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[B-201395.2]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Brooks Bill Applicability—Procurement Not Restricted to A-E Firms—Research Contracts

Brooks Act provides a procedure which must be used when an agency is selecting an architectural or engineering (A-E) firm to perform A-E services. This procedure is not applicable in procuring a research contract, even though the contractor is expected to use engineers, where it is unnecessary for the contractor itself to be a professional engineering firm to successfully perform the contract.

Matter of: Association of Soil and Foundation Engineers—Reconsideration, May 6, 1982:

The Association of Soil and Foundation Engineers (ASFE) requests reconsideration of our decision in *Association of Soil and Foundation Engineers*, B-201395, July 17, 1981, 81-2 CPD 43. In that decision, we denied ASFE's protest that Brooks Act (40 U.S.C. § 541, *et seq.* (1976)) procurement procedures should have been used under request for proposals (RFP) DTFH61-81-R-00034, issued by the Federal Highway Administration (FHWA), Department of Transportation, for centrifuge testing of model pile group foundations.

In its request for reconsideration, ASFE states that the RFP specifically estimated that "2600 professional hours" of "geotechnical engineering" would be needed; also, ASFE argues that mechanical engineering and electrical engineering were needed to perform the contract. Pointing to the Maryland statutes relative to engineering as being typical of all State statutes on the subject, ASFE argues that under State statutes only a licensed engineer may offer to perform engineering services. Therefore, ASFE argues that our decision should have held that Brooks Act procedures applied to this procurement.

We disagree and, therefore, affirm our prior decision.

This was a contract for research which FHWA required to further its highway program. FHWA sought a study evaluating a proposed analytical technique—the use of centrifugal testing of pile group models as a means of predicting the behavior of full scale piling structures. While, as ASFE states, the instant RFP indicated that a substantial portion of the work should be performed by professional engineers, the form which the procurement took reflects FHWA's conclusion that, while the work could be performed under the supervision of a licensed engineer, it could also be performed by a variety of other firms.

In this respect, FHWA pointed out:

> Prior to [the procurement] a serious review was undertaken to determine whether or not this acquisition was limited to special professions such as soil and foundation engineers.

The RFP is not limited to geotechnical firms. The RFP states that experience in geotechnical engineering is required. This expertise can be obtained from universities with well established soils and foundation departments, or any engineering or research firms that have a soils and foundation capability. In addition, other disciplines, such as instrumentation, mechanical design and fabrication, electrical, are required for successful completion of this work. Soils and foundation firms rarely have these additional capabilities.

In our prior consideration of this protest we concluded that since the contract was not being performed in connection with any A-E project, the Brooks Act procedure was not applicable. We see no reason to change our mind.

The Brooks Act provides that Government contracts for A-E services shall be negotiated in accordance with the procedure set forth in the Act. 40 U.S.C. 542. The term "A-E services" is defined in the Act as including those professional services of an A-E nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. 40 U.S.C. 541(3). An A-E firm is defined to mean a legal entity permitted by law to practice the professions of architecture or engineering. 40 U.S.C. 541(1).

In light of the legislative history of the Brooks Act, we have held that the Act applies to the procurement of services which uniquely or to a substantial or dominant extent logically requires performance by a professionally licensed and qualified A-E firm. *Ninneman Engineering—reconsideration*, B-184770, March 9, 1977, 77-1 CPD 171. In that case we stated that A-E services essentially consist of design and consultant services typically relating to a Federal construction or related project. We concluded that if such services were not involved and the work could be adequately performed by other than A-E firms, then the services could be procured outside the Brooks Act even though the services could also be performed by an A-E firm.

Whether a procurement uniquely or to a substantial or dominant extent requires performance by an A-E firm is a matter within the sound discretion of the contracting agency to decide. Nothing in the provisions or legislative history of the Brooks Act indicates that contracts must be awarded to A-E firms merely because architects or engineers will do any part of the contract work. If, for example, a contracting agency determines that a research project involving engineering and other work can be successfully performed by various types of firms, the procurement should not be restricted to engineering firms, notwithstanding that engineers will be used on the project. Contracting agencies are required to permit all qualified sources to compete for the Government's needs, 41 U.S.C. 252(c), 253(a) and FPR 1-1.302-(b), and there is no exception to this requirement in the Brooks Act.

We are mindful of ASFE's argument that under state laws only licensed or registered engineers may lawfully respond to work statements which call for the use of engineers. We note, however, that under the Maryland statute cited by ASFE, performance by a corporation of research for the Federal Government is exempted from this requirement. 75-1/2 Anno. Code of Maryland § 19(5) (1980). In any event, we are not saying that non-engineers should be permitted to do engineering work. We are merely saying that a contracting agency, within the bounds of sound judgment, is free to decide that a particular award need not be restricted to professional engineering firms, even if the specifications call for the use of engineers. Of course, if the agency determines that a contract award should be restricted to A-E firms, the Brooks Act selection procedure must be used. Otherwise, the procedure is not applicable. *Ninneman Engineering—reconsideration, supra.*

In the instant case FHWA decided that various types of firms could successfully perform the contract. Thus, FHWA concluded that the award should not be restricted to engineering firms. We see no reason to dispute FHWA's judgment.

Prior decision affirmed.

[B-206490]

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Certificate of Competency—Prime or Subcontractor Status Determination

General Accounting Office (GAO) disagrees with the Small Business Administration's (SBA) and the protester's conclusion that, under the circumstances of this procurement, a contract award to the low priced offeror would have made that offeror the Government's agent so that the offeror's proposed supplier would have essentially been the prime contractor and, thus, entitled to consideration under SBA's certificate of competency (COC) procedure. Rather, GAO agrees with contracting agency that the COC procedure was not applicable because no contract relationship would have existed between the supplier and the agency in the event of award. 47 Comp. Gen. 223 is distinguished.

Matter of: Frederick A. Potts & Co., Inc., May 7, 1982:

Frederick A. Potts & Co., Inc. (Potts), protests the award of four contracts to firms other than the low offeror, Handelsgesellschaft "Braunkohle" GmbH (Braunkohle), under the anthracite coal portion of request for proposals (RFP) No. DLA600-81-R-0430, issued by the Defense Logistics Agency (DLA) for United States military installations in the Federal Republic of Germany.

Potts contends that Braunkohle, a foreign corporation with a huge amount of business and vast resources, was determined to be nonresponsible because the contracting officer concluded that Braunkohle's coal supplier, Potts—a domestic small business—was not capable of performing based on Potts' delinquent deliveries under a DLA contract, which ended on March 31, 1982. Potts argues, with support from the Small Business Administration (SBA), that the negative determination of Potts' capability should be referred to the SBA under SBA's certificate of competency

(COC) procedure. DLA argues the the law does not require referral of the matter to SBA. We deny the protest.

Braunkohle's offer listed Potts as its supplier for anthracite coal. The contracting officer was concerned about Braunkohle's capability to supply the coal because Braunkohle's was the awardee under the prior year's solicitation and, using Potts as its supplier, Braunkohle's was not able to deliver half of the required coal. The contracting officer requested a preaward survey on Potts. The results contained unsatisfactory ratings of Potts' financial capability, performance record, and capability to meet the RFP's required delivery schedule. Thus, the contracting officer determined that Braunkohle was nonresponsible because of Potts.

Potts presented the situation informally to SBA, and the SBA Associate Administrator for Procurement and Technology Assistance advised Potts by letter that, in his view, the matter of Potts' responsibility should be referred to SBA under the COC procedure. The Associate Administrator noted that the language of the Small Business Act, as amended, would seem to limit SBA's COC procedure to cases where the injured firm would be the prime contractor. Here, he concluded that Braunkohle would have been acting as the Government's agent; thus, in effect, Potts would have been the prime contractor. The Associate Administrator concluded that the Congress did not intend that the provisions of the Small Business Act be circumvented by the use of a prime contractor, like Braunkohle, as a means to insulate from the requirement of the Act firms like Potts, actually performing work that would normally be done by the prime contractor.

SBA's conclusion that Braunkohle is the Government's agent flows from the work to be performed by Braunkohle and by Potts. Potts, as the broker for several mines, would have obtained the coal and transported it to the Port of Philadelphia where a Government vessel would have carried it to Europe. Upon arrival, Braunkohle would have examined the coal to make certain that the coal met the RFP's specifications, stored the coal, if necessary, and delivered it to 50 to 60 locations.

Potts contends that while the law obviously contemplates that the subject of the COC procedure normally will be a prospective prime contractor, nothing in the statute or legislative history specifically limits the procedure to prospective prime contractors. In support, Potts cites *Ray Baillie Trash Hauling, Inc.* v. *Kleppe,* 477 F. 2d 696 (5th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974). There, the SBA "8(a)" program—for socially and economically disadvantaged firms, subsequently enacted into law—was challenged on the basis that there was no specific authorization for it in the statute. The court found that, in view of the clear congressional purpose of the Small Business Act and the general terms in the language of the statute, SBA had the authority to award subcontracts to socially and economically disadvantaged firms on a noncompetitive basis.

Potts argues that the *Baillie* situation and the instant matter are similar in that in both cases the SBA action is not mentioned in the statute but the action is consistent with the purpose of the act. Potts concludes that the SBA's view is reasonable and should be sustained.

Alternatively, Potts states that these coal contracts are unique in terms of the usual lines of distinction between prime contractor and subcontractor. In support, Potts cites our decision at 47 Comp. Gen. 223 (1967) where we stated that:

> * * * the control exercised by the [Government] over every aspect of the procurement, from the mine to ultimate destination, points up the overriding importance to the Government of the "subcontract" cost of coal to such an extent that the usual lines of distinction between prime and subcontract tiers become relatively unimportant. * * *
>
> * * * In view of the special nature of this procurement, it is our opinion that the strict application of the general rule that the provisions of [the Defense Acquisition Regulation (DAR)] and the procurement statute do not apply to subcontract matters would be inappropriate in this situation.

Potts concludes that, here, the real party in interest is Potts, as the prospective subcontractor, and that these coal procurements involve only nominal prime contractors; therefore, the matter of Potts' responsibility should have been referred to SBA for consideration under the COC program.

DLA argues that the protest should be dismissed (1) as untimely under our Bid Protest Procedures or (2) because the matter is not the type of subcontractor protest considered by our Office. We will not dismiss the protest on timeliness grounds because it presents a significant issue within the meaning of our Bid Protest Procedures (4 C.F.R. § 20.2(c)(1981)), because of the conflict between the SBA Associate Administrator and the contracting agency. We will also not dismiss the protest as that of a subcontractor because SBA essentially contends that Potts should be treated as the prime contractor.

Regarding the merits of Potts' protest, DLA points out that the SBA Associate Administrator's letter does not assert that SBA has authority to certify the competency of subcontractors; SBA's position is that if Braunkohle would have been the Government's agent, then Potts would be eligible for consideration under the COC program. DLA contends that Braunkohle would not have been the Government's agent, DLA did not intend to create an agency relationship with the awardee under this RFP, DLA did not intend to establish privity of contract between a potential awardee's coal supplier and the Government, and DLA did not intend to make a potential awardee's coal supplier the real party in interest. In this regard, DLA notes that title to the coal would not have passed from Potts directly to the Government, payment for the coal would not have been made by the Government directly to Potts, and transactions between Braunkohle and Potts would have bound only Braunkohle, not DLA.

Next, DLA points out that, if award was made to Braunkohle, Braunkohle's responsibilities would have been greater than Potts' responsibilities; Potts' responsibilities would have ended at the Port of Philadelphia whereas Braunkohle's overall responsibility continued through inspection, storage, delivery, and acceptance by the Government. DLA explains that DLA would have looked to Braunkohle to solve problems at any stage of the contract, and Braunkohle, not Potts, would have been directly accountable to DLA. From this, DLA concludes that Braunkohle would have been the real party in interest.

Finally, DLA notes that the DAR does not require DLA to submit the question of a small business subcontractor's responsibility to SBA for a COC determination. The DAR provision only addresses the situation where the small business is the bidder or offeror, that is, the prospective prime contractor.

The issue presented for our consideration is whether, under the terms of a contract resulting from award to Braunkohle under the RFP, the SBA Associate Administrator's conclusion—that Braunkohle would have been an agent of DLA—is reasonably based.

In our view, the record contains no support for SBA's conclusion that Braunkohle was to be DLA's agent. We find no language in the RFP to establish an agency relationship and there does not appear to be any agreement between Braunkohle and DLA outside the RFP, which could have established an agency relationship. Further, DLA did not intend to establish an agency relationship and we have no indication from Braunkohle in the record that, in its opinion, it would have been DLA's agent.

From our review of the record, Braunkohle would have been an independent contractor of DLA rather than DLA's agent. *See* 49 Comp. Gen. 668 (1970). While Braunkohle would have been permitted to divide the contract work among its subcontractors, as Braunkohle saw fit, Braunkohle would have had overall responsibility for contract performance. There is no indication that DLA contemplated dealing directly with Potts, that DLA would pay Potts directly, or that DLA could terminate Potts for failure to perform as required.

In addition, Potts' argument—that the SBA Associate Administrator's opinion is entitled to great deference because SBA is responsible for administering the Small Business Act—is not persuasive because, here, the potential contract between DLA and Braunkohle is being interpreted, and not the Act. Thus, if any agency's opinion is entitled to deference, it is DLA's opinion, as the agency responsible for administering the contract.

Further, Potts' analogy to the *Baillie* case is not appropriate. Here, SBA is not suggesting that the COC procedure be extended to potential subcontractors, which are nonbidders or nonofferors. The SBA Associate Administrator's view is that Braunkohle would have been DLA's agent, entitling Potts to be considered as the prime contractor. Thus, this aspect of Potts' protest is without merit.

In addition, in our view, Potts' reliance on 47 Comp. Gen. 223—to support its position that there is no important distinction between prime contractor and subcontractor in these coal procurements—is misplaced. In that decision, we considered a protest by Independent Miners & Associates against the coal procurement for fiscal year 1968 on the grounds that the price-fixing and coal allocation practices of the Anthracite Export Association (AEA) violated applicable regulations requiring maximum practicable competition. There, the Government procured only American-exported coal from European prime contractors and AEA—composed of the Big 6 American mines and their common export company, the only suppliers capable of furnishing the quantity of coal required—fixed prices and allocated shares of coal to be supplied. We found that AEA's activities materially restricted competition and were prejudicial to the interests of the Government because about 75 percent of the contract price resulted from the cost of the coal subcontract. We held that, in view of the special nature of the procurement, regulations requiring maximum practical competition were applicable to the award of subcontracts for coal.

In our decision at 47 Comp. Gen. 562 (1968), we reconsidered and affirmed our holding in 47 Comp. Gen. 223, *supra*, and explained that:

> * * * the statutory and regulatory requirement for competition extended to the first and second tier subcontractor level because the special nature of the procurement precluded effective competition at the prime contract level * * *. 47 Comp. Gen. at 567.

Thus, actual prejudice to the Government caused by price fixing by subcontractors, which were the sole-source of supply, required us to deal with the lack of real competition from prime contractors and required the elimination of anticompetitive practices by subcontractors.

We note that the special circumstances of the 47 Comp. Gen. 223 decision are not present here: the instant RFP did not require that the prime contractor be a European firm, the RFP did not require the use of subcontractors, the RFP did not require that the coal be an American export and, since 1970, the AEA has been enjoined from price-fixing and quantity allocations related to coal procurements (see B-159868, October 18, 1971).

Moreover, there is no showing that DLA, in any way, directed Braunkohle to select Potts as its proposed supplier, or that DLA prohibited Braunkohle from substituting another coal supplier after bid opening. Potts was not the only supplier. We assume that Braunkohle had sound business reasons for selecting Potts in the first place and then not offering a substitute for Potts when Potts' delivery capability was questioned by DLA. However, in the circumstances, we find that Braunkohle was properly determined to be nonresponsible, that Braunkohle was not the Government's agent, and that Potts is not eligible for the SBA COC procedure.

Protest denied.

[B-205661]

Bids—Prices—Increase Requested—After Bid Opening—Effect—Bidder Ineligible for Award

General Accounting Office (GAO) finds that the bidder is not entitled to a post-bid opening adjustment to its bid price and that the bidder's request constitutes the bidder's refusal to extend its bid acceptance period and renders the bidder ineligible for award. Therefore, GAO will not consider the merits of the protest because the protest has become academic and no useful purpose would be served.

Matter of: Steenmeyer Corporation, May 10, 1982:

Steenmeyer Corporation protests the Army's determination to make award to Steenmeyer based only on the base items of invitation for bids (IFB) No. DACA85-81-B-0045 issued by the Army for modernization of bathrooms in military housing at Fort Wainwright, Alaska. We dismiss the protest.

Steenmeyer's bid for the base items (124 units) and the four additive items (244 units) was the low bid. The Army notified Steenmeyer that the award would be made for the base items only. Steenmeyer refused to accept award for any quantity less than the total amount, contending that the Army was obligated to make award for both the base and additive items. Later, the Army rescinded the notice of award and canceled the IFB.

In response to Steenmeyer's protest, the Army explained its justification for the action taken. In reply, Steenmeyer notes that since its suppliers and subcontractors will not stand by their quotes, which formed the basis of Steenmeyer's bid price, Steenmeyer requests an adjustment to its bid price to compensate for its increased costs.

Steenmeyer's request for a price adjustment presents the threshold question of whether, in these circumstances, the firm is entitled to request an increase in its bid price after bid opening and still be eligible for award on the basis of its original bid. We find that Steenmeyer is not entitled to increase its bid price and remain eligible for award.

In our view, Steenmeyer's request for an adjustment constitutes Steenmeyer's refusal to keep its bid available for acceptance by the Government without adjustment. In effect, Steenmeyer has abandoned its original bid. Therefore, the merits of Steenmeyer's protest became academic. Thus, no useful purpose would be served by our Office ruling on Steenmeyer's protest.

Protest denied in part and dismissed in part.

[B-205573]

Contracts—Labor Surplus Areas—Evaluation Preference—Eligibility of Bidder—Place of Substantial Performance—Responsibility Matter

Protest that agency improperly awarded contracts to firm as a labor surplus area (LSA) concern and failed to consider evidence that it lacked ability to meet LSA concern performance requirements is sustained to the extent that the agency had not placed the burden on the firm to demonstrate affirmatively its ability to meet those requirements as a matter of responsibility, but instead assumed the agency had the burden of showing the firm intended to evade the requirements.

Matter of: Lou Ana Foods, Inc., May 12, 1982:

Lou Ana Foods, Inc. protests that the Commodity Credit Corporation (CCC), Department of Agriculture, improperly awarded three contracts to Cal Western Packaging Corporation to supply the CCC with refined soybean salad oil. The CCC periodically invites offers to sell the CCC refined soybean salad oil under Announcement PV-SO-1, as amended. The purchases in question occurred under invitation Nos. 58 through 60, which were partially set aside for award to one or more small business concerns, and which provided a preference in the evaluation of an offer from a firm that agreed to perform the contract as a labor surplus area (LSA) concern. Lou Ana alleges that although Cal Western represented in its offers that it would perform as an LSA concern, and thus received the benefit of the preference, the firm in fact will not do so.

We sustain the protest.

The solicitations established two groups of priorities for the purpose of negotiating the set-side portions of the acquisitions. Group 1, having the highest priority, included small business concerns which agree to perform as LSA concerns, whereas Group 2 included non-LSA small business concerns. An LSA concern, as defined by the solicitations, is a concern which, together with its first tier subcontractors, will perform substantially in geographical areas identified by the Department of Labor as areas of concentrated unemployment or underemployment or areas of labor surplus. Substantial performance in LSAs means that the costs incurred on account of manufacturing, production or appropriate services in LSAs must exceed 50 percent of the contract price.

Cal Western is a packaging firm with a packaging plant in Compton, California, which is an LSA. Cal Western received awards under Group 1 priority, having represented in its offers that it would substantially perform the contracts in Compton. Prior to award in each acquisition, however, Lou Ana filed protests with the contracting officer alleging that Cal Western, being a packaging firm, could not incur more than 50 percent of the contract costs in Compton. The protester alleged that to perform the contracts Cal Western purchases soybean salad oil in non-LSAs for packaging in Compton, and that the purchase price of the salad oil exceeds 50 percent of the contract price. Lou Ana contended that Cal Western therefore should not be deemed an LSA concern.

The contracting officer denied the protests. His view basically was that an offeror's status as an LSA concern involves an agreement to do something in the future, and therefore is not susceptible to challenge prior to award absent evidence of an intent to evade or ignore the requirements to perform substantially in LSAs. At the time of Lou Ana's initial protests with the agency, the contracting officer considered that he lacked such evidence, and therefore denied the protests. He did initiate an audit of Cal Western's contracts, however, to verify Lou Ana's allegations. While the audit verified those allegations, the agency again informed the protester that its protests lacked merit because the audit did not show an intent to evade the LSA concern requirements in any of the particular procurements then in issue.

Initially, there is a question of whether the protest was timely filed. The Department of Agriculture argues that the protest is untimely because it was filed with this Office more than 10 working days after the protester had received initial adverse agency action on the protest it originally filed with the agency. While the protest may be untimely, we nonetheless will consider it on the merits because it raises a significant issue in terms of defining the respective duties of an offeror and the contracting agency toward establishing the offeror's qualifications for award as an LSA concern. See 4 C.F.R. § 21.2(c) (1981).

By representing in its offer that it would substantially perform the contracts in an LSA, Cal Western established its commitment for performance as an LSA concern. Lou Ana's protest against the awards to Cal Western on the basis that Cal Western allegedly lacks the ability to perform as an LSA concern essentially questions the CCC's affirmative determination of Cal Western's responsibility. See *South Jersey Clothing Co.; Catania Clothing Corp.*, B-204531, B-204531.2, February 4, 1982, 82-1 CPD 88.

We generally do not review protests against affirmative responsibility determinations. However, our concern here is the contracting officer's apparent position that he was precluded from finding Cal Western nonresponsible for the contracts in issue, despite his own agency report that the firm in fact did not perform as it represented it would (*i.e.*, as an LSA concern) in prior procurements, simply because he could not say that the firm intended to do so again. We believe that this position reflects a misunderstanding of the relative burdens imposed on an offeror and the agency to establish the offeror's responsibility.

The Federal Procurement Regulations (FPR) provide that a prospective contractor "must demonstrate affirmatively his responsibility and when necessary, that of his proposed subcontractors," FPR § 1-1.1202(c) (1964 ed.), and that a determination of nonresponsibility shall be made by the contracting officer if the information obtained does not indicate clearly that the prospective contractor is responsible. FPR § 1-1.1202(d). The regulations thus place the burden on an offeror to demonstrate affirmatively its responsibility, not on the agency to disprove it; there is no presumption that an offeror is responsible.

Rather than making a nonresponsibility determination contingent on evidence that the prospective contractor in fact does not intend to meet its obligations, the regulations set forth a number of factors for the contracting officer's consideration, including the contractor's record of performance and record of integrity. FPR § 1-1.1201-1(c)(d). Thus while it may be almost impossible for a contracting officer to conclude that a firm actually intends to do other than that reflected in the bid, the regulations themselves appear to permit at least the inference, based on the firm's past performance, that it is doubtful that the firm will meet its obligation.

Moreover, where the offeror is a small business, the agency's nonresponsibility determination does not end the matter, because the Small Business Administration (SBA) has conclusive authority to determine elements of a small business concern's responsibility under its Certificate of Competency procedures. 15 U.S.C. § 637(b)(7) (Supp. III 1979). Therefore, if a small business concern's offer is to be rejected because the contracting officer has determined the concern to be nonresponsible, the matter must be referred to the SBA. FPR § 1-1.708-2(a)(2).

In view of the above, we believe that where a contracting officer has reason to doubt a small business concern's ability to perform as an LSA concern, he should refer the matter to SBA for a Certificate of Competency determination unless the offeror will receive an identical contract (except for the LSA terms) as a non-LSA concern. We suggest that this would have been the proper approach in this case. Nonetheless, since Cal Western's contracts have been completed, the matter is academic for purposes of this protest. (In this respect, the record does not indicate whether the firm in fact performed as an LSA concern. Of course, had the contracting officer, during performance, learned that the firm was not performing as an LSA concern as it committed itself to do, the contracts could have been subject to default. See *Chem-Tech Rubber, Inc.*, 60 Comp. Gen. 694 (1981), 81-2 CPD 232. For future acquisitions, however, we are recommending that the Secretary of Agriculture take appropriate steps to have an offeror's ability to perform as an LSA concern properly treated as a reponsibility matter.

The protest is sustained.

[B-205073]

Contracts—Negotiation—Competition—Maximum Possible Extent

In negotiated procurements, both statute and regulations require that proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of supplies or services being procured. For this reason, General Accounting Office (GAO) closely scrutinizes sole-source procurement, although it will uphold them if they are reasonably or rationally based.

Contracts—Negotiation—Sole-Source Basis—Research and Development—Initial Production Awards—To Most Recent Developer

When item being procured is technologically complex, stems from a research and development contract, and is urgently needed for national defense or safety, the most recent developer's familiarity with work to be performed may justify a sole-source award of an initial production contract, since developer may be uniquely able to implement design changes required for mass production.

Contracts—Research and Development—Initial Production Awards—To Developer—Limited Production Run—Absolute Minimum Recommended

When proposed contract for initial production calls for testing only six of 25 vehicles to be procured, GAO recommends that the agency reevaluate to determine the minimum number needed to validate production design.

Contracts—Negotiation—Sole-Source Basis—Justification—Inadequate Data Package

When, due to long development period and piecemeal funding, an agency has not obtained a technical data package suitable for competitive procurement, GAO recommends that, concurrent with first production run, the agency take all necessary steps to obtain such a data package.

Matter of: International Harvester Company, May 14, 1982:

This is a protest against the Army's proposed sole-source award of the first production contract for the M9 armored combat earthmover (the ACE), a lightweight, high-speed (30 miles an hour), amphibious bulldozer which, among other things, will accompany and dig-in the M1 tank.

The U.S. Army Mobility Equipment Research and Development Command on May 18, 1981, issued a "single source" request for quotations, No. DAAK 70-81-Q-0422, to Pacific Car and Foundry Company (PACCAR) of Renton, Washington, which since 1971 has developed and hand-built four prototypes of this vehicle. Protesting the noncompetitive procurement is International Harvester Company, which seeks an opportunity for prior developers of the ACE to compete for the contract.

We deny the protest, but believe that the noncompetitive procurement should be kept to the absolute minimum number of vehicles. We therefore recommend that the Army reevaluate whether it can meet its objectives—to complete production engineering and to validate a technical data package—with fewer than the 25 vehicles that it now proposes to obtain from PACCAR.

Background

The ACE has been in development for more than 25 years. Beginning in 1955, when the Army first sought a vehicle of this type to support airborne engineer construction units, International Harvester designed, manufactured, and tested four generations (a total of nine vehicles) of what became known as the Universal Engineering Tractor. In 1965 International Harvester turned its drawings and specifications over to the Army, and Caterpillar Tractor Company continued development efforts. In 1971, following a limited competition in which International Harvester did not participate, the Army awarded an advance production engineering contract to PACCAR.

In 1977, PACCAR's version of the ACE was designated the M9 and was type classified standard.[1] The following year, the Army issued a sole-source solicitation to PACCAR to produce 75 vehicles, with an option for an additional 155; however, the solicitation was canceled when Congress deleted the necessary funds from the 1978 budget. PACCAR continued to perform contracts which, according to the Army, were primarily for product improvement and engineering support until fiscal 1982, when $40,400,000 was appropriated for production of the ACE under Public Law 97-114, Dec. 29, 1981, 95 Stat. 1565.[2]

The Protested Solicitation

Under the protested solicitation, the Army originally sought PACCAR's cost proposal to produce 36 vehicles in fiscal 1982 and an additional 51 in 1983; it subsequently requested an alternate proposal for 87 vehicles on a multi-year basis. Now, however, the Army advises us that it intends to hold the first production run to 25 vehicles, eliminate the option quantity, and conduct a competitive procurement for full production in late 1984, a year earlier than planned. The Army ultimately expects to procure more than 1,200 vehicles. In addition to the 25 vehicles, under the protested solicitation the Army seeks a system support package, training materials and classes, and other engineering and technical support. The solicitation originally also called for the preparation of a technical data package; however, under a contract awarded in September 1981, PACCAR is modifying and further testing one of the prototypes and will update data accordingly.

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[1] Type classification is a system of acquisition and control of Army materiel; it essentially involves prequalification of a particular product. *See* Army Regulation (AR) 71-6 (1973) [superseded by AR 70-61 (1978)]; *Christie Electric Corporation*, B-188622, December 8, 1977, 77-2 CPD 441.

[2] Legislation has been introduced that would rescind this amount. *See* S. 2167, 97th Cong., 2d Sess., 128 Cong. Rec. § 1647.

Sole-Source Justifications

The Army has advanced numerous justifications for the proposed award to PACCAR; International Harvester disputes them all. The major arguments center on PACCAR's familiarity with the ACE, which the Army asserts makes it the only firm currently capable of making the transition from development to production, and on the type of technical data package required for a competitive procurement. The Army also asserts that because of the ACE's combat capabilities, not currently available in any other military vehicle, it is urgent to field it as soon as possible. The Army believes only PACCAR can meet its schedule for delivery beginning 570 days after award.

A. *Familiarity with the ACE*

International Harvester argues that the proposed sole-source award ignores its role in development of the ACE (it holds patents on the commercial version) as well as its present capability as a manufacturer of heavy-duty construction equipment. According to the protester, except for revisions to components such as the engine and transmission, which any production contractor (including PACCAR) must obtain from approved sources, the current generation of the ACE is virtually identical to the last generation that International Harvester built.

The Army, however, states that more than 200 design and engineering changes were made to the vehicle by Caterpillar and an additional 700 by PACCAR; these include allegedly design-critical changes in the engine, the drive train (including transmission), the hull assembly, and the hydraulic, suspension, and electrical systems. Some of these changes, the record indicates, were made to overcome deficiencies found in testing the prototypes built by PACCAR. The Army states that others were required because components became obsolete and had to be replaced, and still others are product-improvement changes which have not been fully tested due to lack of funds. One engine, for example, was discontinued because it did not meet Environmental Protection Agency standards.

An additional number of priority changes have been identified and will be implemented before and during initial production, the Army states; some of these are geared to reducing the cost of production, while others are in response to changed battlefield requirements. The final version of the ACE will have such sophisticated capabilities as chemical/biological warfare protection, smoke launchers, and night vision.

The significance of the numerous changes, the Army states, is that they must be properly integrated into the vehicle design. Their impact on existing components is uncertain, the Army continues, but it is crucial that the changes be made in a manner that does not adversely affect other design parameters. The developer having the most current experience with the total design is the only one qualified to resolve potential difficulties without undue technical risk, the Army asserts.

A large number of the problems experienced with all generations of the ACE are rooted in manufacturing methods, the Army further states. In its judgment, the lessons learned by PACCAR cannot effectively be transferred to the operations of another manufacturer and cannot be reflected in the technical data package before completion of initial production. The Army admits that this is a subjective judgment which reflects a conservative approach. However, it states, the basis for it is the need for any other contractor—including prior developers—to become acquainted or reacquainted with the entire vehicle design and the possibility that a new contractor will overlook critical changes. Thus, the Army states, far more is required than merely purchasing components from approved sources.

In this regard, the Army states that PACCAR has coordinated with subcontractors to solve persistent problems in the ACE's complex hydraulic and suspension systems. A change in the transmission has been mutually developed by PACCAR and Clark Equipment Company; in the Army's opinion, it would be difficult and time-consuming for another prime contractor to repeat this development effort, since the drawings and specifications for the transmission are not included in the current technical data package. Further, International Harvester's commercial patent is not relevant, the Army asserts, since the firm has neither produced the vehicle in quantity nor subjected it to the periodic reevaluation and reengineering which the ACE has undergone.

The Army concludes that only PACCAR has the expertise required to implement the changes to the ACE during production. While acknowledging International Harvester's role as a developer of the ACE, the Army does not agree that this experience is sufficient to overcome the firm's lack of experience with the current design.

The Army also points out that both Defense Acquisition Regulation § 3-108(b) (1976 ed.) and Army Regulation (AR) 1000-1 (May 1, 1981) indicate that it is generally in the Government's best interest to place initial production contracts for technical and specialized supplies with the development contractor. The rationale for this policy, the Army states, is to permit the Government to retain the expertise gained by the development contractor through the first production run. It allows incorporation of all "first-build" changes into the technical data package before competitive purchase of a large quantity of the item, and is standard Army policy for complex procurements.

International Harvester's response is that in this case there are three developers of the ACE. If the Army correctly has described all the changes which have been made or proposed since International Harvester last was involved with the ACE, the firm continues, neither PACCAR nor any other developer has built the vehicle which will be produced under this contract, although they have built its predecessors. If changes yet to be made are significant, International Harvester continues, the ACE should not be allowed to move into the production stage; if they are insignificant, then any of the prior developers should be allowed to produce it.

Moreover, International Harvester argues, the Army is reneging on a promise, made in 1971, when it specifically stated that the advanced production engineering contractor was not guaranteed award of the first production contract because the contract would be awarded competitively.

B. *The Technical Data Package*

International Harvester also argues that the Army either has or should have obtained a technical data package for the ACE; the firm estimates that the Army has spent nearly $1.5 million (of a total of $7.7 million in contracts awarded to PACCAR since 1971) for such data. If this information is updated, International Harvester argues, it can go into production as quickly and as well as PACCAR.

The Army, however, states that due to the long development period, piecemeal funding, and changes in Army policy concerning what is suitable for competitive procurement, data delivered under its earlier contracts with PACCAR must not only be updated but also "validated" by being used successfully in a first production run. According to the Army, this requires a configuration audit in which the vehicles are tested and compared with drawings and specifications. Until this is done, the Army indicates, it cannot warrant the data package to other bidders as adequate for mass production. In this regard, the Army rejects International Harvester's proposal that competition should be limited to prior developers of the ACE. A validated technical data package will enable all experienced manufacturers to compete for the full production contract, the Army concludes.

PACCAR, in comments to our Office, supports the Army's position that currently available data is incomplete and states that it never was authorized to produce a complete data package. Drawings, for example, were revised only when they related to the specific tasks covered by its earlier contracts, PACCAR states; the firm estimates that only 100 of approximately 1,200 drawings meet current military standards. Other elements of the technical data package still to be formalized, according to PACCAR, include specifications and data for packaging, quality assurance, inspection, and acceptance.

The overriding purpose of this procurement, the Army states, is to complete the research and development cycle by assembling and validating the technical data package. Under its current contract, PACCAR is fabricating and installing modifications on one of the four prototypes, and after testing and Government approval of the changes, will update the technical data package before first production. But the data package cannot be validated, the Army contends, through modification and testing of a handbuilt prototype; nothing short of actually producing the vehicles and thereby verifying the data will do. The Army also argues that potential disputes over the adequacy of technical data, inherent in award to any non-design developer, could take time to resolve, resulting in postponement of full production to a later fiscal year and increased costs due to inflation.

C. *Urgency*

International Harvester also challenges the Army's other sole-source justifications, particularly urgency. The firm questions whether "time is of the essence" when the Army has no definite schedule for fielding the ACE. The fact that the vehicle was not funded between 1977 and 1982, International Harvester continues, demonstrates that it is not urgently needed and that there is adequate time for competitive procurement.

The Army acknowledges that it has no timetable for fielding the ACE. However, it states, the vehicle is designed to fill a mission which currently exists—not only to support the M1 tank but also for heavy digging of survivable positions for tank and infantry weapons, anti-tank ditches, and other mobility, countermobility, and survivability tasks.

There currently is no alternative to the ACE, since commercially available bulldozers are essentially roadbound, the Army adds, and do not have the ACE's ability to move across country at high speeds; they also lack armor and protection against chemical-biological warfare. The Army argues that the ACE's combat capabilities make it essential to field the vehicle as soon as possible and that an award to any contractor other than PACCAR will cause delays of at least one year in manufacturing and fielding and will increase costs by an estimated $6 million.

Delays which have occurred thus far have been due to funding constraints, not to lack of immediate need, the Army further argues. With unlimited capital and an infinite time for performance, any manufacturer of related equipment could successfully validate the technical data package, the Army concludes, but neither is available.

GAO Analysis—Sole-Source Procurements

A. *General Rules*

When a procurement is negotiated, proposals must be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services being procured. 10 U.S.C. § 2304(g) (1976). DAR §§ 1-300 and 3-101(d) also require competition to the maximum extent practicable. For this reason, our Office closely scrutinizes sole-source procurements. We will, however, uphold such procurements if there is a reasonable or rational basis for them. *Precision Dynamics Corporation,* 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

Presumably, no contracting activity will make a sole-source award without believing such action is in the Government's best interest. However, an award may not be justified merely on the belief that the awardee is best qualified. *Aero Corporation,* 59 Comp. Gen. 146 (1979), 79-2 CPD 430. Thus, when an agency has information which clearly indicates that a second source may be capable of filling its needs, it must investigate further before making a sole-source award. *Aerospace Research Associates, Inc.,* B-201953, July 15, 1981, 81-2 CPD 36.

Mere familiarity with the goods or services being procured, or prior experience which the agency believes will facilitate performance and enable a contractor to anticipate problems, do not, of themselves or even coupled with urgency, justify a sole-source award, nor do potential increases in cost due to changing contractors. Accordingly, we have sustained protests against sole-source awards of contracts to repair an underground heating system for Army housing when the agency failed to show that the installer was the only firm which could complete the work before winter, *Titan Atlantic Construction Corp.,* B-200986, July 7, 1981, 81-2 CPD 12; and for an energy management control system when the agency believed that the offeror was so well acquainted with existing equipment that it could install a new system in less time and at a lower cost than any other contractor. *Electronic Systems U.S.A., Inc.,* B-200947, April 22, 1981, 81-1 CPD 309.

We also have disapproved sole-source awards for collection of delinquent Medicare, Medicaid, and Group Health accounts, justified on the basis of the contractor's familiarity with the accounts and demonstrated ability to collect, *Systems Group Associates, Inc.,* B-195392, January 17, 1980, 80-1 CPD 56; and for upgrading an audiovisual system and refurbishing an auditorium, when the awardee has manufactured the major components and was considered able to perform without detailed specifications. *Techniarts,* B-193263, April 9, 1979, 79-1 CPD 246. See also *Environmental Protection Agency sole-source procurements,* 54 Comp. Gen. 58 (1974), 74-2 CPD 59; *Kent Watkins & Associates, Inc.,* B-191078, May 17, 1978, 78-1 CPD 377.

B. *Awards to Development Contractors*

When, however, the item being procured is technologically complex and/or has had its genesis in a research and development contract, the developer's familiarity with the work to be performed may justify a sole-source award for an initial production run, since the developer may be uniquely able to implement changes required for mass production. This exception to the general rule requiring competition is particularly applicable when for reasons of national defense or safety, full scale production must be achieved at the earliest practicable date.

Thus, we have upheld sole-source awards for the "Seafox," a Naval warfare craft, to the firm which constructed the prototype, *The Willard Company Incorporated*, B-199705, February 18, 1981, 81-1 CPD 102, and for modification of radar for use on various aircraft to the firm which had developed and had proprietary rights to date on the basic item, although the Air Force was entitled to data on improvements. *Applied Devices Corporation*, B-187902, May 24, 1977, 77-1 CPD 362.

Even when, as in this case, a prior developer's work will be incorporated into the item being procured, if substantial changes have been made or if the work contemplated goes beyond that of the developer, the most recent contractor may have unique knowledge or capability, justifying a sole-source award. For example, *Vega Precision Laboratories, Inc.*, B-191432, June 30, 1978, 78-1 CPD 467, involved a sole-source award by the Marine Corps to the most recent supplier of transponder sets, used to enable attacking aircraft to "home in" on ground targets under all weather conditions. Due to urgency, the agency planned to waive first article testing and use unaudited drawings. The protester, under earlier contracts, had produced a model which was the acknowledged forerunner of that being procured. In addition, the firm had kept pace with technical developments; reviewed information made available to it by the agency and believed it could produce the sets; planned to conduct first article testing simultaneously with production in order to meet delivery schedules; agreed to be contractually bound to duplicate the item if it was furnished only one unit; and offered to assist in auditing and revising drawings. Because the protester's work had been done 7 years previously, we found it unnecessary to consider whether it had met performance requirements at that time. We held that the agency's assessment of unacceptable technical risk and potential delay in award to any firm other than the incumbent was reasonable, and we denied the protest.

Similarly, in *Engineered Systems, Inc.*, B-195237, December 14, 1979, 79-2 CPD 408, involving a contract for support of an aircraft system used to collect scientific and technical intelligence, the Air Force proposed a sole-source award to the contractor who, during the previous four years, had modified the aircraft substantially. A prior contractor protested. We noted that due to time and funding constraints, drawings and engineering data on the modifications had been kept to an absolute minimum and had been augmented by the incumbent's own specifications, manufacturing processes, and engineering notes, which were not available to any other firm. We upheld the award but recommended that options not be exercised if a competitive data package could be assembled. See also *Frequency Engineering Laboratories Corporation*, B-202202, December 15, 1981, 81-2 CPD 468; *North Electric Company,* B-182248, March 12, 1975, 75-1 CPD 150; *BioMarine Industries; General Electric Company,* B-180211, August 5, 1974, 74-2 CPD 78; B-173063, September 22, 1971; and B-161031, June 1, 1967.

General Accounting Office Conclusions

We find that the ACE is a complex, state-of-the-art combat vehicle, and that PACCAR is not only the most recent developer, but also the only company which has worked on it for more than 10 years. We believe the Army has reasonably determined that PACCAR's current familiarity with the vehicle, the lead time which would be required for any other contractor to become familiar with it, and the urgency involved combine to make PACCAR the only available source for the proposed procurement.

We reach this conclusion, first, because the solicitation issued to PACCAR does not call for the production of large quantities of the vehicle for operational use. Rather, it calls for PACCAR to provide various types of engineering support for a limited production run. Specifically, the firm is to insure:

> * * * that the mechanical, hydraulic, and electrical design of the equipment is such that when produced in quantity * * * there will be no degradation of performance from that demonstrated and established on the developmental hardware and that quantity production can be effected with minimum * * * problems * * *.

In so doing, PACCAR is required by the specifications to perfect, to the extent possible, the manufacturing processes to be used in follow-on full scale production, and to make inspection, assembly, and interchange of parts as easy as possible. In short, what is involved is production engineering.

Second, as the Army has indicated, the engineering methods developed by PACCAR must be tested through production. In this regard, we find it reasonable to require that the technical data package be validated. The protested solicitation lists numerous deficiencies found in 1976 testing of the vehicle at Aberdeen Proving Ground, Maryland. For example, at that time it failed to start consistently in temperatures below zero degrees Fahrenheit. In addition, it failed to meet requirements that 88 percent of all units be able to complete a 10-hour mission successfully and that 50 percent of all units be able to operate 650 hours between replacement or overhaul of major components. Also, when unballasted, the vehicle could not maintain required speeds of 30 miles an hour on dry, level terrain or 3 miles an hour while afloat, and the latches securing the dozer blade were not adequate to insure its retention during cross country movement.

It appears that extensive testing will be required to determine whether these and other problems, which appear to have been solved only on paper or at best through testing of modifications to the prototypes, have been resolved. This is consistent with a 1978 audit report in which we stated that the vehicle (still referred to as the Universal Engineering Tractor) was outstanding when it performed properly, but was "plagued with durability and reliability problems." We noted that test officials believed that although existing prototypes were being used to correct as many deficiencies as possible before a technical data package was finalized, the vehicles were so old and had been modified so many times that they would not be an accurate indicator of deficiency corrections. See *Letter Report to the Chairman, House Appropriations Committee*, PSAD 78-99, May 1, 1978.

Further, we believe the Army is justified in its belief that it must proceed immediately with a limited production run in order to meet its urgent need for full scale production. The ACE will fill military needs which are not being met by any other equipment, either in Army inventory or available commercially, and obviously these needs will remain unsatisfied until the production units are fielded. International Harvester's contention that production is not urgent because the ACE was not funded for several years fails to recognize that the lack of prior funding logically leads to a greater urgency now and that the Congress provided funds this year after the Army explained its immediate need for the ACE.

The fact that only PACCAR's and its subcontractors' engineering personnel are currently familiar with the ACE's design data, consisting of some 1,200 drawings, numerous technical specifications, and a history of some 900 changes made in the past 16 years, leads us to conclude that it is the only firm that can reasonably assure that the contract will be performed as promptly as possible. Moreover, as the Army points out, if problems arise during production which require recalculation or adjustment of dimensions and tolerances, PACCAR appears uniquely qualified to resolve them without undue technical risk.

Finally, we find no evidence that the Army is attempting to avoid its obligation to compete full scale production of the ACE. The Army at this point is seeking only to produce a limited number of vehicles to insure, in its words, "That a [later] competitive solicitation is not conducted without a technical data package proven adequate to build a vehicle in a full production mode."

International Harvester's protest therefore is denied.

Number of Vehicles To Be Procured

Although we have no legal objections to a sole-source award to PACCAR, we believe that the contract should be for the absolute minimum number of vehicles required to support production engineering and to validate the technical data package. The Army has presented us with only conclusionary statements as to what this minimum is. In 1978, as indicated above, it planned to procure 230 vehicles under a first production contract, if options were exercised. In this procurement, the Army initially argued that 87 vehicles were needed; it now states that it will limit initial production to no more than 25 vehicles. In none of these cases did the Army explain how it arrived at these figures.

The solicitation indicates that the first four vehicles delivered will be subject to first article testing. The fifth will be subjected to a physical configuration audit, in which an "as-built" vehicle is examined against the technical documentation; the sixth will be physically torn down to evaluate maintainability. What the remainder of the 25 vehicles will contribute to the process of validation is not clear from the record. In other words, the Army does not appear to have made a technical judgment that a minimum of 25 vehicles need to be produced by PACCAR before it will be in position for a competitive procurement.

While the many decisions cited above support sole-source procurements under the circumstances present here, they do not support such procurements when they involved more than a minimum quantity or when they continue for more than a minimum time. What is justifiable initially may soon cease to be justifiable, particularly in light of the obvious advantages to be gained from competitive pricing and the wisdom, from a managerial point of view, of developing more than one source. For example, see *Aero Corporation, supra*, and *Aero Corporation* v. *Department of the Navy*, No. 79-2944 (D. D.C., February 18, 1982) involving a proper sole-source award to the original manufacturer of the C-130 of a contract for extending the service life of the aircraft but also a U.S. District Court order to the Navy to develop maintenance kits suitable for future competition between the manufacturer and other experienced C-130 contractors. See generally *Less Sole-source, More Competition Needed on Federal Civil Agencies' Contracting*, PLRD 82-40, April 7, 1982.

We therefore are recommending that the Army reevaluate whether it actually needs 25 vehicles under this contract and that, concurrent with the first production run, it take all necessary steps to insure that a complete and validated technical data package is obtained, so that this noncompetitive procurement will not be extended. See *H. Koch & Sons*, B-202875, December 14, 1981, 81-2 CPD 463; *Aerospace Research Associates, Inc., supra; Applied Devices Corporation, supra.*

In addition, to the extent that the 25-vehicle figure reflects the Army's assessment of what is practical to defray tooling costs, we suggest the Army consider whether the Government's interests would be better served if it were to acquire and furnish under follow-on contracts any special production tooling which may be needed.

[B-200642]

Fraud—False Claims—Debt Collection

On April 7, 1981, after deciding certain legal issues, General Accounting Office remanded this case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of number of days for which fraudulent information was submitted on a temporary duty voucher by a civilian employee. The parties have raised several issues concerning the recalculation. Accordingly, we will set forth the governing legal principles and procedures and return the case to the Air Force for appropriate action consistent with this and our previous decision.

Fraud—False Claims—Burden of Proof

The burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. If, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. Accordingly, a mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government.

Fraud—False Claims—Per Diem—"Lodgings-Plus" Basis—Evidence Establishing Fraud—Sufficiency

The framework for the recalculation necessary in the present case is the lodgings-plus method of determining per diem expenses. Under this method, fraud cannot be established merely because claimant's claimed daily cost for lodging on any one day is more than the average cost of lodging. Thus, fraud cannot be established merely by showing a deviation from an average or estimated figure.

Fraud—False Claims—Per Diem—"Lodgings-Plus" Basis—Average Cost Computation

In calculating the average cost of lodging under lodgings-plus method of the Federal Travel Regulations, the term "total amount paid for lodgings" does not include amounts paid by claimants for days when fraud in any amount was committed, and the term "number of nights for which lodgings were or would have been required" does not include those nights tainted by fraud in any amount. 60 Comp. Gen. 181 (1981) and 60 *id.* 53 (1981) are distinguished.

Matter of: Civilian Employee of the Department of the Air Force—Disposition of Suspected Fraudulent Per Diem Claim—Reconsideration, May 18, 1982:

This case was originally decided by our Office in *Civilian Employee of the Department of the Air Force,* 60 Comp. Gen. 357 (1981). After deciding certain legal issues, we remanded the case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of the number of days, if any, for which fraudulent information was submitted. Because the parties have raised several questions concerning the recalculation, we will set forth below the proper procedures to be followed in the disposition of this suspected fraudulent per diem claim, and remand it again to the Air Force for appropriate action in accordance with this opinion.

The facts of this case, which are more fully set forth in our previous decision, are as follows. The claimant is a civilian employee of the Air Force ("Employee") at McClellan Air Force Base, California. From approximately May 28, 1974, to September 30, 1974, Employee was on temporary duty (TDY) at Jacksonville, Florida, and from approximately October 1, 1974, to March 10, 1975, he was on TDY at Otis AFB, Massachusetts. He then returned to McClellan AFB, and on March 19, 1975, he submitted travel voucher No. T-23115, in which he claimed total per diem expenses of $6,588, consisting of $3,465 for lodging, and $3,123 for meals and incidental expenses. The then maximum per diem rate was $25, consisting of $13.20 for lodging and $11.80 for meals and incidentals.

At some later date, a suspicion arose that Employee's claim for lodging was false in part. The Air Force Office of Special Investigations (AFOSI) and the Federal Bureau of Investigation (FBI) investigated and concluded that he had defrauded the Government by approximately $1,000. After a jury trial on criminal fraud charges in the U.S. District Court for the Eastern District of California in August 1978, he was found not guilty of the charges.

In the meantime, on June 30, 1978, the Air Force Accounting and Finance Officer (AFO) determined the travel claim to be false and administratively initiated a recoupment action for $6,588, the entire per diem portion of the voucher. Since that date various amounts per pay period have been and are being deducted from Employee's pay.

In our prior decision, after deciding that Employee's acquittal on criminal charges does not bar the Government from claiming in a later civil or administrative proceeding that certain items on his voucher were fraudulent, and that the severability rule announced in 57 Comp. Gen. 664 (1978) is applicable to this case, we observed that:

> The record submitted by the Air Force contains three different estimates of the amount of fraud varying between $823 and $1,000, and merely states conclusions as to the various items allowed or disallowed without sufficiently explaining the reasons therefor. 60 Comp. Gen. 357, 360 (1981).

After noting further specific difficulties with the record, we remanded this claim to the Air Force:

> Employee's per diem claim is remanded to the Air Force for a recalculation of the suspected fraud and a determination of the number of days for which fraudulent information was submitted. In performing this task it should be borne in mind that the regulations at the time these events occurred did not require lodging receipts. Then, in accordance with this opinion he should be allowed per diem for the days for which no fraud is involved. *Id.* at 361.

After the Air Force performed the recalculation, Employee, through his counsel, requested that our Office implement our previous decision due to an alleged non-compliance with it by the Air Force. We have reexamined this matter, and have had informal contact with the parties on it. We believe that the proper resolution of this case requires that we remand it again to the Air Force.

We will set forth below some of the relevant legal principles concerning disposition of suspected fraudulent per diem claims as they relate to the recalculation submitted by the Air Force, and provide specific instructions as to the method of properly calculating this claim.

The Federal Travel Regulations (FTR) (FPMR 101-7, May 1973) expressly provide in paragraph 1-11.1 that "[a] claim against the United States is forfeited if the claimant attempts to defraud the Government in connection therewith, 28 U.S.C. 2514." However, in order to establish fraud which would support the denial of a claim or, as here a recoupment action in the case of a paid voucher, our Office has observed that:

> "[T]he burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. However, if, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn." B-187975, July 28, 1977. 57 Comp. Gen. 664, 668 (1978).

A mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government. 57 Comp. Gen. at 668.

The framework for the recalculation necessary in the present case is the lodgings-plus method of determining per diem expenses. At the time of the events in the present case, para. 1-7.3(c) of the Federal Travel Regulations, in relevant part, provided:

> c. *When lodgings are required.* For travel in the conterminous United States when lodging away from the official station is required, agencies shall fix per diem for employees partly on the basis of the average amount the traveler pays for lodgings. To such an amount (i.e., the average of amounts paid for lodging while traveling on official business during the period covered by the voucher) shall be added to suitable allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, if the result is not in excess of the maximum per diem, shall be the per diem rate to be applied to travelers's reimbursement in accordance with applicable provisions of this part. If the result is more than the maximum per diem allowable, the maximum shall be the per diem allowed. No minimum allowance is authorized for lodging since those allowances are based on actual lodging expenses. Receipts for lodging costs may be required at the discretion of each agency however, employees are required to state on their vouchers that per diem claimed is based on the average cost to him for lodging while on official travel within the conterminous United States during the period covered by the voucher.

The Air Force's recalculation determined the average cost of lodging to be $12.07 on the basis of Employee's own figures by dividing the number of nights for which lodgings were or would have been required while away from the official station (287 nights) into the total amount *claimed* to be paid for lodgings ($3,465). Furthermore, the Air Force then disallowed every day on which Employee's claimed costs for lodging exceeded $12.07. It thus found 205 "fraudulent" days, and 82 "nonfraudulent" days.

The above method is unsatisfactory for two reasons. First, if Employee committed fraud by padding his lodging costs, as the Air Force charges, the figure of $3,465 is inflated, and thus the Government would be cheated by using that figure in the computation of the average cost of lodging. Secondly, even if the average cost of lodging figure of $12.07 were accurate, a "fraudulent" day is not established, as the Air Force's recalculation purports to do, merely because Employee's claimed daily cost for lodging (including utilities) on any one day is more than the average cost of lodging. Under the lodgings-plus method, there is simply no requirement that the actual daily cost for lodging be the same or less than the average cost of lodging. Indeed, some variation in the daily cost for lodging is not uncommon, especially during TDY for a long period, and FTR para. 1–7.3(c) even anticipates this situation. See 60 Comp. Gen. 181, 186 (1981). In sum, fraud cannot be established merely by showing a deviation from an average or estimated figure.

In order to properly resolve the present case, we believe the Air Force should follow the following procedures.

First, identify the days in connection with which fraud in any amount was committed (tainted days), and the days for which no fraud was committed (untainted days). The *entire* per diem amount for the tainted days must be disallowed. Per diem under the lodgings-plus system includes all charges for lodging, meals and other expenses, and a fraudulent representation of lodging costs taints the entire per diem claim for a given day. 59 Comp. Gen. 99, 101 (1979); B–200838, April 21, 1981.

In identifying tainted days, if the Government wishes to rely on matter in reports of investigative agencies such as the FBI or the AFOSI in order to establish that fraud was committed, Employee must be allowed to have a genuine opportunity to examine and rebut the contents of such material. In this regard, we observe that the regulations at the time these events occurred did not require lodging receipts. See paragraph C8101 of Volume 2, Joint Travel Regulations (change 103, May 1, 1974).

Secondly, apply the lodgings-plus formula in FTR para. 1–7.3(c). We note that, subsequent to the events in this case, clarifications have been made in the wording of the formula but its original meaning has not changed. Accordingly, the following formula is from FTR para. 1–7.3(c) (FPMR 101–7) (September 1981), the version presently in effect:

(1) Average cost of lodging=*Total amount paid for lodgings.* Number of nights for which lodgings were or would have been required (excluding tainted nights).

(2) Per diem rate (properly adjusted) (rounded to next whole dollar, and subject to then maximum of $25)=Average cost of lodging+Allowance for meals and miscellaneous expenses (then $11.80).

(3) Per diem allowance due employee=Per diem rate× Number of untainted days for which per diem is allowed.

Finally, since Employee has been paid $6,588, we must add the following formula.

(4) Amount to be recouped by Government=$6,588−Per diem allowance properly due employee.

Of course, Employee should be given credit for any amount which has already been recouped, and necessary adjustments should be made by the Air Force to reflect this in his accounts.

In applying the above formula, the following should be borne in mind. In Step (1), the average cost of lodging cannot include nor be based on any tainted day. This is so even if the actual amount expended on lodging for the tainted days is known. See 59 Comp. Gen. 99, 101 (1979); B-200838, April 21, 1981; B-196364, January 6, 1981. Thus, when any day is determined to be tainted by fraud, all expenditures for per diem on that day are excluded entirely from the calculation. A benefit (per diem allowance due employee) should neither accrue nor be based on a fraudulent claim (tainted lodging claim for certain days). Accordingly, in calculating the components of the average cost of lodging, the term "total amount paid for lodgings" does not include amounts paid on tainted days, and the term "number of nights for which lodgings were or would have been required" does not include those nights on which fraud occurred at any time during that day. In cases such as 60 Comp. Gen. 181, 185–86 (1981) and 60 *id.* 53, 55 (1981) where we have referred to the term "total amount paid for lodgings," fraud was not involved, and, thus, those cases are distinguishable from the present case.

As to Step (3) of the formula, we note the emphasized words in the phrase "number of untainted days *for which per diem is allowed*" are an important qualification because Employee's travel order did not authorize his privately owned vehicle (POV) as advantageous to the Government. Invoking the constructive cost of common carrier rule, the Air Force's recalculation has thus disallowed an additional 12.5 days for various periods of Employee's TDY. See para. C10157 Volume 2, Joint Travel Regulations (change 103 May 1, 1974); FTR para. 1-4.1 *et seq.* (FPMR 101-7) (May 1973). Thus, these 12.5 disallowed days must be subtracted from the number of untainted days and the process should proceed as noted above.

Accordingly, we remand Employee's per diem claim to the Air Force for appropriate action consistent with this decision and our previous decision.

[B-200000, B-200001]

Officers and Employees—Promotions—Temporary—Detailed Employees—Higher Grade Duties Assignment—Agency Regulations

Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one.

Officers and Employees—Promotions—Temporary—Detailed Employees—Higher Grade Duties Assignment—Union Agreement Interpretation

Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those contract provisions may provide the basis for backpay. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one.

Unions—Federal Service—Collective Bargaining Agreements—Interpretation—Not for GAO Consideration—Exceptions

Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office.

Matter of: Albert C. Beachley and Robert S. Davis—Extended Details to Higher Grade Positions—Agency Regulation and Provision of Negotiated Agreement, May 25, 1982:

The issues in this case are whether we will accept the agency's interpretation of its own regulation concerning temporary promotions for overlong details and whether we will accept the interpretation of the parties of a similar provision in the collective bargaining agreement concerning temporary promotions for overlong details. These issues arise in connection with our reconsideration of the claims of Mr. Albert C. Beachley and Mr. Robert S. Davis for retroactive temporary promotions and backpay in connection with alleged overlong details to higher grade positions as employees of the Social Security Administration, Department of Health, Education, and Welfare (now Department of Health and Human Services).

We decide that since the above interpretations are reasonable, the claims may be paid as recommended by the agency.

MR. BEACHLEY'S CLAIM

The record shows that Mr. Beachley was detailed from his official position as a GS-12 Computer Specialist to a position as a GS-13 Computer Systems Analyst for the period from June 5, 1972, through November 25, 1972, in the Division of Health Insurance Systems. Mr. Beachley filed a claim for backpay with his agency and was granted a retroactive temporary promotion beginning August 4, 1972, the 61st day of his detail, and continuing through November 25, 1972, the last day of the detail. This action was based on paragraph D3 of chapter III of the Social Security Administration Headquarters Promotion Plan Guide 1-1, which states that if an individual's assignment to higher level work is expected to exceed 60 days in a 12-month period, the assignments should normally be made by temporary promotion rather than by detail. Mr. Beachley claimed that under the agency regulation he was entitled to a retroactive temporary promotion and backpay for the entire period of his detail and accordingly timely filed a claim with the General Accounting Office under 4 C.F.R. Part 31.

MR. DAVIS' CLAIM

Similar circumstances underlie Mr. Davis' claim. The record shows that he claimed to have performed the duties of a GS-13 Computer Systems Analyst rather than the duties of his official position as a GS-12 Computer Specialist, during the period from May 30, 1973, to June 5, 1977. In response to his claim for backpay, the agency concluded that his detail to the higher grade GS-13 position was limited to the period from June 1, 1973, to April 1, 1974. The agency granted Mr. Davis a retroactive temporary promotion with backpay effective August 10, 1973, the 61st day of the documented detail, and continuing to April 1, 1974, the last day he was considered detailed. The agency relied upon the detail provisions contained in Article 17, Section C, of the negotiated collective bargaining agreement, effective August 31, 1972, between the Social Security Administration and Local 1923, American Federation of Government Employees. Like the agency regulation applied to Mr. Beachley's claim that contract provision provided that when details to higher grade positions are expected to exceed 60 days the employee should normally be given a temporary promotion instead.

Contending that the negotiated agreement's detail provision allowed him a retroactive temporary promotion and backpay for the entire period of his detail, Mr. Davis timely filed a claim with GAO under 4 C.F.R. Part 31.

ACTION OF OUR CLAIMS GROUP

Our Claims Group not only denied the claims of Mr. Beachley and Mr. Davis for the first 60 days of their details, but also held that the agency's action in granting backpay from the 61st day of the details was improper. The claims settlement stated, in pertinent part, as follows:

> Since your agency's promotion plan and your union's collective bargaining agreement merely state that temporary promotions should normally be given instead of details to higher grade positions which would exceed 60 days, they cannot be considered nondiscretionary, so as to require that you be promoted prior to the 121st day of your detail. Therefore, your agency's settlement of your claim was incorrect in that it temporarily promoted you 60 days too soon. * * *.

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AGENCY'S REQUEST FOR RECONSIDERATION

The Social Security Administration requested reconsideration of the claims settlements pursuant to 4 C.F.R. Part 32. It argues that its interpretation of its own regulation and the interpretation of the collective bargaining agreement by both management and union should be given effect. It submitted copies of guidelines for processing backpay cases signed by five of its division directors in which it is implicit that management and union have consistently viewed the contract provisions as establishing a nondiscretionary agency policy. The agency also points out that the issue is of great importance since it not only involves decisions it has already made on over 220 claims, but also bears on the larger issue of the interpretation of the negotiated agreement.

ANALYSIS AND CONCLUSION

We have held that an agency, by its own regulation or by the terms of a collective bargaining agreement, may establish a specified period under which it becomes mandatory to promote an employee who is detailed to a higher grade position. Thus, an agency ployee who is detailed to a higher grade position. Thus, an agency may establish a specified period by regulation, or it may bargain away its discretion and agree to a specified period through a provision of a collective bargaining agreement. If the regulation or the agreement establishes a nondiscretionary agency policy and if the provision in question is consistent with applicable Federal laws and regulations, then the violation of such a mandatory provision in a regulation or negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. section 5596. For a comprehensive analysis of our case law in this regard, see *John Cahill*, 58 Comp. Gen. 59 (1978). And see also, as a specific case example, *Burrell Morris*, 56 Comp. Gen. 786 (1977).

The primary issue raised by the Social Security Administration in this appeal is whether the agency regulation and the comparable provision of the collective bargaining agreement, both of which use the word "normally," establish a nondiscretionary agency policy.

In considering the interpretation given an agency regulation by officials of that agency, we give great weight to their interpretation. This is especially the case where, as here, the agency has promulgated supplemental personnel regulations and policies for its employees within the general framework and consistent with Office of Personnel Management regulations. See 5 U.S.C § 301 and Chapter 171 of the Federal Personnel Manual. Here, the Social Security Administration asserts that the wording of the detail provision was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, the violation of which is compensable under the Back Pay Act, 5 U.S.C. § 5596. See *Kenneth Fenner,* B-183937, June 23, 1977. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one.

Similarly, in considering the interpretation given a provision of a collective bargaining agreement by the parties to the agreement, we give great weight to the parties' own interpretation. We have stated that if such an interpretation is reasonable, we will accept it even if other interpretations could be made. *Fish and Guy,* B-197660, June 6, 1980. In Mr. Davis' case the joint position of the agency and the union that the 60-day detail provision is mandatory in the sense of being a nondiscretionary agency policy is a reasonable interpretation.

Accordingly, the claims settlements in the cases of Mr. Beachley and Mr. Davis are reversed in part and the agency's awards of backpay from the 61st day of their details are upheld. However, the denial of the two employees' claims for backpay for the first 60 days of their details is sustained since there are no provisions in the negotiated agreement or agency regulations providing for backpay retroactive to the first day of the overlong detail.

One other aspect of this case should be clarified; that is, whether it is appropriate for us to assert jurisdiction over the claim of Mr. Davis since it pertains to the interpretation of a collective bargaining agreement. We have held that while the enactment of the Federal Service Labor-Management Relations Statute did not take away our jurisdiction to settle claims under Title 31 of the United States Code, it is our intent to exercise discretion in determining which cases are appropriate for adjudication by GAO so as to insure compatibility with the labor-management program. *Schoen and Dadant,* 61 Comp. Gen 15 (1981).

In the circumstances of this case, we feel it is appropriate for us to assert jurisdiction and, in fact, to refuse to do so would be extremely disruptive due to the impact such a decision would have on other claims or grievances. Several recent cases have clarified our jurisdictional policies on claims involving matters of mutual concern filed pursuant to 4 CFR Parts 31 and 32. None of the restrictions established in those cases apply to this case. First, we note that there is no arbitration award involved. Compare *Gerald H. Hegarty,* 60 Comp. Gen. 578 (1981), where we held that we will not review or comment on the merits of an arbitration award. Secondly, we note that no one has objected to submission of this matter to GAO. Compare *Samuel R. Jones,* October 9, 1981, 61 Comp. Gen. 20 (1981) where we held that we would not assume jurisdiction over claim filed under 4 CFR Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to

GAO. Thirdly, we note that this Office frequently considers the type of overlong detail issue presented by this case. It is in an area of our expertise and concerns a matter which has traditionally been adjudicated by this Office. Compare *Linda A. Vaccariello*, 61 Comp. Gen. 274 (1982), where we held that, even where no one objects to submission of the matter to GAO, we will decline to assert jurisdiction over labor-management issues which are customarily adjudicated solely under grievance-arbitration procedures. Thus, in the circumstances of this case, our assumption of jurisdiction is consistent with our underlying policy of fulfilling our statutory responsibility to adjudicate claims in a manner which facilitates the smooth functioning of the labor-management program established by 5 U.S.C. Chapter 71.

[B-203564]

Officers and Employees—Promotions—Temporary—Detailed Employees—Higher Grade Duties Assignment—*Wilson* Case

Our *Turner-Caldwell* decisions granting retroactive temporary promotions for overlong details are reconsidered in light of Court of Claims decision in *Wilson* v. *United States* which reaches opposite result. Although General Accounting Office is not bound by decisions of Court of Claims, the *Wilson* decision is a reasonable interpretion of law and regulation, it follows a clear line of precedent by the court, and it is consistent with the views of the Department of Justice and the Office of Personnel Management. Therefore, we will follow the *Wilson* decision and deny all pending and future claims under our *Turner-Caldwell* line of decisions. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part.

General Accounting Office—Decisions—Overruled or Modified—Prospective Application—*Turner-Caldwell* Decision

Decision to overrule *Turner-Caldwell* decisions is prospectively effective and affects only pending and future claims. Prior decisions or claim settlement issued before date of this decision pursuant to *Turner-Caldwell* line of decisions will not be disturbed.

Matter of: *Turner-Caldwell*—Reconsideration in view of *Wilson* v. *United States*, May 25, 1982:

The issue in this decision is the impact of the Court of Claims decision in *A. Leon Wilson* v. *United States* [1], denying a temporary promotion for an overlong detail on our *Turner-Caldwell* decisions which grant temporary promotions for overlong details. For the reasons stated below, we have decided to adopt the *Wilson* decision and no longer follow our *Turner-Caldwell* decisions as they apply to all pending and future claims.

This decision is in response to a request from the Department of Justice for our comments on the *Wilson* decision and on its impact on our *Turner-Caldwell* decisions. We have also received comments on this question from the Office of General Counsel, Office of Personnel Management (OPM).

[1] Ct. Cl. No. 324-81C, Order, Oct. 23, 1981.

BACKGROUND

Our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), represented a departure from prior decisions of our Office regarding the entitlement of employees to temporary promotions where they have been detailed to higher level positions for more than 120 days without the prior approval of the Civil Service Commission (now Office of Personnel Management). See 52 Comp. Gen. 920 (1973). Our *Turner-Caldwell* decisions allowing temporary promotions under such circumstances followed a decision of the Board of Appeals and Review, Civil Service Commission, dated April 19, 1974, which held that the remedy expressed in the Federal Personnel Manual for an agency's failure to obtain prior Civil Service Commission approval to extend a detail was a temporary promotion for the employee.

Recently, the Court of Claims decided *A. Leon Wilson* v. *United States*, Order, Oct. 23, 1981. The plaintiff had sought a retroactive temporary promotion and backpay for an alleged higher level detail based upon our *Turner-Caldwell* decisions. The court denied the plaintiff's claim in *Wilson* by relying upon prior decisions where it had denied relief for overlong details. *Salla* v. *United States*, Ct. Cl. No. 623-80C (Order, Jul. 2, 1981); *Goutos* v. *United States*, 212 Ct. Cl. 96, 98, 552 F.2d 922, 924 (1976); *Peters* v. *United States*, 208 Ct. Cl. 373, 376-380, 534 F.2d 232, 234-236 (1975). In addition, the court in *Wilson* addressed our *Turner-Caldwell* decisions but declined to follow them, stating that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details. The court likewise found no entitlement under the Back Pay Act, 5 U.S.C. § 5596.

In comments we received from OPM, that office contends that there is no statute or *nondiscretionary* administrative regulation by OPM requiring a constructive promotion for an employee detailed to a higher level position for more than 120 days without prior OPM approval. Therefore, in the absence of a nondiscretionary provision to temporarily promote, OPM believes there is no entitlement to relief under the Back Pay Act, 5 U.S.C. § 5596. In addition, OPM believes that the amendments to the Back Pay Act do not ratify our *Turner-Caldwell* decisions.

DISCUSSION

Our reading of the *Wilson* decision indicates that the Court of Claims, at least impliedly, has overruled the decision of the Board of Appeals and Review which was the foundation for our *Turner-Caldwell* decisions. The Board's decision did not rely upon mandatory language in the Federal Personnel Manual requiring temporary promotions for overlong details. Instead, the Board's decision looked to the mandatory requirement to seek prior Civil

Service Commission approval to extend a higher grade detail beyond 120 days. The decision applied the remedy of a temporary promotion for the detailed employee where the agency failed to take the necessary action. Our *Turner-Caldwell* decisions concurred with the Board's interpretation of the applicable provisions of the Federal Personnel Manual.

The Court of Claims has ruled in *Wilson* that neither the statute nor the Federal Personnel Manual requires the granting of a temporary promotion for an overlong detail and that the absence of a mandatory provision granting the temporary promotion defeats the employee's entitlement under the Back Pay Act. Since our *Turner-Caldwell* decisions reached an opposite conclusion, we must resolve the conflict.

Traditionally, our Office has given careful consideration to decisions of the Court of Claims, but we have also held that we are not bound by decisions of that court. See 50 Comp. Gen. 480, 486 (1971); 45 *id.* 700, 707–708 (1966); 31 *id.* 73 (1951); and 14 *id.* 648 (1935). As we held in 14 *id.* 648, at 652–653, where we believe the issues have not been fully and faithfully presented to the court or where the court's decision represents a broad departure from longstanding administrative interpretation of law as might occur in settlement of a claim, we have exercised our prerogative not to consider the court's interpretation binding as to claims before our Office. See also 50 Comp. Gen. 480, *supra.*

The decision by the Court of Claims in *Wilson* does represent a departure from our *Turner-Caldwell* decisions, but it is consistent with the views of the Office of Personnel Management and the Department of Justice. Furthermore, the *Wilson* decision follows a clear line of precedent by the court in such cases. See *Salla* v. *United States, supra, Goutos* v. *United States, supra,* and *Peters* v. *United States, supra.*

We must concede that the court's interpretation of the statute and regulations governing details is a reasonable interpretation. Furthermore, the court in *Wilson* has rendered a clear statement on overlong details with knowledge of our *Turner-Caldwell* decisions. Thus, we are unable to conclude that the *Wilson* decision falls within that narrow category of decisions which we are constrained not to follow. We will, therefore, follow the court's decision in *Wilson* in all pending and future claims before our Office involving overlong details.

Since our decision of today represents a changed interpretation of law, we will limit the decision to prospective application. Prior decisions and settlements of claims by our Office or other Federal agencies which were made pursuant to our *Turner-Caldwell* decisions will not be disturbed. However, claims which arose or were filed prior to the *Wilson* decision and which have not been decided must be denied. See, for example, 56 Comp. Gen. 551 (1977), amplified in 58 Comp. Gen. 345 (1979).

With regard to the Back Pay Act, we note that the court in *Wilson* and in other detail decisions again stressed that without an actual reduction or withdrawal of pay or allowances there is no remedy under the Back Pay Act. However, our decisions beginning with 54 Comp. Gen. 312 (1974) adopted a more liberal interpretation of the Back Pay Act, holding that a failure ("omission") to carry out a nondiscretionary agency regulation or policy resulting in a denial of pay or allowances also constituted an unwarranted or unjustified personnel action. We held to this interpretation despite dictum in the *Testan* decision (see 56 Comp. Gen. 427, at 430). Our interpretation was adopted by the Civil Service Commission in 1977 when it issued amended regulations implementing the Back Pay Act. See 42 Fed. Reg. 16127, March 25, 1977, codified in 5 C.F.R. Part 550, Subpart H (1978). Furthermore, our interpretation of the Back Pay Act was ratified by the Congress through the amendments to the Back Pay Act contained in the Civil Service Reform Act, Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1216. The key language that was added to the Back Pay Act appears in subsection (b)(3) which states, in part, that a " 'personnel action' includes the omission or failure to take an action or confer a benefit." 5 U.S.C. § 5596(b)(3) (Supp. III 1979). See also S. Rep. No. 95-969, 95th Cong., 2nd Sess. 114 (1978).

The amended Back Pay Act does not, however, modify or overrule the basic premise in *Wilson* that no statute or regulation requires a temporary promotion incident to an overlong detail. In our opinion, the amendments to the Back Pay Act merely ratify our interpretation that there is a remedy for the failure to confer a benefit pursuant to a nondiscretionary provision of law, regulation, or collective-bargaining agreement. The Office of Personnel Management shares that view in its comments to our Office on this matter.

[B-203716]

Attorneys—Fees—Agency Authority to Award—Civil Rights Act Complaints—Discrimination Complaint Settlement—Defending Official's Reimbursement Claim

Employee, who was named as an alleged discriminating official in discrimination complaint, claims reimbursement of attorney fees incurred during investigation of complaint. Claim is denied since, in the absence of express statutory authority, attorney fees are not reimbursable. Neither regulations regarding alleged discriminating officials nor Civil Rights Act or its implementing regulations provide authority for reimbursement of attorney fees in this situation.

Attorneys—Fees—Grievance Proceedings—Under Agency Procedures—Not Involving Pay or Allowances—Fee Reimbursement Claim

Employee, who was issued letter of reprimand for discrimination against subordinate employee, filed grievance under agency grievance procedures and claims attorney fees incident to favorable grievance decision. Claim is denied since, in the absence of express statutory authority, attorney fees are not reimbursable. Grievanc

was not before Merit Systems Protection Board, which has authority to award attorney fees, and grievance did not involve reduction in pay or allowances which is necessary to bring it within scope of Back Pay Act, as amended.

Matter of: Julian C. Patterson—Claim for attorney fees, May 25, 1982:

ISSUE

The issues in this decision are whether an employee may be reimbursed for two separate claims for attorney fees incurred incident to his being named as an alleged discriminating official in a discrimination complaint. We hold that there is no authority for the reimbursement of attorney fees incurred by an alleged discriminating official during the investigation and processing of a discrimination complaint. We also find no authority to reimburse the employee for attorney fees incurred during grievance proceedings he initiated in order to rescind a letter of reprimand he received as a result of the discrimination complaint.

BACKGROUND

This decision is in response to a request from Mr. Conrad R. Hoffman, Controller, Veterans Administration (VA), concerning the claim of Mr. Julian C. Patterson, a VA employee, for reimbursement of attorney fees.

In January 1979, Mr. Patterson was named as an alleged discriminating official in a discrimination complaint filed by Mrs. Toni H. Solomon. Following an investigation into Mrs. Solomon's complaint, a letter of reprimand was issued to Mr. Patterson on June 27, 1980, for discriminating against Mrs. Solomon on the basis of sex. Mr. Patterson filed a grievance under the agency grievance procedures, and the grievance examiner concluded that the letter of reprimand was not justified in view of guidance contained in Federal Personnel Manual (FPM) Letter 713-42, March 13, 1978, concerning the participation of alleged discriminating officials in discrimination proceedings. The grievance examiner found that, contrary to the guidance in FPM Letter 713-42, Mr. Patterson was not given the opportunity to respond to various statements, charges, and innuendos raised in an investigation which went beyond the original complaint.

The agency accepted the grievance examiner's recommendation and rescinded the letter of reprimand. The agency, after further consideration, also concluded that there was insufficient evidence of discrimination against Mrs. Solomon on the basis of sex or national origin.

Mr. Patterson has claimed reimbursement of attorney fees in the amount of $470 for hiring an attorney to review the discrimination file and investigative report, and $500 for hiring an attorney incident to the grievance proceedings. The VA denied Mr. Patterson's claims, but the agency has forwarded the claims to our Office for our determination.

DISCUSSION

Our Office has held that the hiring of an attorney is a matter between the attorney and the client and that, absent express statutory authority, reimbursement of attorney fees may not be allowed. See *Norman E. Guidaboni,* 57 Comp. Gen. 444 (1978), and *Manzano and Marston,* 55 Comp. Gen. 1418 (1976).

With respect to discrimination complaints, the Equal Employment Opportunity Commission has issued regulations implementing the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1976), to allow for the payment of attorney fees by administrative agencies in settlement of discrimination complaints. 29 CFR § 1613.271(c) (1981). However, these regulations limit the award of attorney fees to employees or applicants for employment who prevail on their discrimination complaints. We find no indication that this authority extends to persons who are named in discrimination complaints as alleged discriminating officials.

As noted in the grievance examiner's report, agencies are instructed to follow certain procedures during the investigation of a discrimination complaint with respect to alleged discriminating officials. See FPM Letter 713-42. Generally, the alleged discriminating officials should be interviewed and advised of any allegations of discrimination, be allowed the opportunity to respond to charges or allegations, be allowed to have a representative present when giving testimony, and be given a copy of the agency's final decision on the complaint. However, there is nothing in the guidance contained in FPM Letter 713-42 which authorizes the hiring or reimbursement of fees charged by a private attorney who is representing an alleged discriminating official.

With respect to the grievance filed by Mr. Patterson, we know of no authority under which employees may be reimbursed for the fees of a private attorney in connection with filing a grievance. See 52 Comp. Gen. 859 (1973).

The only other authority for the payment of attorney fees is contained in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, October 13, 1978 (5 U.S.C. 1101 notes), which provides authority for the payment of attorney fees on (1) matters before the Merit Systems Protection Board, and (2) matters arising under the Back Pay Act.

Under the authority of 5 U.S.C. § 7701(g)(1) (Supp. III 1979), the Merit Systems Protection Board may award reasonable attorney fees under certain conditions to employees who prevail on appeals before the Board. Since Mr. Patterson's grievance was handled under agency grievance procedures and was not before the Merit

Systems Protection Board, his attorney fees cannot be paid under this authority.

The Civil Service Reform Act also amended the Back Pay Act, 5 U.S.C. § 5596, to provide for the payment of "reasonable attorney fees" related to an unjustified or unwarranted personnel action. 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979). However, the Back Pay Act refers to an unjustified or unwarranted personnel action "which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. § 5596(b)(1). The final regulations implementing the Back Pay Act also limit the payment of attorney fees to cases that led to the correction of personnel actions that resulted in withdrawal, reduction, or denial of all or part of the employee's pay, allowances, or differentials. See 46 FR 58271, 58276, December 1, 1981 (to appear in 5 CFR Part 550, Subpart H).

Since the letter of reprimand which was the subject of Mr. Patterson's grievance did not involve any withdrawal, reduction, or denial of pay or allowances, his grievance was not subject to the Back Pay Act, and his claim for attorney fees would not be allowable under that authority.

Accordingly, we conclude that there is no authority for the payment of Mr. Patterson's attorney fees.

[B-205059]

Contracts—Federal Supply Schedule—Purchases Elsewhere—Award Combining FSS and Non-FSS Items—Full FSS Coverage Determination—Missing Items' Significance

Where Federal Supply Schedule (FFS) contractor had all but one of the items required by the contracting agency on its FSS contract and the missing item was not of major importance or its price a significant portion of the contractor's overall price, the contractor had, in effect, 100-percent FSS coverage and should have received the award. However, in view of the contracting officer's good-faith determination to award the order to another FSS contractor and the fact that the delivery order has already been filled, no corrective action is recommended. B-204565, March 9, 1982, distinguished.

Contracts—Federal Supply Schedule—Purchases Elsewhere—Award Combining FSS and Non-FSS Items—Full FSS Coverage Determination—Non-Mandatory Accessory Items

Protester's claim of greater FSS coverage than awardee under second solicitation is incorrect. Although protester had required accessory item on its FSS contract, item is not considered part of mandatory Federal Supply Schedule. Therefore, protester and awardee had identical FSS coverage, and award was properly made to awardee as contractor with lowest aggregate price for FSS items and one open market item.

Matter of: Rack and Stanley, May 25, 1982:

Stanley-Vidmar, Inc. (Stanley), protests the award of Delivery Order Nos. DAKF03-81-F-C969 (C969) and DAKF03-81-F-E228 (E228) to Rack Engineering Company (Rack) under Federal Supply Schedule (FSS) contract No. GS-00S-20179. The orders were for storage cabinets and were issued by the Department of the Army (Army), Fort Ord, California.

We find no basis to disturb the awards made in this instance.

Delivery Order C969 was for two sets of "modular high density storage" cabinets, each set consisting of several individual items to be of the same manufacture. At the time the Army determined it needed this requirement, new, multiple-award FSS contracts had just been awarded to Stanley, Rack and Lista International. Since none of the three had available at that time its FSS catalog and price list, the contracting officer decided that the most efficient way of obtaining prices was to issue a request for quotations.

All three contractors responded, and Lista International offered the lowest aggregate price. The Army, however, found Lista International's cabinets to be too small. It therefore decided to purchase the equipment from the next low offeror, Rack, at a total price of $16,919.62. Of the items needed, Rack was missing two from its FSS contract (stack top and labels) and Stanley was missing one (labels). Both contractors, however, quoted prices for all required items.

According to the Army, the contracting officer was unaware that Rack did not have all the required items on its schedule. This was due—as indicated above—to the fact that FSS catalog and price lists were not available at the time the contracting officer was evaluating the quotations. Therefore, when the contracting officer made the award to Rack, she did so under the belief that Rack was not only the low offeror, but also had 100-percent FSS coverage.

In view of the contracting officer's good-faith determination and also the fact that the delivery order has already been filled, we make no recommendation for corrective action. However, we wish to point out that, if the contracting officer had been aware of all the facts at the time of her evaluation, Rack should not have been automatically considered for the award.

In *Stanley and Rack*, B-204565, March 9, 1982, 82-1 CPD 217, we found that there is no regulation or case which requires that award must be made to the contractor with the greatest FSS coverage where FSS and non-FSS items are combined in a single procurement. In such as situation, the contracting agency may properly make the award to the company offering the lowest aggregate price. However, the present case can be distinguished from *Stanley and Rack*. Stanley's only missing item was "labels," which Stanley had listed as $14.08 out of a total price of $17,751.57. Since this item was not of major importance or its price a significant portion of the overall price, the general rule of *Stanley and Rack* is not applicable. Stanley, in effect, had 100-percent FSS coverage and should have been given the award unless the Army was able to obtain a waiver from the General Services Administration (GSA). Without such a waiver, the Army had no basis for making the award to Rack.

Delivery Order E228 was for 81 sets of a "modular high density storage system" which would be stored on the back of trucks. Because these cabinets would be subjected to a certain amount of rough treatment, the Army also needed "shock bars" furnished along with the other components. Stanley's FSS coverage included the shock bar. Rack's coverage, however, included everything except the shock bar. The Army found that it could purchase the entire requirement from Stanley's contract for $71,105.85. In contrast, the Army was required to request a separate unit price from Rack for the shock bar. Rack quoted a price of $105.98 per shock bar, making its total price (FSS items plus the required number of shock bars) $67,227.59.

The Army contracting personnel were apparently confused over how they should go about making the award. The contracting officer, therefore, requested guidance from GSA. The contracting officer's memo of her conversation with a GSA employee who furnished her guidance reads, as follows:

> [The employee] stated I could award on low aggregate basis since shock bar was integral part or accessory to cabinet. * * *
>
> [The employee] called on September 29, 1981, and stated his statement * * * was misunderstood and decision for award must be made by the contracting officer.

The Army then decided to treat the shock bar as a nonscheduled, nonmandatory item and to make an award on the basis of low aggregate price—in other words, to Rack—with the shock bar being considered awarded on an open-market basis.

Stanley argues that the shock bar, by the Army's own admission, is an intergral part of the cabinet system and, therefore, cannot be considered an "option" in the sense that contractors were free to omit it from their quotations for these orders. Moreover, Stanley argues that the fact that other contractors, such as Rack, did not put the shock bar in their FSS contracts did not make the item a "non-scheduled, non-mandatory item" for a contractor like Stanley who does in fact include that item on its FSS contract. In Stanley's opinion, it has 100-percent FSS coverage and, since the FSS class in question is mandatory on the Department of Defense, the Army had no alternative but to award the contract to Stanley.

The basis for Stanley's claim of 100-percent coverage is the fact that it has the shock bar on its FSS contract—and other FSS contractors, for example, Rack, do not. Stanley appears to argue that, once any contractor offers an accessory item, that item becomes as much a part of a mandatory schedule as those items GSA has specifically required to be priced for inclusion on FSS contracts.

We do not agree. Stanley effectively admits that GSA did not require the inclusion of the shock bar as part of the mandatory schedule to be priced when FSS proposals for these storage cabinets were originally solicited. Consequently, it is irrelevant, in our view, that Stanley included the shock bar as part of its proposal and that, as a result, the shock bar is present in Stanley's FSS contract. Stanley's unilateral action cannot raise the shock bar to the status of a mandatory schedule item when GSA did not consider the shock bar to be mandatory at the time proposals were solicited. Therefore, both Stanley and Rack had identical FSS coverage for the mandatory items: namely, all items except for the shock bar. The Army was then free to treat the shock bar as an open-market item. Under these circumstances, award to Rack as the firm with the low aggregate price was proper.

We sustain the protest in part and deny it in part. But as indicated above, we find no basis to recommend any corrective action.

[B-207098]

Contracts—Protests—Interested Party Requirement—Air Controllers' Strike—Participant's Status—Solicitation Provision Prohibiting Employment

Former air controller who participated in strike against the Federal Government is not an interested party to protest a solicitation provision prohibiting contractor from employing such former Federal employees.

Contracts—Injunctive Relief—Not Available Through General Accounting Office

General Accounting Office does not have authority to restrain award of Federal contracts.

Matter of: Keith Donaldson, May 25, 1982:

Keith Donaldson protests the provision contained in invitation for bids No. F41687-82-B-0008 issued by Bergstrom Air Force Base, Texas, and request for proposals No. F30637-82-R-0001 issued by Griffiss Air Force Base, New York, for air controller and other services, prohibiting the contractor from employing former air controllers who participated in the August 3, 1981 strike against the Federal Government. For the following reasons, we will not consider the protest on the merits.

Donaldson, speaking as an individual who has been denied the opportunity to seek employment, complains that the solicitation restriction constitutes black-listing in violation of law. Donaldson further asserts that various legal proceedings have been instituted challenging this employment prohibition and requests that we prevent the award of Federal contracts containing this or similar restrictions until such time as a decision is rendered.

Our Bid Protest Procedures require that protests be filed by "interested" parties. 4 C.F.R. § 21.1(a) (1981). Determining whether a particular party is interested for protest purposes involves consideration of the party's status in relation to the procurement. *Die Mesh Corporation,* 58 Comp. Gen. 111 (1978), 78-2 CPD 374.

As a general rule, the interests involved in whether the award of a contract is proper are adequately protected by limiting the class of parties eligible to protest to disappointed bidders or offerors. *Die Mesh Corporation, supra.* Where, however, the stated interest in the procurement has been sufficiently compelling, we have considered protests by labor unions and civic, trade and parents associations. See *Falcon Electric Company, Inc.*, B-199080, April 9, 1981, 81-1 CPD 271.

On the other hand, it is not enough merely to be an individual employee of a disappointed bidder or offeror, *Dale Chlouber*, B-190638, December 20, 1977, 77-2 CPD 484; a concerned citizen, *Patti R. Whiting*, B-187286, September 29, 1976, 76-2 CPD 298; or a union which believes that its members might be employed by the successful contractor if the work were open to competition, *Marine Engineers Beneficial Association; Seafarers International Union*, 60 Comp. Gen. 102 (1980), 80-2 CPD 418.

Donaldson does not assert that he is interested in competing for the contracts and restricted from doing so by the challenged provision. Rather, he is apparently concerned about the loss of employment opportunities and about the legality of the Government's dismissal of the striking air controllers. In this regard, Donaldson advises that the Merit Systems Protection Board is currently hearing individual dismissal cases and that the Federal Labor Relations Authority has been notified of this circumstance.

Under the circumstances, we believe the major substantive issue of concern to Donaldson—the dismissals—is under consideration by the appropriate forums and is not a matter for consideration under our Bid Protest Procedures. Moreover, as indicated above, one who seeks an opportunity for new or continued employment, which is dependent upon a particular company's receiving a Government contract, is not an interested party to protest since the interests to be protected with respect to procurement-related issues can best be protected by those who would seek to compete for the contracts involved. *Marine Engineers Beneficial Ass'n et al., supra.* In other words, had a company interested in competing for one of these contracts filed a timely protest alleging the impropriety or illegality of the provision Donaldson complains of, we would have considered it. Donaldson, however, does not qualify as an interested party and therefore we will not consider the protest.

Donaldson also requests that the Comptroller General "withdraw, cancel or void" all Government contracts containing this employment prohibition until such time as the matters disputed by the former air controllers are resolved. This Office does not possess the authority to restrain the award of Federal contracts, see *Tymshare Inc.*, B-186858, January 23, 1978, 78-1 CPD 56, and to the extent that this request contemplates injunctive relief, we note that the proper forum for seeking this would be the Federal courts, not our Office. *Tymshare Inc., supra.*

The protest is dismissed.

[B-195347, B-195348]

Departments and Establishments—Services Between—Reimbursement—Merit Systems Protection Board Services—Travel Expenses of Hearing Officers

In view of the Merit Systems Protection Board's (MSPB) statutory responsibility to provide appeals hearings, and absent any specific authority to the contrary, there is no authority for the MSPB to accept reimbursement for the travel expenses of its hearing officers, nor is there any authority for the employing agencies to use their appropriations for this purpose. 59 Comp. Gen. 415 (1980), which held that MSPB may not accept payments from other agencies or augment its appropriations by accepting donations from employees or unions, is affirmed.

Matter of: Reconsideration of MSPB's Authority To Accept Reimbursement for Hearing Officers Travel Expenses, May 26, 1982:

We have been asked to reconsider our decision at 59 Comp. Gen. 415 (1980). In that decision, we held that the Merit Systems Protection Board (MSPB) is prohibited from accepting reimbursement from Federal agencies, employees, or employees' unions for the travel expenses of MSPB hearing officers. For the reasons discussed below, we conclude that 59 Comp. Gen. 415 must be upheld.

By statute, the Merit Systems Protection Board is responsible for the adjudication of Federal employees' appeals from agency personnel actions. The Civil Service Reform Act of 1978 authorizes MSPB, as successor to the Civil Service Commission, to hear, adjudicate, or provide for the hearing or adjudication of all matters within its jurisdiction (5 U.S.C. § 1205(a)(1)). Further, 5 U.S.C. § 7701 provides that a Federal employee or applicant for Federal employment may submit an appeal to MSPB from any action appealable to the Board under any law, rule, or regulation, and that such an appellant has a right to a hearing.

The location of these hearings is not specified by statute. In our 1980 decision, we noted that the Board, under its general authority to prescribe regulations necessary for the performance of its functions (5 U.S.C. § 1205(g)), appears to have inherent authority to determine where hearings are to be held. 59 Comp. Gen. at 416.

It has been MSPB's preferred practice to conduct appeals hearings in the appellant's home area. Because the employing agency and witnesses for both the appellant and the agency are typically located in the same general area, the entire appeals process is, quite logically, less time consuming and more cost-efficient if conducted in that area.

However, despite the obvious practical advantages to the Government as a whole, MSPB has not always been able to afford the expense of sending its hearing officers to the employee/appellant's home area. This was the case in 1979 when, due to a reduction in available funds, the Board first required that all appeals were to be heard at MSPB field offices. In an attempt to continue the practice of holding hearings in the appellant's home area, various employing agencies, employees and their unions offered to pay the travel expenses of MSPB hearing officers. The Board then requested our decision on the legality of accepting reimbursement from these sources.

In 59 Comp. Gen. 415, we ruled that MSPB could not legally accept reimbursement for hearing officers' travel expenses either from employing agencies, or from employees or their unions. The reasons for our decision were as follows:

(1) Reimbursement by the employing agency may not be treated as a transaction authorized by the Economy Act, 31 U.S.C. § 686, because conducting the hearings is a statutory function of MSPB for which it receives appropriations.

(2) Reimbursement by an employing agency would constitute an unauthorized transfer of appropriations in violation of 31 U.S.C. § 628-1.

(3) Acceptance of funds from an employee or union, without specific statutory authority, would be an improper augmentation of MSPB's appropriations.

Late in 1979, the Board was again able to bear the cost of sending its hearing officers to appellants' home areas and, for a brief period, the question of accepting reimbursement was moot. However, in December 1981, Congress passed a continuing resolution which reduced MSPB's funding by 16 percent. Because of this budget cut the Board eliminated travel for its hearing officers, and again ordered that all appeals be heard at MSPB field offices.

As a result, we have received formal requests from MSPB, the Department of Agriculture, the Internal Revenue Service, and a Member of Congress, plus informal requests from several other agencies, that we reconsider our earlier decision. All of these parties have stressed that the cost to the Government as a whole is far less if a single hearing officer travels to an appellant's home area than if the employing agency sends its personnel and witnesses (usually several persons) to an MSPB field office. In addition, MSPB notes that because of the recent increase in reduction-in-force actions the number of appeals the Board now hears has and will continue to increase, thereby multiplying the overall cost increase to the Government. MSPB also states financial hardship caused by the increased travel costs for both employee/appellants and employing agencies has resulted in continuances and other delays. In the cases of appellants who ultimately prevail this will mean larger back-pay awards, further increasing the Government's cost. Finally, MSPB (and others) suggest that is anomalous to construe the "Economy Act" to prohibit reimbursement, when to do so results in a substantial increase in the Government-wide cost of appeals hearings.

In addition, we have been advised that lawsuits have been filed challenging MSPB's action in restricting hearings to MSPB field offices. Two of the cases are *National Treasury Employees Union* v. *MSPB,* U.S. District Court for the District of Columbia, Civil Action No. 82-0588, and *Gloria P. Sanchez Mariani* v. *Herbert E. Ellingwood et al.,* U.S. District Court for the District of Puerto Rico. While, as a matter of policy, we normally do not render decisions matters in litigation, this policy is inapplicable here because the issue we are deciding is different from the issue before the courts. The courts are being asked to decide whether MSPB may properly restrict hearing sites to its own field offices. Our issue is merely the source of funds to pay the travel expenses of hearing officers if MSPB, by choice or otherwise, conducts hearings at some other location. Accordingly, we will proceed to consider the merits of the requests for reconsideration.

The statute popularly known as the "Economy Act" (31 U.S.C. § 686) authorizes the transfer of appropriated funds from one agency to another as reimbursement for provided services. The purpose of 31 U.S.C. § 686 is to allow Federal agencies to benefit from the expertise of other agencies. Where one agency is in a unique position to provide a service in a more effective or cost-efficient manner, other agencies in need of the service may take advantage of this ability by reimbursing the providing agency under a formal agreement. In this way the Government uses the specialized talents and experience of its various departments to the best advantage. The economies which result are the source of the statute's popular name.

The Act does not, however, authorize a Federal agency to reimburse another agency for services which the latter is required by law to provide and for which, as part of the providing agency's mission, it receives appropriations. 16 Comp. Gen. 333 (1936); 17 *id.* 728 (1938); 33 *id.* 27 (1953); B-192875; January 15, 1980. A contrary interpretation would compromise the basic integrity of the appropriations process itself. Under the doctrine of separation of powers, Congress, and Congress alone has the "power of the purse." When Congress makes an appropriation, it also establishes an authorized program level. To permit an agency to operate beyond the level that it can finance under its appropriation with funds derived from another source would be a usurpation of the congressional prerogative.

In this instance MSPB is required by law to provide appeals hearings in cases under its jurisdiction, and it receives appropriations for this purpose. The fact that the Board's legislation does not require that hearing officers travel to an appellant's home area does not make providing a hearing officer (wherever MSPB determines an appeal will be heard) any less a part of MSPB's statutory mission. Nor does the fact that there is a Government-wide savings when the hearing officer travels to the hearing, as opposed to when all necessary parties travel to the hearing officer, provide

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Economy Act authority for the transfer of funds from an employing agency to MSPB.

Further, the appeals hearing is not a "service" which MSPB provides to the employing agency as contemplated by the Economy Act. Thus, the expenses of the hearing officer (salary and any related travel expenses) are not expenses of providing a service to the employing agency and are not the proper subject of an Economy Act transaction. The expenses are nothing more than administrative expenses incurred by MSPB in carrying out its statutory function.

An additional factor, not mentioned in 59 Comp. Gen. 415, is 31 U.S.C. § 628, which restricts the use of appropriated funds to the purposes for which they were appropriated. Paying the expenses of MSPB hearing officers is not a purpose for which other agencies receive appropriations, nor can it be viewed as a "necessary expense" of carrying out the objects for which *the employing agency's* appropriations are made. Thus, not only is reimbursement by the employing agency unauthorized under the Economy Act, it would also violate 31 U.S.C. § 628. In other words, there is no authority for MSPB to receive the reimbursement, and there is equally no authority for the employing agency to make the expenditure. See in this connection B-143536, August 15, 1960, to the effect that 31 U.S.C. § 628 is not overcome merely because the proposed expenditure would result in substantial savings to the Government.

While we recognize that it is more efficient and economical for the Government as a whole if MSPB hearing officers travel to appellants' home areas, we are aware of no authority for the Board to accept reimbursement from other Federal agencies, or from employees or their unions. It is for Congress, through the appropriations process, to determine the amount of funds available to MSPB to carry out its mission, including travel, or to provide specific authority for the acceptance of funds from outside sources.

MSPB could seek statutory authority to accept donations to supplement its appropriations. In this way, it could accept contributions from private sources for the travel expenses of its hearing officers or for other purposes. 49 Comp. Gen. 572 (1970); 46 *id.* 689 (1967); 36 *id.* 268 (1956). MSPB could also seek specific legislative authority to hold hearings at the employees' home sites on a reimbursable basis. On balance, however, we think it is preferable for the Congress to provide adequate funding to the Board. Not only would this be most economical for the Government, it would avoid potential inequities that might result from the facts that not all agencies can equally afford reimbursement, not all employees belong to labor unions, and reliance on donations would provide an undependable and possibly inadequate funding source.

In sum, while we are in full sympathy with the concerns of those who have sought reconsideration of 59 Comp. Gen. 415, what we are faced with here is essentially a funding problem. The inadequacy of MSPB's appropriations to enable it to carry out its function in a manner most economical to the Government as a whole does not change the law. Accordingly, we must affirm our 1980 decision.

[B-205969.2, B-205969.3]

Bids—Acceptance Time Limitation—Bids Offering Different Acceptance Periods—Shorter Periods—Extension Propriety—Protest Determination Effect

The rule, expressed in recent General Accounting Office decisions, that a bidder offering less than the requested bid acceptance period cannot extend that period to accept award when others have offered the requested period does not apply where an award in fact was made to another firm within the shorter bid acceptance period and the bidder that offered the shorter period filed a timely and successful protest that it should have received the contract. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished.

Bids—Invitation for Bids—Cancellation—Reinstatement—Price Comparison With Invalid Resolicitation—Auction Prohibition

It would be fundamentally unfair and tantamount to sanctioning a prohibited auction for an agency to declare unreasonably high the low bid under a reinstated solicitation based on a comparison with the low bid under a resolicitation where a bidding misrepresentation by the resolicitation's low bidder in connection with the first procurement created the auction situation.

Bids—Invitation for Bids—Cancellation—Reinstatement—Price Comparison With Invalid Resolicitation—Award Propriety

A procuring agency properly may make award to a bidder at the price it bid under a reinstated IFB despite the fact that that bidder submitted a lower bid under an invalid resolicitation.

Bids—Acceptance Time Limitation—Bids Offering Different Acceptance Periods—Shorter Periods—Responsiveness of Bid—Solicitation Provisions

A bidder can offer an acceptance period that is shorter than the one requested and still be responsive to a solicitation that does not mandate a minimum acceptance period, although the bidder runs the risk that award will not be made before the shorter period expires.

Matter of: Professional Materials Handling Co., Inc.—Reconsideration, May 28, 1982:

The Defense Logistics Agency (DLA) and Ludlow Sales & Service have requested reconsideration of our decision *Professional Materials Handling Co., Inc.*, B-205969, April 2, 1982, 82-1 CPD 297 (hereinafter *Professional*), in which we sustained *Professional's* protest against the rejection of its bid under DLA invitation for bids (IFB) No. 700-81-B-2138 for a forklift truck. We recommended that DLA reinstate the IFB, which had been canceled in favor of resolicitation, and make award to *Professional*. To implement this remedy, we recommended that DLA first terminate contract No. DLA-700-82-C-8097 that it had awarded to Ludlow Sales under the resolicitation.

We affirm our decision and recommendations.

Background

Professional's bid of $16,759 under the IFB offered an acceptance period of 30 calendar days after bid opening, instead of the 60-calendar day period requested by the IFB and offered by other bidders. Ludlow Sales offered a truck for $17,200, and represented that 80 percent of the contract costs would be incurred in a labor surplus area (LSA). That representation made the firm eligible for a five percent preference in bid evaluation, which in turn caused its bid to be evaluated as lower than *Professional's*. DLA awarded the contract to Ludlow Sales 23 days after bid opening.

Professional then protested successfully to DLA that the awardee's bid in fact should not have been afforded the bid evaluation preference. DLA therefore sustained the protest and canceled the Ludlow Sales contract. But since *Professional's* 30-day bid acceptance period had expired by that time, DLA did not allow *Professional* to revive its bid, and instead canceled the IFB. At that point, *Professional* protested to our Office against the rejection of its bid. DLA subsequently resolicited the requirement and awarded another contract to Ludlow Sales, the low bidder at $14,860.

Bases for Prior Decision

In *Professional*, we found DLA's determination that it was precluded from accepting *Professional's* bid under the IFB to be incorrect. DLA based its determination on its interpretation and application of recent decisions by our Office that held, in pertinent part, that a bidder offering less than the requested acceptance period cannot be allowed to extend that period either before or after its expiration, where other bidders offered the longer requested acceptance period. *Introl Corporation*, B-206012, February 24, 1982, 82-1 CPD 164; *Ramal Industries, Inc*,. 60 Comp. Gen. 666 (1981), 81-2 CPD 177, *aff'd.* B-202961.2, B-202961.3, November 12, 1981, 81-2 CPD 400.

The rationale for our holdings in *Introl* and *Ramal* is that the bidder offering less than the requested bid acceptance period has not assumed as great a risk of price or market fluctuations as have the firms that offered the requested acceptance period. Thus, allowing the bidder to decide whether it desires to extend the bid or whether to let it expire, subject to the dictates of its own particular interests, would be prejudicial to the bidders who offered the requested acceptance period and who therefore are bound by their bid prices for the entire period.

In *Professional,* however, we concluded that the facts clearly distinguished that situation from those in *Introl* and *Ramal.* We stated:

> We do not believe this [*Introl/Ramal*] rationale applies to a bidder which files a timely protest against award of the contract to another firm where the contract was awarded within the protester's bid acceptance period. The bidder in such a case is not attempting to extend its bid acceptance period after minimizing its exposure by initially offering a short acceptance period. Rather, by filing a protest against an award that was made within its offered acceptance time, the bidder is asserting that it was entitled to the award within that time and that it still seeks the award. Thus, unlike the bidder which offers a shorter period than its competitors, and then seeks to extend it when it would be advantageous for it to do so, the protester does no more than seek to correct a perceived impropriety that caused its bid to be rejected rather than accepted within the offered acceptance period. Under the circumstances, we believe the filing of a protest against the award that was made within the 30-day acceptance period offered here had the effect of tolling expiration of the period. * * * In such a situation, of course, the bidder is not automatically entitled to award; that entitlement depends on the outcome of the protest, over which the protester has little direct control.

DLA's Request for Reconsideration

Because DLA rejected *Professional's* bid based on its interpretation of the holdings in *Introl* and *Ramal,* the thrust of its request for reconsideration is that the fact situation in *Professional* was not significantly different from those in *Introl* and *Ramal* to call for cancellation of the contract awarded on resolicitation. DLA suggests that a number of recent decisions by this Office on the subject of bid acceptance periods—*Introl, Ramal, Esko & Young, Inc.,* 61 Comp. Gen. 192 (1982), 82-1 CPD 5, and *Professional*—have caused confusion among the contracting agencies and could lead to problems in the future. DLA questions, for example, whether the *Professional* rule would apply to an untimely protest, or a timely protest filed after the expiration of the protester's short acceptance period.

We believe that the cited decisions are sufficiently clear so that they reasonably can be applied by agencies seeking guidance in appropriate fact situations. As stated above, in *Introl* and *Ramal* we held that when a bidder accepts the risk of losing a contract by offering an acceptance period less than that contemplated by the Government as necessary to complete the selection process, although the bid is responsive it cannot be extended after expiration if other firms offered the requested bid acceptance period. The reason is, essentially, that the bidder minimized its risk and can control the Government's ability to accept the bid to the prejudice of firms that offered the requested period. *Esko & Young* simply held that in the single bid situation, where there are no other bidders that would be prejudiced by the extension of the bid, the *Introl/Ramal* rationale obviously is inapposite, so that the bid can be extended. *Professional* merely holds that if a bid offers less than the requested bid acceptance period, and the agency indeed awards within the shorter period, the bid's expiration should not estop the

Government, in response to a timely protest, from correcting an erroneous award and awarding the bidder in issue the contract that it should have received while its bid was viable.

Regarding DLA's concern whether an untimely protest would require application of the *Professional* rule, *Professional* clearly states that the protest must have been filed in a timely manner.[1] The *Professional* rule also would apply to a situation where an ultimately successful protest against an award that was made within the protester's shorter acceptance period is timely filed, but after the expiration of the protester's shorter acceptance period. The award within the shorter acceptance period, and the timely protest, are the factors that toll the expiration of the successful protester's acceptance period.

DLA also suggests that due to the large number of protest-like complaints it receives, only protests to our Office, and not those to a contracting agency, should invoke application of *Professional*. We believe, however, that as long as a firm indicates a clear intent, pursuant to agency and General Accounting Office bid protest procedures, to protest a perceived deficiency in the selection process, and is successful, the deficiency should be corrected under the rationale of *Professional*.

Price Unreasonableness

DLA specifically disagrees with our recommendation that the $14,860 contract with Ludlow Sales be terminated and award in the amount of $16,759 be made to *Professional* under the reinstated IFB. DLA states:

> In light of the prices received on resolicitation, the contracting officer believes that Professional Materials' [$16,759 bid under the IFB] is unreasonable. Therefore, the contracting officer does not believe an award should be made to Professional Materials. Furthermore, the contracting officer believes that an award to Professional Materials at $16,579 would be improper when the Government has another bid from Professional Materials [under the resolicitation] of only $16,459.

We believe that it would be entirely unfair to sanction the award to Ludlow Sales under the resolicitation on the basis argued by DLA. It must be expected that whenever bid prices are exposed and award made to the wrong firm,[2] so that the contract subsequently

[1] DLA submits hat *Professional's* protest against the initial award to Ludlow Sales was not filed in a timely manner because *Professional* allegedly had knowledge of its bases for protest at bid opening, yet did not file a protest to DLA until nearly a month thereafter. There is no reason to believe, however, that *Professional* knew or should have known that Ludlow Sales should have been found ineligible for the LSA preference until shortly before the protest was filed. Moreover, even if *Professional* did know, the firm was entitled to assume that DLA would not make an improper award. The protest's timeliness thus must be measured from the time *Professional* learned that DLA intended to award the contract to Ludlow Sales, not from bid opening. (The protest was filed two working days after the award.) *See International Harvester Company*, 59 Comp. Gen. 409 (1979). 79-1 CPD 359.

[2] We note here that DLA was perfectly willing to award Ludlow Sales the contract under the original IFB at $17,200.

is cancelled and the requirement resolicited, the resolicitation will result in lower bids—the competitors have seen the price below which they must bid in order to secure the contract. The problem in this case essentially resulted from Ludlow Sales' misrepresentation in its bid under the initial IFB that the forklift truck it was offering was supplied by an LSA concern, which caused Ludlow Sales to be evaluated as the low bidder. This representation, while it may have been innocent, coupled with DLA's failure to investigate adequately before awarding to the firm, resulted in *Professional's* losing the contract that it should have won. In our view, rewarding Ludlow Sales with the contract on resolicitation because it was able to take advantage of the auction situation that it created would undermine the integrity of the competitive bidding system.

Thus, we believe that any DLA determination that *Professional's* bid under the initial IFB is unreasonably high, based on a comparison with bids received under the resolicitation after disclosure of bid prices under the original IFB, would be inappropriate in these circumstances.

Finally, we find it irrelevant that *Professional* bid $200 less under the resolicitation than it did under the initial solicitation, since *Professional* in fact was entitled to the contract at the price bid initially ($16,759).

Ludlow Sales Request For Reconsideration

Ludlow Sales suggests that *Professional* cannot receive award under the reinstated IFB because its bid thereunder was nonresponsive in offering less than a 60-day bid acceptance period. The IFB, however, did not mandate a minimum acceptance period, but merely requested a 60-day acceptance period. We have held that a bidder can offer an acceptance period that is shorter than the one requested and still be responsive to a solicitation which does not mandate a minimum acceptance period although the bidder runs the risk that award will not be made before the shorter period expires. See *Introl, supra.*

Finally, Ludlow Sales is concerned that the Government will have to pay approximately $2,000 more for the required forklift truck by awarding to *Professional* under the reinstated IFB. As discussed above, however, we believe that to allow the existing award to Ludlow Sales to stand would undermine the integrity of the system of competitive bidding, despite the immediate advantage the Government may gain by a lower price in this particular procurement. We note here that DLA suspended performance under the resolicitation contract pending our decision so that termination for convenience could be accomplished easily.

Our prior decision is affirmed.

[B-207112]

General Accounting Office—Jurisdiction—Cooperative Agreements—Complaints Against Agency Use—Criteria For Review

A complaint that the Department of Energy's use of a cooperative agreement, rather than a procurement, was improper is dismissed because the complainant has failed to establish that the project in question should have been the subject of a procurement.

Matter of: Electronic Space Systems Corporation, May 28, 1982:

On April 14, 1982, Electronic Space Systems Corporation (ESSCO) complained to our Office about the Department of Energy's (DOE) intent to enter into a cooperative agreement with another company, Advanco Corporation (Advanco), for a research project. We dismiss ESSCO's complaint.

As ESSCO describes it, this effort originated with the issuance by DOE of program opportunity notice (PON) No. DE-PN04-81AL16333(PON) for the design, fabrication, test and performance evaluation of a prototype solar parabolic dish/Stirling engine system module described in detail in the PON. (Oversimplified, a Stirling engine produces power in much the same manner as gasoline or diesel engines, except that in a Stirling engine heat is applied to the cylinders externally rather than by burning a fuel, such as gasoline, inside the cylinders. A parabolic dish or "concentrator" can focus the sun's rays into a small area to produce the heat needed to operate the Stirling engine. The two devices may be combined, for instance, as a stand-alone system to run an electric generator.) ESSCO also states that in reviewing the PON, it noted that the P-40 Stirling engine, manufactured by United Stirling, Inc. (United), was "frequently mentioned" in section "G" of the PON. We have examined the PON and find that section "G," to which ESSCO refers, provides background technical information on at least five different Stirling engines.

ESSCO indicates that its efforts to link up with United in the proposal effort were unsuccessful because United had an exclusive commitment to another proposer, which we presume to be Advanco. ESSCO, therefore, provided information in its proposal on other Stirling engines and proposed to make an extensive evaluation of all Stirling engines after the agreement was completed. We have been informally advised that the solicitation closed in August 1981 and that DOE received five proposals. At a debriefing in April 1982, ESSCO was advised that it was not selected because of the inadequacy of the Stirling engine portion of its proposal.

ESSCO asserts, in effect, that the United Stirling-Advanco exclusive arrangement and an alleged DOE preference for the United Stirling engine resulted in a *de facto* sole source which would not have been justifiable under the procurement regulations. ESSCO contends that DOE conducted this effort as a cooperative agreement rather than a procurement in an improper effort to avoid that statutory and regulatory requirements for competition which govern Federal procurements.

We have stated that we will consider an objection to an agency's use of a cooperative agreement only if there appears to be a conflict of interest, not alleged here, or when there is a showing that the agency is using the cooperative agreement to avoid the statutory and regulatory requirements for competition which would apply to a procurement. *Renewable Energy, Inc.*, B-203149, June 5, 1981, 81-1 CPD 451; *Del Manufacturing Company*, B-200048, May 20, 1981, 81-1 CPD 390. At a minimum, however, this latter showing requires a clear demonstration that the particular project or undertaking which is the subject of the cooperative agreement should properly have been the subject of a procurement. Based on our reading of ESSCO's initial filings with our Office, we conclude that ESSCO has failed to satisfy this threshold requirement.

ESSCO relies for its conclusion that this should have been a procurement on the assertion that a stand-alone electrical generating system would be very useful at remote military and weather stations and that this direct benefit falls within the definition of "procurement under the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, 41 U.S.C. §§ 501, *et seq.* (1976 Ed., Supp. III), as the acquisition of property and services for the direct benefit of the Government. (*See* 41 U.S.C. § 503(a).) ESSCO also points to the similarity between the language and format used in this PON and in DOE solicitations for negotiated procurements, such as references to "proposals," the establishment of one person as the point of contact, and the use of point scoring in the evaluation of proposals, as reflecting the intent to conduct a procurement.

Initially, we do not agree with ESSCO's apparent position that "benefit" is dispositive of the question of whether a contract, grant or cooperative agreement should be used in any particular instance. In this regard, we note parenthetically that even if we agree with ESSCO that stand-alone electrical generating equipment might be useful to the Government in many applications, there are as many instances in which such devices might be of benefit to private and commercial interests, particularly in remote areas for such commonly identifiable activities as oil exploration or logging. Rather than rely on "benefit," our Office has expressed the position that whether any specific project or undertaking should be accomplished through a procurement, grant or cooperative agreement should be determined by the purpose of the proposed activity—that is, whether it is the Government's principal purpose to acquire the services or goods in question, or whether it is the Government's purpose to stimulate or support their production. (This assumes, of course, that the agency has the statutory authority to enter into the type of relationship in question.) See "Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements," Report of the Comptroller General, GGD-81-88, September 4, 1981. The Federal Grant and Cooperative Agreement Act of 1977, *supra*, gives the agency considerable discretion in determining which mechanism to use to carry out the project or activity in question. This Office will not question the exercise of that discretion unless it appears that the agency disregarded the statutory and regulatory guidance provided to assist in making these determinations or if we find that the agency lacked authority to enter into a particular assistance relationship. None of these factors are applicable here.

Under the Solar Energy Research, Development and Demonstration Act of 1974, Pub. L. 93-473, 88 Stat. 1431, 42 U.S.C. § 5551, *et seq.* (1976), as modified by the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, August 4, 1977, DOE has the responsibility to conduct, support, and stimulate scientific, economic, social, and environmental research and studies on the beneficial uses of solar energy, 42 U.S.C. §§ 5555(b) (1), (2) and (3) (1976). We think it a fair summary to state that the purpose of these efforts is to promote the broad national interest rather than to satisfy a specific governmental need for a supply or service. 42 U.S.C. § 5551 (1976). The requisite statutory authority to enter into an assistance relationship is clearly present.

In our view, this PON reflects the broader support and stimulation purposes of the Solar Energy Research, Development and Demonstration Act of 1974, *supra,* rather than an intent to acquire services or technology, and, therefore, was correctly denominated a cooperative agreement. We note, for instance, that as described in the PON, the primary purpose of the project is:

> * * * to encourage firms who, in cooperation with the Government, will identify the market, design, assemble, and perform sufficient tests to establish the technical feasibility of a prototype dish-Stirling module for their early sales promotion. The ultimate goal of this project is the availability of a dish-Stirling module as a commercially available product in the 1984-1985 time frame. * * *

The specifications, sample statement of work, and other materials included with the PON, are consistent with this expressed purpose. In sum, it is our reading of the PON that its principal purpose is to encourage the development and early market entry of a dish/Stirling module rather than to support the conduct of a procurement. A cooperative agreement is an appropriate vehicle to accomplish this objective. We therefore have no reason to question the method that DOE selected to pursue this project.

Since ESSCO's initial filings with our Office, read in the light most favorable to ESSCO and without answer or rebuttal, fail to demonstrate that this project should have been conducted as a procurement, we conclude that the conditions under which we might consider ESSCO's complaint are absent. We therefore dismiss ESSCO's complaint.

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