alimony. When the Air Force was served with a garnishment order valid on its face it was required to comply with it, and the Government incurred no liability to Sergeant Mathews in doing so. Thus, where an order appears regular on its face, the Government must garnish wages to make payment, and in fact, may be held liable if it fails to do so. See 56 Comp. Gen. 592 (1977). See also 42 U.S.C. § 659(f) which specifically provides that neither the United States, any disbursing officer, nor governmental entity is liable for payments made under this authority "pursuant to legal process regular on its face."

The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular "on its face" means just that. Facial validity of a writ need not be determined "upon the basis of scrutiny by a trained legal mind," nor is facial validity to be judged in light of facts outside the writ's

provisions which the person executing the writ may know. *Aetna Insurance Co.* v. *Blumenthal,* 29 A.2d 751, 754 (Conn. 1943).

As is indicated above, when the Air Force received the garnishment order, they reviewed it and found it valid on its face and in conformity with the Florida law. Sergeant Mathews has not shown that that finding was incorrect. Instead, he argued that the order was invalid because it was obtained by fraud, and that he had not been properly served in the original court action against him. As the Air Force advised him, these were matters for him to litigate in the courts and not for the Air Force to decide. That is, they were not challenges to the facial validity of the garnishment order. While the order was set aside in 1980, it was valid at the time payment was being made under it, and the Government had a duty to comply with it until the court modified it. There is no authority for reimbursement of the amounts withheld from Sergeant Mathews' pay, nor is there authority to reimburse him for the legal and other expenses he claims he incurred in having the order overturned.

Accordingly, the disallowance of the claim is sustained.

[B-196356.2]

Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Subcontractor Partnerships

Prior decision, 59 Comp. Gen. 422, holding that individual members of a partnership, serving as a subcontractor, who perform the work of laborers or mechanics on a project subject to the Davis-Bacon Act are covered thereunder, will not be followed pending action by Department of Labor.

Matter of: T.W.P. Company—Reconsideration, February 4, 1982:

The Department of the Air Force requests reconsideration of our decision in the matter of *T.W.P. COMPANY,* 59 Comp. Gen. 422 (1980), 80-1 CPD 295.

In that decision, we denied the protest holding, in part, that:

(1) Since the Air Force found the successful bidder responsible, there was no basis to question the award merely because the successful bidder submitted a below-cost bid; and

(2) Since the successful bidder took no exception to the solicitation's Davis-Bacon Act provisions, the question of whether the bidder would comply with the Davis-Bacon Act was a matter of contract administration and not for consideration under our Bid Protest Procedures.

The Air Force does not object to either one of these findings. What the Air Force does question is our third finding regarding the application of the Davis-Bacon Act, 40 U.S.C. § 276a (1976), to the individual members of a partnership, serving as a subcontractor, performing the work of laborers or mechanics on a project subject to the act. We held that under such circumstances the individ-

389-405 O - 80 - 2

ual members of the partnership must be paid no less than the prevailing Davis-Bacon wage rates specified in the contract and that the Air Force should take whatever steps are necessary to ensure compliance with the various requirements of the act.

On reconsideration, the Air Force argues, essentially, that we have misinterpreted the statutory provision in question and that our recommendation is impractical and places an undue administrative burden on both the contractor and the contracting agency. While we do not agree that we have misinterpreted the Davis-Bacon Act, for reasons discussed below, we modify our prior decision.

The pertinent facts of the case are that Mather Air Force Base, California, issued an invitation for bids soliciting bids for the repainting of family house interiors. Of the five bids received, Bill Ward Painting & Decorating (Ward), the incumbent contractor, submitted the lowest bid with the T.W.P. Company (TWP) submitting the second low. In the past, Ward had subcontracted the work to Gorman and Sons Painting (Gorman), a partnership consisting of a husband, wife and two sons as coequal partners. Gorman was scheduled to perform the work under this contract as well. TWP protested that: (1) Ward's bid was below cost; (2) in the past the Air Force had not required Ward to comply with the Davis-Bacon Act's minimum wage or payroll reporting requirements and did not intend to make Ward comply under this solicitation either; and (3) because the Air Force did not intend to enforce the Davis-Bacon requirements in regard to Ward, the bidders had not competed on an equal basis.

As indicated above, we denied TWP's protest on the merits and made no recommendation that would disturb the contract award, noting parenthetically that the record indicated that the dollar amount designated for labor by Gorman was more than the Davis-Bacon wages. We then went on to say:

> However, we believe it is incumbent upon us to comment on the Air Force's position that the Davis-Bacon Act does not apply to subcontractors such as Gorman. It is Air Force policy that to the extent contract work is performed by coequal partners of a bona fide partnership, no Davis-Bacon coverage is applicable to those partners since they are not "laborers" or "mechanics" within the meaning of the act. Consequently, the Air Force has not and will not require Ward to comply with the Davis-Bacon Act, despite the Davis-Bacon provision contained in the IFB. The Air Force states that it instituted this policy because the Department of Labor has not provided any current guidance regarding the applicability of Davis-Bacon wage rates when the work is to be performed, as here, by coequal partners rather than by individuals working for an hourly wage.
>
> The Davis-Bacon Act provides that the prevailing wage will be paid to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics." In other words, the purposes of the act cannot be defeated by a claim that, due to some contractual relationship, an individual is an independent contractor although he is in fact performing the work of a laborer or mechanic. The controlling element, therefore, is the type of work performed, not the contractual relationship between the parties. *See* 41 Op. Att'y Gen. 488 (1960); and *cf. United States* v. *Landis & Young*, 16 F. Supp. 832 (W.D. La. 1935).

In view of the above, each of Gorman's coequal partners should be paid no less then the prevailing Davis-Bacon wage when actually performing the work on this project. Therefore, the Air Force should take whatever steps are necessary to ensure compliance with the various requirements of the act. In addition, the Air Force should ensure that, in the future, whenever a member of a partnership performs the work of a laborer or mechanic on a project that falls within the scope of the Davis-Bacon Act, the prevailing wage determination is applied.

The Air Force argues that we have misinterpreted the provision in 40 U.S.C. § 276a which provides that the prevailing wage will be paid to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics." Further, the Air Force notes that the Department of Labor (DOL) issued "All Agency Memorandum No. 123" in June 1976 which did in fact apply the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act to working partners or owners of a subcontracting firm. The Air Force points out, however, that on August 30, 1976, DOL withdrew Memorandum No. 123 because of the administrative difficulties it had created for the contracting agencies. According to the Air Force, it has been unable to obtain any further guidance from DOL; therefore, the Air Force has followed its earlier policy of not applying the Davis-Bacon requirements to working partners.

Upon receipt of the Air Force's request for reconsideration, we sent a letter to DOL requesting its views on the issues raised because of DOL's responsibility under the act. However, after repeated followup letters, DOL has yet to furnish our Office with a formal statement of its views. Since there is no indication that DOL will respond in the near future, we will consider the Air Force's request without the benefit of DOL's views.

As indicated above, we do not agree with the Air Force's interpretation of the act because of the possibility that the purposes of the act may be defeated through such an interpretation. Nevertheless, in view of DOL's responsibility in this area, and since DOL withdrew Memorandum No. 123—requiring application of the act to working partners or owners of a subcontracting firm—because of the difficulties it had created for the contracting agencies, we will not insist upon adherence to our decision pending action by DOL.

Our prior decision is modified accordingly.

[B-204178]

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—GOCO *v.* COCO Bids—Evaluation—Implied Criteria

Solicitation called for bids on two methods of contracting out work being performed in-house by Government personnel. While solicitation explicitly provided for a cost comparison of the cost of performance in-house with cost of contracting out, solicitation was silent on exact method of making award between the low bidder on each of the two methods of contracting out. However, General Accounting Office finds that

solicitation implied that cost principles in OMB Circular A-76 Cost Comparison Handbook would be used in the evaluation and that the two low bidders understood that such principles would be used.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—GOCO *v.* COCO Bids—Evaluation—Cost Elements for Inclusion

Protest against inclusion of two cost elements from OMB Circular A-76 Cost Comparison Handbook in evaluation of bids is denied where protester has not shown that their inclusion was unreasonable or that the amounts represented under those elements were inaccurate.

Matter of: Crown Laundry & Dry Cleaners, Inc., February 5, 1982:

Crown Laundry & Dry Cleaners, Inc. (Crown), protests the cost comparison procedures used in evaluating the bids on invitation for bids (IFB) No. DABT10-81-B-0009 issued by the Procurement Division, United States Army Infantry Training Center (Army), Fort Benning, Georgia. The solicitation was for laundry and drycleaning services at Fort Benning. Bids were solicited for both Government-owned, contractor-operated (GOCO) facility using existing equipment and facilities at Fort Benning and a contractor-owned, contractor-operated (COCO) facility using the contractor's own equipment and facilities.

The IFB, issued on March 11, 1981, advised bidders that it was part of a cost comparison to determine whether accomplishing the work in-house using Government employees or by contract would be more economical.

Crown contends that the standby costs charged to Crown's COCO bid were erroneously calculated and contrary to the Office of Management and Budget (OMB) Circular A-76 and the Cost Comparison Handbook, Supplement No. 1 to OMB Circular A-76, and the cost of capital charged to Crown's COCO bid was erroneous and excessive.

We deny the protest.

Four bids were received. Crown was the only GOCO bidder which also submitted a COCO bid. Apex International Management Services, Inc. (Apex), submitted the lowest of the four GOCO bids. The bids were entered on a cost comparison form to determine the most economical method of obtaining the required laundry and drycleaning services. After evaluation pursuant to the Cost Comparison Handbook, Apex was found to have the most economical method of performance followed by Crown's COCO bid. A total of $6,869.25 separated the two evaluated bids.

By letter of June 18, 1981, Crown made an administrative appeal of the cost comparison to the contracting officer. Pursuant to paragraph 11 of OMB Circular A-76, Crown's appeal was provided to a cost comparison appeals review board. By letter dated July 10,

1981, the review board denied Crown's appeal and on July 21, 1981, Crown protested here.

Crown contends that the procurement officials considered $245,480 in standby costs which were erroneously computed and used in the evaluation without any detailed justification as required by the Cost Comparison Handbook. Crown points out that the Cost Comparison Handbook specifically requires a detailed justification for holding Government property in standby status. The justification should be included in the documentation supporting the cost analysis. Crown argues that the only basis Army procuring officials gave for including standby costs was Army Regulation (AR) 210-130, Laundry/Dry Cleaning Operations (March 2, 1979). In Crown's opinion, reliance upon an existing Army regulation cannot constitute the detailed justification. Therefore, Crown contends, in the absence of any detailed justification, the procuring officials improperly included standby costs in the cost comparison.

The Army takes the position that the detailed justification for maintaining its laundry facilities in standby status is AR 210-130 because paragraph "1-3c(4)" of AR 210-130 specifically provides that existing Army base laundry facilities in which operations are discontinued in favor of commercial service are to be maintained on a standby basis unless otherwise directed by Headquarters, Department of the Army. The Army goes on to point out that paragraph "1-3c(4)" was added to AR 210-130 in March 1979, the same month that OMB's Cost Comparison Handbook was issued. The change to the AR was made to address the situation that the Army would face in the event a COCO contract was awarded and, as such, the Army states that the changes constitute its position on the matter.

Regarding cost of captial, Crown asserts that the procurement officials improperly included an amount for cost of capital for both in-house and contracting out in the cost comparison. According to Crown, a cost of capital figures is required only for a cost comparison with a GOCO bid because the Government plant and facilities necessary for the work will be utilized by that type of contractor. In Crown's opinion, no such cost of capital exists when the Government facility is not used by the COCO contractor. Crown argues that only the capital actually utilized by the COCO contractor in performing the bid should be considered.

Crown also asserts that the procedures followed in this procurement were contrary to the procedures followed by other Army installations in other procurements. Crown argues that the proper procedure as authorized by the Cost Comparison Handbook is for the Government to use the figure for the cost of capital for in-house performance and a much smaller figure, in Crown's opinion, for the cost of actual capital utilized for contracting out to a COCO operation. Crown cites cost comparisons in procurements at Fort Riley, Kansas, and Fort Campbell, Kentucky, as examples where

allegedly proper procedures were utilized in computing these costs of capital figures.

The Army responds that the Cost Comparison Handbook provides that the cost of capital for assets retained by the Government to assure performance in case of significant contract interruption or delay will be used for both in-house and contracting out cost comparisons.

Paragraph 1c of section "M" of the IFB provided that a single contract would be awarded to the responsible bidder submitting the lowest responsive bid for either a GOCO or a COCO operation. The IFB does not, however, explicitly state that the cost comparison principles set forth in the Cost Comparison Handbook would be used in determining the lowest responsive bidder. Nevertheless, we think that such a method was implied from the terms of the IFB since paragraph 31 of section "L," Notice of Cost Comparison, stated that a cost comparison would be made "as indicated on the cost comparison form." Moreover, the record indicates that Crown and Apex understood that the Cost Comparison Handbook principles would be used in the evaluation of their bids. Consequently, we conclude that Crown and Apex were competing on an equal basis for award.

Furthermore, the advertising statute governing this procurement requires that award be made "to the responsible bidder, whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered." 10 U.S.C. § 2305(c) (1976). This language requires award on the basis of the most favorable cost to the Government. See *Square Deal Trucking Co., Inc.,* B-183695, October 2, 1975, 75-2 CPD 206. Inasmuch as different costs would accrue to the Government depending on which contract method was used in performance, an award which did not take into account these differing cost considerations would not reflect the actual needs of the Government.

Turning to Crown's contention that standby cost should not have been included in the evaluation of its bid, section "F," chapter IV, of the Cost Comparison Handbook provides in pertinent part as follows:

1. In unusual and infrequent instances, it may be necessary to hold Government equipment and/or facilities in a standby status when an in-house activity is terminated in favor of contract performance to assure provision of the needed product or service * * *

2. * * * A detailed justification is required for holding the Government property in standby status, and a copy of the justification should be included in documentation supporting the cost analysis.

Paragraph "1-3c(4)" of AR 210-130 states that existing "Army facilities in which operations are discontinued in favor of commercial service will be maintained on a standby basis unless otherwise directed by Headquarters, Department of the Army."

In our opinion, the inclusion of standby costs in evaluating Crown's bid was reasonable. Paragraph "1-3c(4)" is the Department of the Army's policy determination that in the area of laundry and drycleaning, the Army installation's plant and facilities will be kept in a standby status in order to insure adequate laundry service in the event of interruption or delay in the performance of the contractor's contract. In this regard, the Army points out that laundry and drycleaning services at major Army installations require extensive facilities and that until recently most Army installations fulfilled their laundry and drycleaning needs in-house with Government personnel.

We also note that Crown alleges that in cost comparison studies at Fort Knox, Kentucky; Fort Riley, Kansas; Fort Lewis, Washington; and Fort Campbell, Kentucky, for COCO contracts, standby costs were either not included or were minimal. However, the Army states that there were no standby costs in these cost comparisons because only GOCO bids were received. The Army emphasizes that the cost comparison studies alluded to by Crown can only show that no standby costs were entered on the appropriate forms and not that such costs would have been excluded had there been any COCO bids.

As to the contention that the standby costs were erroneously computed, Crown asserts that the Government total of $245,480 for the contract period is more than the Government's figure for the actual use of the Government facilities by a GOCO contractor. In our view, the mere fact that standby costs are more than the costs of a GOCO contractor using the Government's plant and facility does not in itself indicate an error in the computation. Paragraph "F.3," chapter IV, of the Cost Comparison Handbook provides that where it is determined that Government property should be held in a standby status, *all related* costs must be estimated for inclusion in the cost comparison analysis. Further, paragraph "F.3" shows that the key elements in standby costs are depreciation of the Government's equipment and the labor expense incurred in standby status. With regard to depreciation, the record shows that the useful life of the equipment is not increased through standby maintenance. Consequently, the depreciation figure for GOCO use of the equipment is the same as the depreciation figure for the equipment being in standby status.

Finally, with respect to the inclusion of a cost of capital figure in the evaluation of Crown's bid, paragraph "D.1," chapter "V," of the Cost Comparison Handbook states that the cost of capital is defined as an imputed charge on the Government's investment in all of its plant facilities and other assets necessary for the work center to manufacture products or to provide services. In entering this cost on the cost comparison form, paragraph "D.2c" provides as follows:

The cost of capital for assets that will be used only for in-house performance but which must be retained by the Government to assure performance in the event of

significant contract interruption or delay will also be entered on both lines 18 [in-house] and 23 [contract out] for each year in the period of performance.

We think that an inclusion of a cost of capital figure in evaluating Crown's COCO bid and Apex's COCO bid was reasonable. Paragraph "D.2" of chapter "V" of the Cost Comparison Handbook shows that the charge for the cost of capital is an opportunity cost. If the Government's capital had not been devoted to performance use during the contract period, it could have been devoted to another use which would have provided other income or avoided interest expenses.

Also, the Army states that the cost of capital figures used in the cost comparison were computed in compliance with the Cost Comparison Handbook procedures and we have no basis to question the accuracy of the computation itself. We do note that the record shows that the calculations were verified by the Army Audit Agency—an Army activity separate from the procuring activity. See *ACMAT Corporation,* B-197589, March 18, 1981, 81-1 CPD 206.

We deny Crown's protest. However, we recommend that in future solicitations of this nature where the bidders may not otherwise be aware how their various bids will be evaluated, the Army explicitly set forth in the solicitation the exact method that will be used to determine the low bidder between the GOCO and COCO bids.

[B-200718.3]

General Accounting Office—Jurisdiction—Contracts—Issues Not Raised in Protest

In resolving a bid protest, General Accounting Office (GAO) is not confined to address only those issues or arguments raised by the parties to the protest. The purpose of GAO's bid protest function is to insure compliance with the rules and regulations governing the expenditure of public funds. Accordingly, where GAO is aware of a regulation that is relevant to a particular situation, GAO will apply it appropriately, whether or not the parties have taken notice of it.

Matter of: A. J. Fowler Corporation—Second Request for Reconsideration, February 8, 1982:

This decision responds to A. J. Fowler Corporation's second request that we reconsider our decision in *Moore Service, Inc.*, B-200718, August 17, 1981, 81-2 CPD 145, in which we sustained a protest against award to Fowler under invitation for bids (IFB) DABT51-80-B-0048 issued by the Department of the Army. We affirm that decision.

The IFB sought bids for refuse collection and disposal services at 3,582 quarters at Fort Bliss, Texas. We sustained Moore's protest because the Army failed to advise offerors of its plans to increase the number of 80-84 gallon "mobile toters" which the Army expected to provide in place of the 30 gallon galvanized containers at most of the quarters. We found that a competition based on the im-

minent availability of that increased number of toters may have yielded a substantial reduction in the bid prices. We therefore recommended that the Fowler contract renewal option not be exercised, and that the Army conduct a new procurement and award a new contract for the fiscal year 1982 requirement.

Fowler's first request for reconsideration was based on the view that we failed to recognize that the contractual obligation on which offerors bid was to service 3,582 quarters, regardless of whether the Army furnished toters, cans, or some other containers. Since what Fowler viewed as the material contract specification—the number of quarters to be serviced—never changed, Fowler believed that our decision should be reversed.

In response, we pointed out that in fact we did recognize in our decision that no change in the description of the service to be performed was involved. We sustained Moore's protest because contracting personnel cannot make an award with the intention to change either the specifications or the conditions of performance materially—here, by increasing the number of quarters to be equipped with toters from 1,425 to 3,582.

We also discussed Fowler's complaint, supported by the Army, that because Fowler invested $750,000 in equipment to perform the contract expecting that the options would be exercised, it will be placed in financially difficult circumstances if it is unable to continue performance. We stated:

> * * * the Government's desire to continue contracting with Fowler in order to permit the firm to write off start-up and equipment costs is not a basis recognized for option exercise under the Defense Acquisition Regulation (DAR). Instead, the DAR requires that the contracting officer determine whether exercise of an option is in the Government's interest by soliciting bids unless he has reason to believe that better pricing cannot be obtained. DAR § 1-1505(d) (1976 ed.). Fowler's and the Army's concern stems from their belief that better pricing can be obtained, since both fear Moore will underbid Fowler's price. Thus, in the absence of our August 17 recommendation [that the renewal option in Fowler's contract not be exercised], the Army could exercise the Fowler contract option, according to the regulation governing the exercise of an option, only if resolicitation fails to produce a lower price.

A. J. Fowler Corporation—Request for Reconsideration, B-200718.2, September 29, 1981, 81-2 CPD 260. Accordingly, we affirmed our initial decision.

In the present request for reconsideration, Fowler objects to our September 29 discussion of DAR § 1-1505(d) and its relevance to the procurement. The firm contends that the discussion was not appropriate because neither the protester, Fowler, nor the Army ever argued that the regulation applied to the option exercise.

Our initial decision in the matter makes it clear that Fowler's option should not be exercised because the procurement was deficient, and does not discuss the requirements of DAR § 1-1505(d). We discussed the regulation in our decision on Fowler's first reconsideration request only in response to Fowler's and the Army's suggestion that, notwithstanding the procurement deficiency, the

firm's option should be exercised essentially to enable Fowler to recover start-up and equipment costs; this suggestion reflected an apparent misunderstanding of the rule governing option exercises, which is at DAR § 1-1505(d). Thus, our basic position always has been that the option should not be exercised because of the Army's error in the conduct of the procurement.

In any event, we do not consider ourselves confined to address only those issues and arguments raised by the parties to a bid protest. The purpose of our bid protest function is to assure compliance with the rules and regulations governing the expenditure of public funds, consistent with out statutory authority to settle and adjust public accounts and claims against the Government. Accordingly, where we are aware of a regulation that is relevant to a particular situation we will apply it and make findings and recommendations under it as appropriate to preserving the integrity of the competitive procurement system, whether or not the parties to the protest have taken notice of it. *Association of Soil and Foundation Engineers—Reconsideration,* B-200999.2, May 11, 1981, 81-1 CPD 367.

The Army also asks that we reconsider our decision. The Army's first argument is that despite the fact that a refuse collection and disposal contract technically may be a 1-year contract with two annual renewal options, such contracts in fact are competed and awarded with the implicit understanding that the contractor will perform for 3 years, that is, that the options will be exercised. The reason is that the service is "highly capital intensive initially," and therefore (1) very few firms will compete if only a 1-year contract is offered, particularly against an incumbent that already has capitalized its equipment, and (2) when firms do compete for 1-year contracts, their prices will be very high. The Army suggests that these are the reasons why there were very long incumbencies before the Army began the practice of offering, in effect, 3-year contracts. The Army argues that this Office's "interpretation" of DAR § 1505(d):

> * * * is tantamount to a determination reserved to a Contracting Officer, could be patently unfair or uneconomical *overall* in a given situation, and is potentially far more damaging (as precedent) than any perceived flaw in the instant procurement.

Our view of the regulation, however, was not our "interpretation," but simply a reading of its language.

Fowler competed for and was awarded a 1-year contract with options, not a 3-year contract. DAR § 1-1505 governs the exercise of these options. The regulation provides that an option "should be exercised" only if that is the most advantageous method of fulfilling the Government's needs after price and certain other factors (not relevant here) are considered. The regulation expressly provides that if the contracting officer anticipates that the option price will not be the best price available, the required price consideration "shall be made" on the basis of the prices disclosed in response to a new solicitation. DAR § 1-1505(d)(1).

Thus, DAR § 1-1505 does not permit the Government to award a 3-year contract under the guise of a single year contract with two option years; as we stated in our September 29, 1981 decision, the Government's desire to continue contracting with a firm so that the contractor can recover costs that it did not make an allowance for in the base year price simply is not recognized in the governing regulation. Rather, the regulation expressly requires the contracting officer to investigate whether each option year price is the best price available for the option year. The record before our Office in connection with our decision in this matter evidenced both Fowler's and the Army's belief that better pricing could be obtained in a new competition. In that case, the express provision in DAR § 1-1505, and not our "interpretation" of the regulation, required a new competition.

The Army's second point is that we were wrong in concluding that bidders would have bid lower if they had known that the Army intended to increase the number of toters to be used in contract performance from 1,425 to 3,582. In connection with the initial protest, Moore, which bid $56,000 more than Fowler did ($616,189.80 to $560,952.00), had asserted that the use of toters instead of 30 gallon containers allows an employee to handle one toter for every two or more 30 gallon containers and permits containers to be dumped using an automatic lift; Moore contended that it could have saved $2,730 per month in labor costs and used one less truck had it based its bid on the use of toters for all 3,582 dwellings rather than 1,425. As stated above, we found that a competition based on the imminent availability of 3,582 toters may have resulted in substantially lower prices than were received in the competition held, which was based on the use of 1,425 toters.

The Army now argues that "time spent per residence" is the basis for computing bids on these contracts, not the types of containers used. The Army contends:

> * * * From a time standpoint it may be *significantly faster* to dump even two cans per quarter and place them on the curb than it is to hook up the mobile toters to the hoisting device, let it slowly run up and dump and slowly run down again, remove it, and roll it back to the curb. The speed of dumping cans can be controlled by the crew, whereas the speed of dumping toters mechanically is outside of their control. In addition, because there is no force in the dumping action, many times the crew will have to hand-remove material stuck in the toter which they would not have to do with cans because they can "bang" them when dumping. * * * The toters were installed for the ease of residents, not contractors. Many refuse contractors do not favor them because they are more cumbersome and time consuming to handle. In no event could a truck and crew be eliminated due to the change in containers furnished at curbside.

We have stated that we will not consider evidence on reconsideration that an agency could have but did not furnish during the initial consideration of a protest. *Interscience, Systems, Inc., Cencom Systems, Inc.—Reconsideration,* 59 Comp. Gen. 658 (1980), 80-2 CPD 106. The Army did not make this argument in connection with Moore's protest, although the issue clearly was crucial to the reso-

lution of the matter. The Army did not make this argument in connection with Fowler's request that we reconsider our recommendation that the options in the firm's contract not be exercised, although it was expressly raised by Fowler. In fact, the Army letter in support of this second request for reconsideration was not received until 1 month after Fowler's request was filed. Parties or agencies that withhold or fail to submit all relevant information to our Office in the expectation that our Office will draw conclusions beneficial to them do so at their own peril, since it is not our function or province to prepare, for parties to a protest, defenses to or positions on allegations clearly raised. *Id.*

We remain of the view that the Army's increase in the number of toters was a substantial change in the conditions of performance, and that the Army should have advised prospective bidders of its plans in that respect. The Army advises that it has solicited bids for what would have been Fowler's first option year, but has delayed bid opening pending our resolution of Fowler's second request for reconsideration. Under the circumstances, and since the best method to assess how much a service will cost the Government is through competition, *Olivetti Corporation*, B-187369, February 28, 1977, 77-1 CPD 146, we believe that the Army simply should open bids under the new solicitation. In this respect, if Fowler's option year price in fact is lower than the low bid, of course we would have no objection to exercising that option in lieu of a new contract award at a higher price.

Our August 17, 1981 decision again is affirmed.

[B-203770]

Grants—Comprehensive Employment and Training Act (CETA)—Participating Agencies—Appropriation Availability—Retirement Contributions for CETA-Assigned Employees—Reimbursement

General Services Administration does not have authority to pay retirement contributions to state retirement system for Comprehensive Employment and Training Act (CETA) employee assigned to it by the Metropolitan Community Colleges District, Kansas City, Missouri, a CETA subgrantee, 46 Comp. Gen. 115, distinguished.

Matter of: General Services Administration—Contributions for CETA Employee, February 8, 1982:

This responds to a request from the General Services Administration (GSA) about whether it has authority to pay an invoice of $93.73 for retirement contributions made by the Metropolitan Community Colleges District for one of the District's Comprehensive Employment and Training Act (CETA) employees assigned to GSA. For the reasons given below, we find that GSA does not have authority to pay the invoice.

The Metropolitan Community Colleges District (the District) of Kansas City, Missouri, as a program agent for CETA, provided employment for CETA participants with the district and, upon request, by assignment to outside agencies such as GSA. See Comprehensive Employment and Training Act Amendments of 1978, 29 U.S.C. §§ 801 *et seq.* (Supp. III, 1979). CETA regulations specifically provide that assigned employees, such as the one assigned by the District to GSA, are considered employees of the employing agency, 20 C.F.R. §§ 675.4 and 676.25-3(c)(5) (1981), and not the agency to which they are assigned.

Beginning in 1980, the District agreed to participate in the Missouri Non-Teacher Retirement System. Accordingly, it made contributions to that System for staff employees at the rate of 3 percent of salary. In compliance with a Missouri Attorney General opinion that required employers participating in the Retirement System to make retirement contributions for full-time CETA employees, the District decided it would pay the retirement costs for its CETA employees, including the one who was assigned to GSA, but that it would request GSA to reimburse it for the retirement contributions for the employee assigned to GSA.

In a legal opinion, the GSA Office of Regional Counsel concluded that reimbursement of the retirement contributions by GSA was questionable since GSA did not have authority to pay retirement costs. Accordingly, GSA submitted the matter to our Office for resolution. Subsequently, in response to our request for its comments, the Department of Labor informed us that since CETA did not preclude payment by GSA, the issue of whether and under what circumstances GSA might use its funds was within the purview of this Office. The Department also explained that program regulation 20 C.F.R. § 676.28-1 (1981) discourages retirement contributions under CETA where, as appears to be the case with the Missouri Non-Teacher Retirement System, the payments do not vest rights in the employees when made. Finally, the Department's response said that even if the system did qualify for CETA contributions to it, the funds would have to come out of the District's subgrant or contract.

Since the Comprehensive Employment and Training Act does not authorize GSA to reimburse CETA subgrantees for their retirement contributions for their CETA employees assigned to GSA, GSA can make those reimbursements only if it is otherwise authorized to do so. The question before us is then limited to determining the authority of GSA to reimburse the District for payments the District has made into the Missouri Non-Teacher Retirement System on behalf of the CETA worker assigned to GSA.

Section 628 of title 31 of the United States Code (1976) requires that appropriations be applied solely to the objects for which they are made. As a corollary to this law we have held that where an

appropriation is made for a particular object, by implication it confers authority to incur expenses that are necessary or incident to the proper execution of the object. *See e.g.,* 6 Comp. Gen. 619, 621 (1927).

A payment into a retirement fund is normally part of the compensation paid an employee for services. In this instance, the District is the employer of the CETA worker pursuant to CETA regulations and thus must make the payment into the Missouri Non-Teacher Retirement System. Our review of the Act appropriating money to GSA for fiscal year 1980,[1] Pub. L. No. 96-74, 93 Stat. 566-70, September 29, 1979, and its legislative history, fails to show any appropriation, including those for "general management and agency operations-salaries and expenses" or "administrative and staff support services—salaries and expenses" as being available for the described payments as a necessary expense incident to the proper execution of any appropriation. Furthermore, it does not appear that the arrangement between the District and GSA provides for GSA reimbursing the District for its retirement contributions.

We distinguish our conclusion here from that in 46 Comp. Gen. 115 (1966) and the cases following that decision, *e.g.,* 50 Comp. Gen. 553 (1971). In 46 Comp. Gen. 115 we considered the College Work-Study Program under title I-C of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. §§ 2751 *et seq.* (Supp. V. 1965-68). That program was designed for cost sharing between participating educational institutions and work site organizations, including Federal agencies. At the time of that decision, the Economic Opportunity Act provided that the institutions pay up to 90 percent [2] of the student compensation from grant funds, and the work site organizations the remainder. Pub. L. No. 88-452, 42 U.S.C. 2701 note, § 124(f), 78 Stat. 515.

The Act also limited the use of grant funds for administrative expenses to 5 percent of the amount of the grant funds applied to compensation of students at work site organizations. *Id.* § 124(b). The fact that the use of grant funds for administrative expenses was limited clearly suggested the need for work site organizations to share in the administrative costs as well as the compensation costs. Accordingly, in 46 Comp. Gen. 115, 117, we held that the Veterans Administration could include various administrative costs which were not reimbursed with grant funds (social security taxes,

[1]We cite the Treasury, Postal Service and General Government Appropriation Act for fiscal 1980 because GSA activities for fiscal 1981 and 1982 were, and are, funded through continuing resolutions. Pub. L. No. 96-536, 94 Stat. 3166, December 16, 1980; Pub. L. No. 97-51, 95 Stat. 958, October 1, 1981. The cited resolutions essentially continued GSA programs under the same authorities as the 1980 Appropriation Act.

[2]By amendment in 1968 that share was reduced to 80 percent. Pub. L. No. 90-575, § 134, 82 Stat. 1029, currently codified at 42 U.S.C. § 2753(b)(6). Moreover, in 50 Comp. Gen. at 554-55, we explained explicitly that if Federal agencies agreed, they could make higher payments than the 20 percent minimum.

compensation insurance and related standard contributions) as part of its participation in the program.

Unlike the work study program, CETA does not authorize a cost sharing arrangement between eligible employers, *i.e.,* the institutions receiving grant funds, and the Federal agencies where the employees work. Administrative costs such as those described in 46 Comp. Gen. 115 are covered by CETA grants. There is no statutory authority for participating Federal agencies to make those payments. Moreover, because of the short term employment under CETA, both that Act, 29 U.S.C. § 823(j), and its implementing regulations, 20 C.F.R. § 676.28-1, carefully limit the use of CETA grant funds for retirement contributions for CETA employees.

Neither GSA nor the District has presented a legal argument supporting GSA's reimbursing the District for the retirement contributions. The only expression we have from GSA is a memorandum concluding that GSA's Office of Regional Counsel has found no authority for the payment. Accordingly, based on the information presented, we conclude that GSA is not authorized to make the $93.73 reimbursement.

[B-205176]

Bankruptcy—Chapter 13 Proceeding—Bankrupt Annuitants, etc.—Survior Benefit Plan—Payments to Trustee—Court Order Compliance

Although 10 U.S.C. 1450(i) provides that a Survivor Benefit Plan (SBP) annuity is not subject to assignment, attachment, garnishment, or other legal process, the annuity may be paid to a trustee in bankruptcy pursuant to the order of a bankruptcy court in a proceeding under Chapter 13 of the Bankruptcy Code (11 U.S.C. 1301-1330 (Supp. III, 1979)), since such proceeding is completely voluntary on the part of the debtor and court could order the annuitant to pay the trustee. Thus, Government receives a good acquittance when the annuity is paid to the trustee at the request of the annuitant.

Matter of: Payment of Survivor Benefit Plan Annuity to Trustee in Bankruptcy, February 8, 1982:

An Air Force official has asked whether the Department should comply with a bankruptcy court order requiring payment to the trustee in bankruptcy of all or part of an individual's Survivor Benefit Plan (SBP) annuity, when that individual has filed a plan to repay debts under Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301-1330, in view of the restriction of 10 U.S.C. 1450(i). We find that the annuity may be paid to the bankruptcy court under this voluntary procedure for payment of an individual's debts as provided for in Chapter 13 of the Bankruptcy Code.

The question was presented by the Deputy Chief, Accounting and Finance Division, Directorate of Resource Management, Headquarters Air Force Accounting and Finance Center. The Department of Defense Military Pay and Allowance Committee has assigned the submission control number DO-AF-1377.

A recipient of an SBP annuity under 10 U.S.C. 1450 filed a petition and plan under Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301-1330 (Supp. III, 1979), to make arrangements to pay her debts. The bankruptcy court ordered that $142 of the individual's SBP annuity be paid directly to the bankruptcy trustee. The finance officer questions whether compliance with this order is required in view of 10 U.S.C. 1450(i), which provides that an "annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process."

In 47 Comp. Gen. 522 (1968) we decided that the Air Force could continue their policy of complying with bankruptcy court orders issued in proceedings under Chapter 13 of the Bankruptcy Code. We concluded that even though there had been no waiver of sovereign immunity, the Government receives a good acquittance against an employee who is involved in Chapter 13 bankruptcy proceedings since the court order requiring assignment of pay is binding on the employee. That case, however, did not involve a provision of law as specific as 10 U.S.C. 1450(i).

Further, after that decision was issued the Bankruptcy Code was substantially revised. See Public Law 95-598, November 6, 1978, 92 Stat. 2549. Chapter 13 of the Code, which was formerly limited to wage earners, was expanded to authorize any individual with a regular income—social security recipients, annuitants, etc.—to file a plan with the court for the repayment of debts. Additionally, the Congress added sections to the Code authorizing bankruptcy courts to issue orders to Government units in Chapter 13 cases. Subsection 1325(b) of title 11, United States Code, provides as follows:

(b) After confirmation of a plan, the court may order an entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Entity is defined in 11 U.S.C. 101(14) (Supp. III, 1979) as including any person, estate, trust, or governmental unit. "Governmental unit" is defined as including a department, agency or instrumentality of the United States. 11 U.S.C. 101(21) (Supp. III, 1979).

The Congress also made specific reference to the doctrine of sovereign immunity in 11 U.S.C. 106 (Supp. III, 1979) which provides in subsection (c):

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any asssertion of sovereign immunity—

(1) A provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
(2) A determination by the court of an issue arising under such a provision binds governmental units.

Thus, it is clear that the Congress intended to expand the coverage of Chapter 13 to include a broader segment of society and that it intended to require cooperation of governmental units to the same extent as required of other entities. Also, at least one district court has held that provisions of 42 U.S.C. 407, which are similar to those of 10 U.S.C. 1450(i) in that they prohibit assignment, attach-

ment or garnishment of the payments covered, do not preclude social security benefits from being subject to proceedings under Chapter 13 of the Bankruptcy Code. The court reasoned that since a debtor is allowed to voluntarily include social security benefits as property of the estate under a Chapter 13 proceeding, the assignment was proper as the voluntary action of the debtor. In *Re Buren*, 6 B.R. 744, 748 (M.D. Tenn. 1980).

However, we do not find it necessary to decide whether the Bankruptcy Code supersedes 10 U.S.C. 1451(i) since the rationale of 47 Comp. Gen. 522 (1968) is applicable to the Chapter 13 proceedings under the amended Bankruptcy Code. Thus, the voluntary assignment of an individual's annuity pursuant to a Chapter 13 bankruptcy proceeding may be honored by the Government since payments made pursuant to such as assignment will provide a good acquittance to the Government against the annuitant.

Accordingly, the voucher submitted for payment to the trustee in bankruptcy rather than the annuitant is returned for payment.

[B-204402]

Bids—Invitation for Bids—Specifications—Government Property Use—Authorization Requirement—Property Identification in Bid

Where letter authorizing use of Government property by bidder granted permission to use property on "attached list" which was not attached, but contracting officer found that "attached list" had reference to list of property bidder had furnished for rent-free approval which included evaluation factor for rent-free use, there was substantial compliance with invitation for bids (IFB) requirement that authorization identify Government property authorized for use and state that the authorized use is to be rent free provided an appropriate evaluation factor is added to the bid.

Bids—Invitation for Bids—Specifications—Government Property Use—Authorization Requirement—Contracting Officer's Authority

Challenge of authority of contracting officer to issue an authorization to bidder for use of Government property is overcome by documentation furnished by agency establishing that the contracting officer was authorized to issue authorization. Contention that no authorization was provided for bidder to use Government property is overcome by written authorization provided before bid opening to contracting officer responsible for immediate IFB by contracting officer having cognizance of the property.

Bids—Invitation for Bids—Specifications—Deviations—Form *v.* Substance—Unsigned Attachments

Where bid was signed, absence of signature required on accompanying documentation is an irregularity in form rather than substance. Absence of required second copy of documentation is an irregularity in form.

General Accounting Office—Jurisdication—Contracts—Performance—Contract Administration Matter

Whether bidder will use more Government property to perform contract than it listed in its bid goes to contract compliance and is a matter for the contracting

agency in the administration of the contract and does not affect the validity of the award.

Bids—Mistakes—Correction—Still Lowest Bid

Although the successful bidder failed to use the proper production period in the calculation of the evaluation factor for rent-free use of Government property, the contracting agency used the proper production period in its calculation and the successful bidder still remained low so the protester was not prejudiced by the computation in the successful bidder's bid.

Bids—Invitation for Bids—Specifications—Tests—First Article—Waiver Propriety

It is not necessary to consider on the merits allegation that the contracting agency should not have waived first article testing, since, with or without first article testing, successful bidder remains the low bidder.

Bids—Evaluation—Foreign *v.* Domestic Components of End Product—Canadian Components—Status

Protester was not prejudiced by successful bidder representing that foreign content in end product is zero where protester contends that two components in successful bidder's end item comprising 30 to 40 percent of the cost of the end item are Canadian, since no evaluation factor is required to be added to the bid where the components are Canadian or where the cost of components which are made in the United States exceeds 50 percent of the cost of all the components.

Bids—Evaluation—Foreign Military Sales Items—Government Property Use—Compensation Factor

Just because bidder bids the same price for foreign military sales items as it has for other items in the IFB does not mean that the bidder has failed to include in the foreign sales items the compensation required for the use of Government-furnished production property. Government is not subsidizing cost of foreign sales items, since the contractor is required to pay the rental due the Government for the use of Government property in connection with the manufacture of foreign sales items.

Agents—Of Private Parties—Authority—Contracts—Signatures—Time for Submitting Evidence

Evidence to establish the authority to sign a bid can be presented after bid opening.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Apparent Prior to Bid Opening/Closing Date for Proposals

Protest made after bid opening that option quantity should have been included in the basic bid quantity is untimely, since a protest based on an impropriety in an IFB apparent prior to bid opening is required to be filed prior to bid opening.

Contracts—Options—Not To Be Exercised—Contract Administration Matter—Not for GAO Resolution

Whether to exercise an option is a matter of contract administration outside the ambit of the Bid Protest Procedures.

Contracts—Awards—Protest Pending—Legality of Award—Effect of Agency Regulations

Even if the award was contrary to regulation providing for withholding of award while protest is pending, legality of the award would not be affected.

Matter of: Optic-Electronic Corp., February 9, 1982:

Optic-Electronic Corp. (OEC) protests on a number of grounds the award of a contract to RCA under invitation for bids (IFB) DAAK20-81-B-0044 issued by the Department of the Army.

Based on the following, we deny the protest.

Use Authorization

OEC protests that an award should not have been made to RCA because RCA did not comply with the authorization requirement in the IFB for the use of Government production and research property in the performance of the contract to be awarded under the IFB.

Section M.23 of the IFB required that the authorization to use Government property identify the Government property authorized for use, show the Government contract number under which the property is administered, and state that the authorized use is to be rent free provided an appropriate evaluation factor is added to the bid. OEC contends that the RCA bid was deficient in that the authorization in the bid allowing RCA to use Government property in contract DAAK20-74-C-0270 for the contract to be awarded under the IFB contained no specific identification of the Government property to be used and no evaluation for rent-free use.

OEC is correct in its contention that the letter authorizing the use of Government property in contract DAAK20-74-C-0270 for the performance of the contract to be awarded under the IFB did not list the specific Government property to be used in the contract to be awarded or the evaluation factor to be applied to the bid. The authorization letter merely stated that permission is granted to use the property "shown on the attached list," but there was no list attached to the letter. The RCA bid did list the Government property RCA proposed to use and the evaluation factor to be applied for rent-free use. However, it is not apparent from the authorization letter that the "attached list" has reference to the list in the RCA bid.

Although the IFB did require the authorization to exist at the time of bid opening, it did not require the authorization to be furnished with the bid where it was for the use of Government property in the bidder's possession under an existing contract. Thus, whether the authorization was in fact granted by bid opening for all the Government property on the RCA list could be ascertained by information furnished after bid opening.

In this case, the contracting officer ascertained that the list of property and the proposed evaluation factor for rent-free use attached to the RCA bid had been a part of RCA's request for rent-free use of the property. The contracting officer found that the authorization to use the property on the "attached list" had referred to the list of property RCA had furnished for rent-free approval. Since RCA's request for authorization to use the property listed the

equipment to be used and proposed an evaluation factor for rent-free use, the authorization to use the property was substantial compliance, although not exact compliance, with the IFB requirement.

OEC also challenged the authorization to use the Government property in contract DAAK20-74-C-0270 for the contract to be awarded under the IFB on the ground that the contracting officer who issued the authorization lacked the authority to sign the authorization. However, the Army has furnished documentation establishing that the contracting officer was authorized to issue the authorization. Therefore, OEC's challenge is overcome.

RCA also proposed in its bid to use Government property in contract DAAB07-77-C-3298 for the contract to be awarded under the IFB. OEC contends that the RCA bid should have been disqualified because no authorization was provided with the RCA bid for the use of Government property in contract DAAB07-77-C-3298.

However, an hour and a half before the bid opening, the contracting officer having cognizance of the property in contract DAAB07-77-C-3298 provided written authorization for the use of the property to the contracting officer responsible for the immediate IFB. As indicated above, although the IFB did require the authorization to exist at the time of bid opening, it did not require the authorization to be furnished with the bid where it was for the use of Government property in the bidder's possession under an existing contract.

OEC also protests (1) that only one copy of the identification and evaluation factor documents was submitted by RCA and neither was signed by a company official authorized to sign bids; (2) that RCA's Government property list seemed incomplete; and (3) that RCA failed to use the correct production period of time in its calculation of the evaluation factor that would be added to its bid because of the rent-free use of the Government property.

RCA did furnish only one unsigned copy of the property identification list and the evaluation factor computation. If, as OEC contends, the IFB required that two copies of the property identification list and the evaluation factor computation signed by the company official authorized to sign bids be furnished with the bid, the failure to furnish a second copy and the signature would be a minor informality. Since the bid under which the documentation was furnished was signed, the absence of a signature on the documentation was an irregularity in form rather than substance. *See, for example,* 50 Comp. Gen. 71 (1970); 49 *id.* 541 (1970); 42 id. 36 (1962). The absence of a second copy of the documentation also is an irregularity in form. *See, for example,* Defense Acquisition Regulation (DAR) § 2-405(i) (1976 ed.).

OEC contends that RCA's property identification list is incomplete because it does not list all the property used by RCA under prior Government contracts with RCA. In effect, OEC is intimating

that RCA will be using more Government property to perform under the immediate IFB than it has listed in its bid. Whether RCA complies with the contract resulting from its bid is a matter for the contracting agency in the administration of the contract and does not affect the validity of the award. *Nedlog Company,* B-204557, September 21, 1981, 81-2 CPD 235.

The Army agrees with OEC that RCA should have used a 25.5-month production period instead of the 10- to 15-month period used in computing the evaluation factor to be added to the RCA bid for rent-free use of the Government property. In evaluating the bids, the Army used the evaluation factor resulting from the Army's computation based upon the 25.5-month production period. RCA remained the low bidder. Thus, OEC was not prejudiced by the computation included in RCA's bid.

First Article Testing

OEC protests that the Army should not have waived first article testing for RCA because the procurement history allegedly shows a need for first article testing by RCA. However, with or without first article testing, RCA remains the low bidder. Therefore, it is not necessary to consider this allegation on the merits. *General Fire Extinguisher Corporation,* B-186954, November 15, 1976, 76-2 CPD 413.

Foreign Content

OEC protests RCA's indication in the "Percent Foreign Content" clause included in the IFB pursuant to DAR § 7-2003.81 (Defense Acquisition Circular (DAC) 76-26, December 15, 1980) that "zero" percent of the proposed contract price represents foreign content or effort. The basis for OEC's protest is that two components in the RCA end item comprising 30 to 40 percent of the cost of the end item are Canadian.

Generally, where a bidder offers a foreign end product an evaluation factor is added to the bid. *See* DAR § 6-104.4 (DAC 76-25, October 31, 1980). However, no evaluation factor is required where the components are Canadian or where the cost of components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all the components, since in those situations the end product is treated as a domestic source end product. *See* DAR §§ 6-1401, 6-1403.1(c)(3), 6-001.1(c) and (d), and 6-104.4 (DAC 76-25, October 31, 1980). Thus, OEC was not prejudiced by the RCA foreign content representation.

Foreign Military Sales

OEC contends that because RCA has bid the same price for the foreign military sales items in the IFB as it has for the other items in the IFB, the foreign military sales items did not include compensation for the use of Government-furnished production and re-

search property in violation of DAR § 13-406 (DAC 76-20, September 17, 1979). OEC contends that the Government therefore is not being compensated for the use of the Government equipment.

Since this is an advertised procurement and no price breakdown is required to be furnished with the bid, the Government has no way of knowing whether RCA included the required compensation in the bid price. Just because the prices for the foreign military sales items and the other items are the same price does not mean that the compensation was not included. It is conceivable that the charge is in the price, but that RCA has made other concessions to keep the prices identical. In any event, RCA is required to pay the rental due the Government for the use of the Government property in connection with the manufacture of foreign sales items. Therefore, the Government is not subsidizing the cost of foreign sales items.

Authority To Sign Bid

OEC protests that there was no evidence furnished with the RCA bid to show that the person who signed for RCA had the authority to act.

Subsequently, RCA furnished corporate documentation confirming that the person who signed the bid was authorized. Evidence to establish the authority to sign a bid can be presented subsequent to bid opening. *Aul Instruments, Inc.,* B-199416.2, January 19, 1981, 81-1 CPD 31; *F & H Manufacturing Corporation,* B-196161, February 7, 1980, 80-1 CPD 105.

Options

OEC protests that the option quantity should have been included in the basic bid quantity. Further, OEC protests that the Army should not exercise the option in the contract because it would not be in the best interest of the Government.

The first aspect of the protest goes to the propriety of the IFB. A protest based upon an alleged impropriety in an IFB apparent prior to bid opening is required to be filed prior to bid opening. 4 CFR § 21.2(b)(1) (1981). OEC's protest after the opening of bids is untimely.

As to the second aspect of the protest, the decision whether to exercise an option is a matter of contract administration outside the ambit of our Bid Protest Procedures. *Oscar Holmes & Sons Trucking Company, Inc.,* B-197080, January 15, 1980, 80-1 CPD 47.

Award During Protest

OEC contends that the award to RCA was in violation of DAR § 2-407.8 (1976 ed.) providing for the withholding of award while a protest is pending. It is not necessary for us to consider this contention, since, even if the award was contrary to DAR § 2-407.8, its legality would not be affected. *Aul Instruments, Inc., supra.*

[B-203898]

Bids—Invitation for Bids—Amendments—Nonreceipt—Agency's Regulatory Mailing Requirements—Compliance Not Established

Record must reasonably indicate that copies of amendment were mailed in accordance with regulatory requirements if protester is to be charged with the risk of nonreceipt of amendment. Agency compliance with regulation is not reasonably established where 3 of 4 bidders appear not to have received amendment in the mail.

Matter of: Andero Construction Inc., February 16, 1982:

Andero Construction Inc. protests any award to Lewis M. Merlo, Inc. under invitation for bids (IFB) DAKF01-81-B-0023 issued by the Presidio of California (Army) for replacement of street curbs and gutters. Merlo submitted the third highest of four bids received but was found to be in line for award when the two lower bids were rejected as nonresponsive. Andero complains that its second low bid would have been in line for award had it acknowledged receipt of Amendment 1 to the IFB, which modified the applicable wage rate determination. Andero denies that copies of the amendment, which it says neither it nor other potential bidders received, were ever mailed by the Army and alleges therefore that adequate competition was not obtained. We sustain the protest.

According to the Army, the protest should be denied because a bidder bears the risk of non-delivery of a solicitation amendment. The Army does not dispute Andero's statement that it did not receive the amendment, but says that at least one bidder (Merlo) received the amendment through the mail.

Andero concedes that the procuring activity is not an insurer of the delivery of bidding documents to prospective bidders who instead must bear the risk of non-receipt of solicitations and amendments. *G & H Aircraft,* B-189264, October 28, 1977, 77-2 CPD 329. However, Andero maintains that it should not also be expected to bear the risk of what it believes was a wholesale failure by the Army to mail copies of the amendment.

In this respect, there is no claim on the record before us that the contracting officer has any personal knowledge that copies of the amendment were prepared or mailed. No one (including the contract specialist who worked on this procurement) has come forward to indicate that he has any knowledge in this regard. The Army explains that the processing and mailing of amendments is done in bulk by clerical personnel, but has produced no routine business records indicating that those persons prepared or mailed copies of the amendment.

Andero does not view this as sufficient. Andero argues that the risk which a bidder assumes is limited to cases where the agency can establish that it first "complied with all regulations regarding timely mailing of the amendments." Andero notes that the Defense

Acquisition Regulation (DAR) § 2-208 (1976 ed.) provides that, when an amendment is issued, it shall be sent to everyone to whom the IFB was originally sent.

The issue, then, is whether or not it must be reasonably established that the amendments were in fact mailed, if a particular bidder is to be charged for the risk of non-receipt. We believe this is an implicit factor in our decisions dealing with this issue.

The underlying theory in our decisions which place the risk for the non-receipt of material amendments to a solicitation on the bidder is that the agency discharges its legal responsibility when it issues and dispatches an amendment in sufficient time to permit all bidders to consider the amendment in formulating their bids. *CompuServe,* B-192905, January 30, 1979, 79-1 CPD 63. For this reason, the fact that a particular bidder did not receive an amendment is not considered to be a sufficient basis to warrant resolicitation if adequate competition has been obtained and it has not been shown that there was a conscious and deliberate effort by the agency to exclude the bidder that did not receive the amendment. 52 Comp. Gen. 281 (1972). Thus, in 52 Comp. Gen., *supra,* we stated:

> * * * While the Government should make reasonable efforts to see that interested bidders receive timely copies of the invitation for bids and amendments thereto, the fact that there was a delay in a particular case *where the provisions of ASPR* [*now DAR*] *2-208* have been complied with, does not * * * require the resolicitation of the procurement.* * *
>
> * * * [T]he propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained * * *. [Italic supplied.]

In this respect, adequate competition may result when only a small number of responsive bids, or even one bid, is received, so long as the agency made the required effort to achieve competition. *Reliable Elevator Corp.,* B-191061, April 27, 1978, 78-1 CPD 330.

The record does not establish that the required effort was made here. That an agency complied with the regulatory requirements with respect to furnishing amendments to solicitations is usually evident from the number of bids or proposals received which did acknowledge the amendments, coupled with a statement from the agency which reasonably indicates that it did attempt to comply and that there was no deliberate effort to exclude a bidder or offeror from participating. See, *e.g., CompuServe, supra* (where five proposals were received and agency clerical personnel used the wrong zip code on the mailing to the protester).

Here the evidence falls short of that. The agency never affirmatively states that the amendments were mailed. While there is an affidavit in the record from the contract specialist, he states only his conclusion that "Merlo's acknowledgement of the amendment served as proof that it had been mailed out" and recites that he had not said he "had forgotten to mail out the amendment * * *." The only evidence in the record indicating that any copies of the amendment might have been mailed is a one sentence statement

submitted by the awardee, Merlo, after the protest had been filed, to the effect that it received the amendment through the mails. The one other copy known to have been received appears to have been picked up in person from the contract specialist. Moreover, the contracting officer states that the processing and mailing of amendments "is done in bulk by clerical personnel * * *," so that it appears that the contract specialist is not in a position to indicate that the amendment was in fact mailed to those who should have received it.

Under these circumstances, where three of the four bidders who responded to the solicitation apparently did not receive mailed copies of the amendment and the agency, unlike in our prior cases, does not state that the amendments were mailed, we think this record is insufficient to establish that the agency complied with DAR § 2-208; we further think it is questionable whether adequate competition was obtained under these circumstances.

Accordingly, we recommend that the Army cancel the IFB and resolicit its requirement.

The protest is sustained.

[B-204593]

Compensation—Periodic Step-Increases—Leave Without Pay Effect—Nonpay Status in Excess of 52 Weeks

Employee sustained a disabling injury as the result of a household accident. He had served approximately 20 months at the GS-14, step 4, grade level and under normal circumstances, would have been eligible to receive a within-grade increase to step 5 on Oct. 22, 1978, after a waiting period of 104 calendar weeks. At his request, he was granted leave without pay (LWOP) and placed in a nonpay status from July 11, 1978, to Aug. 7, 1979. The approximate 20 months of service prior to the period the employee was in a nonpay status, a period in excess of 52 calendar weeks, does not constitute creditable service for purposes of eligibility to receive a within-grade increase and a new waiting period is required to begin effective Aug. 8, 1979. 5 C.F.R. 531.403(b)(2) and 531.405(b).

Matter of: Anthony J. Vaccarino—Within-Grade Increase—Nonpay Status in Excess of 52 Calendar Weeks, February 19, 1982:

This decision is in response to a request by Mr. D. E. Cox, authorized certifying officer, Federal Bureau of Investigation (FBI), United States Department of Justice, as to whether a waiver may be granted from section 531.403, title 5, Code of Federal Regulations, which states that a new waiting period for a within-grade increase begins after a break in service or nonpay status in excess of 52 calendar weeks.

The issue arises at the request of Mr. Anthony J. Vaccarino, an employee of the FBI, who sustained a disabling injury as the result of a household accident. He was granted leave without pay (LWOP) and placed in a nonpay status, at his own request, from July 11, 1978, to August 7, 1979, a period in excess of 52 calendar weeks.

Prior to being placed in the LWOP status, Mr. Vaccarino had been promoted to GS-14, step 4, effective October 24, 1976, and had served 20 months in step 4. If he had not been placed in a nonpay status, he would have been eligible to receive a within-grade increase to GS-14, step 5, on October 22, 1978, after having performed creditable service at the step 4 level for a waiting period of 104 calendar weeks. 5 U.S.C. § 5335 (1976).

After returning to work on August 8, 1979, Mr. Vaccarino was advised that, in accordance with 5 C.F.R. § 531.403(b)(2), a new waiting period for his step increase began after he was in a nonpay status in excess of 52 calendar weeks. Accordingly, the beginning date of the waiting period was reestablished as August 8, 1979, with eligibility for a within-grade increase postponed until August 9, 1981.

Mr. Vaccarino contends that the reestablishment of a new waiting period for his eligibility to receive a within-grade increase has penalized him and unjustly disregarded the approximately 20 months of creditable service he had performed prior to being placed in LWOP status. He requests that he be credited with the approximate 20 months of creditable service he had performed and that he be granted his within-grade increase on a date approximately 4 months after the date he returned to duty on August 8, 1979.

The authority for the granting of within-grade increases is contained in 5 U.S.C. § 5335 (1976) and the implementing regulations, 5 C.F.R. Part 531, Subpart D (1978). In accordance with these provisions, employees must complete certain waiting periods for advancement between steps consisting of 52, 104, or 156 calendar weeks of creditable service. See 5 C.F.R. § 531.403. The 104-calendar-week waiting period is applicable here. However, when an employee is placed in a nonpay status for a period in excess of 52 calendar weeks, section 531.403 provides that a new waiting period begins. Further, service performed prior to a single nonpay period when the nonpay period exceeds 52 calendar weeks, and any part of the nonpay period of more than 52 calendar weeks, are not creditable service. 5 C.F.R. § 531.405(b). Also, the period of time spent in a nonpay status for more than 2, 4, or 6 workweeks (4 workweeks here) does not constitute creditable service in the computation of a waiting period, except in circumstances involving a work-related injury under subchapter I of Chapter 81, title 5, United States Code, 1976, service during a national emergency, or an assignment to a State or local government or other institution under 5 U.S.C. §§ 3371-3376 (1976). 5 C.F.R. § 531.404; *John L. Swigert,* B-191713, May 22, 1978.

Therefore, since Mr. Vaccarino's leave absence was in excess of 52 calendar weeks, the approximate 20 months of service he performed prior to such absence does not constitute creditable service. Finally, Mr. Vaccarino's leave without pay for more than 52 weeks

does not come within any of the enumerated exceptions, and consequently, the period during which he was in a nonpay status from his position with the FBI may not be counted as creditable service for purposes of eligibility to receive a within-grade increase and a new waiting period is required to begin. This Office has no authority to waive the specific statutory and regulatory provisions applicable to this case.

Accordingly, the action of the FBI in reestablishing Mr. Vaccarino's waiting period to begin on August 8, 1979, for purposes of a within-grade increase to GS-14, step 5, was proper and we find no basis upon which the provisions of 5 C.F.R. §§ 531.403 and 531.405 may be waived in his case.

[B-204517]

Taxes—State—Government Immunity—Incidence of Tax on Vendor—Public Utility License—Commission Order To Bill Customers Effect

Veterans Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of state tax, which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers.

Matter of: Veterans Administration Medical Centers—Payment of Alabama Public Utility License Tax, February 22, 1982:

The Deputy Administrator of the General Services Administration has requested our decision on whether the Veterans Administration Medical Centers (VA Centers) located in Alabama must pay that portion of their electric bills which represents a 1.8 percent increase in the Alabama public utility license tax. This increase was imposed by Alabama statute on the Alabama Power Company, which passed it on to its customers, including the VA Centers, in their electric bills. The tax pass-through was provided for in an order of the Alabama Public Service Commission (PSC). The Deputy Administrator requests this decision because the VA Centers purchase electricity under an area-wide contract between the General Services Administration and Alabama Power.

For the reasons indicated below, we conclude that the VA Centers are obligated to pay the portion of their bills attributable to the tax increase. The VA Centers should reimburse the Alabama Power Company for the payments they have withheld.

The license tax was levied by Alabama statute as follows:

Each person, firm or corporation, * * * operating an electric or hydroelectric public utility shall pay to the state a license tax equal to two and two-tenths percent on each $1.00 of gross receipts of such public utility for the preceding year * * *. Such license tax shall be paid to the department of revenue by check made payable to the treasurer and shall be paid quarterly, one fourth on October 1, one fourth on Janu-

ary 1, one fourth on April 1 and one fourth on July 1 * * *. Code of Alabama § 40-21-53 (1975).

Public utilities in Alabama, including the Alabama Power Company, are regulated by the Alabama PSC. The PSC has authority to fix utility rates. On April 28, 1969, the PSC issued an order pertaining to the inclusion of taxes or license fees in utility bills. Although we do not have a copy of the PSC order, the relevant portion of it is quoted in the Deputy Administrator's submission, as follows:

Bills shall be increased to offset the applicable proportionate part of any taxes, assessments, licenses, franchise fees or rentals *which may hereafter be imposed upon the company* by any Government Authority at rates higher than those in effect December 31, 1967, and which are assessed on the basis of meters, customers, the price of or revenues from electric energy sold or the volume of energy generated, purchased for resale or sold. [Italic added by Deputy Administrator.]

At the time this order was issued, the public utility license tax, at the rate of 0.4 percent, was part of the expenses which the Alabama Power Company could recover as part of its utility rates as set by the PSC. The tax was later increased to its current rate of 2.2 percent, and under the PSC order, the Alabama Power Company included the 1.8 percent increase as a line item in its customers' bills.

Initially, the VA Centers paid the portion of their bills attributable to the tax increase without protest. Subsequently, because of an opinion by Veterans Administration attorneys that the United States was constitutionally immune from paying the tax, the VA Centers withheld the amount of the tax increase from their payments. Moreover, they also deducted an additional amount from their payments in order to recover the tax they had already paid.

Generally, the United States is not required to pay state or local taxes levied directly on its operations. This immunity is based upon the constitutional principle of sovereign immunity. 57 Comp. Gen. 59 (1977). However, a tax does not necessarily violate the Government's immunity merely because the Government must bear the financial burden of a tax levied on others. *Id.* at 59-60. Whether or not the United States is immune from a particular state tax depends on where the "legal incidence" of the tax falls under state law. If the legal incidence of a tax is on a vendor dealing with the Government, the United States, as a purchaser, is not immune from bearing the financial burden of the tax, which may be included by the vendor in its charges as part of the cost of doing business with the vendee. However, if the incidence of the tax under the state law is on the purchaser, the United States as purchaser is immune from paying that tax under the Constitution. *Id.* at 60; 55 Comp. Gen. 1358, 1359 (1976).

Some state tax statutes impose the tax on the vendor, but require the vendor to pass the tax on to its customers. In considering such tax statutes, we have concluded that because the statute *re-*

quired the tax to be passed on the legal incidence of the tax fell on the customer, and the United States as customer was thus immune from paying the tax. *See* 57 Comp. Gen. *supra*, at 61, and cases cited therein.

As the quotation above indicates, section 40-21-53, Code of Alabama, imposes the public utility license tax on the utilities themselves. The statute does not require that the tax be passed through to the utility's customers, nor does it provide any mechanism for doing so. In our opinion, the statute clearly indicates the intent of the taxing body, the Alabama legislature, that the legal incidence of the tax be on the utility companies. We can find no hint of an intent that the incidence of the tax be transferred to the consumers of electricity.

The Veterans Administration, however, argues that the 1969 PSC order requires that the tax be passed on to customers and thus transfers the legal incidence of the tax to those customers, including the United States. Therefore, it argues, it is constitutionally immune from paying the tax.

The Veterans Administration argument has some merit. PSC is an authority of the State of Alabama, and its order, based on the quotation contained in the submission, appears to require utilities to include tax increases in their bills. However, in our opinion, in determining where the *legal* incidence of a tax falls, we must be bound by the intent of the taxing authority. Where the tax is imposed by statute, that intent must be determined, if possible, from the language of the statute itself. As we have indicated, the wording of the Alabama statute shows only that the legislature, the taxing authority in Alabama, intended that the utility companies pay the license tax. It says nothing about collecting the tax from anyone else. In our opinion, the order of the PSC merely provides that the utilities shall pass the economic burden of the tax to their customers as part of their rates.

Our conclusion is supported by *United States* v. *Leavenworth,* 443 F. Supp. 274 (D. Kan. 1977), *app. dismissed by stipulation of parties,* No. 79-1241 (10th Cir.). In that case the City of Leavenworth, by ordinance, imposed a franchise fee on the Kansas Power and Light Company. The ordinance specified that the fee was to be paid by the utility and made no provision for passing the fee through to the utility customers. However, the Kansas State Corporation Commission had ordered that all franchised fees must be directly charged to utility customers residing within the municipality imposing the fee. When Kansas Power and Light passed on the fee to Federal installations in the City of Leavenworth, the Government brought suit.

The district court examined the language of the ordinance and determined that the legal incidence of the fee fell on Kansas Power and Light. The court indicated that the ordinance

* * * contains no provisions for collection directly from the United States, nor does it purport to authorize any procedures whereby penalties, for non-payment * * * may be sought against the United States property or its treasury. Furthermore, so far as the City's interest in collection is concerned, there is no requirement that Kansas Power & Light pass on to the United States all or any part of the financial burden of the franchise fee.* * * *Id.* at 282.

The court went on to say that the fact that the economic burden of the tax was passed on was not determinative of the legal incidence of the tax.

* * * Nor does the fact that the United States may be required under Kansas State Corporation Commission orders to reimburse Kansas Power & Light for a *pro rata* share of the franchise fee alter the incidence of the tax as originally laid.* * * *Id. at 282-83.*

The *Leavenworth* case was cited with approval in *United States* v. *Maryland,* 471 F. Supp. 1030 (D. Md. 1979). The court in *Maryland,* after reviewing *Leavenworth,* stated:

* * * In both cases, the statutory provisions in question, construed in light of all the circumstances, must control in determining where the incidence of the tax falls. *Id.* at 1040.

We therefore conclude that the legal incidence of the Alabama public utility license tax falls on Alabama Power Company, and not the United States. Therefore, the VA Centers are not constitutionally immune from bearing the economic burden of the tax. The VA Centers should return to Alabama Power the portion of their utility bills which they have erroneously withheld.

[B-206173]

Entertainment—Appropriation Availability—Specific Statutory Authorization Requirement

Funds appropriated to the Dept. of the Interior for salaries and expenses may not be used to pay for any portion of the expenses of a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials, or for a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests. Entertainment expenses, unless specifically authorized by statute, are not properly chargeable to appropriated funds. 43 Comp. Gen. 305 and 47 *id.* 657.

Donations—Private Funds—Usage—Conferences, Entertainment, etc.—Official Agency Purpose Requirement

Funds donated to the Cooperating Association Fund of the National Park Service may be used to fund a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials and a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests only if the Secretary sustains the burden of showing that the receptions were given in connection with or to further official Park Service purposes. In this instance, from the information provided, the parties appear to be primarily social in nature.

Appropriations—Interior Department—Availability—Official Reception and Representation Expense Fund—Agency Discretion—Christmas Party

To the extent funds are available in the Dept. of Interior's official reception and representation fund, they may be applied to the costs incurred for a Christmas

party given by the Secretary of the Interior and to reimburse any amounts already spent from salary and expense accounts and from donated funds for that purpose. Unlike the Christmas party, which was attended by Government officials and their guests, the use of the fund for a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials would be inappropriate because the breakfast was hosted and attended entirely by private persons. The amount of any shortfall for expenses attributable to the Christmas party, as well as the expenses of the breakfast, must be paid by the officials who authorized the expenditures.

Matter of: Department of the Interior—Funding of Receptions at Arlington House, February 23, 1982:

This responds to a request from the House Subcommittee on Oversight and Investigations of the Committee on Interior and Insular Affairs and the House Environment, Energy, and Natural Resources Subcommittee of the Committee on Government Operations concerning the funding of two receptions held at Arlington House (also known as the Custis-Lee Mansion). The receptions were hosted by the Secretary of the Interior, James G. Watt, and his wife in December 1981. We conclude that the use of appropriated funds, other than the Secretary of the Interior's discretionary fund for official reception and representation expenses (discretionary fund), is unauthorized. We conclude further that use of the Cooperating Association Fund of the National Park Service, a fund consisting entirely of monies donated to further official agency purposes, was also improper. Accordingly, the relevant appropriation accounts and the Cooperating Association Fund should be reimbursed for any expenditure directly attributable to these receptions.

On December 14, 1981, a breakfast was held at Arlington House hosted by the wife of the Secretary of the Interior. Attending this breakfast were the wives of the other Cabinet members and the wives of several assistants to the President. The exact purpose of this breakfast has not been specified by the Department. Information developed by our audit staff shows that the total estimated cost of the breakfast was $1,921. Of this total amount, $1,148.10 constituted catering expenses, $325 was for table name cards, escort cards, and menu cards, $48 was for six placards advising the public that Arlington House was temporarily closed for Mrs. Watt's breakfast, and $400 constituted the labor costs of eight National Park Service employees who worked a total of 31 hours. The services of the eight employees during these 31 hours were apparently devoted exclusively to tasks associated with the breakfast.

The other reception, hosted by the Secretary and his wife, was held on the evening of December 17, 1981. The heading on the guest list obtained from the Department of the Interior reads "Arlington House Christmas Party." Approximately 220 persons attended the Christmas party, 62 of whom were high-ranking Interior officials. The other guests were Cabinet members and their spouses, members of the White House staff and their spouses or

guests, other senior officials of the executive branch with spouses of guests and spouses or guests of the Interior officials.

Our audit staff determined that the total estimated cost of the Christmas party was $6,921.20. Of this total amount, $2,732.86 constituted catering expenses, $2,325 was for the renting of a tent which was erected in front of Arlington House and which was where the reception was primarily held, $55.96 was for the purchase of refuse receptacles, $7.38 was for the purchase of coat check tickets, and $1,800 constituted the labor costs of 20 employees of the National Park Service working a total of 135 hours, all of which was overtime associated with the party.

Our audit staff has determined that the labor cost of both these events have been charged initially to appropriated funds of the National Park Service, although it is apparently the intent of the Department to reimburse these costs from the Secretary's discretionary fund or from the Cooperating Association Fund. Additionally, the other major items such as the catering expenses, the cost of the tent, and the costs of the invitations and cards, have been, or are intended to be, charged to the Cooperating Association Fund. Other incidental expenses were paid from the imprest fund of the National Park Service. The Park Service apparently intends to reimburse the imprest fund for the expenditures from the Cooperating Association Fund.

By letter dated February 8, 1982, we requested the views of the Department of Interior as to the propriety of the use of appropriated funds to pay the salaries of the employees who provided services at the two events under discussion here, the propriety of using Cooperating Association funds in support of these events, and the possible use of the Secretary's discretionary fund for official reception and representation expenses for these purposes. Although the Department did not respond directly to our request, we have been provided a copy of the Department's February 16 letter to Congressman Markey addressing these issues.

That letter states:

> The expenses for the events will be funded by the Secretary's Official Reception and Representation Expenses Fund which is authorized in the Department's Appropriation Act and the National Park Services' Director's Discretionary Fund.

(The latter fund is described by the Department as consisting solely of donations from Cooperating Associations.)

The letter also states:

> The NPS Director's Discretionary Fund was earmarked [for these events] at the planning stage because the Department's Appropriation Act had not been approved at the time and, therefore, resources were not readily available. Now that the Act has been approved, it is the intent of the Secretary to use a portion of his Official Reception and Representation Expenses Fund to fund the two events.

The letter does not specifically address the question of the relationship, if any, between the use of donated Cooperating Associ-

ation Fund amounts in these circumstances and the mission of the National Park Service. It does, however, state that:

> * * * The guests' visits to the house were designed to acquaint them with the historic significance of the house and to enhance their further understanding and appreciation of the Secretary's objectives concerning the NPS's role in historic preservation.
>
> * * * * * * *
>
> The Arlington House provided a setting more conducive to social gatherings than would have the Interior building.

Finally, concerning restrictions on the use of the Cooperating Association Fund, the letter states:

> There are no specified uses in the Director's Discretionary Fund by the Office of the Secretary. * * *

The use of appropriated funds to pay for the wages of employees earned while working at the breakfast held on December 14, and the December 17 Christmas party, or for any other expenses directly attributable to these two functions, constituted an unauthorized expenditure of these funds. We have consistently held that entertainment expenses, unless specifically authorized by statute, are not properly chargeable to appropriated funds. See 43 Comp. Gen. 305, 306 (1963). Entertainment expenses are not specifically authorized in Interior's current appropriation. See Department of the Interior and Related Agencies Appropriation Act, 1982, Pub. L. No. 97-100, 95 Stat. 1391 (1981).

Items such as the furnishing of meals or refreshments as well as the purchase of equipment to be used in the preparation of refreshments are considered entertainment expenses. 47 Comp. Gen. 657, 658 (1968). Likewise, all labor costs directly attributable to the furnishing of meals or refreshments or any other similar activity should be considered entertainment expenses. We perceive no distinction between the expenses incurred by Interior for the breakfast and the Christmas party, including the labor costs of the Interior employees who provided support services, and other types of expenses which we have previously determined to be entertainment expenses. For example, we have considered the serving of coffee or other refreshments at meetings or the providing of dinner at annual recognition ceremonies as prohibited entertainment expenses. 47 Comp. Gen., *supra;* 43 Comp. Gen. 305, *supra.* We conclude, therefore, that the expenditure of appropriated funds for expenses directly attributable to these two affairs was not authorized and that appropriate reimbursement to these appropriations should be made.

Unlike appropriated funds not specifically made available for entertainment purposes, there is no absolute prohibition against the use of donated funds for entertainment purposes. Rather, we have held that donated funds may be spent on entertainment where such expenses are in furtherance of official agency purposes. B-142538, February 8, 1961. This decision to the National Science

Foundation concluded that expenses for food and entertainment for luncheons and dinners incident to a conference for the interchange of scientific information among foreign and United States scientists appeared to be proper charges to a trust fund similar to the Cooperating Association Fund. The decision also stated that in deciding whether a particular expense is in furtherance of official agency purposes, great weight will be given to an administrative determination to that effect. The administrative determination was characterized as one which, based on the facts, "must reasonably justify the conclusion not only that the entertainment will further a purpose of the Foundation but that the Foundation's functions could not be accomplished as satisfactorily or as effectively from the Government's standpoint without such expenditures." Finally, the decision cautioned that the use of donated funds for entertainment, the purpose of which is "to cultivate cordial relations, manifest good will, or to reciprocate in kind hospitality extended by others" would be questionable.

In a similar case, we permitted the Foundation to use its donated funds to pay for refreshments of persons participating in panel discussions sponsored by the Foundation. 46 Comp. Gen. 379 (1966). We also permitted the National Credit Union Administration to use donated funds to pay for entertainment expenses incurred in hosting members of the National Credit Union Board where protocol required that the Administration incur those expenses. B-170938, October 30, 1972.

Our position on this issue was clarified in a 1980 letter to Senator Proxmire specifically concerning the use of the Cooperating Association Fund of the National Park Service. B-195492, March 18, 1980. We stated that while an agency's determination of whether a particular expense was justified would be accorded great weight, agencies do not "have blanket authority to use [donated] funds for personal purposes; each agency must justify its use of [donated] funds as being incident to the terms * * *" of the statutory authority permitting acceptance of said donations. We went on to state that "[t]he burden is on the [agency] to show that its * * * expenditures were to carry out [authorized statutory] purposes." The letter concluded by pointing out that a number of past expenditures from the fund for entertainment had been justified by the Department on the basis of an overbroad interpretation of the 1961 National Science Foundation case.

In this case, the use of the Cooperating Association Fund to pay for certain costs attributable to the breakfast and to the Christmas party is contemplated by the Department's February 16 letter. That use of these funds will be necessary is demonstrated by the fact that the Secretary's discretionary fund has only $4500 remaining in it for the current fiscal year, substantially less than the cost of the two events.

To determine whether these expenditures are authorized, it is necessary to refer to the purpose of this Fund. As required by 16 U.S.C. § 6, the Fund must be used "for the purpose of the national park and monument system." The fundamental purpose of the national park and monument system as described in 16 U.S.C. § 1 is to:

[C]onserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

A document entitled "National Park Service Donations Policy" submitted with one of the congressional requests in this case provides guidance on the kind of expenditures from the Cooperating Association Fund which may reasonably be considered as being in furtherance of Park Service purposes. The Policy states:

* * * Disbursements from this Fund must be for projects directly related to National Park Service administration; support will not be provided for projects that are initiated outside of the Service and unrelated to the mission of the National Park Service. * * *

The Policy provides as follows concerning expenditures for entertainment:

* * * In accordance with the Comptoller General's decision of February 8, 1961, entertainment expenditures * * * are restricted to those occasions when the entertainment will further the purposes of NPS and that such purposes could not be served as satisfactorily or as effectively without such expenditures. (One use of the Fund which is inconsistent with the Comptroller General Decision is the expenditure for coffee or other refreshments for meetings attended solely or mostly by Service or other Government employees.)

Applying the rules enunciated by our decisions and adopted by the National Park Service Donations Policy to the facts of the two questioned events compels the conclusion that the events were clearly unrelated to the furtherance of the Park Service's mission. Neither the breakfast nor the party was associated with any related Government conference or other meeting, as has usually been the case in prior cases in which we sanctioned the use of donated funds for entertainment purposes. In fact, no Park Service officials attended the breakfast and only a small percentage of the guests at the Christmas party were from the Park Service.

The only justification advanced by the Department to link the two events to official Park Service purposes is the statement in its February 16 letter that during the course of the two receptions, guests were free to tour the house, and thus could become acquainted with its historic significance and the Secretary's objective concerning historic preservation. In our view, this link with official purposes is too tenuous to justify the use of donated funds. The availability of tours of the building or general discussions of historic preservation objectives does not change the basically social nature of both gatherings, as characterized by the Department itself in its February 16 letter. In that letter, the Department offers as justification for the use of Arlington House rather than the Interior headquarters building that the former is "more conducive to

social gatherings." Moreover, so far as we are aware, no finding was made detailing "why the purposes of the NPS could not be served as satisfactorily or as effectively without such expenditure," as required by the Donations Policy.

As stated in the Department's February 16 letter, the 1981 Department of Interior Appropriation Act provides the Office of the Secretary with not to exceed $5,000 for *official* reception and representation expenses. While questions could be raised about the use of this fund as well, agency heads have traditionally been accorded a great deal of discretion by the Congress in the expenditure of this type of fund. We will not object to the use of this fund for expenses related to the Christmas party. Unlike the Christmas party, which was attended by Government officials and their guests, the use of the discretionary fund for the breakfast, which was hosted and attended entirely by private persons, would be inappropriate.

Accordingly, to the extent funds are available in the official reception and representation fund, they may be applied to the costs incurred for the Christmas party, including the labor costs for Interior employees who worked at that event. The amount of any shortfall for expenses attributable to the Christmas party, as well as the expenses of the breakfast, must be paid by the Interior officials who authorized the expenditures.

[B-201821]

Foreign Differentials and Overseas Allowances—Cost-of-Living Allowances—Nonforeign Areas—Computation—Federal Housing Category—Applicability

Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy Federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, Oct. 30, 1978, defines Federal housing category as applying only to those who occupy Federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order 12070, as amended, which refers to Federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct.

Matter of: Professional Air Traffic Controllers Organization—Cost-of-Living Allowances, February 25, 1982:

This decision is being issued at the request of the Professional Air Traffic Controllers Organization (PATCO) and the Federal Aviation Administration (FAA). It concerns the appropriate rate at which FAA employees should be paid cost-of-living allowances (COLA) at Kalae, Molokai, Hawaii. The specific issue is whether FAA employees residing in Federal housing on Molokai may have their COLA computed under the "Local Retail/Private Housing" category, as PATCO argues, or whether it should be computed under the "Local Retail/Federal Housing" category as FAA has

been doing. For the reasons stated below, we hold that FAA's method of computing the COLA is proper.

The Office of Personnel Management (OPM) determines the COLA rates in question and issues regulations under the governing statute, 5 U.S.C. § 5941 (1976), and Executive Order No. 10,000, 13 Fed. Reg. 5453 (1948), as amended, reprinted under 5 U.S.C. § 5941 (Supp. III, 1979). *Clark Edwards,* B-189055, November 30, 1977. Accordingly, we requested OPM's comments on the submission. Although PATCO has supplied us with its views, the FAA has chosen not to provide us with its rationale for its actions.

The record shows that since October 30, 1978, FAA employees residing in Federal Housing in Kalae, Molokai, have been authorized the allowance for "Local Retail/Federal Housing" rather than the allowance for "Local Retail/Private Housing." The PATCO, however, argues that under Federal Personnel Manual (FPM) Letter 591-29, October 30, 1978, entitled "Nonforeign Area Cost of Living Allowances," FAA employees in Molokai are entitled to a COLA rate of 15 percent by virtue of their being under the "Local Retail/Private Housing" category. No allowance was provided in FPM Letter 591-29 for employees in Hawaii in the "Local Retail/Federal Housing" category, because the survey was inadequate and needed to be redone. However, the FPM letter defines the two housing categories as follows:

Definitions of Allowance Categories

The following definitions of the various allowance categories identified in the tables in this attachment shall be used in determining employee eligibility for the appropriate allowance rate:

Allowance category	Definition
Local Retail/Private Housing.	This category includes those Federal employees who purchase goods and services from private retail establishments and who occupy housing units that are privately owned or rented. It also includes those employees who do not fall into one of the other allowance categories.
	Local Retail/Federal Housing
	This category includes those Federal employees who purchase goods and services from private retail establishments and who occupy, as a condition of their Federal civilian employment, housing units that are owned or released by a Federal agency * * *

The above provisions were repeated in FPM Letter 591-32, February 20, 1979.

The PATCO argues that although FAA employees on Molokai, Hawaii, do occupy Federal housing, they do not come within the Federal housing category, quoted above, since they do not occupy Federal housing as a condition of their employment. Rather, PATCO argues that, since the private housing category includes "* * * those employees who do not fall into one of the other allow-

ance categories," then the employees occupying Federal housing, but not as a condition of their employment, must be paid the allowance provided for under the private housing category. The FAA does not contest that the employees in question do not occupy Federal housing as a condition of their employment.

The Office of Personnel Management refers us to Executive Order No. 12,070, as amended, 43 Fed. Reg. 28977 (1978), reprinted under 5 U.S.C. § 5941 (Supp. III, 1979). That Executive order amended Executive Order No. 10,000 which was issued pursuant to the authority granted the President in 5 U.S.C. § 5941, to prescribe regulations establishing the rates and defining the area, groups of positions, and classes of employees to which each cost-of-living allowance rate applies. Executive Order No. 12,070, which became effective June 30, 1978, states:

1-101. The requirement of Section 205(b)(2) of Executive Order No. 10000, as amended, that consideration be given to quarters or subsistence, commissary or other purchasing privileges, in determining cost of living allowance rates, is suspended except to the extent that such privileges are furnished as a result of Federal civilian employment.

1-102. Quarters or subsistence, commissary or other purchasing privileges, shall not be taken into consideration in determining cost of living allowance rates of employees who are furnished such facilities as a result of Federal civilian employment but who do not use them.

As OPM points out, Executive Order No. 12,070 states that the reduced allowance shall not apply to persons who are furnished quarters but who do not use them. Implicit in this, therefore, is the intent to reduce the allowance of those who have the option of using Federal housing privileges and who, in fact, do so.

More significantly, there is a crucial distinction in the wording found in Executive Order No. 12,070 from that found in FPM Letters 591-29 and 32. The Executive order states that consideration be given to quarters privileges in determining COLA rates as to those employees furnished Government quarters "as a result" of Federal civilian employment. The FPM Letters, however, take into account quarters privileges in reducing the allowance only if the quarters are furnished "as a condition" of the employee's Federal civilian employment. The FPM Letters, therefore, go beyond mere implementation of the Executive order and actually restrict the application of the Executive order to a more limited group of employees than that contemplated in the Executive order.

The Office of Personnel Management recognized that FPM Letters 591-29 and 591-32 were at variance with Executive Order No. 12,070, and it clarified its position in FPM Letter 591-37, September 12, 1980, to include in the Federal Housing category those employees "who occupy, as a result of their Federal civilian employment, housing units that are owned or leased by a federal agency." The purpose of the change was to make it clear that this category was not limited to employees who are required to reside in such housing.

The implementing instructions in the Federal Personnel Manual are governed by the Executive order and cannot vary the Executive order's requirements. 52 Comp. Gen. 794 (1973). We hold therefore that FPM Letters 591-29 and 591-32 are invalid insofar as they may be interpreted to preclude the reduction of the cost-of-living allowance to employees occupying Federal housing as a result, but not as a condition, of their employment. Thus, the FAA properly computed the cost-of-living allowance for its employees who resided in Federal housing on Molokai, Hawaii.

[B-204970]

Bids—Invitation for Bids—Amendments—Failure To Acknowledge—Cost Increase—Significant

Rejection of low bid which did not contain acknowledgment of amendment was proper since, while amendment's cost effect was insignificant compared with total price of low bid, cost effect amounted to more than 11 times the difference between the two low bids. Therefore, waiver of protester's failure to acknowledge amendment would not be justified because amendment had more than a trivial or negligible effect on price. *See* Defense Acquisition Regulation 2-405(iv)(B) (1976 ed.).

Bids—Invitation for Bids—Amendments—Failure To Acknowledge—Materially Determination—Cost-Increase Estimates of Protester

Protester's estimate of cost increases produced by unacknowledged amendment may not be used to determine the materiality of amendment since this would permit protester to become eligible for award by citing costs that would permit waiver or to avoid award placing a larger cost value on the effects of amendment.

Bids—Invitation for Bids—Amendments—Nonreceipt—Bidder's Risk—Bidder Exclusion Not Intended

Failure of bidder to acknowledge amendment may not be waived on basis that bidder was not sent amendment by agency where evidence does not indicate deliberate effort by agency to exclude bidder from competing on procurement. Also, allegation by bidder—that it was aware of contents of amendment because of discussions with subcontractors and considered amendment in preparing its bid—does not negate necessity for acknowledging amendment, since bid responsiveness must be determined from bid itself.

Bids—Modification—After Bid Opening—Nonresponsive Low Bid—Failure to Acknowledge Material Amendment

Protester's request for late modification of bid based on its statements after bid opening acknowledging receipt of amendment is rejected since bid is not otherwise acceptable.

Contracts—Offer and Acceptance—Acceptance—What Constitutes Acceptance

Contracting officer's announcement at bid opening that protester was apparent low bidder did not constitute acceptance of protester's offer since acceptance by the Government must be clear and unconditional.

Bids—Competitive System—Comnpliance Requirement—Pecuniary Advantage Notwithstanding

Possibility that Government might realize monetary savings in particular procurement if material deficiency is corrected or waived is outweighed by the importance of maintaining the integrity of the competitive bidding system.

Matter of: Marino Construction Company, Inc., February 25, 1982:

Marino Construction Company, Inc. (Marino), protests the rejection of its bid for failure to acknowledge amendment 0003 to invitation for bids (IFB) No. DACA45-81-B-0203, issued by the Department of the Army, Omaha District, Corps of Engineers (Army). The IFB was for construction of an addition to a fire station at General Billy Mitchell Field in Milwaukee, Wisconsin. We find that the rejection was proper.

The Army states that on September 4, 1981, the third in a series of amendments to the IFB was issued. Essentially, amendment 0003 altered the solicitation by substituting a requirement for overhead steel doors in place of the IFB's wood door requirement and by changing certain specifications pertaining to mechanical and electrical work. On the September 18 bid opening, nine bids were received by the Army. Marino's bid at $464,034 was determined to be the apparent low bid; the second low bid of $465,000 was submitted by R. J. Prossen, Inc. (Prossen). Marino's bid contained an acknowledgment of the first two amendments, the latter of which established the September 18 bid opening date; however, Marino's bid did not acknowledge the third IFB amendment. On September 24, the Army notified Marino that its bid had been found nonresponsive for failing to acknowledge the third amendment.

The Army estimated that amendment 0003 would involve additions to the contract price totaling $10,779 and deletions amounting to $7,018. Relying on our decision in *Spartan Oil Company, Inc.*, B-185182, February 11, 1976, 76-1 CPD 91, the Army considered only the estimated cost effect of the additions to determine whether Marino's failure to acknowledge the amendment could be waived. Although the Army determined that the cost of the additions "amount[ed] to approximately 2 percent" of Marino's bid, it found that the additions' cost amounted to more than 11 times the difference between the two low bids. In view of the latter, the Army determined that the amendment had more than a trivial or negligible effect on price and that, therefore, Marino's failure to acknowledge the amendment could not be waived. *See* Defense Acquisition Regulation (DAR) § 2-405(iv)(B) (1976 ed.).

In support of its rejection of Marino's bid, the Army has cited several of our decisions, including *AFB Contractors, Inc.*, B-181801, December 12, 1974, 74-2 CPD 329, and 53 Comp. Gen. 64 (1973). In the cited cases, our Office applied the principle that whether the value of an unacknowledged amendment is trivial or negligible de-

pends on the amendment's estimated impact on bid price *and* the relationship of that impact to the difference between the two low bids; both tests must be satisfied in order to permit waiver. In *AFB Contractors,* we held that an unacknowledged amendment was not trivial or negligible with respect to price where the estimated increase in bid price was only 0.874 percent of the low bid, but was approximately 14.8 percent of the difference between the two low bids. Likewise, in 53 Comp. Gen. 64, above, we held that an estimated increase in bid price was not trivial or negligible where the increase was 0.434 percent of the actual bid, but was 20.9 percent of the difference between the two low bids.

Marino disputes Army's determination that our decisions in *AFB Contractors,* and 53 Comp. Gen. 64, above, are controlling. In this regard, the protester contends that there is an inconsistency between the decisions relied on by the Army and our holdings involving similar circumstances in 52 Comp. Gen. 544 (1973); *Algernon Blair, Inc.,* B-182626, February 4, 1975, 75-1 CPD 76; *Flippo Construction Co., Inc.,* B-182730, March 7, 1975, 75-1 CPD 139; and *Titan Mountain States Construction Corporation,* B-183680, June 27, 1975, 75-1 CPD 393. In the latter decisions, we determined that the unacknowledged amendments' costs (amounting to 0.137, 0.037, 0.2, and 0.0075 percent, respectively, of the involved low bids) represented insignificant percentages (5.68, 2.47, 2.85, and 0.24 percent, respectively) of the differences between the low and the second low bids; therefore, waiver was permitted.

No precise standard can be employed in determining whether a change effected by an amendment is trivial or negligible in terms of price and, consequently, a determination must be based on the particular facts of each case. Nevertheless, given the above pricing facts, we reject Marino's argument that there is an inconsistency in our treatment of the cited cases. In other words, even if the value of the unacknowledged amendment is insignificant compared with the low bid (as was the circumstance in all six of the above decisions), waiver will not be permitted if the value is significant (as was the circumstance in *AFB Contractors* and 53 Comp. Gen. 64, above) compared with the difference between the two lowest acceptable bids.

In this case, we believe that amendment 0003 cannot be viewed as being trivial or negligible with respect to price. Although the estimated increase is only 2 percent of Marino's bid and, therefore, insignificant based on this comparison, it constitutes approximately 11 times the difference between Marino's and Prossen's bids. Therefore, Marino's failure to acknowledge amendment 0003 cannot be waived as a trivial defect under the above DAR provision or under the IFB which provided, in effect, that a bidder's failure to acknowledge an amendment involving a trivial matter would not cause rejection of the bid.

Marino further contends that the Army's determination of the amendment's materiality was based on invalid estimates. In this regard, the protester maintains that the amendment actually increased the contract price by only $1,770.

We have held that the determination as to the cost significance of an amendment may not be based on the valuation placed upon it by the bidder seeking a waiver. 53 Comp. Gen. 64, above. To do otherwise would permit a bidder after publication of bid prices to decide to become eligible for award by citing costs which would allow waiver or to avoid award by placing a larger cost value on the effects of the amendment. Consequently, we must accept the Army's determination that the amendment increased costs by $10,779.

In any event, we note that the contractor's estimate of increased costs represents more than 100 percent of the difference ($966) between the two low bids. Accordingly, a determination of cost impact based on the protester's estimates would still result in a finding that amendment 0003 had more than a trivial or negligible effect on price.

Marino, in addition to the above challenges to the materiality of amendment 0003, contends that the reason it did not acknowledge the amendment is because it was never received. In this regard, the protester asserts that it was not included in the initial mailing list and that the Army improperly transmitted the amendment by ordinary mail, instead of registered mail; moreover, Marino insists that amendments should be regularly sent by registered mail.

We have consistently held that the contracting agency is not an insurer of delivery of bid documents to prospective bidders, but that the risk of nonreceipt is on the bidders. *G.E. Webb,* B-204436, September 21, 1981, 81-2 CPD 234. Therefore, if a bidder does not receive and acknowledge a material amendment, and there is no evidence that this failure is the result of a conscious or deliberate effort on the part of the contracting agency's part to exclude the bidder from the competition, the bid must normally be rejected as nonresponsive. *Jose Lopez and Sons Wholesale Fumigators, Inc.,* B-200849, February 12, 1981, 81-1 CPD 97.

Here, the Army maintains that it mailed all bidders, including Marino, a copy of the amendment via regular mail; moreover, the Army notes that regular mail is used because if "all of the thousands of amendments issued every year by [the Omaha District] alone [were sent] by registered mail [this] would cost the taxpayer untold sums of money." Although it is unfortunate that Marino's name was not recorded on the bidders' list, we do not find anything in the record indicating that the error was other than an inadvertent mistake, or that it was occasioned by any deliberate attempt on the part of the procuring personnel to exclude the protester from participating in the procurement. Therefore, Marino's failure to acknowledge the amendment, even though the company alleged

ly never received the amendment, renders its bid nonresponsive. *Central Deivery Service,* B-186413, August 4, 1976, 76-2 CPD 125. Moreover, we cannot question the Army's objection to the use of registered mail, which is not required for the transmission of amendments. *See* DAR § 2-208 (Defense Acquisition Circular No. 76-25, October 31, 1980).

Notwithstanding its failure to receive the amendment, the protester contends that its bid was based on subcontractors' telephone bids incorporating the third amendment. In support of this contention, Marino has submitted records of the bids including subcontractors' acknowledgments of amendment 0003.

The responsiveness of a bid, that is, a bidder's intent to be bound by all the terms and conditions of a solicitation, including amendments, must be determined from the bid itself. 51 Comp. Gen. 352 (1971). Therefore, to be effective, an acknowledgment of an amendment must be submitted prior to bid opening. *Ira Gelber Food Services, Incorporated,* 55 Comp. Gen. 599, 601 (1975), 75-2 CPD 415. In this connection, a bidder may not cure a bid which is nonresponsive on its face by demonstrating after bid opening that it was aware of the substance of an amendment. See *Dover Elevator Co.,* B-194679, November 8, 1979, 79-2 CPD 339. Therefore, even if Marino was alerted to the contents of amendment 0003 prior to bid opening and considered the amendment in preparing its bid, it would still have to formally acknowledge the amendment. *Dover Elevator Co.,* above. Otherwise it would not be legally binding itself to comply with the amendment's requirements. *Navaho Corporation,* B-192620, January 16, 1979, 79-1 CPD 24.

Marino also asks that we consider, pursuant to the IFB's bidding instructions, page 1B-3, paragraph 7, its recent statements acknowledging receipt of the amendment as a late modification of its bid to include the terms of amendment 0003. Paragraph 7(a) of the IFB's bidding instructions provides that a late modification of an otherwise acceptable bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted. Since Marino's bid was not otherwise acceptable, it cannot be modified. See *Western Microfilm Systems/Lithographics,* B-196649, January 9, 1980, 80-1 CPD 27.

Additionally, the protester argues, in substance, that the Army finally accepted its bid at bid opening when the contracting officer declared Marino the apparent low bidder and that the Army took an unreasonably long period of time (6 days) before informing Marino that its bid would be rejected. As a general rule, the acceptance of an offer by the Government must be clear and unconditional; it must appear that both parties intended to make a binding agreement at the time of the purported acceptance of the offer. See *Donald Clark Associates,* B-184629, March 24, 1978, 78-1 CPD 230. Here, the contracting officer informed all bidders that the low bid announced at bid opening would be "apparent only," and that all

bids would be reviewed at a later time for "defects which could render them unacceptable." Moreover, the contracting officer insists that Marino was notified of the rejection of its bid "as soon as the decision had been rendered [and] that it took time to evaluate the amendment's effect and formulate a decision." In view of the contracting officer's statements, we cannot find that the Army has unconditionally accepted Marino's offer or that the Army took an unreasonably long period of time in notifying Marino of the bid rejection.

Marino points out that its bid would result in a $966 monetary savings to the Government. However, the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the Government might realize a monetary savings in a particular procurement if a material deficiency is corrected or waived. *Jose Lopez and Sons Wholesale Fumigators, Inc.*, above.

Finally, Marino maintains that the Army acted improperly by releasing the bid opening results to trade publications. We disagree. As pointed out by the agency, information pertaining to bidders' identities and the amounts bid is a matter of public record at the time of bid opening.

We deny the protest.

[B-199998]

Unions—Federal Service—Collective Bargaining Agreements—Interpretation—Not for GAO Consideration—Grievance Procedures Applicability

The question of whether the temporary promotion provisions in a collective bargaining agreement apply to unit employees temporarily serving in nonunit positions is an issue of contract interpretation which is customarily ajudicated solely under grievance-arbitration provisions, and is therefore not appropriate for resolution by General Accounting Office (GAO). Accordingly, this Office will defer to labor-management procedures established under 5 U.S.C. Chapter 71.

General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect—Grievance *v.* Claims' Settlemant—Claims Jointly Submitted

Claims involving matters of mutual concern to agencies and labor organizations submitted under 4 C.F.R. Part 31 are considered joint submissions where both parties to the agreement have notice of the submission to GAO and neither party objects to our consideration of the claim. See also 4 C.F.R. 22.7(b) (1981).

Officers and Employees—Transfers—Temporary Quarters—Sharing Commercial Lodging Quarters—Pro Rata Reimbursement—Propriety

Transferred employee reclaims amount of temporary quarters subsistence expenses administratively reduced to 50 percent pro-rata share based solely on the fact that the quarters were shared by another employee during period of TQSE claim. Since employee actually incurred the expense, and in the absence of any evidence that occupancy by a second person increased the rental cost or that the amount claimed was otherwise unreasonable, the full amount of the claim is allowable.

Matter of: Linda A. Vaccariello—Backpay under provision of negotiated agreement—Temporary quarters subsistence expenses, February 26, 1982:

The first issue in this case is whether a negotiated agreement's provision for retroactive temporary promotions after details to a higher graded position of 31 days or more applies to unit employees temporarily serving in nonunit positions. We determine that the question presented is a matter of contract interpretation which is more appropriately resolved pursuant to the labor-management procedures established under 5 U.S.C. Chapter 71.

The second issue involves the propriety of an agency's reduction of an employee's temporary quarters subsistence claim based solely on the fact that another employee shared the quarters during the period of the claim. We hold that the employee is entitled to reimbursement of the full amount claimed.

Ms. Linda A. Vaccariello presents a claim for retroactive temporary promotion and backpay arising under a provision of a negotiated agreement concluded by Social Security Administration Headquarters Bureaus and Offices in Baltimore, Maryland, and Local 1923, American Federation of Government Employees. Since both parties to the negotiated agreement have been provided with copies of Ms. Vaccariello's submission, and neither has objected to our consideration of the claim, the submission is considered a joint submission under 4 C.F.R. Part 31, and our jurisdictional analysis set out in *Samuel R. Jones,* 61 Comp. Gen. 20 (1981), does not apply. Claims involving matters of mutual concern to agencies and labor organizations submitted under 4 C.F.R. Part 31 are considered joint submissions where both parties to the agreement have notice of the submission to GAO and neither party objects to our consideration of the claim. See also 4 C.F.R. § 22.7(b) (1981). At the same time the agency has included for our consideration a reclaim voucher filed by Ms. Vaccariello for certain temporary quarters subsistence expenses. The claims arise and shall be treated independently here in order of presentation.

THE BACKPAY CLAIM

At the time this claim arose Ms. Vaccariello's position of record as an employee of the Social Security Administration, Department of Health, Education and Welfare (now Department of Health and Human Services), was that of a GS-12, Quality Appraisal Analyst. Ms. Vaccariello contends that from September 2, 1977, to October 31, 1977, she was informally detailed to the position of Supervisory Quality Appraisal Analyst, GS-13. Ms. Vaccariello claims the salary of the higher grade position for the entire period of the detail under the following provisions of Article 17, Subsection C3 of the Social Security Administration's applicable 1977 negotiated agreement with AFGE Local 1923:

Subsection 3. Any employee detailed to another position shall be given a job description or functional statement if such assignment is for 30 calendar days or more. Details in excess of 30 calendar days will be reported on Standard Form 52, "Request for Personnel Action," and maintained as a permanent record in the Official Personnel Folders. For details to higher positions of more than 10 consecutive workdays but less than 30 calendar days, the Administration shall provide the employee with a memorandum for his Official Personnel Folder. Employees detailed to higher grade positions for 31 calendar days or more shall be paid the appropriate higher rate from the first day of detail.

The agency counters this assertion by referring to Article 1, Section B of the agreement which provides as follows:

Section B. This Agreement covers all nonsupervisory General Schedule and Wage Grade employees of the Social Security Administration Headquarters Bureaus and Offices, including professionals, in the Baltimore SMSA, collectively making up the bargaining unit and hereinafter referred to as employees or group of employees, but excluding guards, supervisors, management officials, employees engaged in personnel work in other than a purely clerical capacity, and investigative personnel. Those employees excluded from the bargaining unit may join the Union.

The agency denied Ms. Vaccariello's claim reasoning that, although her position of record at the time of the detail was in the bargaining unit for purposes of Article 17, Subsection C3, the position to which she was detailed was not. It is the agency's view that Article 17, Subsection C3, did not cover details to supervisory positions. According to the agency, details to supervisory positions were covered instead by provisions of the agency's promotion plan. Thus, in accordance with Part III(d)(3) of the Social Security Administration Headquarters Promotion Plan in effect at the time in question, an employee could be detailed to a higher graded position for up to 60 days. Since Ms. Vaccariello's detail did not exceed the prescribed 60-day limit, the agency denied her claim.

The question of whether the temporary promotion provision in the collective bargaining agreement applies to unit employees temporarily serving in nonunit positions is an issue of interpretation of the collective bargaining agreement which is customarily adjudicated solely under grievance-arbitration procedures. While GAO frequently considers the type of overlong detail issue presented in this case, the issue of whether the collective bargaining agreement covers details to supervisory positions is not appropriate for resolution by GAO. Such labor-management issues are best resolved pursuant to procedures available under 5 U.S.C. Chapter 71, the Federal Service Labor-Management Relations Statute. *Schoen and Dadant,* 61 Comp. Gen. 15 (1981), Accordingly as a matter of policy, we will not take jurisdiction of Ms. Vaccariello's claim.

In so deciding we are aware of the fact that Ms. Vaccariello's claim pre-dates the enactment of Title VII of the Civil Service Reform Act of 1978 (Pub. L. 95-454), 5 U.S.C. 7111. However, even under Executive Order No. 11491, as amended, 3 C.F.R. 254, entitled "Labor Management Relations in the Federal Service," we believe resolution of this issue is a matter more appropriately addressed by labor-management authorities.

THE TEMPORARY QUARTERS SUBSISTENCE EXPENSES CLAIM

Ms. Vaccariello has also presented a separate claim for additional reimbursement for temporary quarters subsistence expenses in connection with her transfer from Boston, Massachusetts, to Baltimore, Maryland, in June 1976.

Ms. Vaccariello's original travel voucher reflects that she occupied temporary quarters in a monthly rental apartment in Columbia, Maryland. The quarters were shared with another employee of the Social Security Administration. This second employee, while not receiving any subsistence expenses during the period of Ms. Vaccariello's claim, had in fact been reimbursed for 30 days of temporary quarters subsistence expenses at the same address prior to Ms. Vaccariello's arrival.

The agency advised Ms. Vaccariello that, since temporary quarters were shared with another employee, lodging costs had been approved on a 50 percent pro-rata basis of the monthly rental. Ms. Vaccariello disputes both the logic and the amount of this item of reimbursement, pointing out that she paid the entire rental amount on the subject apartment for the period in question, and she has provided a photostated copy of her cancelled personal check in support of her contention. There is no suggestion in the record that the amount of rent was higher because the apartment was occupied by two individuals, that the cost of the apartment was otherwise unreasonable or excessive, or that the two individuals actually shared the rental expense.

Under 5 U.S.C. § 5724(a)(3) an employee for whom the Government pays expenses of travel and transportation under 5 U.S.C. § 5724(a) may be reimbursed subsistence expense for himself and his immediate family for a period of up to 30 days while occupying temporary quarters. The regulations implementing 5 U.S.C. § 5724(a)(3) are contained at Part 2-5 of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973). Paragraph 2-5.2(c) of the FTR defines temporary quarters as "any lodging obtained from private or commercial sources to be occupied temporarily by employee or members of his immediate family who have vacated the residence quarters in which they were residing at the time the transfer was authorized." Moreover, under provisions contained in paragraph 2-5.4 of the FTR, while lodging represents an allowable subsistence expense, reimbursement shall be only for actual subsistence expenses incurred provided these are incident to occupancy of temporary quarters, and are reasonable as to amount.

Regarding the reasonableness of amounts claimed, it is the responsibility of the employing agency to determine what is reasonable. However, the agency may not make such a determination without adequate information to justify the amount arrived at. *Richard W. Metzler*, B-191673, December 5, 1978, and cases cited

therein. The evaluation of reasonableness must be made on the basis of the facts in each case. 52 Comp. Gen. 78 (1972).

In Ms. Vaccariello's case the agency's determination to reduce her entitlement to lodging expenses was based solely on the fact that the quarters were also used by another employee who was not a member of Ms. Vaccariello's immediate family. Since there is no evidence that occupancy by a second person increased the rental cost, that the amount claimed was otherwise unreasonable, or that the two individuals actually shared the rental expense, we do not believe there is an adequate basis for denial of the full amount claimed.

Accordingly, on the basis of the information provided in the record before us, Ms. Vaccariello's claim for the total amount of the monthly rental payment for temporary quarters in connection with her official transfer is allowable.

U.S. GOVERNMENT PRINTING OFFICE : 1982 O - 389-405 : QL 3