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[B-203128]

Office of Personnel Management—Jurisdiction—Fair Labor Standards Act—Exemption Status Determination

National Federation of Federal Employees requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act of civilian aircraft pilots. Under 29 U.S.C. 204, the Office of Personnel Management is authorized to administer FLSA with respect to Federal employees. In B-51325, Oct. 7, 1976, we stated that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. Accordingly, since OPM has in fact reviewed the claims of the employees and has determined them to be exempt from FLSA as administrative employees, this Office will not consider the claims.

Matter of: Civilian Aircraft Pilots—Exempt Status Determinations Under Fair Labor Standards Act, January 4, 1982:

Mr. James M. Peirce, President, National Federation of Federal Employees, requests a determination from this Office on the exemption status under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), of 11 civilian aircraft pilots. The pilots, who are employed by the United States Army Electronics Research and Development Command (Army), Fort Monmouth, New Jersey, claim overtime pay for the period April 24, 1975, to the present.

Two of the pilots, Mr. Walter Sabey and Mr. Bissell M. McElyea, had filed FLSA complaints contesting their exempt status determination for the years 1974 to 1979 with the Office of Personnel Management's (OPM) Eastern Region Office. Mr. Sabey was informed that after a review of all the information and comments concerning his duties, OPM determined that his exempt status was correct. He was denied a reconsideration of that status by OPM Headquarters. Mr. McElyea received a final decision from OPM also informing him that his exempt status determination was correct. Both the Army and OPM had determined the pilots to be exempt from FLSA under the administrative employee exception. See Federal Personnel Manual (FPM) Letter 551-7, July 1, 1975.

The union questions OPM's determination that the pilots are exempt from FLSA because other pilots employed in the same General Schedule series at different agencies are considered nonexempt. The union requests a determination from this Office that these employees are nonexempt from FLSA for the entire period of their employment and accordingly requests overtime pay under FLSA for the period we determine the employees to be nonexempt.

Under 29 U.S.C. § 204 (1976), OPM is authorized to administer FLSA with respect to Federal employees. We have stated in the past

that we consider the role granted OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. We have held that this Office will not review OPM's determinations as to an employee's exempt or nonexempt status. 59 Comp. Gen. 128 (1979); *Earl Machett*, B-193623, July 23, 1979; B-51325, October 7, 1976.

Accordingly, since OPM has in fact reviewed the claims of the aircraft pilots regarding their status under FLSA and has determined them to be exempt as administrative employees, this Office will not consider the claims.

[B-204053]

Bids—Acceptance Time Limitation—Failure to Comply—Waiver—One Bid Received

Compliance with a bid acceptance period stated in an invitation generally is a material requirement because a bidder offering a shorter acceptance period has an unfair bidding advantage since it is not exposed to market place risks and fluctuations for as long as its competitors are. Where only one bid is received, however, the fact that it offers a shorter acceptance period than solicited does not require its rejection, since there are no competitors subject to possible prejudice.

Matter of: Esko & Young, Inc., January 4, 1982:

Esko & Young, Inc., protests the Veterans Administration's (VA) rejection of its bid under invitation for bids (IFB) No. 793-6-81 for roofing work on a building at the VA Supply Depot, Hines, Illinois. The VA rejected the bid, which was the only timely one received, as nonresponsive for failure to comply with the bid acceptance period requirement of the IFB.

We do not believe the VA was precluded from accepting Esko's bid, and the protest therefore is sustained.

The IFB stated that "bids offering less than 30 days for acceptance by the Government from the date set for opening will be considered nonresponsive and will be rejected." Esko's bid offered only a 10-day acceptance period, and therefore was rejected as nonresponsive. The VA then resolicited for the roofing requirement and, as a result of the second competition, award was made to another company.

Esko contends that its insertion of the 10-day figure in the IFB space for the bid acceptance period was a clerical error which the VA either should have waived or allowed to be corrected after bid opening as a minor informality. Esko asserts that since it was the sole bidder, such post-bid opening waiver or correction would not prejudice any other firm.

All of our previous decisions concerning a bidder's failure to offer a required bid acceptance period involved fact situations in which two or more firms submitted bids. In those decisions, we consistently held that a provision in an IFB which requires that a bid remain available for acceptance by the Government for a prescribed period of time in order to be considered for award is a material requirement, and that the failure to meet such requirement thus renders a bid nonresponsive. *See*, *e.g.*, 48 Comp. Gen. 19 (1968); 46 *id.* 418 (1966). As we explained in *Miles Metal Corporation*, 54 Comp. Gen. 750 (1975), 75-1 CPD 145, to hold otherwise affords the bidder that limited its bid acceptance period an unfair advantage over its competitors because that bidder has the option to refuse the award after the time set in its bid has expired in the event of, for example, unanticipated increases in cost. On the other hand, bidders complying with the required acceptance period would not have that option but would be bound by the Government's acceptance within the period required in the invitation.

Since Esko was the sole bidder, however, the rationale for considering compliance with the invitation's bid acceptance period to be a material bidding requirement does not apply. No bidding advantage accrues to the single bidder stating a bid acceptance period less than that requested in the Government's solicitation because there are no competitors who, in contrast, subject themselves to the risks of maintaining their bid prices for the longer period. Thus, as long as the Government can accept the bid within the acceptance period offered, or the bidder agrees to extend the bid acceptance period (contrast *Ramal Industries, Inc.*, 60 Comp. Gen. 666 (1981), 81-2 CPD 177, involving multiple bidders), we do not believe that a bid in this circumstance must be rejected as nonresponsive.

The protest against the rejection of Esko's bid is sustained.

The VA has advised us that the roofing work under the protested solicitation and contract is well under way and that any termination of the present contract would result in extensive termination costs and damaging delays in the completion of the building's roof. Therefore, we do not believe it is in the Government's best interest to recommend any remedial action in this instance. Moreover, since this is the first decision that discusses and explains the materiality of a bid acceptance period requirement in a sole bidder situation, and since there is no explicit regulatory guidance for procuring agencies in this area, we can understand the VA's application of the general rule involving multiple bidders to the instant situation. For future reference and application in single bid situations, however, we are bringing this decision to the attention of the Administrator of Veterans Affairs.

[B-202762]

Small Business Administration—Small Business Act—Amendment—Public Law 95-507—Section 211—Subcontracting Plans in Negotiated Procurements

Provision of Pub. L. 95-507 (95th Cong., 2nd. sess.), requiring the negotiation with awardee of a small business subcontracting plan prior to award, is not applicable to protested procurement because contract offered no subcontracting possibilities. Record shows that awardee maintained an in-house capability to perform the contract work.

Contracts—Conflict of Interest Prohibitions—Awardee Manufacturer of Equipment it Evaluates

General Accounting Office concludes that procuring agency imposed appropriate conditions in awardee's contract to avoid any conflict that might arise from the awardee having to evaluate any military equipment manufactured either in whole or part by it. Clause in awardee's contract required awardee to make an immediate and full disclosure to the contracting officer of any potential organizational conflict of interest discovered by the awardee during performance of the contract. If the awardee does not disclose potential conflict, the Government may terminate the contract for default.

Contracts—Negotiation—Offers or Proposals—Evaluation—Administrative Discretion—Cost/Technical Tradeoffs

Procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made and the extent to which one may be sacrificed for the other is governed only by tests of rationality and consistency with established evaluation factors. Evaluation scheme in protested solicitation stated that technical criteria were to be substantially more important than cost considerations. The record also shows that agency's board determined awardee's technical proposal was superior overall by a significant margin.

Contracts—Negotiation—Offers or Proposals—Evaluation—Criteria—Disclosure to All Offerors

It is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to restructure their proposals. However, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify aspects that are logically and reasonably related to the stated factors. Record shows that, after receipt of initial proposals, agency's board properly instructed technical evaluators not to award extra points for personnel résumés of an offeror which showed education and experience that exceeded solicitation requirements.

Matter of: Columbia Research Corporation, January 5, 1982:

Columbia Research Corporation (Columbia) protests the award of a contract to the General Electric Company (G.E.) under solicitation No. N00019-80-Q-0057 issued by the Naval Air Systems Command (NAVAIR). The solicitation was for the performance of reliability and maintainability engineering services during fiscal year 1981 on various items of military equipment. The solicitation also provided for four 1-year options covering fiscal years 1982 through 1985.

Columbia raises the following grounds of protest:

(1) A small business subcontracting plan was not included in and made a material part of G.E.'s contract, in violation of Pub. L. 95–507, 92 Stat. 1757 (95th Cong., 2nd sess.), 15 U.S. Code 683;

(2) Under the terms of the solicitation, the contractor was required to make free and unbiased technical recommendations concerning the suitability of certain aircraft and missile systems. Because G.E. was the supplier of a substantial portion of such equipment, the award to G.E. created an organizational conflict of interest; and

(3) The award to G.E. at a price that was nearly 40 percent higher than that offered by Columbia constituted an unreasonable and unnecessary expenditure of public funds by the agency.

We deny the protest.

Small Business Subcontracting Plan

Columbia contends that Pub. L. 95–507 required the negotiation of a small business subcontracting plan before the award of the contract to G.E. Columbia states that the solicitation included a clause which provided for such negotiation with the successful offeror, as required by the act. However, while G.E. initially submitted a 16-page small business contracting plan with its proposal, the company's best and final offer indicated that "0" percent of the estimated costs would be subcontracted to small business. Columbia argues that notwithstanding G.E.'s initial representation that it proposed to subcontract with small business, a subcontracting plan was not negotiated and made a part of G.E.'s contract.

Columbia further asserts that in passing Pub. L. 95–507, it was the intent of the Congress that large business firms receiving substantial Government contracts should subcontract a portion of the work to small businesses. According to Columbia, Pub. L. 95–507 was not meant to encourage large firms to subcontract with small businesses, but that where there are qualified small business subcontractors available, Pub. L. 95–507 requires the large businesses to enter into subcontracts with them. Columbia emphasizes that there were qualified small business firms to perform part of the contract work because three of the eight offerors under the solicitation were, in fact, small businesses.

NAVAIR states that the solicitation contained a clause requiring offerors to estimate what amount of the total cost of the contract would be for subcontracts and of that amount what percentage would be subcontracted to small businesses and small disadvantaged businesses. NAVAIR further states that while G.E.'s original proposal did indi-

cate that the company intended to subcontract 7 percent of its subcontract effort to small business, G.E.'s technical proposal contained no subcontractor résumés or other specific information concerning such subcontractor effort. NAVAIR indicates that it requested, during written discussions, that G.E. submit résumés and other information regarding G.E.'s small business subcontracting effort. Because G.E.'s best and final offer did not respond to this request, NAVAIR states that it concluded that no subcontracting effort whatever was planned by G.E. during the period of the basic contract. According to NAVAIR, this conclusion was confirmed when G.E., as the apparent successful offeror, submitted a small business subcontracting plan showing a zero amount for subcontracts. Consequently, NAVAIR takes the position that no small business subcontracting plan was required for the basic contract period because no "subcontracting possibilities" existed for this period.

Analysis

Section 211(d)(4)(B) of Pub. L. 95-507 (15 U.S.C. 637(d)(4)(B) provides that before the award of any negotiated contract exceeding certain prescribed amounts which "offers subcontracting possibilities," the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. Here, however, NAVAIR concluded no subcontracting possibilities existed because G.E., the awardee, maintained the in-house capability to perform the contract work. We find from our review of the record that this conclusion is supported by the fact that, in past engineering analyses contracts with the Navy, G.E. customarily performed the work in-house rather than contracting with third parties. Moreover, the solicitation contained a Substitution of Personnel clause which required the successful offeror to employ for the first 90 days of the contract only those individuals whose résumés were submitted for evaluation by NAVAIR during the procurement process. The record shows that NAVAIR evaluated G.E.'s proposal in the area of personnel capabilities on the basis of the company's use of in-house personnel.

As to Columbia's argument that Pub. L. 95-507 requires large businesses to subcontract with small businesses rather than perform the contract work in-house, we recognize that the requirement in section 211(d)(6) for a subcontracting plan to be included in a contract as a material element might be viewed as an indication that subcontracting

is required. On the other hand, the same section of the statute requires a prospective contractor's subcontracting plan to describe:

> * * * the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts.

This provision suggests that Congress intended to insure that small and small-disadvantaged businesses have a fair chance to compete for subcontracts when subcontracting opportunities would be made available by the prime contractor, not that firms have a right to subcontracts notwithstanding the prime contractor's intention not to subcontract.

We also find nothing in the legislative history of Pub. L. 95-507 to indicate that Congress intended that a contractor be required to subcontract. The history generally discusses the fact of the requirement for a subcontracting plan as a material part of the contract. We do note, however, that the Senate Committee on Governmental Affairs, in considering the bill that resulted in Pub. L. 95-507 (H.R. 11318), commented that the clause in section 211(d)(3) which states the Federal Government's policy, and is to be included in contracts subject to section 211(d), "is a 'best efforts' clause, which requires the contractor to adhere to federal policy *if it awards subcontracts* * * *." [Italic supplied.] We think the words "in the awarding of subcontracts" as prescribed in section 211(d)(3), when read in light of the Committee's comment, suggest that the contractor must plan for use of small business subcontractors only if the firm is awarding subcontracts.

Compelling a prime contractor to subcontract for portions of the work required by a contract would drastically change the prime contractor's traditional discretion in that respect. We think it is reasonable to believe that if Congress had intended to compel subcontracting, it would have been more explicit in indicating that intention. Consequently, we cannot conclude that the statute should be read as requiring subcontracting by a prime contractor with the Federal Government.

In any event, we note that subsequent to the award, NAVAIR did negotiate a small business subcontracting plan with G.E. By amendment, this plan was made a part of G.E.'s contract and took effect on July 1, 1981, when the contractually imposed 90-day bar on the substitution of personnel was lifted.

Conflict of Interest

Columbia contends that an organizational conflict of interest was created by the award to G.E. because of G.E.'s position as a manu-

facturer, which diminished the company's capacity to give impartial, technically sound, objective assistance and advice to the Government. Columbia points out that G.E. has for many years manufactured and supplied engines, armament and fire control systems for the most advanced United States Navy aircraft. Columbia argues that because G.E. is required under the terms of its contract to make unbiased recommendations to the Government concerning the reliability and maintainability of G.E.-produced aircraft system components, G.E. has clearly been placed in a position where it can make decisions favoring its own products. Thus, Columbia takes the position that a contract which requires reliability and maintainability studies should not have been awarded to a company whose own hardware is involved.

Analysis

We think that NAVAIR has imposed appropriate conditions in G.E.'s contract to avoid any conflict that might arise during performance. The record shows that to avoid any potential conflict, NAVAIR included the following clause in the solicitation:

K-33 Organizational Conflict of Interest

Because the performance of the effort under this contract will require access to other contractor's proprietary data and the ability to make free and unbiased recommendations to the Government, the Government will require the inclusion of an Organizational Conflict of Interest clause in the contract in accordance with DAR Appendix G.

Offerors are, therefore, required to submit a suggested clause (which will not be evaluated for purposes of selection of the contractor), for negotiation, concerning the avoidance of an organizational conflict of interest.

The clause that G.E. submitted in response to the solicitation request was negotiated and made a part of G.E.'s contract. The contract clause provides, in pertinent part, as follows:

H-11 Organizational Conflict of Interest

(1) GENERAL

(a) The term "organizational conflict of interest" means that a relationship exists whereby the Contractor (including affiliated divisions, consultants, or sub-contractors) has interests which (1) may diminish his capacity to give impartial, technically sound, objective assistance and advice or may otherwise result in a biased work product, or (2) may result in an unfair competitive advantage. It does not include the "normal flow of benefits" from the performance of a contract.

(b) The contractor warrants that, to the best of his knowledge and belief, he does not have any organizational conflict of interest, as defined in subparagraph (a).

(c) The Contractor agrees that, if in the performance of this contract he discovers a potential organizational conflict of interest with respect to this contract, he shall make an immediate and full disclosure in writing to the Contracting Officer which shall include a description of the actions which the Contractor has taken or proposes to take to avoid, eliminate or neutralize the

conflicts. In the event that the Contractor does not disclose a known potential conflict to the Contracting Officer, the Government may terminate the contract for default.

(d) If the Contractor is directed by authorized Government personnel by written tasks or verbal directions (in a program review or otherwise) to perform services which the Contractor believes to constitute a potential Organizational Conflict of Interest, the Contractor is required to notify the Principal Contracting Officer (PCO) in writing of the nature of the Conflict of Interest within ten (10) days after receipt of the Government directive, so that a determination may be made. No effect shall be expended toward the performance of the services in question until this determination has been made or unless otherwise directed by the PCO.

NAVAIR states that if a potential conflict is identified during the performance of the contract, it will either perform the particular task in-house or competitively select another contractor.

Columbia, however, argues that there is not merely an undefinable potential conflict of interest but rather a continuing "actual" conflict of interest that arose on the date of the contract award because G.E. manufactured several major components of the contract line items being evaluated. As noted above, G.E. has warranted that, to the best of its knowledge, it does not have any organizational conflict of interest. If an organizational conflict does arise during the course of evaluating the military equipment listed in the contract involving the components that G.E. manufactured, G.E. has the burden to disclose the conflict and to neutralize or avoid it. If G.E. does not do this, the company runs the risk of having its contract terminated for default by the Government. Through the use of clause H-11, we believe the Government has taken adequate steps to protect itself in this situation.

Award at Higher Price

While recognizing that in a procurement of technical services, factors other than cost should receive substantial consideration, Columbia maintains that at some point in the evaluation of offers, consideration must also be given to cost factors. Columbia alleges that NAVAIR's consideration of the technical and management factors involved in the procurement revealed a disparity of only 3 percent between the initial point scores of G.E. and it. In view of such a small differential, Columbia questions NAVAIR's willingness to pay a 40 percent higher cost than the amount it proposed. Columbia also points out that its proposed cost was based upon a labor category averaging technique that has been recommended by the Government for a substantial period of time. Columbia asserts, moreover, that its quoted price was consistent in every respect with its Government pricing practices and, thus, "realizable" to NAVAIR had NAVAIR chosen Columbia as the awardee.

In addition, Columbia asserts that after the initial technical evalua-

tion, NAVAIR changed the basis upon which the offerors' résumés of educational experience were to be evaluated, as well as the factors which made up the technical score for management. Columbia alleges that while NAVAIR amended the solicitation to give offerors notice of the additional subcriteria under the factor "Management Organization and Plan," offerors were not notified of either the alleged changes in the evaluation criteria or the realignment of points for evaluating the offerors' educational résumés. According to Columbia, the alleged realignment of points favored G.E. because after best and final offers Columbia's proposal went from being ranked first under the most important evaluation criterion, "Personnel," to second behind the proposal of G.E.

NAVAIR responds that after the final evaluation, G.E. received a total technical score of 3873 to Columbia's 3592. NAVAIR also states that it decided the difference in the technical scores between the two companies was significant and that, thus, it was to the Government's advantage to pay a higher cost in order to obtain the superior G.E. proposal. NAVAIR points out that the solicitation cautioned offerors that the technical criteria was to be substantially more important in the selection of an awardee. NAVAIR emphasizes that under the solicitation's source selection scheme, cost was an important factor in the selection scheme only where the technical ranking of two or more proposals in the competitive range was equal or nearly equal.

As to Columbia's assertion that one of the technical evaluation criteria was improperly changed, NAVAIR contends that it was not required to notify the offerors when the method used to evaluate the offerors' résumés was revised. NAVAIR argues that it did not change the evaluation criteria, subcriteria or the weights assigned to each criteria. NAVAIR argues that its procurement review board studied the method used by the technical evaluators to evaluate résumés and determined that this method had not adequately followed the guidance set forth in the solicitation. NAVAIR states that, as a result, the technical evaluators were advised that in evaluating résumés they should consider the relevance of the listed education and experience and that extra points should not be awarded to résumés showing educational degrees in excess of the solicitation's requirements.

Analysis

The solicitation provided that the offerors would be evaluated on the basis of the following technical criteria: (1) personnel capabilities; (2) technical comprehension; and (3) management organization and plan. The qualifications and experience of the offeror's proposed personnel were the most important criteria. The record shows that

NAVAIR's evaluation board determined that G.E.'s technical proposal was superior overall by a "significant margin." According to the board, the area in which the technical scores revealed the greatest margin between G.E. and the other offerors was in personnel capabilities. Also, the board ranked G.E. the highest in the area of technical comprehension.

In a negotiated procurement, procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CDP 325. As we noted in 52 Comp. Gen. 358, at 365 (1972), the determining element is the considered judgment of the procuring agency concerning the significance of the difference in technical merit among the offerors. Thus, we have upheld awards to higher rated offerors with significantly higher proposed costs because it was determined that the cost premium involved was justified considering the significant technical superiority of the awardee's proposal. *Riggins & Williamson Machine Company, Incorporated, et al.*, 54 Comp. Gen. 783 (1975), 75-1 CPD 783.

As indicated in *Hager, Sharp & Abramson, Inc.*, B-201368, May 8, 1981, 81-1 CPD 365, where the agency procurement officials have made a cost/technical tradeoff, the question is whether the determination to make the award to the contractor was reasonable in light of the solicitation's evaluation scheme. In view of the fact that personnel capabilities was the most important evaluation criterion, we find that NAVAIR's determination to award to G.E., the offeror which received the highest technical score in that area, was consistent with the solicitation's evaluation scheme.

With respect to Columbia's assertion that the solicitation's evaluation criteria for personnel capabilities were improperly changed, we have stated that procuring agencies do not have the discretion to announce in a solicitation that one evaluation plan will be used and then follow another in the actual evaluation. See *Umpqua Research Company*, B-199014, April 3, 1981, 81-1 CPD 254. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. *Telecommunications Management Corporation, B-194584*, August 9, 1979, 79-2 CPD 105. Consequently, it is improper for an agency to depart in any material way from the evaluation plan described in a solicitation without informing the offerors and giving them an opportunity to struc-

ture their proposals with the new evaluation scheme in mind. *Umpqua Research Company, supra.*

On the other hand, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account. All that is required is that those aspects not identified be logically and reasonably related to or encompassed by the stated evaluation factors. *Buffalo Organization For Social and Technological Innovation, Inc.*, B–196279, February 7, 1980, 80–1 CPD 107. Here, the solicitation clearly stated that the résumés submitted by the offerors would be evaluated on the basis of the qualifications and experience of the personnel "proposed for this contract." Thus, we think that NAVAIR's instruction to the technical evaluators to consider only the relevance of the evaluation and experience and not award extra points for résumés with educational degrees in excess of solicitation requirement was logically and reasonably related to the personnel capabilities evaluation factor in the solicitation.

Conclusion

Accordingly, we deny Columbia's protest.

[B–204602.2]

Contracts—Protests—Moot, Academic, etc. Questions

Protest based on contracting agency's failure to conduct debriefing is academic when agency indicates that one will be given after award if protester files written request.

Contracts—Negotiation——Offers or Proposals—Evaluation—Technical Acceptability—Scope of GAO Review

General Accounting Office (GAO) will not reevaluate proposals but, rather, limits review to examination of whether evaluation is reasonable and in accord with listed criteria. GAO will not substitute its judgment for contracting agency's unless protester shows abuse of discretion or violation of procurement statutes or regulations.

Contracts—Negotiation—Competition—Competitive Range Formula—Technical Acceptability—Chance for Award Possibility

While discussions generally are held with all offerors whose proposals are either technically acceptable or capable of being made acceptable, even technically acceptable proposal may be eliminated from competitive range if there is no reasonable chance it will be selected.

Matter of: Media Works, Inc., January 19, 1982:

The Media Works, Inc. protests rejection of its proposal for design and development of two correspondence courses for the Army Quarter-

master School at Fort Lee, Virginia. The firm was one of six responding to solicitation No. DAB T60–81–R–0015, issued by the Training Support Center, Fort Eustis, Virginia, on June 8, 1981. We deny the protests.

Initially, Media Works protested its elimination from competition during the course of a cost audit. It also objected to the Army's failure to conduct a debriefing. Upon receipt of the administrative report, the firm further protested the Army's finding that its proposal was technically unacceptable, since the report states that other proposals were "susceptible" to being made acceptable. Media Works argues that negotiations should have been conducted with all six offerors, since none of their initial proposals were technically acceptable.

In addition, Media Works believes that its full technical proposal may not have been evaluated, since only extracts from its sample subcourse (defined in the solicitation as a module which teaches a single task or a group of close-related tasks) were duplicated in the administrative report. Media Works also alleges that the Army's decision to conduct audits before completion of technical evaluations unduly burdened offerors and was evidence of poor management. Finally, the firm questions the contracting officer's determination that it was urgent to award the contract notwithstanding the protest.

At the outset, although an urgency determination is included in the file, the Army states that no award has yet been made. In addition, because of the preaward status of this protest and the proprietary nature of competing proposals, certain portions of the record have not been released to Media Works. Although we have reviewed the full administrative report, due to these restrictions our discussion is necessarily limited. See *Texstar Plastics Company, Inc.*, B–201105, September 18, 1981, 81–2 CPD 223.

With regard to the audit question raised by Media Works, the Army states that it decided to conduct audits at the same time that it was making technical evaluations in an attempt to utilize funds appropriated for fiscal 1981. The Army states, however, that its audit of Media Works was totally independent of its finding of technical unacceptability and in no way jeopardized the firm's chance for award. As for a debriefing, the Army states that Media Works has not requested one. We believe the Army has satisfactorily explained the timing of the audits and find that the protest regarding the debriefing is academic, since the Army indicates that Media Works will be given one following award if it files a written request.

We believe that the crux of Media Works' protest is the Army's finding of technical unacceptability. As we have often stated, it is not the function of our Office to reevaluate proposals when an evaluation is challenged. Rather, we limit our review to an examination of

whether the evaluation was reasonable and in accord with listed criteria. We will not substitute our judgment for that of a contracting agency unless the protester shows that there has been an abuse of discretion or a violation of procurement statutes or regulations. *Quest Research Corporation*, B-203167, December 10, 1981, 81-2 CPD 456. We find neither here.

In this respect, Media Works' proposal received only 42.92 points during evaluation, the lowest score given. The Army determined that this proposal and the next lowest ranked one had no reasonable chance for award, and consequently it did not include them in the competitive range. The proposal of Northrop Services, Inc. received the highest score, 72.65 points, and also was lowest-priced. Although evaluators agreed that the three remaining proposals could be revised to make them acceptable, according to the Army this would only have further increased their proposed costs. The Army therefore negotiated only with Northrop and plans to award a contract to that firm.

We find that the evaluators fully considered each proposal in view of each of the listed criteria. These included offerors' technical approaches and required sample subcourses on how to fill out a materiel readiness report. Also considered were offerors' ability to complete the contract on time, corporate experience and qualifications of proposed personnel, and use and quality of graphics. Using an extremely detailed checklist, each evaluator rated each offeror as outstanding, good, acceptable, or nonresponsive with regard to numerous subcriteria under these general headings.

For example, in assessing sample subcourses, evaluators were asked to determine the degree to which each proposed module met or incorporated 32 different objectives or items. In the case of Media Works, the pre-test and post-test which the protester believed might not have been evaluated were included but were consistently rated nonresponsive. We conclude that the Army's finding that Media Works' subcourse would need major reworking to meet requirements was reasonable and was made after examination of Media Works' entire proposal. Moreover, since according to the solicitation the Army intended to retain the successful contractor's sample subcourse as a measure for those submitted during performance, we believe Media Works reasonably was eliminated from the competitive range on the basis of weaknesses and deficiencies in this area.

As for other offerors, as a general rule discussions are held with all whose proposals are either technically acceptable or capable of being made acceptable, and thus have a reasonable chance of award. *See* Defense Acquisition Regulation § 3-805 (1976 ed.). However, even a technically acceptable proposal may be eliminated from the competitive range if there is no reasonable chance that it will be selected.

Hittman Associates, Inc., 60 Comp. Gen. 120 (1980), 80-2 CPD 437. When, as here, in the contracting agency's judgment meaningful discussions cannot be held with more than one offeror, we have considered that selection to be within the agency's discretion. *Id.*, citing *Art Anderson Associates*, B-193054, January 29, 1980, 80-1 CPD 77. We do not believe the Army abused its discretion in negotiating only with Northrop when the next-best offeror whose proposal was deemed capable of being made acceptable was initially rated more than 10 points lower and was priced more than $170,000 higher. Thus, Media Works' protest on this basis is without legal merit.

The protest is denied.

[B-203818]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison *v.* Contractor Selection—Exhaustion of Administrative Remedies

Protester may protest directly to General Accounting Office without first exhausting administrative appeals process under OMB Circular A-76 in cases where question does not concern determination between contract and in-house performance.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Additional Information Supporting Timely Submission

A specific basis of protest raised after the filing of a timely initial general protest is timely if it merely provides additional details of the earlier-raised allegation.

Bids—Evaluation—Criteria—Undisclosed—Not Prejudicial to Protester

Determination of low bidder based on cost adjustment process which was not disclosed to bidders is defective. Nevertheless, since protester was not prejudiced by evaluation, protest is denied.

Matter of: MAC Services, Ltd., January 21, 1982:

MAC Services, Ltd. (MAC), has protested the proposed award of a contract to Inland Service Coropration (Inland) under invitation for bids No. DABT10-81-B-0007 issued by the Department of the Army (Army) for refuse collection and disposal services at Fort Benning, Georgia.

The IFB was issued on March 2, 1981. Bids were solicited on the four schedules set forth below:

Schedule 1—Government-furnished equipment and landfill.
Schedule 2—Government-furnished equipment, Contractor-furnished landfill.
Schedule 3—Contractor-furnished equipment, Government-furnished landfill.
Schedule 4—Contractor-furnished equipment and landfill.

Each schedule required contractors to submit bids covering a 1-year contract period with two 1-year option periods. The IFB further provided that option prices would be evaluated for purposes of award and that a "single contract will be awarded to the responsible bidder submitting the lowest responsive bid for either Schedule 1, 2, 3, or 4."

The IFB also contained a "Notice of Cost Comparison" clause which provided:

> Bidders are notified that this solicitation is a part of a cost comparison to determine whether accomplishing the specified work in-house or by contract is more economical.
>
> The Government's in-house cost estimate shall be based on the statement of work set forth in this solicitation and shall be submitted to the Contracting Officer in a sealed envelope not later than the time set for bid opening. At the time of the bid opening, the bids and the sealed Government in-house estimate will be opened and the results announced. This announcement is based upon an initial comparison of the cost of in-house performance with the cost of contracting out as indicated on the cost comparison form. The abstract of bids, the completed cost comparison form and detailed supporting data relative to the in-house cost estimate shall be made available to interested parties for review.
>
> A period of fifteen (15) working days will be provided for public review by interested parties of the cost comparison data. No final determination regarding the question of in-house or Contractor performance will be made during this review period. Interested parties may file written requests, based on specific objections, for review of the cost comparison results with the Contracting Officer during this period. This review shall only be used to resolve questions concerning the calculation of the cost comparison, and shall not apply to decisions regarding selection of one bidder in preference to another. Decisions with regard to such requests are final.

This clause, on its face, advised bidders that the Government's "in-house cost estimate" would be used only to determine whether "contracting out" would be more economical. However, the Army also intended to use the cost estimate for another purpose which was not evident elsewhere in the IFB. As discussed below, elements of the undisclosed cost estimate—especially relating to Government-furnished equipment—were added to the actual bids submitted in order to determine which bid "would result in the greatest cost savings to the Government."

Bids were opened on June 23, 1981. The bids, including option prices, of Inland and MAC were:

	Schedule			
	1	2	3	4
Inland	$1,874,959			
MAC	3,669,215	$3,446,209	$3,802,185	$3,201,838

The Army reports that the "adjusted cost of in-house performance" was $3,348,128 under each schedule. Thus, the acceptance of either of the low bids under schedules 1 or 4 would have been more economical than performing the service in-house.

The IFB contained no indication as to how the Army would determine the low bidder entitled to award under the disparate schedules involved—assuming, as was the case here, that bids on more than one schedule were found to be below the Government's in-house cost estimate.

To determine which of the low bids contained greater value, the Army employed an adjustment process so as to eliminate, for purposes of bid evaluation, the differing requirements involved in schedules 1 and 4.

For example, to Inland's bid a dollar adjustment of $193,515 was added representing the "depreciation and opportunity cost" associated with the "Government-furnished equipment" to be provided the contractor if award were to be made under schedule 1. The end result of this adjustment process was to raise Inland's schedule 1 bid to $3,021,326.95 and MAC's schedule 4 bid to $4,108,016.35. Because of this evaluation, Inland's schedule 1 bid was selected for award.

By letter dated June 29, 1981, and received by us on June 30, 1981, MAC filed a protest with our Office alleging that the only appropriate award should be based on schedule 4 to MAC. By letter dated July 1, 1981, the contracting officer requested additional information from MAC concerning its protest. On July 9, the two parties held a meeting and by letter dated July 14, 1981, MAC provided additional information. In its July 14 correspondence, MAC primarily challenged the correctness of the various adjustments the Army made to each bid in order to determine the bid having the "greatest cost savings."

Based on our review, we deny the protest.

In an administrative report, the Army argued that the protest be dismissed for failure by MAC to first exhaust the administrative appeals process provided under the above cost-comparison clause before filing a protest with our Office. The clause's appeal procedure is intended, however, to resolve questions concerning the determination between contract and in-house performance rather than questions concerning award to one bidder in preference to another bidder. Since MAC is questioning the award to Inland, it was proper for MAC to directly file its protest with us without first seeking administrative redress through the Army.

The Army has also questioned the timeliness of MAC's letter of July 14, arguing that it was filed more than 10 days after MAC was aware of the basis for its protest and that it raised additional allegations which were new and independent of the allegation raised in the timely June 30 letter. Generally, whether a specific basis of protest raised after the filing of a timely initial general protest is timely is determined by the relationship between the later-raised base to the initial protest. See *Annapolis Tennis Limited Partnership*, B–189571,

June 5, 1978, 78-1 CPD 412. If the later-raised base is characterized as a new and independent ground for protest, then it must independently meet the timeliness requirement. However, where the letter merely provides additional details for an earlier-raised timely allegation, we will consider the additional argument.

We consider the July 14 letter to be additional details supporting the initial general allegation. The contracting officer had requested additional information and MAC in its July 14 letter merely provided further details.

We conclude that the cost-adjustment process used by the Army here for the additional purpose of determining the successful bidder must be considered to be deficient since bidders were not informed of this process in the IFB. As stated in *General Telephone Company of California*, 57 Comp. Gen. 89 (1977), 77-2 CPD 376:

> * * * GTC objects to any consideration of residual value simply because that factor was not specifically included as an evaluation factor. We agree with GTC in this regard; however, present value calculations, as well as the "other cost factors," were also not included in the solicitation as evaluation factors and, for the same reasons, should not be considered in bid evaluation. To permit bidders to compete on equal terms, the invitation must be sufficiently definite to permit the preparation and evaluation of bids on a common basis. Bidders cannot compete on an equal basis as required by law unless they know *in advance* the basis upon which their bids will be evaluated. 36 Comp. Gen. 380 (1956). We have consistently held that if any factors other than *bid price* are to be considered in determining the low bidder, the IFB must advise bidders of such factors. * * * [Italic in original.]

As also stated in Defense Acquisition Regulation § 2-201(a)(M)(i) (Defense Acquisition Circular No. 76-26, December 15, 1980):

> * * * invitations for bids shall contain * * * a statement of the exact basis upon which bids will be evaluated and award made, to include any Government costs or expenditures (other than bid prices) to be added or deducted, or any provisions for economic price adjustment as factors for evaluation.

Generally, a mere defect in an IFB does not require resolicitation if award under the defective IFB would serve the Government's needs and where bidders would not be prejudiced by the award. See, for example, *Seaward International, Inc.*, B-199040, January 16, 1981, 81-1 CPD 23.

MAC does not contend that an award to Inland would fail to meet the Army's needs; however, MAC does insist that it was prejudiced by the cost evaluation. Specifically, MAC has alleged the following grounds of prejudicial cost evaluation.

1. The evaluation of Government-furnished equipment and landfill for comparison purposes was artificially low and, thus, Inland's price should have been evaluated at a higher figure.

2. Fort Benning had not obtained a necessary State permit to operate a sanitary landfill—thereby precluding any award under schedule 1.

3. If Fort Benning were to comply with the State permit require-

ment, the Army would incur $50,000 or more in costs in order to obtain the permit. These costs should have been added to Inland's bid for comparison purposes.

4. MAC's schedule 4 bid, as evaluated, should have been reduced by the cost of Government landfill equipment which would not have to be used under a schedule 4 contract and could be used elsewhere by the Army.

5. The costs added to its schedule 4 bid for contract administration and general and administrative expenses were excessive since the costs were the same costs added to Inland's schedule 1 bid. This was improper since, allegedly, a schedule 1 contract involves more Government administrative effort.

The Army's replies to these specific objections and our analysis of these objections follow.

Evaluation of Government-furnished Equipment and Landfill

The Army's reply to this ground of protest is as follows:

* * * Government Furnished Equipment * * * [was] costed as prescribed by DA Circular 235-1 * * *. In accordance with above regulations, equipment costs consist of depreciation and opportunity cost and do not represent acquisition/replacement or current market value costs. No cost for the sanitation landfill is shown * * * since land does not depreciate. * * * There are no provisions within the regulatory guidelines that permit current fair market value of land to be used as a base for cost procedures. * * *

* * * * * * *

For cost comparison purposes, the dollar values of government equipment were properly applied in accordance with OMB Circular A-76 and the cost comparison handbook. Landfill value was properly considered in the cost of capital for both the in-house performance and for contractor performance where the contractor elected to use the government owned landfill.

MAC has not taken specific objection to the Army's reply. Consequently, and since we otherwise find no objection to the cost analysis, we cannot question this evaluation.

State Permit

The Army's position on this issue is as follows:

* * * [Fort Benning] has authority for the State of Georgia to operate the on-post landfill until 28 February 1982. The installation intends to bring its landfill into compliance with the State requirements and obtain the necessary permit. We recognized that failure to obtain a permit from the State would cause termination at some future date of either in-house operation or any contract awarded under schedule I * * *. However, speculation over the probability of this event is no basis to change the government's decision to award a contract.

Since Fort Benning has current operating authority and intends to obtain any necessary permit, we cannot conclude that award under schedule 1 is improper merely because of the possibility that at some later date the contract may have to be terminated because of the lack of a permit.

Cost of Obtaining State Permit Should be Added to Inland's Bid

The Army is "unable to substantiate the * * * claim that $50,000 had already been expended in an effort to bring Fort Benning into compliance with State requirements." Moreover, the Army notes that the State of Georgia does not charge a fee for a permit.

Even if $50,000 is added to Inland's evaluation bid, as urged by MAC, it is clear that Inland's bid would still remain low by a wide margin.

Credit for Value of Landfill Equipment

As noted above, we cannot question the monetary value which was added to Inland's bid for comparison purposes with MAC's schedule 4 bid. Since this consideration was properly added to Inland's bid, it would be improper to deduct a similar value from MAC's schedule 4 bid. If this were done, the net effect would be to consider this factor twice to Inland's detriment.

Contract Administration and Overhead Expenses

The Army's position on this issue is as follows:

> * * * The [contract administrative expense] factor [4%] allowed for the Government's cost of administering contracts * * * [is] in accordance with OMB Circular A-76 * * *. The Government's Surveillance Plan is applicable to all schedules, and inspection efforts are equitably applied under all schedules to insure that required services as stated in the solicitation are performed to the acceptable standards * * *. In Schedule IV * * * the contractor must meet collection point and equipment safe and serviceable standards, whereas in Schedule I * * * the contractor must meet landfill and equipment safe and serviceable standards. The Cost Comparison Handbook * * * states that the general and administrative (G&A) rate (16.02%) * * * is applicable to * * * all schedules. In Schedule IV * * * the G&A rate was applied against contract administration cost only, whereas in Schedule I * * * the G&A rate was applied against contract administration and government furnished property. * * * It is the * * * [Army's] position that the contract administration * * * and General and Administrative * * * rates were equitably applied under Schedule IV * * *.

We cannot question the Army's position on the evaluation of these expenses.

Conclusion

Based on our review of these cost objections, we find no basis to conclude that MAC is prejudiced by the proposed award to Inland given the wide difference in the evaluated bid prices. Nevertheless, we are recommending to the Secretary of the Army that future solicitations expressly inform bidders of the costs that will be added to bids in order to determine the successful bidder.

We deny the protest.

[B-199209]

Contracts—Grant-Funded Procurements—Prices—Statutory Limitations—Waiver

There is no discretion or authority in officers or agents of the Government to waive provisions of statute.

Contracts—Grant-Funded Procurements—Prices—Reduction by Low Bidder After Bid Opening—Unreasonably High Bid Price

Bid determined to be unreasonably high cannot be said to be that of otherwise successful bidder which is entitled to voluntarily reduce its price after bid opening.

Contracts—Grand-Funded Procurements—Prices—Reduction by Low Bidder After Bid Opening—Voluntary Action Requirement

Only purely voluntary and unsolicited price reductions may be accepted from otherwise successful low bidder; negotiation or solicitation of lower offers is not permissible. Consequently, Housing Authority acted reasonably by not negotiating with any low bidder on various schedules contained in solicitation in effort to reduce bidders' prices.

Matter of: Reservation Industries, Inc., January 26, 1982:

Reservation Industries, Inc. has filed a complaint against the cancellation of an invitation for bids (IFB) issued by the Fort Belknap Indian Housing Authority for the construction of two housing projects in Harlem, Montana. The construction was to be financed by the Department of Housing and Urban Development (HUD) pursuant to an annual contributions contract (ACC). We find no merit to the complaint.

The solicitation provided as follows:

> Separate bid proposals will be included in this set of specifications as follows:
>
> 1. Proposal I—Mt. 10-13, Scattered Sites Water and Sewer Systems
> 2. Proposal II—Mt. 10-14, Site Improvements and Utilities for Hays and Mission Canyon Subdivision
> 3. Proposal III—Mt. 10-13, 15 Mutual Help Dwelling Units
> 4. Proposal IV—Mt. 10-14, 20 Low Rent Dwelling Units
> 5. Proposal V—Combined Lump Sum bid consisting of Proposals I, II, III, IV
>
> The award will be made to a qualified bidder submitting a responsive low bid as follows: Low bid in Proposal I, II, III, and IV or to Proposal V which is a combined lump sum bid consisting of Proposal I, II, III, IV, provided the combined bid in Proposal V is lower than sum of low bids in Proposals I, II, III, and IV.

The Housing Authority received one bid under Schedule (Proposal) I, three under Schedule II, one under Schedule III, three under Schedule IV and one lump sum bid under Schedule V. The sum of the low bids on Schedules I-IV was lower than the lump sum bid on Schedule V. Reservation Industries was the low bidder on Schedule IV.

The construction costs under Schedules III and IV, however, were subject to the following limitation, as provided for in section 6(b) of the United States Housing Act of 1937, as amended (42 U.S.C. § 1437d(b) (1976), as amended, Pub. L. No. 96-399, § 201(c) (Oct. 8, 1980)):

> Every contract made pursuant to this [Act] for loans (other than preliminary loans) or annual contributions shall provide that the cost of construction and equipment of the project (excluding land, demolition and nondwelling facilities) on which the computation of any annual contributions under this [Act] may be based shall not exceed by more than 10 per centum the appropriate prototype cost for the area. The prototype costs shall be determined at least annually by the Secretary * * *.

The only bid on Schedule III exceeded the established prototype cost by 28.8 percent and the maximum limit allowed by law by almost 19 percent. Therefore, the Housing Authority could not accept the bid.

In the apparent belief that under the solicitation as written it was required to award on each of the individual schedules and could not make a partial award on Schedules I, II, and IV, the Housing Authority next considered the lump sum bid. It determined, however, that this bid was unreasonably priced because it exceeded the Government's cost estimate for the work by 13.2 percent. Consequently, the Housing Authority canceled the solicitation and resolicited.

Reservation Industries does not challenge the Housing Authority's interpretation of the solicitation. It contends, however, that award nevertheless should have been made to the low bidders on each of the individual schedules, and that the Housing Authority and HUD are estopped from relying on the statutorily imposed cost limitation as a justification for canceling the solicitation. Reservation Industries argues that this provision was waived by the actions of the Housing Authority, which allegedly entered into negotiations with the lump sum bidder in an attempt to bring its Schedule III price within the statutory cost limitation. The HUD Regional Office allegedly concurred in this action.

At the outset, we note that there is nothing in the record to support the allegation that the Housing Authority entered into negotiations with the lump sum bidder to bring its Schedule III price within the cost limitation, or even that its Schedule III price exceeded the limitation. Further, the only evidence concerning the HUD Regional Office's position is that it disapproved of any negotiations with the lump sum bidder and so notified the Housing Authority.

In any event, since the cost limitation was imposed on the Housing Authority itself by its ACC with HUD, we fail to see how the requirement was subject to waiver by the Housing Authority. Rather, any

such waiver would have to be made by HUD officials, and this they did not have the authority to do. The cost limitation was required to be included in the ACC by statute, and there is no discretion or authority in officers or agents of the United States to waive any provision of statute. *Harry L. Lowe & Associates*, 53 Comp. Gen. 620 (1974), 74-1 CPD 96.

Reservation Industries also argues that rather than canceling the solicitation, the Housing Authority should have negotiated with each of the low bidders on the individual schedules to bring their prices down to an acceptable level. However, there is nothing in the record to suggest that the Housing Authority found any of the individual bids, other than that on Schedule III, to be unreasonably priced. Further, we would consider any such action in regard to any of the low bidders on any of the schedules to be improper since this was an advertised rather than a negotiated procurement.

In support of its position, Reservation Industries cites two decisions of this Office. B-74013, March 9, 1948, and B-159412, July 26, 1966, *aff'd*, September 6, 1966. In this regard, we note that Federal procurement law is not *per se* applicable to a contract entered into with Federal funds by a recipient of such funds. Nevertheless, we have held that the grantee must comply with those principles of Federal procurement law which go to the essence of the competitive bidding system. *Concrete Construction Company*, B-194077, June 7, 1979, 79-1 CPD 405.

Reservation Industries cites B-74013 and B-159412, *supra*, for the proposition that a contracting agency may accept a price modification from a low bidder submitting an "otherwise acceptable bid." We have held, however, that a bid determined to be unreasonably high cannot be said to be that of the "otherwise successful [or acceptable low]" bidder which is entitled to voluntarily reduce its price after bid opening. *Strand Aviation, Inc.*, B-194411, June 4, 1979, 79-1 CPD 389. Also pertinent is 45 Comp. Gen. 228 (1965), which overrules B-74013, *supra*, to the extent it is inconsistent with that decision, and holds that while the Government may accept the benefit of a voluntary reduction in the price of an otherwise acceptable low responsive bid, this principle is not for application where the bid prices received after formal advertising are unreasonably high. Our decision in B-159412, *supra*, is not to the contrary; the price of the low bidder who was permitted to reduce its price in that case was not found to be unreasonably high.

In addition, Reservation Industries fails to recognize that only purely voluntary and unsolicited price reductions may be accepted from the otherwise successful bidder. The negotiation or solicitation of lower offers is not permissible. B-158528, April 26, 1967; B-157055,

February 17, 1967; 45 Comp. Gen. 228, *supra*. Therefore, we find no basis on which to conclude that the Housing Authority acted unreasonably by failing to negotiate with any of the low bidders in an effort to reduce their prices.

Reservation Industries also requests reimbursement for the costs of preparing its bid. In view of our conclusions above, there is no basis upon which to consider such a claim. Consequently, it is unnecessary to decide whether a bidder on a grantee procurement can recover bid or proposal preparation costs. *E.D.S. Federal Corporation*, B-190036, May 11, 1978, 78-1 CPD 359.

The complaint is denied.

[B-199793]

Telephones—Private Residences—Prohibition—Exceptions—Federal Secure Telephone Service (FSTS) Installation—National Security Justification

General Services Administration proposal to install Federal Secure Telephone Service (FSTS) telephones in private residences for official Government business of a sensitive nature subject to National Security Agency (NSA) guidelines does not violate 31 U.S.C. 679, which prohibits the expenditure of appropriated funds for telephone service installed in private residences. FSTS system has sufficient safeguards built in to reduce danger of abuses this statute was intended to address.

Matter of: Federal Secure Telephone Service, January 27, 1982:

This case was presented for an advance decision by the General Services Administration (GSA) which proposes to install Federal Secure Telephone Service (FSTS) telephones for official business in private residences of high level civilian and military officials who have appropriate security clearances and have been certified by their agency heads as having responsibilities involving national security. GSA requests our opinion concerning the applicability of 31 U.S.C. § 679 (1976), which provides that no appropriated funds be expended for telephone installation in private residences, to its proposal. For the reasons set forth below, 31 U.S.C. § 679 is not for application under the circumstances here present. Therefore, we have no objection to the use of appropriated funds for the installation and maintenance of the system proposed.

The FSTS telephone system was developed to minimize the vulnerability of certain telephone communications from various penetration techniques. The telephone, in other words, ensures secure voice communications between parties. GSA is responsible for installation and

maintenance of FSTS equipment on a Government-wide basis. The submission states that FSTS

> provides a secure communications capability to a limited number of civilian and military personnel who have appropriate security clearances and are designated by their agencies as having responsibilities involving national security.

Concerning residential installation, GSA states that it anticipates that such installations would amount to about one percent of all FSTS installations. A draft handbook prepared by GSA for residential installation of FSTS requires the agency head to certify in writing that national security requirements necessitate the placement of an FSTS telephone in a particular private residence. Further, National Security Agency guidelines will be used to determine which officials are eligible for FSTS access, generally.

Once installed in a private residence, the FSTS telephone will be authorized for communication of top secret information. The telephone cannot be activated for use without a key that will be assigned the authorized user by GSA. GSA's draft handbook states that the key will be required to be kept under the user's personal control at all times or otherwise adequately protected. As a further deterrent to unauthorized use, we understand that the telephone may be programmed to preclude operation unless the user first uses a pre-set code. Once properly activated, however, a FSTS telephone could be used for any purpose the user desired. Concerning use for non-official purposes, GSA points out that it will require the agency head to certify that the telephone will be utilized for official business only and that the FSTS telephone is susceptible to the same audit techniques as are used in the Federal Telecommunications System to ensure that official business is being transacted. GSA also points out that the status and integrity of the high level personnel who will be designated to have FSTS service installed in their residences will minimize the likelihood of unofficial use.

GSA requests a decision concerning the applicability of 31 U.S.C. § 679 (derived from section 7 of the Act of August 23, 1912, Ch. 350, 37 Stat. 414 as amended by the act of April 30, 1940, 54 Stat. 175) to the installation and maintenance of the FSTS telephone in private residences. In pertinent part this section provides:

> Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, * * *

The FSTS system has been developed to ensure secured voice communications. Thus, the question to be resolved is whether the statutory prohibition is to be applied to installations of FSTS telephones in

private residences of selected officials who may be required to discuss official matters of a sensitive nature from their homes, where use of such telephones will be limited to official business.

Issued shortly after the statute's enactment, a decision of the Comptroller of the Treasury dated November 12, 1912, 63 MS Comp. Dec. 575, provides background as to the purpose and scope of 31 U.S.C. § 679. There it was stated in part:

> Section 7 of the Legislative, Executive and Judicial Appropriation Act, set out in your letter, was not passed as I understand for the purpose of requiring government employees to bear the expense of telephone messages on public business, but on the contrary, its plain intent was that the Government should not be chargable with the cost of private and personal messages of such employees. The provision in question was passed to secure the latter purpose and grew out of the fact that a large number of public officers here in the District of Columbia had installed in their private residences telephones at Government expense under the guise of their use for public purposes, when in truth the Government had provided them with sufficient telephones in their public offices to transact all the public business. [See also, Senate Committee on Appropriations on H.R. 24023 (64th Cong.), pg. 251–53, 302–304.]

As can be seen, the statute was enacted to stop public officers from obtaining personal telephone service at Government expense. We have held, however, that in certain limited circumstances, this statute would not bar funding of residential telephone service. For example, in the cited November 12, 1912 decision, it was ruled that the statute did not prohibit the installation of telephones in Government buildings provided to forest rangers as residences but which also were used for official purposes. See also 4 Comp. Gen. 891 (1925) and 19 Comp. Dec. 350 (1912), which also recognize this exception to the statutory prohibition.

In B–128144, June 29, 1956, we authorized use of appropriated funds for the cost of installation and maintenance of direct telephone lines from an Air Force Command Post switchboard to private residences of certain high level civilian and military officials to ensure communications in the event of a national emergency. In this case, the Air Force proposed to install telephones in thirty private residences. A direct line was to connect to the private residence and the Command Post. The Command Post was to act as a relay or switchboard to connect callers with those whom they wished to contact. In order to ensure that telephones in the private residences were used for official business only, the Air Force promulgated regulations to that effect and authorized the Command Post switchboard operator to record conversations and keep records of connections made from the private residences. It was clear that the switchboard was not to act as a substitute for commercial telephones. Rather, these telephones were to be restricted to the conduct of urgent official business in the event of a national emergency. In authorizing the use of appropriations in these

circumstances, we presumed that the officials involved would continue to obtain separate telephone service for their personal use in their private residences.

As a general rule, however, we have consistently held that 31 U.S.C. § 679 is plain, comprehensive, and constitutes a mandatory prohibition against the payment from appropriated funds of any part of the expense of furnishing personal telephone service to a Government officer or employee in a private residence except for long distance toll charges properly certified as being for public business. We have maintained this position irrespective of the desirability or necessity of such service from an official standpoint and in spite of the fact that the telephones were to be used extensively for official business. See 4 Comp. Gen. 19 (1924); B–175732, May 19, 1976; B–61938, September 8, 1950; 59 Comp. Gen. 723 (1980).

The cited cases, however, including 59 Comp. Gen. 723, *supra*, are distinguishable from the proposal under consideration here. In the first place, no provisions were made in those cases to assure that private calls would not be made since the telephones to be installed in private residences were no different than those normally installed for private use. In this case, access and use will be controlled. Secondly, the telephones in the cited cases, while desirable from an official standpoint, were, in essence, to serve as a convenience for the Government officials involved. This is because official calls to and from the officials' residences could have been placed and received, if necessary, from their private telephones, even though this might have caused some personal inconvenience. Here, the official calls to or from private residences could not be made over private telephones because of the need for security.

We therefore regard our decision in B–128144 as controlling in the instant case. GSA advises us that the purpose for which the FSTS system was developed was to ensure secured voice communication of information affecting the national security in appropriate situations. While the possibility exists that FSTS telephones installed in private residences could be used for the personal benefit of the users, we regard this potential for misuse as minimal. GSA will require the agency head to certify that the telephone will be used for official business only in accordance with NSA guidelines. The FSTS telephone will be subject to the same monitoring techniques used to supervise the use and operation of the Federal Telecommunications System. Presumably here, as in B–128144, the officials involved will continue to obtan commercial telephone service for personal business at their own expense.

Accordingly, we have no objection to the use of appropriated funds for the installation and maintenance of FSTS telephones in private residences in appropriate circumstances.

[B-201817]

Unions—Federal Service—Dues—Overpayment—Government's Right to Recover—Waiver

Agency erroneously continued to deduct union dues from three employees who were promoted out of bargaining unit and remitted amounts to union. Upon discovering the error, the agency refunded the deductions to the employees and collected the amounts erroneously paid from the union. Since the record shows that the union was not at fault in receiving these payments, repayment is waived pursuant to 5 U.S.C. 5584.

Matter of: National Federation of Federal Employees, Local 1239—Waiver of Union Dues Erroneously Deducted, January 27, 1982:

Local 1239 of the National Federation of Federal Employees (NFFE) has requested waiver of repayment of union dues it received which had been erroneously withheld from three employees after they had been promoted out of Local 1239's bargaining unit. We hold that Local 1239 is entitled to waiver of repayment of the erroneously withheld union dues.

Three employees of the Dugway Proving Ground, Utah, Department of the Army, namely, Mr. Bert C. Barlow, Mr. Darrell L. Coffman, and Mr. Bud M. Cox, all authorized the agency to deduct union dues from their pay and remit that money directly to Local 1239. When these three employees were then promoted to supervisory positions at various dates from 1973 to 1976, the agency should have terminated the dues allotments from the employees to the union, but failed to do so. In October 1979, the agency discovered the error and refunded to the employees the amounts withheld by mistake. In addition the agency recouped the total amount erroneously withheld, $1,063.50, from current amounts due Local 1239.

Local 1239 protested this action and raises the following arguments in its defense. First, the union contends that it did not know who among its members were supervisors and, therefore, was not aware that it had received erroneously withheld funds. Second, the union contends that it provided services to those employees during the period in question. In view of these circumstances the union requests waiver under the provision of 5 U.S.C. § 5584.

Before discussing the specific issues in this case, a review of past

decisions in this area is necessary. In an early decision we recognized that, when an agency failed to terminate union dues allotments from employees promoted to supervisory positions, the continued withholdings were erroneous, and we held that remittance of those withholdings to the union represented erroneous payments. 54 Comp. Gen. 921 (1975). In that case we upheld the agency's actions in refunding the erroneously withheld dues to the employees and recouping the total amount of the erroneous payments from the current amounts due the union. We did not discuss the issue of whether the agency may waive recoupment from the union. Our decision was upheld by the Court of Claims in *Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *United States*, 215 Ct. Cl. 125 (1977). See also B-180095, December 8, 1977.

In our next major decision in the area, *Recoupment of Union Dues*, B-180095, September 8, 1980, we were faced with a similar factual situation but with some important differences. In that case after the agency discovered its error, it neither refunded the erroneous dues allotment deductions to the employees nor recovered any money from the union. Also in that case the union sued for and was granted an injunction to restrain the agency from setting off against current allotment checks to the union the dues of two union members who had been promoted out of the bargaining unit but whose voluntary dues allotments had been continued. *American Federation of Government Employees Local 1858 (AFL-CIO)* v. *Clifford Alexander, Secretary of the Army*, Civil Action No. 78-W-5023-NE decided April 14, 1978, United States District Court for the Northern District of Alabama. Since the union had convinced the district court that it had provided services to these employees despite the fact that they were not in the bargaining unit, and since the employees should have noticed that their dues allotments continued, we held that there was no requirement to reimburse the employees or to recoup the allotments from the union.

In our next case in this area, *Buster Owens*, B-195406, May 11, 1981, we were presented with a situation where the employee had been promoted out of the bargaining unit and diligently attempted to have his allotment terminated on several occasions after promotion. We held that the employee was entitled to reimbursement of the improperly withheld allotment and we recognized that, under the rationale of our earlier decisions, the union was legally obligated to repay the erroneous amounts. However, since the union was without fault in continuing to receive what had been a properly authorized allotment, we

granted waiver of the amount due the Government under 5 U.S.C. § 5584.

In a similar case, *Roy W. English*, B-192050, July 13, 1981, an employee named Roy English authorized the deduction of union dues from his paycheck, but the dues were deducted from the paycheck of another employee, Roy W. English. We held that Roy W. English was entitled to be paid the amounts erroneously withheld from his salary. We also relied on *Buster Owens*, *supra*, in holding that the agency involved should determine whether waiver of the erroneous payments to the union was appropriate in view of all the facts.

Therefore, in this case it is clear that the payments of the erroneously withheld union dues to NFFE Local 1239 were erroneous payments which may be considered for waiver. *Buster Owens*, *supra*, and *Roy W. English*, *supra*. Also, we see no reason to object to the agency's action in refunding the dues to the employees in this case.

Under 5 U.S.C. § 5584, a claim of the United States against a person arising out of an erroneous payment of pay or allowances (other than travel, transportation, and relocation payments) to an employee may be waived if collection action would be against equity and good conscience and not in the best interests of the United States and if there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining waiver.

In the present case, the claim of the United States against Local 1239 arises out of the erroneous transmittal of voluntary union dues allotments to the union. Since the allotments represent pay otherwise due the employees, the erroneous payments to the union qualify for waiver consideration under 5 U.S.C. § 5584, and the union, as a person pursuant to the rules of construction of 1 U.S.C. § 1, is entitled to request a waiver of the Government's claim.

The record before us shows that Local 1239 was not at fault in this matter because it was not aware of receiving erroneous payments. The Department of the Army as the employing agency had the sole responsibility for terminating the dues allotments for ineligible employees. The erroneous payments were made through administrative error on the Army's part and were received by the union in good faith and without fraud or misrepresentation.

Accordingly, the collection from Local 1239 of the $1,063.50 amount representing erroneously paid union dues allotments is waived under the provisions of 5 U.S.C. § 5584.

[B-204119]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Reduction in Retired Pay—Not Required—Survivor, etc. Benefit Costs

The reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. 5532(c) involves a determination of the amount by which the combined rate of retired pay plus Federal civilian salary exceeds the rate of basic pay prescribed for level V of the Executive Schedule. The retired pay is reduced by that amount, subject to a proviso that the remainder must at least be equal to the cost of the retiree's participation in any survivor's benefits program or veterans insurance program.

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Maximum Limitation—Computation—Pay-Period Basis

5 U.S.C. 5532(c) requires that combined military retired pay plus Federal civilian salary not exceed the rate of pay for level V of the Executive Schedule for any "pay period." Hence, the amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired pay and civilian salary for the entire year may be less than the annual pay prescribed for level V of the Executive Schedule.

Matter of: Lieutenant Colonel Robert C. McFarlane, USMC (Retired), January 27, 1982:

The Head, Disbursing Branch, Fiscal Division, United States Marine Corps, has requested our decision on the proper computation of the retired pay reduction required by 5 U.S.C. § 5532(c). The request was assigned Control No. DO-MC-1368 by the Department of Defense Military Pay and Allowance Committee.

The issues stem from Lieutenant Colonel Robert C. McFarlane's retirement from active military service with the Marine Corps on July 1, 1979, and his subsequent appointment to a full-time civilian position with the United States Senate on July 2, 1979. Although he has since changed employment, Colonel McFarlane has, at all times since his military retirement, been employed full time in civilian positions with the Government.

Colonel McFarlane's retired pay was reduced pursuant to 5 U.S.C. § 5532(b) as of July 2, 1979. The two questions presented here involve the proper method of computing the further reductions required by 5 U.S.C. § 5532(c), which provides:

(c)(1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired or retainer pay (reduced as provided under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule,

such member's retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. The amounts of the reductions shall be deposited to the general fund of the Treasury of the United States.

(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period (reduced as provided under subsection (b) of this section), except that the amount of the reduction may not result in—

(A) the amount of retired or retainer pay allocable to the pay period after being reduced, when combined with the basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently paid for level V of the Executive Schedule; or

(B) the amount of retired pay or retainer pay being reduced to an amount less than the amount deducted from the retired or retainer pay as a result of participation in any survivor's benefits in connection with the retired or retainer pay or veterans insurance programs.

The first question presented in the submission concerns the proper interpretation of 5 U.S.C. § 5532(c)(2)(B). It is suggested that subparagraph 5532(c)(2)(B) may allow alternate methods of computing the retired pay reduction. Under the method now being used, the cost of participation in a survivor's benefits program or a veterans insurance program is not considered in computing the required reduction, unless the remainder is inadequate to cover that cost. Under the alternate method suggested, the cost of participating in those programs would be subtracted from retired pay before computing the amount by which the retired pay combined with the civilian salary exceeds level V of the Executive Schedule. It is questioned whether the use of that alternate method is permissible in Colonel McFarlane's case, since it would be more beneficial to him.

In our view, the statute is clear on its face and is capable of only one interpretation. Subparagraph 5532(c)(2)(B) simply requires that, when reducing retired pay by the amount the retired pay combined with civilian salary exceeds level V of the Executive Schedule, the retired pay remaining will at least be equal to the cost of participating in a survivor's benefits program or veterans insurance program. This provision ensures that the retiree will not incur any out-of-pocket costs to participate in those programs and will always be entitled to at least as much retired pay as is necessary to cover participation in the programs. However, subparagraph 5532(c)(2)(B) only precludes retired pay from "being reduced to an amount less" than the cost of participating in the programs, and it does not otherwise authorize that cost to be taken into account. It is therefore our view that in computing the retired pay reduction required by 5 U.S.C. § 5532(c),

the cost of participating in survivor's benefits or veterans insurance programs is to be considered only if that cost is not covered by the retired pay remaining after being reduced in the amount by which the total combined salary and retired pay exceeds level V of the Executive Schedule. Thus, we conclude that the method currently being used to compute the retired pay reduction is correct, and the alternate method suggested is impermissible.

The second question presented is whether retroactive payments of retired pay may be made at the end of a year to Colonel McFarlane if his combined civilian salary and retired pay for the entire year does not exceed the annual pay prescribed for level V of the Executive Schedule. The question arises because of Comptroller General decisions which were issued under the dual compensation provisions of section 212 of the Economy Act of 1932, as amended, 5 U.S.C. § 59a (1958 ed.), which provided for a maximum rate of retired pay plus civilian salary of $10,000 per year. We held that under the specific terms of that particular statute, a retired officer was entitled to the amount of retired pay withheld from him during a calendar year if the total amount received for that entire year as compensation as a Government civilian employee and retired pay as an officer was less than $10,000. See 42 Comp. Gen. 71 and 229 (1962). That statute was, however, repealed by subsection 402(a)(20) of the Dual Compensation Act of 1964, Public Law 88–448, approved August 19, 1964, 78 Stat. 494. The Dual Compensation Act of 1964 substituted other dual compensation restrictions which were codified in 5 U.S.C. § 5532.

The current dual compensation limitations of 5 U.S.C. § 5532 generally require that the reduction of retired pay of a retired service member holding full-time Federal civilian employment be computed on a pay period rather than an annual basis. See, generally, 44 Comp. Gen. 266 (1964), 47 *id.* 185 (1967), and 50 *id.* 604 (1971). Moreover, 5 U.S.C. § 5532(c)(2), quoted above, makes particular reference to "each reduction" required "for any pay period." Thus, the statute specifically provides a limitation on the amount to be received for any one pay period rather than for any given calendar or fiscal year. It is therefore our view that the current dual compensation provisions of 5 U.S.C. § 5532(c) do not permit retroactive payments at the end of a year to adjust the retired pay accounts of individuals from whom retired pay has been withheld in pay periods during the year.

The two questions presented are answered accordingly.

[B-203446]

Appropriations—Availability—Refunds of Erroneous Collections—Federal Land Policy and Management Act—Special Treasury Account

Department of Interior was ordered by a court to refund money which the court determined Interior erroneously collected. The funds collected by Interior during fiscal years 1978 through 1981 were deposited into a special account in the Treasury and were appropriated by the Congress. Refunds for these years should be made from this appropriation. The funds collected prior to fiscal year 1978, however, were deposited into the Treasury as miscellaneous receipts. Refund of these collections must be from the appropriation created by 31 U.S.C. 725q–1 as there is no other specific appropriation or account available for this purpose.

Matter of: Department of Interior—Refunds to Intermountain Power Project, January 28, 1982:

The Department of the Interior requests a decision regarding the proper appropriation to use to pay refunds to the members of the Intermountain Power Project as ordered by the United States District Court for the District of Utah. See *Beaver, Bountiful, Enterprise* v. *Andrus*, No. C–76–227 (D. Utah, September 28, 1979), *aff'd*, 637 F.2d 749 (10th Cir. 1980). The Intermountain Power Project (IPP) is a non-profit corporation formed and organized by cities and towns in Utah and California to build power plants. The location of one of its proposed power plants was intended to be on Federal land administered by the Bureau of Land Management, a part of Interior. Before IPP could build the power plant on this land it had to obtain a right-of-way permit from Interior. As a condition for granting the permit, Interior charged a fee to IPP to offset the costs incurred in processing the application. The fee was collected during the fiscal years 1975 through 1981. It was this fee that the district court ordered refunded.

For the reasons indicated below, we conclude that the portion of the charge collected by Interior between fiscal years 1978 and 1981, which was deposited in a special account in the Treasury and was appropriated by the Congress, may be refunded from this appropriation. That part of the charge which was collected between fiscal years 1975 and 1977 and deposited in the Treasury as miscellaneous receipts must be refunded from the appropriation for moneys erroneously received and covered, established by 31 U.S.C. § 725q–1.

Under the Federal Land Policy and Management Act of 1976 (FLPMA), the Secretary of the Interior is authorized to recover costs incurred in processing applications for right-of-way permits. 43

U.S.C. § 1764(g). The Act further provides that the Secretary need not recover these costs from state or local governments securing the right-of-way for the public interest. *Id.* Under the statute which preceded the FLPMA, the Public Lands Administration Act, Pub. L. No. 86–649, 74 Stat. 506 (PLAA), 43 U.S.C. 1361 note, the Secretary was also authorized to recover the costs of processing applications.

During the period in which Interior was collecting the fee from IPP, its regulation implementing the fee provision both under the PLAA and the FLPMA stated:

> (a)(1) An applicant for a right-of-way or a permit incident to a right-of-way shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act (42 U.S.C. 4321–4347), before the right-of-way or permit will be issued under the regulations of this part.
>
> (2) The regulations contained in this section do not apply to: (i) State or local governments or agencies or instrumentalities thereof where the lands will be used for governmental purposes and the lands and resources will continue to serve the general public, except as to right-of-way or permits under Section 28 of the Mineral Leasing Act of 1920, as amended (87 Stat. 576); (ii) road use agreements or reciprocal road agreements; or (iii) Federal government agencies. 43 C.F.R. § 2802.1–2 (1976) (superceded).

In 1975, after analyzing IPP's application for a right-of-way permit, Interior determined that IPP did not qualify for the exemption from reimbursing processing costs contained in the regulations, and therefore Interior assessed IPP for the costs of processing its application. Subsequently, Interior's Bureau of Land Management collected a total of $907,286.12 from IPP. Of this total amount, $478,058.80 was collected by the Bureau during fiscal years 1975 through 1977, and deposited into the Treasury's General Fund Account (142499 Other Fees and Charges for Miscellaneous Services). Between fiscal year 1978 and February 28 of fiscal year 1981, $429,277.32 was collected by the Bureau and deposited into a special deposit account (14x5017 Service Charges, Deposits and Forfeitures).

IPP protested the imposition of these fees and it brought an action seeking to overrule the decision by Interior. In 1980, the Tenth Circuit Court of Appeals, upholding a district court ruling, held that pursuant to either the FLPMA or the PLAA, and the implementing regulations, IPP was not required to reimburse Interior for any cost Interior incurred in processing IPP's application. *Beaver, Bountiful*, 637 F.2d 749, *supra*. Accordingly, the court ordered Interior to refund to IPP from applicable funds the fees which it determined were erroneously collected.

The rule for determining which appropriation is properly charge-

able for a refund of money erroneously collected is set forth in our decision at 17 Comp. Gen. 859 (1938). This decision states:

> When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable. * * * It is only when collections erroneously covered into the Treasury as miscellaneous receipts are involved and the refund is not properly chargeable to any other appropriation that there is for consideration charging the appropriation "Refund of moneys erroneously received and covered." *Id.* at 860.

In this case, the record shows that $429,277.32, which was erroneously collected by the Bureau between fiscal year 1978 and fiscal year 1981, was credited to the account 14x5017 Service Charges, Deposits and Forfeitures. This procedure was in accord with Section 504(g) of the FLPMA, 43 U.S.C. § 1764(g), which provides that fees received by Interior as reimbursement for costs it incurs in processing applications for right-of-way permits are to be deposited "with the Treasury in a special account" from which funds are authorized to be appropriated. The Congress has appropriated these funds to be "immediately available until expended." *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1980, Pub. L. 96-126, 93 Stat 954, 955. The FLPMA also states that any amount collected in excess of that required by law is to be refunded from applicable funds. 43 U.S.C. § 1734(c). The applicable funds to use for the refunding of the $429,277.32 collected during fiscal years 1978 through 1981 are the funds which were appropriated from the account to which the money was erroneously deposited. *See* 17 Comp. Gen., *supra*, at 860.

For the $478,058.80 erroneously collected by the Bureau prior to fiscal year 1978 a different result is necessary. These funds were not collected pursuant to the FLPMA, but rather were collected pursuant to the PLAA. Since the PLAA did not authorize these funds to be deposited into a special account, they were deposited into a miscellaneous receipts account (142499 Other Fees and Charges for Miscellaneous Services).

As stated above, when moneys are erroneously deposited into the Treasury as miscellaneous receipts, the appropriation "Refund of money erroneously received and covered" is to be used to refund these moneys unless there is a specific appropriation available for such refunds. 17 Comp. Gen., *supra*, at 860. We have found no such specific appropriation available for refunding these sums. Accordingly, the appropriation account created by 31 U.S.C. § 725q–1 entitled "Refund of moneys erroneously received and covered" is to be used to refund the amount erroneously collected by the Bureau during fiscal years 1975 through 1977.

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