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[B-198630]

General Accounting Office—Jurisdiction—Contracts—Disputes—Contract Disputes Act of 1978—Election Effect

Contractor under pre-March 1, 1979, contracts has filed "constructive change" claim originally made to contracting officer in March 1980.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

General Accounting Office—Jurisdiction—Contracts—Disputes—Under Disputes Clause—Fact Questions

Even though Army alleges that constructive change claim filed at GAO is time-barred, allegation does not entitle GAO to decide legal validity of defense. Fact remains that claim, on its face, is not for GAO's review since claim involves a question of fact; moreover, Armed Services Board of Contract Appeals (or Court of Claims) may ultimately decide legal validity of defense under all relevant factual circumstances.

Matter of: Freund Precision Inc., October 5, 1981:

Freund Precision, Inc. (Freund), has submitted a claim for losses allegedly incurred in the performance of Department of the Army contracts Nos. DAAA08-77-C-0035, DAAA08-78-C-0249, DAAA08-78-C-0321 and DAAA08-77-C-0085. These fixed-price contracts were awarded to Freund by the Army before March 1, 1979, for the supply of "gun shields and upper gun rotors."

By letter dated March 19, 1980, and received by the Army on March 27, 1980, Freund submitted a claim for costs of repairs and replacements required by the Army so that the gun shields would properly assemble on the Army's gun frames. According to Freund, the gun shields that it originally shipped met the basic drawing requirements contained in the contracts and "were not deficient in any way." Therefore, in Freund's opinion, the Army is responsible for the costs involved.

By letter dated April 21, 1980, the Chief of Adversary Proceedings Division in the Army's Office of Counsel responded to Freund's claim. The letter stated as follows:

> A review of the contracts indicates that final payments under contracts -0035 and -0085 were completed in 1978. Final payment under contract -0249 was made in March of 1979. The records also disclose that final payment under the last of your contracts, No. DAAA08-78-C-0321, was made on 25 March 1980.
>
> Although not stated as such in your letter, it is assumed that your claim for additional compensation is premised on the basis that a [constructive] change occurred due to drawing errors. Certain changes are, of course, compensable pursuant to the Changes clause of the contracts. However, your attention is called to the fact that the said clause provides that a claim for adjustment must be asserted within 30 days from the date of receipt by the contractor of the notification of change. The contracting officer, however, may receive and act upon any such claim asserted at any time prior to *final payment* under the contract.

Accordingly, final payment is a total bar to the assertion of any claim that you may have otherwise submitted.

Freund contends that Army's disclaimer of any obligation to pay simply because final payment has been made is "incorrect." Freund believes that it has every right to further compensation for these costs.

Under section 16 of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601–613 (Supp. III, 1979), a contractor who initiates a claim after the effective date (March 1, 1979) of the Contract Disputes Act with regard to a contract made before the effective date of the act may elect to have its claim considered under the act rather than under the disputes clause of its contract.

In order to permit the contractor to make an informed decision as to which alternative remedy is to be chosen, section 6(a) of the act requires the contracting officer to "inform the contractor of his rights as provided in this act" when a contractor makes a claim to the contracting officer "relating to a contract." A contractor's subsequent "conscious election" of one of the alternative remedies is final. *Cf. Tuttle/White Constructors, Inc.* v. *United States*, Court of Claims No. 205–80C, July 29, 1981, where the court held that a contractor who had made a conscious election to proceed under the disputes clause was foreclosed from later electing to proceed under the act.

If, under the circumstances, Freund has made a conscious election to proceed under the act, we may not consider the claim because consideration of the claim would provide the contractor with a forum it would otherwise not have under the act. See *Thurman Contracting Corporation*, B–196749, June 13, 1980, 80–1 CPD 415.

If, on the other hand, Freund has made a conscious election to proceed under the disputes clause of its contract, it is still our view that the claim is not for our consideration. Prior to the act, we would not decide a claim involving a disputed fact, as here. See *Consolidated Diesel Electric Company*, 56 Comp. Gen. 340, 343 (1977), 77–1 CPD 93. Specifically, the "Changes" clause in Freund's contracts makes the "[f]ailure to agree to any adjustment a dispute concerning a question of fact." Thus, the claim for a constructive change involves a question of fact for resolution by the authorities described in the disputes clause and not by our Office.

Although the Army has asserted that the claim is time-barred, it is not appropriate for our Office to decide the validity of the defense since the claim, on its face, is not for our decision. Moreover, the Armed Services Board of Contract Appeals (ASBCA) has decided that it may determine, under all the relevant factual circumstances involved, whether a claim for a constructive change is time-barred by the mere fact of final payment as claimed by the Army here. See *Adamation, Inc.*, ASBCA No. 22495, March 11, 1980, 80–1 BCA

14385. Ultimately, therefore, it may be appropriate for the Board (or the Court of Claims), not our Office, to decide the validity of the Army's defense to the present claim in deciding any possible appeal or suit that Freund may initiate.

Claim dismissed.

[B-199207]

Federal Communications Commission—Ship Radio Inspectors—Holiday *v.* Regular Overtime Compensation

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

Holidays—Created by Executive Order—Inspectional Services—Compensation Rate—Ship Radio Inspectors

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

Matter of: Donald W. Bogert and Joe E. Coleman—Holiday Pay—Federal Communications Commission—Ship Inspection Overtime, October 6, 1981:

Mr. Wayne B. Leshe, Chief Accountant, Federal Communications Commission, has requested an advance decision concerning two vouchers. The vouchers involve payments to Mr. Donald W. Bogert (Voucher No. 7906) and Mr. Joe E. Coleman (Voucher No. 7907) as employees of the Federal Communications Commission (FCC) for extra compensation—commonly referred to as "Ship Inspection Overtime"—for inspection of ships in accordance with the provisions of the Communications Act of 1934, 47 U.S.C. § 154(f)(3), and FCC regulations set out at 47 C.F.R. § 83.48 (1978), and 47 C.F.R. § 83.74 (1979).

Donald W. Bogert (Voucher No. 7906)

Mr. Bogert, an engineer with the FCC, was ordered to perform a ship inspection of a certain vessel on Saturday, November 11, 1978,

Veterans Day. Mr. Bogert accomplished this inspection on the appointed day at Baltimore, Maryland, between the hours of 1 p.m. and 4:30 p.m. On November 13, 1978, Mr. Bogert submitted a collection bill to the vessel's owner for the ship inspection in an amount equal to 2 days' pay. At the same time, Mr. Bogert submitted a claim to his agency for 2 days' pay for performing a ship inspection on a holiday in accordance with section 83.48(a)(4) of title 47, Code of Federal Regulations (1978).

On December 6, 1978, the Chief of the Enforcement Division of the Field Operations Bureau (Mr. Bogert's supervisor) rejected the collection bill and claims voucher. This action was based on a finding that, while November 11, 1978, was a "holiday" within the meaning of 47 U.S.C. § 154(f)(3), the provisions of 5 U.S.C. § 6103(b) require that a designated holiday that falls on a Saturday (such as the Veterans Day in question) be given to Federal employees on the preceding Friday. Thus, because Mr. Bogert received that preceding Friday as a holiday with pay he was not entitled to claim Saturday as a double holiday. The Division Chief instructed the Engineer-In-Charge of the Baltimore office to submit a request for regular overtime for Mr. Bogert for the hours worked on November 11, 1978.

Mr. Bogert did not accept this interpretation of the "Ship Inspection Overtime" provisions of 47 C.F.R. § 83.48(a)(4) (1978). Following subsequent review and rejection of his claim within his agency, Mr. Bogert's contention remains that he performed the ship inspection duties on November 11, and that date is a national holiday specifically listed in section 83.48(a)(4) of the 1978 edition of title 47, Code of Federal Regulations, and therefore 2 days' pay is the proper charge for the holiday work. Although Mr. Bogert's interpretation is arguable, we conclude that it is not meritorious.

Under 47 U.S.C. § 154(f)(3) and 47 C.F.R. § 83.48(a)(9) (1978) (applicable at the time Mr. Bogert performed the ship inspection), for any authorized services performed on Sundays and holidays, totaling not more than 8 hours, extra compensation is payable equivalent to 2 days' pay in addition to any regular compensation for such days. The term "holiday" is explained in 47 C.F.R. § 83.48(a)(4) as follows:

> * * * The term "holiday" shall include only national holidays, viz. January 1, February 22, May 30, July 4, the first Monday in September, November 11, Thanksgiving Day (when designated by the President), December 25, and such other days as may be designated national holidays by the President or Congress.

In our opinion, the term "holiday" as used in 47 U.S.C. § 154(f)(3) and the implementing regulation quoted above must be construed in the

light of the provisions of 5 U.S.C. § 6103 (1976) which specifically establishes legal public holidays. Section 6103(b) specifically provides that, for purposes of statutes relating to pay and leave of Federal employees, the following rules apply:

> (1) Instead of a holiday that occurs on a Saturday, the Friday immediately before is a legal public holiday for—
> (A) employees whose basic workweek is Monday through Friday * * *.

Since subsection (b)(1) establishes that instead of holidays—including November 11—that occur on a Saturday, the Friday before is a legal public holiday, it follows that Mr. Bogert was entitled to and in fact received a paid holiday on November 10, 1978. Therefore, the hours of work Mr. Bogert performed on Saturday, November 11, 1978, are compensable as regular overtime.

Joe E. Coleman (Voucher No. 7907)

Mr. Coleman was ordered to perform a ship inspection of a certain vessel on Monday, December 24, 1979. Mr. Coleman accomplished this inspection on the appointed day at Port Arthur, Texas, between the hours of 11 a.m.. and 4 p.m. On December 31, 1979, Mr. Coleman submitted a collection bill to the vessel's owners for the ship inspection in an amount equal to 2 days' pay. At the same time, Mr. Coleman submitted a claim to his agency for 2 additional days' pay for performing a ship inspection on a holiday in accordance with 47 C.F.R. § 83.74(a)(4) (1979). The agency has forwarded Mr. Coleman's voucher for our consideration of the propriety of compensating Mr. Coleman for 2 additional days' pay for work performed on that day.

By Executive order all executive departments and agencies were closed and employees, other than those required to be at their posts for reasons of national security or other public reasons, were excused from duty on Monday, December 24, 1979. The Executive order also provided that December 24 would be considered a holiday for the purposes of the pay and leave of employees of the United States. Thus, by the very terms of the order, the holiday was limited only to a specific group of Federal employees of the executive branch of the Government. This limitation precludes consideration of Monday, December 24, 1979, as a holiday within the meaning of the ship inspection holiday pay rule contained at 47 C.F.R. § 83.74(a)(9) (1979).

Under 47 C.F.R. § 83.74(a)(9) (1979), which implements the "Ship Inspection Overtime" provisions of 47 U.S.C. § 154(f)(3), for any services performed on a holiday, totaling not more than 8 hours, extra

compensation is payable equivalent to 2 days' pay in addition to regular compensation for such days. The term "holiday" is explained in section 83.74(a)(4) of the 1979 edition of title 47, Code of Federal Regulations, as follows:

> * * * The term holiday shall include only *government recognized holidays*, and such other days as may be designated *national holidays* by the President or Congress. [Italic supplied.]

As we noted in our conclusion in Mr. Bogert's case, this explanation of the term "holiday" makes the provisions of 5 U.S.C. § 6103 indispensable to the proper understanding of qualifying holidays under the regulation. We think it is clear that the "government recognized holidays" provided for in the regulation refer to the "*legal public holidays*" established in 5 U.S.C. § 6103(a); and, that the provision for "such other days as may be designated *national holidays*" clearly contemplates the establishment of a holiday for all of the public and not just a specified group of Federal employees.

Accordingly, we conclude here as we did in B-153107, October 30, 1969, for purposes of applying the similar customs overtime law, 19 U.S.C. § 267, 19 U.S.C. § 1451 (1976), that the ship inspection overtime provisions of 47 U.S.C. § 154(f)(3), and 47 C.F.R. § 83.74(a) (1979), do not apply to holidays established by Executive order for Federal employees but only to "those holidays specifically set out, which days generally are understood not only by Government employees but by the public to be holidays." 26 Comp. Gen. 848 at 852 (1947). As a result, Mr. Coleman is not entitled to compensation under the holiday pay provision of 47 C.F.R. § 83.74(a)(9) (1979) for ship inspection services performed on Monday, December 24, 1979. Any payment of holiday compensation for that date must be in accordance with 5 U.S.C. § 5546(b) (1976).

Additional inquiries formulated by the certifying officer are deferred for future consideration as they do not present questions of law involved in the payment of these vouchers in accordance with 31 U.S.C. § 82d (1976). The vouchers are returned for disposition in accordance with the above.

[B-201613]

Contracts—Grant-Funded Procurements—General Accounting Office Review—Exhaustion of Administrative Remedies Requirement

General Accounting Office will review complaints regarding procurements under EPA construction grants, provided complainant has exhausted administrative remedies by seeking review by grantor agency. This decision extends 60 Comp. Gen. 414.

Contracts—Grant-Funded Procurements—Protest Timeliness—Non-Solicitation Impropriety Allegations—Reasonable-Time Standard

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

Contracts—Grant-Funded Procurements—General Accounting Office Review—Modification of Contract—Scope of Modification

General Accounting Office will consider complaint regarding contract modification when it is alleged that modification changed scope of contract and therefore should have been subject of new procurement.

Contracts—Grant-Funded Procurements—Competitive System—Compliance—Scope of General Accounting Office Review—Grantor-Agency Decisions

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

Contracts—Grant-Funded Procurements—Competitive System—Compliance—Award With Intent To Materially Modify Contract Performance Conditions

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

Contracts—Grant-Funded Procurements—Bid Preparation Costs—Recovery Criteria

When complainant has not shown what actual bid price would have been under revised specifications, complainant has not shown that it had substantial chance for award, entitling it to bid preparation costs.

Matter of: Brumm Construction Company, October 6, 1981:

Brumm Construction Company has filed a complaint with our Office regarding modification of a contract for construction of sanitary sewers by an Environmental Protection Agency (EPA) grantee. Brumm appeals a decision by an EPA regional administrator holding that the grantee properly used the changes clause of the contract to reduce the scope of work involved and that readvertisement therefore was not necessary.

We find that by awarding the contract with the apparent intent to modify it, the grantee undermined the integrity of the competitive procurement system. We therefore are sustaining the complaint.

Background:

The grantee is the Marquette County, Michigan, Board of Public Works, which received approximately $8.8 million, or 75 percent of

the total estimated cost of a sewage collection system and treatment plant addition, from EPA under the Clean Water Act, 33 U.S.C. § 1251–1376 (1976).

The apparent low bidder for the contract in question was Proksch Construction Company at $620,041. Shortly after opening Proksch claimed a mistake of $150,000, which would have brought its price to within two percent of the second-low bidder's price of $786,598. Brumm was third-low at $833,720.

The grantee refused to allow Proksch to withdraw or correct its bid and instead made award to it on June 7, 1978. A notice to proceed was issued on June 22, 1978, and on the same day the grantee's engineer and Proksch executed the protested change order. Approximately a month later, Brumm obtained copies of the original plans for the sewers and compared them to the work in progress. Brumm subsequently obtained copies of the new plans and made similar comparisons, then protested to the grantee in a letter dated August 4, 1978.

Brumm's Protest

Brumm alleged that changes in alignment of the sewer lines reduced the amount and difficulty of work; that these changes represented an attempt to compensate Proksch for its claimed mistake-in-bid, since Proksch would have met financial disaster if it had been required to install the sewers according to original specifications; and that the integrity of the competitive procurement system had been compromised because Brumm was not given an opportunity to bid on the sewers as actually constructed. The second-low bidder joined Brumm in this protest, but has not complained to our Office.

Grantee and EPA Decisions

Following a hearing, the grantee found Brumm's protest untimely because it had not been filed within one week after receipt of revised drawings, which had been mailed by the city engineer on June 29, 1978. (The one-week requirement is contained in EPA regulations covering protests on grantee procurements, 40 C.F.R. § 35.939(b)(1).)

On appeal, EPA's Region V administrator, in a decision dated August 14, 1980, found that there was no obligation for an unsuccessful bidder to monitor construction and that Brumm had acted promptly upon actual knowledge that the sewers were being installed according to plans other than those on which its bid had been based. The regional administrator therefore considered the extent and effect of the changes.

There is no dispute as to the facts. The completed sewer line was approximately 260 feet shorter than the 10,200 feet originally specified,

due to having been moved from the north to the south side of the street for 1/10 of its length. In addition, the line was not as deep as originally specified for 3/4 of its length. The horizontal realignment reduced the amount of sod and the number of driveways and curbs which had to be restored, and the vertical realignment enabled the contractor to avoid two existing 12-inch sewer lines. As a result of these changes, Proksch's contract price was reduced by $53,000; Brumm, however, contends that actual savings were much greater.

Using Brumm's prices per linear foot for various depths, the regional administrator calculated that the changes in specifications would have reduced Brumm's bid by $219,000, but that Brumm's price for the revised job would still have been $48,000 more than Proksch's, given the difference between the two original bids. The regional administrator seemingly rejected Brumm's argument that its unit prices might have been different if it had been bidding to the new specifications, because these prices did not appear to be based on any exact formula incorporating factors such as type of soil, depth to groundwater, terrain, commercial development, or location of water, sewer, and gas mains. Nevertheless, the regional administrator stated that he was "inclined to agree" that there was no way to predict what the bids would have been if the project had been readvertised.

Readvertisement was ruled out, however, by the regional administrator's finding that the changes were not in the nature of cardinal changes. Citing *American Air Filter Co., Inc.*, 57 Comp. Gen. 285 (1978), 78-1 CPD 136, and a reconsideration of that decision, 57 Comp. Gen. 567 (1978), 78-1 CPD 443, as well as later decisions by our Office and the Court of Claims, the regional administrator stated that the cardinal change cases were useful because they provided standards for determining whether a changed contract was essentially the same as the original.

The regional administrator found that the initial and final points of the sewer line had remained the same under both contracts. In addition, he stated, the sewer followed essentially the same route as originally planned and carried the same wastewater in the same quantity to the same destination. He therefore concluded that the changes had not resulted in a fundamentally different undertaking between Proksch and the grantee; that they properly had been dealt with under the changes clause of the contract; and that they were not so extensive as to require readvertisement.

These conclusions are the subject of Brumm's complaint to our Office. Although the contract has been fully performed, Brumm requests that we issue a decision "analogous to a declaratory judgment" and award it bid preparation costs.

GAO Analysis—Preliminary Issues:

There are several preliminary issues which must be considered before we reach the questions of the propriety of the contract modification and the applicability of the cardinal change standards.

A. Comptroller General Authority

First, as it has in the past, EPA argues that our Office lacks authority to resolve complaints regarding procurements under EPA construction grants unless the agency specifically requests or acquiesces in our review. We frequently have exercised such authority, however. See, for example, *Garney Companies, Inc.*, B–196075.2, February 3, 1981, 81–1 CPD 62, and *Carolina Concrete Pipe Company*, B–192361, March 4, 1981, 81–1 CPD 162. Our review is particularly appropriate where the complaint involves the fundamental requirement for full and free competition. *Id.*, and cases cited therein. Our only requirement is that complainants first exhaust their administrative remedies when, as here, the grantor agency has procedures for complaints to it. *Sanders Company Plumbing and Heating*, 59 Comp. Gen. 243 (1980), 80–1 CPD 99. Brumm's complaint meets this criterion.

B. Timeliness

Second, EPA argues that under a new timeliness standard set forth in *Caravelle Industries, Inc.*, 60 Comp. Gen. 414 (1981), 81–1 CPD 317, Brumm's complaint to our Office is untimely.

We formerly held that the specific time limits of our Bid Protest Procedures, 4 C.F.R. § 21.2 (1981), apply only to protests of direct Federal procurements. *Carolina Concrete Pipe Company, supra.* In *Caravelle*, however, we stated that while it might not always be appropriate to establish strict time limits for grant complaints, they must be filed within a "reasonable" time so that we can decide an issue while it is still practicable to recommend corrective action if warranted. We added that in most instances, the only "reasonable" time for filing complaints in which solicitation deficiencies were alleged would be the time required by the Bid Protest Procedures, *i.e.*, before bid opening or the time for receipt of proposals.

In Brumm's case, the EPA administrator's decision was signed on August 14, 1980, and mailed to all parties on August 23, 1980; however, Brumm's complaint was not filed with our Office until December 22, 1980. If the Bid Protest Procedures had been applied, any request for our review should have been filed within 10 days after Brumm knew or should have known of the EPA decision. Again, while it may not always be appropriate to apply the 10-day rule to

grant complaints involving matters other than alleged solicitation deficiencies, we believe such complaints must be filed within a "reasonable" time after the basis for them is known.

We will, however, consider Brumm's complaint on the merits because it was filed before the *Caravelle* decision was issued. It took EPA more than six months to respond to our request for a report, and *Caravelle* was decided during the interim. Although we do not think it appropriate to apply the new timeliness standards for grant complaints retroactively, in the future, a complaint filed four months after an adverse agency decision will not be considered filed within a "reasonable" time.

C. Scope and Standard of Review

Other preliminary questions involve the scope and standard of our review. As a general rule, we do not consider protests concerning contract modifications, since these are matters of contract administration and thus for resolution by procuring agencies. We will, however, consider protests or complaints on this basis when, as here, it is alleged that the modification changed the scope of the contract and should have been the subject of a new procurement. *Die Mesh Corporation*, B-190421, July 14, 1978, 78-2 CPD 36.

Since it involves review of an EPA decision, however, our consideration will be limited to whether that decision was reasonable, *Carolina Concrete Pipe Company*, *supra*, in light of the agency's regulations which encourage free and open competition in grantee procurements. See 40 C.F.R. § 35.936-3 (1980).

GAO Analysis—Substantive Issues:

A. Award With Intent To Modify

Turning to the substance of Brumm's complaint, we see the primary issue as whether the award was made with the intent to change contract specifications. We recognize that circumstances may change during performance, and that the Changes Clause is designed to permit the Government and the contractor legally to modify their agreement to reflect conditions which were not anticipated at the time of award. However, a contracting officer may not make an award which he knows or should know is not based on the conditions under which the performance will occur, since such action tends to undermine the integrity of the competitive procurement system. The potential injury is the same whether there is a material change in specifications or a material change in the conditions of performance. In either case the Government (or in this case the grantee) is deprived of the full bene-

fit of competition—a lower price or better terms which it might otherwise have obtained. *Moore Service, Inc.*, B–200718, August 17, 1981, 81–2 CPD 145, citing *A&J Manufacturing Company*, 53 Comp. Gen. 838 (1974), 74–1 CPD 240.

In its arguments to EPA, Brumm asked why, if realignment of the sewers was desirable after bid opening or at time of award, was it not equally desirable during design or bidding, especially since it significantly reduced the contract price. The EPA decision does not address this issue.

The change was agreed to two weeks after award, on the same day that the contractor was notified to proceed. It closely followed Proksch's claimed mistake-in-bid and the grantee's refusal to allow correction or withdrawal. Moreover, the contract price was reduced, but the record contains no evidence (other than the grantee's statement) that this accurately reflected reductions in length and depth of the sewer, the amount of restoration, and the number of existing sewer lines to be avoided.

In our opinion, the execution of the modification, making changes which were at least arguably significant, and simultaneous issuance of the notice to proceed, under such circumstances were tantamount to award of a contract with the intent to modify it. These actions, in our view, effectively distorted the competition on which the award was based. See *Lamson Division of Diebold, Incorporated*, B–196029.2, June 30, 1980, 80–1 CPD 447.

We therefore cannot conclude that the EPA decision was reasonable and, by letter of today, are so advising the Administrator of EPA. We do not find it necessary to consider whether, as Brumm alleges, EPA's reliance on the cardinal change doctrine was misplaced.

The complaint is sustained.

B. Bid Preparation Costs:

As for bid preparation costs, the Court of Claims requires a bidder or offeror to show, among other things, that it had a substantial chance of receiving an award before it is eligible for reimbursement of such costs. *Decision Sciences Corporation—Claim for Proposal Preparation Costs*, 60 Comp. Gen. 36 (1980), 80–2 CPD 298. We do not believe Brumm has made such a showing, since what it actually would have bid for the sewer construction job under the revised specifications is an open question. Under these circumstances, we do not reach the question of whether bid preparation costs are available on a procurement by a Federal grantee. See *The Eagle Construction Company*, B–191498, March 5, 1979, 79–1 CPD 144.

[B-201554]

Subsistence—Actual Expenses—Maximum Rate—Reduction—Meals, etc. Cost Limitation—Lodging Costs Not Incurred

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

Matter of: Harry G. Bayne—Claim for Actual Subsistence Expense, October 8, 1981:

The issue in this case is whether an agency has the authority, by written memorandum, to limit reimbursement of the cost of meals to 46 percent of the maximum rate for actual subsistence expenses when a traveler on a temporary duty assignment incurs no lodging expenses.

This request for a decision was filed by Jefferson Wyatt, Jr., Certifying Officer and Chief, Financial Management Branch, Department of Energy (DOE), Dallas, Texas. It concerns the claim of Harry G. Bayne, Chief Counsel, Crude Production Audit Division, Office of Special Counsel, DOE.

Mr. Bayne traveled from Dallas, Texas, to Houston, Texas, to perform temporary duty for the period August 13–15, 1980. He stayed with friends and so incurred no lodging expenses. With regard to meals, he submitted a voucher claiming $27.95 for August 13, $33 for August 14, and $37.70 for August 15, for a total of $98.65.

The agency disallowed $29.65, based upon its subsistence allowance policy as evidenced by a memorandum to all employees from the Director, Management and Support, dated March 27, 1980. That memorandum reads as follows:

> Occasionally employees stay with friends or relatives during their temporary duty assignments. In such cases reimbursement for food and miscellaneous expenses will be limited to 46% of the total subsistance [sic] allowance. (ie: When employee does not incur lodging cost generated by a Hotel, Motel, etc.) (The 46% is the same as for food and miscellaneous expense on regular per diem.)

Since the maximum rate for Houston at the time of Mr. Bayne's travel was $50 per day, the agency disallowed all amounts exceeding 46 percent of $50, that is, amounts over $23 per day. The agency advises that this policy was issued because of a recurring problem the agency has experienced with travelers who incur no commercial lodging expenses, but then submit claims for high meal costs.

Mr. Bayne contests the disallowance of the amounts claimed. He argues that "actual expenses" means just that and, as long as the amount is below the $50 limit, it should be allowed. He states that if an employee stayed in a $50 per night hotel the Government would pay

for it and the employee would have to pay for meals out of his own pocket. Similarly, Mr. Bayne believes that if an employee spent $50 on food the Government should pay for it, but the employee would then have to pay for his own hotel. Thus, Mr. Bayne believes the agency policy is erroneous and seeks a ruling as to the agency's authority to issue such a policy.

The authority for payment of actual expenses in lieu of per diem is found in 5 U.S.C. § 5702(c), which at the time of Mr. Bayne's travel provided as follows:

> (c) Under regulations prescribed under section 5707 of this title, the Administrator of General Services, or his designee, may prescribe conditions under which an employee may be reimbursed for the actual and necessary expenses of official travel when the maximum per diem allowance would be less than these expenses, except that such reimbursement shall not exceed $50 for each day in a travel status within the continental United States when the per diem otherwise allowable is determined to be inadequate (1) due to the unusual circumstances of the travel assignment, or (2) for travel to high rate geographical areas designated as such in regulations prescribed under section 5707 of this title.

Mr. Bayne is not correct in his belief that an employee is entitled to be reimbursed for meals up to the maximum rate. We have held that employees are entitled to be reimbursed only for reasonable expenses for meals since travelers are required to act prudently in incurring expenses while on official business. *Charles J. Frisch*, B-186740, March 15, 1977. The employing agency is responsible in the first instance for determining what constitutes reasonable expenses for meals in each case, and, where it has exercised that responsibility, we will not substitute our judgment for that of the agency unless the agency's determination is clearly erroneous, arbitrary, or capricious. *Norma J. Kephart*, B-186078, October 12, 1976. Reimbursement for actual subsistence expenses in high rate areas is intended to compensate the traveler for the higher expenses usually incurred while traveling in large metropolitan areas, not to allow an employee who saves in one area (e.g., lodgings) to claim additional expenditures in another area (e.g., meals). *Kephart*, *supra*.

In *Kephart*, we also suggested that agencies should consider issuing written guidelines, under the authority of paragraph 1-8.3b of the Federal Travel Regulations, to serve as a basis for review of an employee's expenses. We said that such guidelines could provide advance guidance to employees who are able to obtain lodgings at substantial savings. This is essentially what the Department of Energy has done in the present case.

Moreover, we do not think it was unreasonable to establish guidelines alerting employees to the fact that the maximum amount considered reasonable for meals and miscellaneous expenses is 46 percent of the statutory maximum. See *Frisch*, *supra*, and *Micheline Motter* and *Linn Huskey*, B-197621 and B-197622, February 26, 1981, where,

after a determination that the amount claimed for meals was clearly excessive, the agency allowed only $18.28 for meals, or 46 percent of the $40 maximum.

However, such a guideline may not operate as an absolute bar to payment of additional amounts when the additional amounts can be adequately justified as reasonable because of the unusual circumstances involved. Since the statute, 5 U.S.C. § 5702(c), states that employees may be reimbursed for actual and necessary expenses, payment of an additional amount should be permitted when justified by unusual circumstances.

Hence, in this case, it is clear that the Department of Energy had authority to issue the memorandum dated March 27, 1980, imposing a limit of 46 percent of the statutory maximum on meals and miscellaneous expenses. However, the policy should be revised to reflect the fact that while payment will normally be limited to 46 percent of the statutory maximum, amounts in excess of that figure may be paid if adequate justification based on unusual circumstances is submitted by the employee.

In Mr. Bayne's case, no additional justification has been offered to provide a basis for payment of the additional amounts. Accordingly, absent further justification for the additional amounts, the agency's denial of Mr. Bayne's claim for the additional amounts spent for meals is sustained.

[B-199999]

General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect—Grievance Procedure Elected—Party Objection to GAO Review

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

Matter of: Ira Schoen and Melissa Dadant—Claims on matters subject to a negotiated grievance procedure—GAO jurisdiction, October 9, 1981:

The issue in this case is whether the General Accounting Office should assert jurisdiction over a claim filed pursuant to 4 C.F.R. Part 31 where a grievance has been filed under a negotiated grievance procedure and one of the parties to the agreement objects to the

submission. We hold that GAO will not assert jurisdiction in such circumstances.

Ms. Melissa Dadant and Mr. Ira Schoen have filed claims with the General Accounting Office pursuant to 4 C.F.R. Part 31 for retroactive temporary promotions and backpay based on alleged overlong details to higher-grade positions in the Copyright Office of the Library of Congress. The two claims were presented by their authorized representative, the American Federation of State, County and Municipal Employees (AFSCME), Capital Area Council of Federal Employees (Local 2910).

FACTS

Ms. Dadant, a GS–11 employee of the Library of Congress, claims that she was assigned the duties of a GS–12 position for approximately 1 year (October 10, 1978, through October 22, 1979). Similarly, Mr. Schoen, a GS–11 employee, claims that he was assigned duties of a GS–12 position for approximately 15 months (July 3, 1978, through October 22, 1979). On August 23, 1979, both employees filed grievances under the negotiated agreement. In the final agency decision at step two of the grievance procedure the agency admitted that it had violated Article XII, Section 3, of the collective bargaining agreement between the Library and Local 2910, which states, in part, that "if a detail to a higher grade-level position extends beyond two months, or if it is known in advance it will extend beyond two months, a temporary promotion shall be made."

The Library of Congress concluded that it had erred in failing to give Ms. Dadant and Mr. Schoen temporary promotions beginning the day following the first 2 months of their respective details. However, the agency refused to grant retroactive pay for the entire overlong period of the respective details because Article XXVIII, Section 12, of the collective bargaining agreement provides that grievances must be filed "within ten (10) work days from the date the grievant knew or should have reasonably known of the condition which prompted the grievance." Having determined that the grievants knew or should have known, on or about the date their detail began, that they are performing the duties of a higher-grade position, the agency granted backpay to Ms. Dadant and Mr. Schoen only for the period starting 10 work days preceding the date that the grievances were filed.

THE AGENCY'S POSITION

If dissatisfied with the agency's position, the union had the right to invoke binding arbitration. Instead, the union filed a claim with

GAO under 4 C.F.R. Part 31, the claims settlement authority of this Office, seeking backpay for the entire period of the overlong detail.

This course of action on the part of the claimants prompted the Library of Congress to raise the following objections to our consideration of these claims:

(1) The Library contends that the instant claim for back pay is premature in view of the binding arbitration provisions (Article XXIX) of the collective-bargaining agreement between the Library and AFSCME (Local 2910). The contract provides for binding arbitration to resolve those agency grievance decisions at step 2 that are unacceptable to the union. By failing to invoke arbitration; the union has, in effect, waived its right to any further adjudication of these grievances. The request for GAO intervention in this matter, at this time, raises questions of jurisdiction, and we argue respectfully that any further adjustment of these grievances would not only interfere with the relevant due process provisions outlined in our contract with AFSCME but subvert and dilute the meaning and intent of these provisions.

(2) The Library also argues that it is not required to pay claimants any more than the back pay awarded in the attached grievance report and recommendation because the grievants failed to file their complaints within the time prescribed by the collective bargaining agreement between the Library and AFSCME (See attached: Article XXVIII, Section 12). There is no dispute that the grievants and their exclusive representative knew of the circumstances giving rise to the complaint well before the grievances were filed, but did not file the instant grievances until August 23, 1979, almost a year after the details in question took place (October 10, 1978) and 8 months after the details to the higher grade were in process for 60 days (December 10, 1978). The Library contends that the time requirements for filing grievances as incorporated in its contract with AFSCME, must be faithfully followed to prevent prospective grievants from the unreasonable delay of asserting a right which would disadvantage the Library by placing the agency in a position where its rights may be imperiled and its defenses embarrassed.

ANALYSIS

The type of overlong detail provision relied upon by claimants has been discussed in a line of decisions of this Office which predated the passage of the Federal Service Labor-Management Relations statute [1] and the publication of our rules governing requests for decisions on matters of mutual concern to agencies and labor organizations.[2] In that line of cases we held that an agency may bargain away its discretion and thereby make a provision of a collective bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable Federal law and regulations. The violation of such a mandatory provision in a 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 the Back Pay Act, 5 U.S.C. § 5596, thus entitling the aggrieved employees to retroactive compensation for such violation of a negotiated agreement. For a comprehensive analysis of our decisions in this regard, see *John*

[1] Title VII, Civil Service Reform Act of 1978, Pub. L. 95–454, October 13, 1978, 5 U.S.C. §§ 7101–7135.

[2] 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689–92, August 21, 1980).

Cahill, 58 Comp. Gen. 59 (1978). As a result, under our authority under title 31 of the United States Code, we have in the past reviewed provisions of collective bargaining agreements in this type of case to determine whether the remedy sought is consistent with applicable laws, regulations, and Comptroller General decisions so that it may be validly implemented through the expenditure of appropriated funds for backpay. See, for example, *Roy F. Ross and Everett A. Squire*, 57 Comp. Gen. 536 (1978).

However, since the enactment of the Federal Labor-Management Relations Statute, we have reconsidered our jurisdictional policies on matters of mutual concern to agencies and labor organizations in recognition of the intent of Congress in establishing a statutory basis for the Federal labor-management program. We have already established the jurisdictional policies which will apply to such matters when filed pursuant to 4 C.F.R. Part 22 (1981). See 45 Fed. Reg. 55689–91, August 21, 1980, for a full explanation of these policies. In this case, and in our companion case of today, *Samuel R. Jones*, B–200004, 61 Comp. Gen. 20, we consider the jurisdictional policies which will apply when matters of mutual concern are filed as claims under 4 C.F.R. Part 31.

GAO's jurisdiction over Federal personnel matters is based upon title 31 of the United States Code. The claims settlement authority invoked in this case by filing pursuant to 4 C.F.R. Part 31 is based primarily on 31 U.S.C. § 71 which provides that all claims by or against the Government of the United States shall be settled and adjusted in the General Accounting Office.

The Federal Labor-Management Relations Statute did not amend title 31. Accordingly, except to the extent that Congress has expressed a contrary intent, individuals still have a right to file a claim with GAO on any matter involving the expenditure of appropriated funds. However, as a matter of policy, and in an effort to fulfill our statutory responsibilities in a manner which will facilitate the smooth functioning of the labor-management program, we believe some restrictions on our willingness to assert jurisdiction over matters of mutual concern to agencies and labor organizations is appropriate.

One area in which GAO will decline jurisdiction concerns arbitration awards. Consistent with the intent of Congress, the Comptroller General will not review or comment on the merits of an arbitration award which is final and binding pursuant to 5 U.S.C. § 7122(a) or (b). 4 C.F.R. 22.7; *Gerald M. Hegarty*, B–202105, July 7, 1981, 60 Comp. Gen. 578; H.R. Rep. No. 95–1403, 95th Cong., 2d Sess. 56 (1978); S. Rep. No. 95–1272 and H. Rep. No. 95–1717, 95th Cong., 2d

Sess. 158 (1978). This restriction applies equally to claims filed under 4 C.F.R. Part 31 and to requests for decisions filed under 4 C.F.R. Part 22.[3]

The second area in which GAO will decline to assert jurisdiction, either under 4 C.F.R. Part 31 or Part 22, involves instances where to do so would be disruptive to the procedures authorized by the Federal Service Labor-Management Relations Statute.[4] Thus, while the enactment of that statute did not amend 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.

We believe our adjudication of the claims of Ms. Dadant and Mr. Schoen in the circumstances of this case would be disruptive to the grievance-arbitration process authorized by the labor-management statute. Therefore, we are declining to assert jurisdiction.

Having elected to invoke the negotiated grievance procedure, neither the claimants nor the union should now be permitted to abandon that procedure over the agency's objection and seek redress in another forum. While we will generally consider matters filed under either Part 22 or Part 31 of title 4 of the Code of Federal Regulations where neither party to the collective bargaining agreement objects to submission of the matter to GAO, we will not, in the circumstances of this case, assert jurisdiction over the objection of one of the parties to the agreement. See *Samuel R. Jones*, 61 Comp. Gen. 20, our companion case of today, for an explanation of when we will assert jurisdiction over claims filed under 4 C.F.R. Part 31 over the objection of one of the parties to the collective bargaining agreement. If the union was dissatisfied with the agency's decision at step two of the grievance procedure, the matter should have been pursued through the provisions in the contract for binding arbitration. The claims settlement authority of GAO is not an appropriate forum in which to seek review or reversal of a grievance decision.

We also note that in order to adjudicate these claims we would necessarily have to address not only the overlong detail provisions of Article XII, Section 3, of the negotiated agreement, but also, the timeliness issues raised in connection with Article XXVIII, Section 12, of that agreement. We would have to make a determination as to whether the 10-day period allowed for filing grievances under the

[3] However, payments made pursuant to a final and binding arbitration award do not serve as precedent for payment in similar situations not covered by the award. See 45 Fed. Reg. 55690, August 21, 1980.

[4] GAO will also decline to consider matters which are more properly within the jurisdiction of other administrative bodies or courts of competent jurisdiction, or matters which are unduly speculative or otherwise inappropriate for decision. See 4 C.F.R. § 22.8 (1981).

negotiated agreement barred the claimants from receiving backpay for the entire overlong period of the detail. This timeliness issue is primarily an issue of contract interpretation which is customarily adjudicated solely under the grievance-arbitration provisions of the contract. While GAO frequently considers the type of overlong detail issue presented by this case, the timeliness issue is not appropriate for consideration by GAO. Such labor-management issues are best resolved pursuant to the procedures authorized by Congress with the enactment of the Federal Service Labor-Management Relations Statute.

Therefore, without reaching the merits of the compensation claims presented by Ms. Dadant and Mr. Schoen, we are, for the reasons stated above, declining to exercise jurisdiction over these claims.

[B-200004]

General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect—Grievance Not Filed—Rights Not Solely Based on Agreement

Civilian employee of Dept. of Army was detailed to higher-grade position for period of 42 days. Collective bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate. GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective bargaining agreement and no grievance has been filed.

General Accounting Office—Jurisdiction—Labor-Management Relations—Civil Service Reform Act Effect—Grievance *v.* Claims' Settlement—Jursidictional Policy Differences

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

Matter of: Samuel R. Jones—Claims on matters subject to a negotiated grievance procedure—GAO jurisdiction, October 9, 1981:

In this decision we are considering the claim of Mr. Samuel R. Jones for a retroactive temporary promotion and backpay in con-

nection with an overlong detail which Mr. Jones asserts is remediable pursuant to our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977). Since Mr. Jones' claim is based on a right that arises solely under the collective bargaining agreement, and the agency has objected to consideration of the claim by the General Accounting Office, we will not take jurisdiction over Mr. Jones' claim.

At the same time, we are extending the analysis contained in a companion case decided today, *Schoen and Dadant*, 61 Comp. Gen. 15, B–199999, regarding this Office's jurisdiction policy for settling claims on matters of mutual concern to agencies and labor organizations when those claims are filed pursuant to 4 C.F.R. Part 31.

FACTS

The administrative record establishes that Mr. Jones was employed as a Railroad Maintenance Vehicle Operator at the Hawthorne Nevada Army Ammunition Plant. For a period of 42 days, from June 19 through July 30, 1978, Mr. Jones was officially detailed to and performed the higher-grade duties of the position of Railroad Maintenance Vehicle Operator Foreman. During the period of Mr. Jones' detail there was a negotiated agreement in effect between the agency and the American Federation of Government Employees (AFGE Local 1630), the exclusive representative of unit employees, including Mr. Jones. Article 15, Section 3 of the agreement provided that an employee of the unit would not be detailed to a position of higher grade for more than 30 days within a period of 1 year. On this factual basis Mr. Jones, through his authorized representative, AFGE Local 1630, filed a claim with our Claims Group under Part 31 of title 4, Code of Federal Regulations, on June 19, 1979, seeking backpay for the period of the detail beyond 30 days. Unlike *Schoen and Dadant*, *supra*, no grievance was ever filed under the negotiated agreement.

THE AGENCY'S POSITION

The Personnel Division of the Hawthorne Army Ammunition Plant has strenuously objected to our consideration of Mr. Jones' backpay claim. The agency points out that at the time of Mr. Jones' detail from June 19, 1978, to July 30, 1978, there was a negotiated agreement in effect between the agency and American Federation of Government Employees Local 1630. As a wage grade Railroad Maintenance Vehicle Operator, Mr. Jones was a unit employee. The same agreement that provides in Article 15, Section 3, that an employee of the unit may not be detailed to a position of higher grade for more than 30

days within a period of 1 year, also provides in Article 11, Section 1, that the "* * * negotiated procedure shall be the exclusive procedure available to the Union and the employee in the bargaining unit for resolving employee grievances * * * excluding those for which a statutory appeals procedure exists."

The agency asserts that even if Mr. Jones' detail exceeded the 30-day limitation, it was a grievable issue, and as such, the negotiated grievance procedure was the exclusive procedure available for redress. The agency therefore contends as follows:

> This agency contends that when a grievable matter subject to an *exclusive negotiated procedure* may arguably constitute an unwarranted or unjustified personnel action, the appropriate authority to make any finding must be those individuals including arbitrators entitled to make such decisions under the terms of the operative collective bargaining agreement. To reason otherwise would result in redressing one arguable violation of a mandatory provision of a negotiated agreement by deliberately circumventing another. This can only serve to subvert the statutory scheme governing labor relations in the Federal sector.

Hence, the agency argues that the Comptroller General should not assume jurisdiction over any matter which could be grieved under a collective bargaining agreement, and would deny all consideration of Mr. Jones' claim because he did not file a grievance under the negotiated grievance procedures.

ANALYSIS

In order to understand the jurisdictional policies established in this case, it is necessary to first consider the source of the right to backpay relied upon by the claimant. The type of overlong detail provision used to support the claim for backpay in this case is commonly referred to as a *Turner-Caldwell* type of claim. However, as discussed below, there is an important distinction in that the right in this case arises solely under the collective-bargaining agreement and is for 30 days, rather than 120 days.

In our *Turner-Caldwell* cases, *supra*, we established the rule that, for purposes of the Back Pay Act, 5 U.S.C. § 5596 (1976), an agency has no authority, absent prior Civil Service Commission approval, to detail an employee to a higher-graded job beyond 120 days. Where an agency does not obtain such approval and keeps an employee on overlong detail, the employee is deemed to have been temporarily promoted from the 121st day of the detail until the employee is returned to regular duty and is entitled to backpay for that period. Federal Personnel Manual (FPM) Bulletin No. 300–40, May 25, 1977, was issued by the Civil Service Commission to provide additional information to assist agencies in the proper application of these decisions.

The type of negotiated 30-day detail provision asserted in Mr.

Jones' claim was discussed in a line of decisions of this Office which predated the enactment of the Federal Service Labor-Management Relations Statute [1] and the publication of our rules governing requests for decisions on matters of mutual concern to agencies and labor organizations.[2] In that line of cases we stated that although the remedy of retroactive temporary promotion recognized by the *Turner-Caldwell* line of decisions is based on the Civil Service Commission's instructions at FPM chapter 300, subchapter 8, requiring the Commission's approval of certain details in excess of 120 days, an agency, by its own regulation or by the terms of a collective bargaining agreement, may establish a shorter period under which it becomes mandatory to promote an employee who is detailed to a higher-grade position. Thus, an agency may bargain away its discretion and thereby make a provision of a collective bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable Federal laws and regulations. The violation of such mandatory provision in a 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. § 5596, thus entitling the aggrieved employees to retroactive compensation for the violation.

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), where we held that an 8-day detail of a prevailing rate employee to perform the duties of a higher-level General Schedule position was a violation of a collective bargaining agreement provision. We concluded that the violation constituted an unwarranted personnel action which entitled the employee to corrective action under the Back Pay Act.

In summary then, Mr. Jones' 42-day detail is not justifiable under the 120-day provisions of our *Turner-Caldwell* decisions and FPM Bulletin No. 300–40. Rather, under Article 15, Section 3 of the collective bargaining agreement and the line of Comptroller General decisions represented by the *Cahill* and *Morris* cases cited above, Mr. Jones asserts that he is entitled to a retroactive temporary promotion with backpay as of the 31st day of his detail.

Turning now to the jurisdictional issue, the question presented is whether GAO will assume jurisdiction over a claim filed under 4 C.F.R. Part 31 when the issue is subject to a grievance procedure authorized by the Federal Service Labor-Management Relations Stat-

[1] Title VII, Civil Service Reform Act of 1978, Pub. L. 95–454, October 13, 1978, 5 U.S.C. §§ 7101–7135.

[2] 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689–92, August 21, 1980).

ute, and one of the parties to the agreement objects to GAO's consideration of the matter, even though no grievance has been filed.

The agency's argument that GAO should not assume jurisdiction over any matter subject to a negotiated grievance procedure overlooks the fact that the Federal Service Labor-Management Relations Statute did not amend title 31 of the United States Code. The Comptroller General has been rendering decisions on matters involving the expenditure of appropriated funds and settling claims by or against the Government since 1921 and, therefore, the radical change in our jurisdiction proposed by the agency in this case cannot be lightly assumed. See, in particular, 31 U.S.C. §§ 71, 74, and 82d. Since the statute did not amend title 31, we cannot assume that Congress intended employees to be totally barred from having their claims considered by GAO, as argued by the agency. To permit such a total withdrawal of our jurisdiction without a specific directive from Congress would be an abrogation of our statutory duty to settle and adjust claims against the United States. Such a far-reaching result is unsupported and unintended by the express terms and legislative history of the Federal Service Labor-Management Relations Statute.

Having established that the mere existence of a negotiated grievance procedure does not in itself preclude the Comptroller General from considering a claim filed under 4 C.F.R. Part 31, we do however conclude that some restrictions on our jurisdiction are appropriate in recognition of the intent of Congress in enacting the Federal Service Labor-Management Relations Statute. We believe the proper balance between our function under title 31 and the smooth functioning of the procedures authorized by that statute can best be achieved if we decline to assert jurisdiction over cases where the right upon which the claim is based arises solely under the collective bargaining agreement and one of the parties to the agreement objects to consideration of the matter by GAO.

While this restricts the right of individual claimants to have claims adjudicated by GAO, it preserves the right to file a claim on those matters which have traditionally been adjudicated by GAO where the right is based on law or regulation or other authority which exists independently from the collective bargaining agreement. At the same time, in recognition of the important role of collective bargaining in the civil service, it preserves the exclusivity of the grievance procedure where the right relied upon arises solely under the agreement.

We recognize that very often the collective bargaining agreement incorporates rights which may also exist outside of the contract. For

example, an agency regulation could provide for backpay after the 60th day of an overlong detail and the collective bargaining agreement could simply incorporate that regulation. In such cases, as in all matters filed with GAO, the burden is on the claimant to establish that the right relied upon also exists outside of the contract. If the right is based on authority which also exists outside of the negotiated agreement, GAO will generally consider such a claim under 4 C.F.R. Part 31 even though the other party to the agreement objects to consideration of the matter by GAO, provided no grievance has been filed.

In summary then, the jurisdictional policies which will apply to claims filed under 4 C.F.R. Part 31, as expressed in this case and its companion case decided today, *Schoen and Dadant*, *supra*, are as follows:

(1) GAO will not review or comment on the merits of an arbitration award which is final and binding pursuant to 5 U.S.C. § 7122 (a) or (b).[3] *Gerald M. Hegarty*, B-202105, July 7, 1981, 60 Comp. Gen. 578; 4 C.F.R. § 22.7(a).

(2) Where a grievance has been filed and one of the parties to the agreement objects to our jurisdiction, GAO will decline to assert jurisdiction. *Schoen and Dadant*, *supra*.

(3) Where no grievance has been filed and where otherwise appropriate, GAO will consider a claim on a matter subject to a negotiated grievance procedure over the objection of one of the parties only where the right relied upon is based on law or regulation or other authority existing independently from the collective bargaining agreement. Claims based upon rights which arise solely under the collective bargaining agreement will not be adjudicated by GAO where a party to the agreement objects to consideration of the matter by GAO.

We recognize that the policy in paragraph (3) above, regarding matters subject to a grievance procedure differs somewhat from the policy which would apply to matters submitted pursuant to 4 C.F.R. Part 22 (1981). Specifically, 4 C.F.R. § 22.7(b) provides that the Comptroller General will not issue a decision or comment on the merits of a matter which is subject to a negotiated grievance procedure when one of the parties to the agreement objects to submission of the matter to GAO. Thus, under Part 22, an objection by one of the parties to the agreement will always operate to preclude assertion of our jurisdic-

[3] However, payments made pursuant to such an award do not serve as precedent for payment in similar situations not covered by the award. 45 Fed. Reg. 55690, August 21, 1980.

tion, whether or not the right relied upon is based upon authorities which exist outside of the agreement.[4]

These different policies under Part 22 and Part 31 are based upon the differences in the procedures themselves. Under 4 C.F.R. Part 22 (1981), heads of agencies (or their designees), heads of labor organizations (or their designees), or authorized certifying and disbursing officers may request a decision from the Comptroller General on any matter of mutual concern to agencies and labor organizations. Arbitrators and other neutrals may request an advisory opinion from the General Counsel of the General Accounting Office. The procedures provide for service on the parties, a period for comment, and provide that a decision or opinion will normally be issued within 60 days after expiration of the period for written comments. Because of the type of procedure involved, particularly the 60-day provision, it would be inappropriate to permit one of the parties to unilaterally seek and obtain a decision on a matter subject to the grievance procedure within 60 days. The potential for a disruptive impact on the grievance-arbitration process in such circumstances prompted our decision to preclude consideration of such unilateral requests for decisions under this expedited procedure.

In contrast, the claims procedure set forth at 4 C.F.R. Part 31 is a less formal procedure available to all individual employees, whether or not they are represented by a labor organization. Under Part 31, individual employees or their authorized representatives may file claims directly with the employing agency or with our Claims Group. Following receipt of a report from the agency, the Claims Group issues a settlement certificate which is appealable by the employee or the agency to the Comptroller General under additional procedures set out at Part 32. Historically, this Part 31 procedure has always provided a forum for any Federal employee to seek review by the General Accounting Office of agency action in regard to his or her compensation and other employment entitlements without the expense and delay of litigation.

Because Part 31 is a different type of procedure, we do not believe it would be disruptive to the grievance-arbitration process to consider claims filed under that Part, provided the basis for the claim exists independently from the collective bargaining agreement and no grievance has been filed. Moreover, as discussed above, since the Federal Service Labor-Management Relations Statute did not amend title 31,

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[4] A limited exception was provided for in the case of requests from certifying and disbursing officers because these individuals have statutory authority, independent of agency management, to decline payment of a voucher and because they are not a party to the collective bargaining relationship and do not have direct access to the procedures established by the Federal Service Labor-Management Relations Statute.

we cannot totally bar consideration of all claims which could be subject to a negotiated grievance procedure. Rather, we seek a balance between our function under title 31 and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute.

Accordingly, in the circumstances presented in Mr. Jones' case, we are declining jurisdiction of his claim because the right relied upon arises solely under the collective bargaining agreement and the agency has objected to GAO's consideration of the claim.

[B-201084, 201085]

Officers and Employees—Hours of Work—Traveltime—Travel Inseparable From Work—Federal Aviation Administration Employees—Uncommon Tours of Duty

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

Matter of: Dwain L. Baxter and H. Russell Hunter, October 9, 1981:

By letters dated June 2, 1980, and May 23, 1980, Messrs. Dwain L. Baxter and H. Russell Hunter, employees of the Federal Aviation Administration (FAA), Western Region, appeal the determination of our Claims Group, dated April 10, 1980, which disallow their claims for additional overtime compensation for the period January 1967, to December 1974. The claims are for overtime compensation under the provisions of the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542 (1970), for time spent in a standby duty status at the Sawtelle Peak, Idaho, radar facility. The employees were found to have been entitled to overtime compensation and were paid in August 1975. The essence of the present appeal is that travel time, under the circumstances to be enumerated below, should also be considered compensable time in calculating the employees' overtime.

For the reasons which follow, we believe the travel time should be considered compensable hours of work, and the employees are, therefore, due additional compensation.

The FAA paid both claimants for the overtime duty based on a formula approved by our Office. The formula equated standby time to the total elapsed time minus the hours for which the claimants had already been compensated with regular or overtime pay, minus 8 hours for each 24-hour period in accordance with the two-thirds rule, under which an employee who is required to remain for a 24-hour period

at his duty station in a standby status is entitled to compensation for 16 of those hours. Under the two-thirds rule, time spent sleeping or eating, during which no substantial labor is performed, is not compensable. See B–170264, December 21, 1973. We note that the FAA excluded travel time from the total elapsed time in its computation of the amount due the claimants, whereas the claimants included that time in their original claims. For that reason Mr. Baxter and Mr. Hunter now claim additional compensation of $4,916.23, and $4,713.41, respectively, for the time spent traveling in Government-owned vehicles from the pickup site in Ashton, Idaho, to the work site, and return.

In its computation of the hours of standby time, the FAA began the total elapsed time with the employees' arrivals at the long range radar site, and ended it with their departures from the site. However, it appears that the duty hours which the FAA subtracted from the total elapsed time were the total duty hours, including the hours spent traveling to and from the site. In effect, this offset the travel time against the standby overtime. Therefore, the formula applied by the FAA might be expressed as: the total hours at the radar site minus hours at the site for which the claimants have previously been compensated, minus 8 hours per 24-hour period at the site, and minus hours spent traveling to and from the site in a Government-owned vehicle.

The FAA's administrative report addressed the question of when tours of duty for the long range radar sites begin and end. The employees at Sawtelle Peak are required to use a Government vehicle because road conditions are such as to cause excessive wear and tear on vehicles or to require a special purpose vehicle (snowcat, four-wheel drive, etc.). The employee must report to a designated point to pick up the vehicle and return it to that point so that it can be used by others. In these cases, this is an inherent part of the employee's work and the pickup point becomes a check-in point and is designated as part of their duty station. Therefore, it was administratively determined by the FAA on August 26, 1974, in a letter to Regional Directors from the Acting Associate Administrator for Administration that the employees' tours begin at the time they report to the check-in point and end when they return the vehicle to that point.

The official pickup point for Messrs. Baxter and Hunter was established by FAA Order NW 4670.1, June 16, 1975, as Ashton, Idaho, a distance of approximately 49 miles from Sawtelle Peak. The FAA has recommended denial of the claims because: (1) it was not until August 26, 1974, that an official determination was made as to when tours of duty for long range radar sites began and ended; (2) it was not

until June 16, 1975, that Ashton, Idaho, was designated an official pickup point; (3) the Sawtelle Peak did not qualify for a remote worksite allowance; and (4) all due entitlement was paid to the claimants in August 1975. We disagree.

Section 5542(b)(2) of Title 5 of the U.S. Code (1970), as amended, states the following with respect to compensating an employee for time spent in travel:

> (2) Time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—
> (A) The time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or
> (B) The travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

There is no doubt that under section 5542(b)(2)(A) an employee having a regularly scheduled workweek must be compensated for time spent in travel on official business which is within regularly scheduled work hours. *Artis Holcomb*, B–194297, August 22, 1979. The difficult question here is the application of section 5542(b)(2)(B) to these claims.

The Civil Service Commission (now Office of Personnel Management), has explained the limited conditions in section 5542(b)(2)(B), under which traveltime is considered hours of work, in section 3(b)(2) of subchapter S1, Federal Personnel Manual (FPM) Supplement 990–2, Book 550. However, subparagraph (c)(v) of section 3(b)(2) of the FPM states that those conditions are not applicable in certain circumstances, as follows:

> (v) The above conditions do not apply to work situations involving travel which is an inherent part of, and inseparable from, the work itself. In such events when an agency determines that the travel represents an additional incidental duty directly connected with the performance of a given job, and is therefore considered to be an assigned duty, the time spent in travel is work time and will be payable at regular or overtime rates, as appropriate. (See Comptroller General decisions B–146389, February 1, 1966, and B–163042, May 22, 1968.)

Our decisions B–146389, February 1, 1966, and B–163042, May 22, 1968, which relied on B–143074, September 29, 1960, sanctioned the agency practice of treating as compensable traveltime, travel which is an inherent part of and inseparable from the work itself. In B–143074, *supra*, we held it was proper for the Army to prescribe by regulation that the traveltime of a survey party between assembly point and survey site was inherent to the work at the survey site and was thus compensable as work. In B–146389, *supra*, we approved FAA regulations which stated that employees who reported to headquarters, received assignments, picked up vehicles, tools, and supplies, and then

traveled to one or more facilities for maintenance work, may be paid compensation for such traveltime. The FAA found that the traveltime was a part of the employee's established tour of duty.

The same principle outlined above of treating as compensable travel time travel which is an inherent part of and inseparable from the work itself is applicable here. The record shows that as early as 1965, the employees were using Government vehicles to travel to and from Sawtelle Peak to Ashton, Idaho. Thus, the official determination as to when the tour began in 1974, and the designation of Ashton as an official pickup point, appears to merely clarify that which had been a standard practice for many years. The administrative report, while recommending denial of the claim on the one hand, also states "that travel to the site was supposed to be performed during duty hours."

Accordingly, we conclude, as we did in B-143074 and B-146389, *supra*, that in these circumstances, the travel time was an inherent part of and inseparable from the work itself. Hence it is compensable under 5 U.S.C. § 5542(b)(2)(B)(i). Therefore, the FAA computation based on the exclusion of the travel time from the total elapsed time is in error.

The claims of the two Sawtelle Peak employees are returned to our Claims Group for a determination of the amounts due, either by Claims Group or the agency as appropriate. Payment may also be made in accordance with the above to other employees similarly assigned to the Sawtelle Peak radar facility, provided that the claims were received in this Office within the limitations period in 31 U.S.C. § 71(a) (1976).

[B-203777]

Bids—Mistakes—Correction—Still Lowest Bid—Two Mistakes Claimed

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

Matter of: Bruce-Andersen Co., Inc., October 14, 1981:

Bruce-Andersen Co., Inc. (B-A), protests the failure of the Army Corps of Engineers (Corps) to award it a contract because the Corps denied correction of two errors in its apparent low bid under invitation for bids (IFB) No. DACA63-81-B-0061 issued by the Corps, Fort Worth District, for the construction of an Army Reserve Center at Houston, Texas.

We conclude that correction of one error may be permitted, the second error may be waived, and the B–A bid may be considered for award.

B–A bid $3,634,026 for the base bid and $233,000 for additive No. 1. The second low bid was submitted by Fortec Constructors in the amount of $4,172,000 for the base bid and $282,000 for additive No. 1.

After bid opening, B–A alleged two mistakes in its bid and requested correction or permission to withdraw. The errors consisted of omitted costs for specification requirements covering chemical composition concrete ($44,239 for the base bid, $6,972 for additive No. 1) and interior grade beam framing, excavation and backfill ($174,258 for the base bid, $23,432 for additive No. 1). B–A subsequently offered to waive the concrete error only. B–A would remain the low bidder by over $300,000 if correction was permitted.

The Corps found clear and convincing evidence of the mistake and intended bid with respect to interior grade beam framing, excavation and backfill. This was based on a detailed review of B–A's worksheets which showed that the firm failed to carry forward these costs into the bid. The Corps found clear and convincing evidence of an inadvertent omission of concrete costs. However, no clear and convincing evidence of an intended amount was found because the worksheets did not reflect this omitted item and the requested correction was based on B–A's post-bid-opening estimate. Therefore, the Corps decided that B–A should be allowed only to withdraw the bid.

B–A contends that there is no dispute as to the error relating to other than concrete since the amount of that error has been established by clear and convincing evidence; therefore, the only issue of any consequence is whether B–A may waive the concrete error. The protester argues that waiver of a claimed error is allowed where the evidence is clear that, even with correction, the bidder will still be low. B–A further states that, although the amount of any error of omission can never be ascertained with any absolute degree of certainty, in cases involving requests for correction, reasonable approximations are accepted as being consistent with the standard of "clear and convincing" evidence. B–A finally contends that no reasonable estimation of the omitted costs for concrete would approach the amount necessary to displace B–A as the low bidder.

Fortec argues that bid correction is not proper here since B–A is unable to establish a "precise intended bid prior to bid opening." The firm also questions whether B–A's workpapers demonstrate by clear and convincing evidence that any mistake occurred. Fortec contends that, in any event, the claimed errors were of judgment and estimating, which do not attain the certainty or credibility requisite for bid

correction. Fortec argues that B–A's offer to waive the costs of concrete is an attempt to redefine the legal requirements respecting an acceptable intended bid; by excluding consideration of these costs, B–A is attempting to avoid the very costs which signify the absence of an intended bid.

Where a bidder, whether intentionally or not, is in the position, after the other bid prices have been revealed, of withdrawing its bid, asking for correction or requesting waiver of an error, whichever is in the bidder's best interest, consideration of that bid ordinarily would be detrimental to the Federal procurement system. 42 Comp. Gen. 723 (1963). A bidder may not be permitted to waive a claim of error or waive part of its claim of error (selective correction) to remain the low bidder. 42 Comp. Gen., *supra;* 37 Comp. Gen. 851 (1958); *North Star Electric Contracting Corporation, National Electrical Contractors Association*, B–187384, January 28, 1977, 77–1 CPD 73; *Technology Incorporated*, B–185829, May 10, 1976, 76–1 CPD 305. However, where correction of a low bid could not be permitted because the amount of the intended bid was not established with the certainty required by the rules applicable to correction of mistakes in bids, the acceptance of such a low bid would not be prejudicial to other bidders if the evidence clearly indicated that the correct or "intended" bid would have been lowest. *See* 52 Comp. Gen. 258 (1972) (sales); 42 Comp. Gen., *supra;* B–155432, December 1, 1964; B–165405, October 24, 1968; B–168673, April 7, 1970. Waiver of mistake has been permitted in these circumstances even where the mistake involved the bidder's failure to consider and include cost items in computing the bid. *See* B–165405, *supra.* Whether the corrected or "intended" bid would have been lowest may be ascertained by reference to reasonable estimations of omitted costs. *See* 42 Comp. Gen., *supra;* B–165405, *supra;* B–168673, *supra;* B–155432, *supra.*

Our examination of B–A's workpapers confirms the Corps' conclusion that clear and convincing evidence shows that B–A intended to bid $3,808,284 for the base bid ($3,634,026 bid plus $174,258 for the interior grade beam framing, excavation and backfill) and $256,432 ($233,000 plus $23,432) for additive No. 1. Therefore, we find no legal objection to correction. Defense Acquisition Regulation § 2–406.3 (1976 ed.). As for the omitted concrete costs, we agree with the Corps that B–A inadvertently omitted costs for this item. Although the record does not show what price the other bidders included for this item, the contracting officer indicates that the estimates prepared by B–A "may be reasonable," and Fortec has not submitted any evidence to the contrary. Of particular significance, the monetary amounts of the two errors, whether considered in the aggregate or separately, provide

reasonable assurance that B–A's bid remained materially lower than Fortec's absent the mistakes.

In these circumstances, we conclude that B–A's bid may be corrected upward with respect to the interior grade beam framing, excavation and backfill to $3,808,284 for the base bid and $256,432 for additive No. 1, the concrete error may be waived, and the B–A bid may be considered for award.

Protest sustained.

[B–201789]

Compensation—Overtime—Inspectional Service Employees—Customs Inspectors—Sunday and Holiday Compensation—Additional Overtime Compensation Entitlement

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

Matter of: Customs Inspector—Entitlement to overtime compensation, October 20, 1981:

This action is in response to a request for an advance decision by Mr. William T. Archey, Acting Commissioner of Customs, as to whether Customs Inspectors who perform services in excess of 8 hours but less than 9 hours on a Sunday or holiday are entitled to receive an extra ½ day's pay for overtime work in addition to 2 days' pay for services performed for up to 8 hours on such days.

The Commissioner advises that this matter arises out of a claim for overtime compensation under 19 U.S.C. § 267 for work performed in excess of 8 hours on a Sunday. The submission states that on Sunday, December 11, 1977, the inspector worked from 1 p.m. to 2 p.m. and from 8:45 p.m. to 9:15 p.m. which is considered a continuous period of 8¼ hours under the Customs Service overtime compensation regulations. On another occasion, Sunday, October 22, 1978, he commenced work at 6 a.m., and including waiting time, completed his assignment at 2:15 p.m., a continuous period of 8¼ hours for Customs overtime purposes. On each occasion the inspector received the extra 2 days' pay provided under 19 U.S.C. § 267 for Sunday work plus overtime compensation under such provision in the amount of ½ day's pay for the ¼-hour period worked in excess of 8 hours. The Customs Service later determined that the employee was not entitled to overtime compensation for the time he worked in excess of 8 hours on each Sunday. The

Customs Service has obtained a refund from the employee for the overtime compensation paid under 19 U.S.C. § 267 for the additional ¼-hour period of work and the employee has appealed this action to the agency. The employee contends that he is properly entitled to overtime compensation under the Customs Service regulation set forth at 19 C.F.R. § 24.16(d) which he argues provides that any time worked over 8 hours in a day should be construed as at least 1 hour's work.

Customs Inspectors are entitled to overtime compensation for inspectional duties under the authority of 19 U.S.C. § 267 which provides in part as follows:

> The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays * * * such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. * * *

The Customs Service regulations implementing 19 U.S.C. § 267 are set forth at 19 C.F.R. § 24.16 (1980). Subsection 24.16(h) provides in part that the rate of extra compensation for Sunday work is fixed at 2 days' pay for work of up to an aggregate of 8 hours. It further provides that work in excess of an aggregate of 8 hours during the 24 hours of a Sunday shall be compensated for on the same basis as for overtime services performed at night on a weekday.

With regard to overtime compensation under 19 U.S.C. § 267, 19 C.F.R. 24.16(g) provides as follows:

> (g) Rate for night services. The reasonable rate of extra compensation for authorized overtime services performed by Customs employees at night on any weekday is hereby fixed at one-half of the gross daily rate of the regular pay of the employee who performs the service for each 2 hours of compensable time, any fraction of 2 hours amounting to at least 1 hour to be counted as 2 hours * * *

The above requirement that compensable overtime must consist of at least 1 hour's actual service is consistent with our decisions which have long held that entitlement to overtime compensation under the similar overtime provision for immigration inspectors, 8 U.S.C. § 1353a requires that an employee perform at least 1 hour of overtime work. See 16 Comp. Gen. 757 (1937) and 49 *id.* 577 (1970). Such a construction would be equally applicable to the requirements for overtime for Customs Inspectors under 19 U.S.C. § 267 since the courts have routinely applied payment of the special rate of overtime in the same manner under both statutes. See *Bishop* v. *United States*, 174 Ct. Cl. 31, 38 (1966).

The employee contends that the ¼-hour period he worked on each occasion should be regarded as 1 hour's work in view of the Customs

regulation at 19 C.F.R. § 24.16(d) which provides in pertinent part as follows:

> * * * Customs employees shall not be deemed available to perform reimbursable overtime services at night unless the total time of service, including waiting time, will be at least one hour, but nothing in this section shall prohibit the district director or other administrative officer from requiring an employee to perform, before he leaves his duty status and without extra compensation under the act of February 13, 1911, as amended, any work which is pending at the beginning of the night and can be completed in less than 1 hour. * * *

We view the above regulation as establishing an administrative policy as to when an off-duty Customs Inspector may be called for duty. It does not require that any overtime work performed is automatically to be regarded as 1 hour's work so as to entitle the employee to overtime compensation. To conclude otherwise would be altogether inconsistent with the regulatory provision that a Customs Inspector who is on duty status may be required to perform overtime services of less than 1 hour without extra compensation under 19 U.S.C. § 267.

Accordingly, since the employee in question did not perform at least 1 hour of overtime work on each Sunday for which he claims additional compensation he would not be entitled to overtime compensation under 10 U.S.C. § 267 in addition to the 2 days' extra compensation he received for up to 8 hours' work on a Sunday.

[B-202238]

Communication Facilities—Contracts—Automatic Call Distributing Systems—Restrictive Specifications—Reasonableness—Regulated Carrier's Protest

General Accounting Office (GAO) has no basis to conclude that provisions in solicitation for an automatic call distributing system do not reflect agency's legitimate needs where protester, a regulated public utility offering telephone services, complains that provisions make it impossible for a regulated carrier to bid, but does not show that the agency's rationale for including the provisions is unreasonable.

Contracts—Negotiation—Requests for Proposals—Specifications—Minimum Needs—Detailed Requirements

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

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Inability to Meet

Fact that the protester, or even all regulated public utilities, cannot meet Government's requirements is not *per se* indicative that solicitation unduly restricts competition.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—New Issues—Unrelated to Original Protest Basis

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

Contracts—Protests—General Accounting Office Procedures—Information Sufficiency—Clarification Requests by GAO—Duty to Make

GAO's duty under section 21.2(d) of Bid Protest Procedures to seek clarification of inadequately stated protest is applicable only where initial protest letter fails to state any basis for protest. Where initial protest adequately states basis of protest for one or more issues, section 21.2(d) is not applicable; it is the protester's duty to diligently pursue all other aspects of protest in a timely manner.

Contracts—Negotiation—Offers or Proposals—Time Limitation for Submission—Sufficiency of Time for Response

When offeror had solicitation available for review for period of months, and agency issued amendment deleting restriction affecting that offeror and extending date for receipt of initial proposals by 13 days, offeror had adequate opportunity to respond to solicitation.

Contracts—Negotiation—Pre-Proposal Conference—Agency Discretion

Agency was under no obligation to hold a preproposal conference since such conferences are held at the agency's discretion.

Matter of: Illinois Bell Telephone Company, October 20, 1981:

Illinois Bell Telephone Company (Bell) protests that request for proposals (RFP) No. IRS 81-29, issued by the Internal Revenue Service (IRS) to procure an automatic call distributing system, is restrictive of competition mainly because the specification describes one manufacturer's equipment and certain RFP terms limit the ability of regulated public utilities to compete.

The IRS responded to certain of Bell's objections by amending the solicitation. The remaining issues are either without merit or untimely.

Background

As a result of a recent consolidation of its telephone inquiry function, the IRS anticipated that its Chicago office would receive approximately 20,000 calls daily from taxpayers seeking guidance. The IRS

therefore determined that it needed automatic equipment to systematically distribute these calls to some 200 agents handling telephone inquiries and for other related functions. The subject solicitation sought offers for an integrated system to automatically perform this call distribution function, which includes agent stations, supervisory control stations, processors for electronic switching between lines, and auxiliary equipment, plus maintenance.

The IRS issued its original solicitation on January 22, 1981, which called for the submission of proposals on February 9. By letters dated January 30 and February 3, Bell pointed out a number of errors and inconsistencies in the solicitation and requested additional time to prepare a proposal. On February 4 the IRS contacted the offerors by telephone to advise them that the date set for receipt of proposals was to be extended. The IRS issued amendment No. 1 to the solicitation on February 13 correcting the deficiencies noted by Bell and extending the date for submission of proposals to February 26. This amendment in effect revised the entire solicitation.

Bell filed a protest with this Office on February 19, complaining that it was precluded from submitting a proposal because of the deficiencies in the original solicitation and stating that it had not received the amendment to the solicitation that the IRS had promised and that its request for a preproposal conference had not been honored. Further, the protester argued that certain specific terms and conditions in the solicitation prevented it, as a regulated public utility, from submitting a proposal. Bell finally maintained that the specification "described the mechanical functions" of another firm's equipment, therefore making it impossible for Bell to compete.

Shortly thereafter, on February 27, the IRS issued amendment No. 2 to the solicitation deleting one of the allegedly restrictive provisions and extending the date for receipt of proposals to March 12. Bell did not submit a proposal by the amended closing date. On April 20 the competition was reopened to incorporate minor revisions into the solicitation. Although the amendment was sent to Bell, it did not respond by the April 30 closing date.

The contracting officer subsequently determined that immediate award was in the Government's best interest and proceeded under Federal Procurement Regulations § 1–2.407–8(b)(4) to award the contract despite Bell's protest.

Solicitation Provisions

Bell contends that the proposed contract provisions contained in the solicitation were unnecessarily restrictive in a number of areas. The first of these provisions precluded the consideration of special assembly tariffs proposed by communication carriers. This prohibition was

deleted by amendment No. 2 to the solicitation and thus this aspect of the protest has been resolved.

Bell also asserts that the solicitation contained other terms which Bell, as a regulated communications carrier, could not satisfy due to tariff restrictions. The provisions in question: (1) provide for a one year fixed-price contract with fixed-price one year options; (2) prohibit the assessment of termination or cancellation charges; and (3) permit the Government to assess penalties for equipment downtime.

In reply, the IRS states that as it must operate on annual funds appropriated by Congress and in view of the rapidly changing technology in this area the most advantageous arrangement for the Government is an annual lease without cancellation charges and with option periods. The agency also states that fixed-price offers were required for accurate price comparison and because it is the preferred contract form for this type procurement. Finally, the IRS notes that the provisions relating to downtime penalties are needed to motivate the contractor to repair phone lines as quickly as possible and in effect constitute an equitable adjustment for lines which become inoperable.

The IRS argues that these contract provisions reflect its judgment as to the best business arrangement for procuring a complex system of this kind. IRS further states that where the solicitation conditions reflect the legitimate needs of the Government, they are not unduly restrictive of competition simply because they exclude one or more offerors.

A tariffed communications carrier, whose rates are subject to change and which by law must treat all classes of customers receiving similar service in the same manner, generally cannot be considered for the award of a fixed price contract for services covered by the tariffs. *American Telephone and Telegraph Company*, 60 Comp. Gen. 654 (1981), 81-2 CPD 157; but see *Anchorage Telephone Utility*, B-197749, November 20, 1980, 80-2 CPD 386. Fixed price contracts, however, are accorded a statutory preference under 41 U.S.C. 254(b) and this Office will not take legal objection to their use. *National Veterans Law Center*, 60 Comp. Gen. 223 (1981), 81-1 CPD 58.

With respect to Bell's contentions that the solicitation provisions prohibiting cancellation changes and assessing penalties for downtime are restrictive, the determination of the Government's minimum requirements and the best methods for accommodating them are properly the responsibility of the contracting agency. *Maremont Corporation*, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. This Office will not substitute its judgment for that of the contracting agency unless it is shown that the agency's judgment is unreasonable. *General Tele-*

phone Company of California, B–190142, February 22, 1978, 78–1 CPD 148. While the solicitation must be drafted in a manner to maximize competition, the fact that one or more potential offerors may be precluded from participating because of its terms does not render those terms restrictive if they reflect the legitimate needs of the agency. *Willard Company, Inc.*, B–187628, February 18, 1977, 77–1 CPD 121. The prohibition against undue restriction of competition does not require that a Government need be compromised in order to accommodate all potential offerors.

Here, although Bell argues that these provisions unduly restrict competition by preventing it from competing, the protester does not question the rationale set forth by IRS for the inclusion of the provisions. In view of this and since the provisions appear reasonable we have no basis to conclude that they do not reflect legitimate agency needs.

After receipt of the agency report on the protest, Bell objected to the solicitation provision concerning the Government's right to order optional equipment. Bell states that while the provision indicated the amount of optional equipment which would be required over the ten-year option period, it did not indicate in which of the ten years the equipment would be needed. The protester argues that no common carrier can possibly bid without knowing when the equipment would be required. Our Bid Protest Procedures require that alleged improprieties in the solicitation be protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1981); *AIL West*, B–190239, January 17, 1978, 78–1 CPD 38. In our opinion, Bell could and should have advanced these arguments in its initial protest letter or at least prior to the March 12 closing date for receipt of proposals. We will therefore not consider this element of Bell's protest which it did not raise until its comments on the agency report were filed on May 29.

Specification Restrictions

Bell's initial letter of protest contended that the specification was unnecessarily restrictive, in that it allegedly described the mechanical functions of the automatic call distributing system manufactured by another firm. Bell pointed out that the IRS originally intended to procure the other firm's equipment without competition, as evidenced by the November 12, 1980, announcement in the *Commerce Business Daily*.

The IRS responds that the specification was drafted to meet its legitimate needs for increased service, and that the protester must demonstrate how the agency has failed to satisfy this test. The IRS further states that because Bell's allegations were so indefinite, it cannot speculate as to the parts of the specification Bell believed were unduly restrictive.

It is the protester's responsibility to establish that the specification is, in fact, unduly restrictive by showing that the alleged restrictions are not reasonably related to the agency's needs. *Alan Scott Industries*, B–193530, April 27, 1979, 79–1 CPD 294. We do not believe that Bell can satisfy its burden of showing that the specification is unduly restrictive by simply asserting that it is functional in nature and that those functions describe the manner in which a competing product operates. *Oshkosh Truck Corporation*, B–198521, July 24, 1980, 80–2 CPD 161.

Further, the specification is functional only in the limited sense that it describes the manner in which the performance objectives are to be met; it does not impose physical design requirements upon offerors. Consequently, offerors were free to choose any combination of equipment which would perform the described operations in the manner and sequence indicated.

Subsequently, when commenting upon the agency report to this Office, Bell specified a number of particular specification provisions which it alleged were unduly restrictive of competition. For example, Bell notes that the specification required that incoming calls be connected directly to an agent when one is available while Bell's equipment would process such calls through a recorded message. The specification also required that incoming calls be placed with the agent who has been idle the longest while Bell's equipment would assign incoming calls randomly to available agents.

The IRS argues that Bell's belated challenge of these particular aspects of the specification is untimely. The IRS also notes that one of the contested specification provisions has been deleted by amendment No. 3 to the solicitation. Without admitting the timeliness of Bell's contentions, the IRS also points out its rationale justifying each of the remaining specification requirements. The IRS also identifies other manufacturers which produce equipment satisfying the challenged specification provisions.

In a situation where a protester merely listed the relevant paragraph numbers from the challenged specification without further explanation, we held that subsequent amplifying arguments amounted to untimely, piecemeal presentation of the issues. *Radix II, Inc.*, B–186999, February 8, 1977, 77–1 CPD 94. It follows that Bell's initial protest, which did not even list particular paragraphs, did not adequately convey Bell's intent to challenge specific portions of the specification. Accordingly, Bell's detailed challenge is untimely since the provisions in question were apparent on the face of the solicitation and the protest identifying them was first received by this Office after the date for receipt of initial proposals.

Bell, however, contends that this Office was obliged to request additional information from Bell under section 21.2(d) of our Bid Protest Procedures. In Bell's view, our failure to request additional details meant that those aspects of its protest had been presented properly. Bell therefore concludes that it was free to present any argument which was relevant to its initial allegation that the specification was restrictive.

Under section 21.2(d) of the Procedures, we request details when an initial protest filing is so vague or incomplete that neither we nor the procuring activity could be expected to identify a basis for protest. When the initial filing does adequately state at least one ground for protest, we do not seek details of other issues, no matter how incompletely they may be presented, since the agency involved can identify and respond to what the protester appears to care about most of all. In the final analysis, it is the protester's duty to diligently develop its own protest, not this Office's responsibility. Thus, if portions of a protester's initial submission do not suffice to identify some issues adequately, we view any subsequent submissions from the protester as having to satisfy the timeliness test of *Radix II*.

Meaningful Opportunity To Respond

Bell contends that the restrictive specification and solicitation provisions, the short time allowed for proposal preparation, and the IRS failure to conduct a preproposal conference, taken together, denied it a meaningful opportunity to compete.

The allegations relating to the restrictiveness of the specification and solicitation provisions have been discussed above. In our opinion, when IRS issued amendment Nos. 2 and 3 deleting the prohibition against special assembly tariffs and one of the protested specification requirements, the remaining solicitation provisions and the specification reflected the agency's minimum needs and were therefore not unduly restrictive of competition. Thus, if they excluded Bell from submitting a proposal, that firm simply could not meet the agency's needs.

As to the alleged lack of time to prepare a meaningful response to the solicitation, Bell received the original solicitation in January 1981 and sought its revision by letters dated January 30 and February 3. The record shows that Bell received amendment No. 1, which substantially revised the solicitation, on February 20. Amendment No. 2, which was sent to Bell by telegram on February 27, extended the date for submission of initial proposals to March 12. In view of Bell's familiarity with the IRS requirements gained in its review of the initial and revised solicitation, Bell should have been able to respond rapidly once the prohibition against the use of special assembly tariffs

was dropped. In these circumstances, we believe that the nearly two weeks allowed for submission of proposals by amendment No. 2 was adequate. Further, Bell was given another opportunity to submit an offer when the competition was reopened on April 20 by amendment No. 3.

Finally, Bell questions the IRS failure to hold a preproposal conference, contending that the conference would have given Bell an opportunity to seek clarification of the solicitation provisions it now protests. As noted in *A. J. Fowler*, B-191636, October 3, 1978, 78-2 CPD 252, preproposal conferences are not held routinely but are used when the procuring agency believes that a conference is necessary to explain complex aspects of the procurement. While recognizing that a preproposal conference may prove useful to offerors in certain instances, we will not question the agency's discretionary decision not to hold such a conference. *Fox & Company*, B-197272, November 6, 1980, 80-2 CPD 340.

Consequently, we do not believe that Bell was denied a meaningful opportunity to respond to the solicitation.

The protest is dismissed in part and denied in part.

[B-200722]

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

Additional materials submitted in support of a timely protest will be considered as part of the protest. The additional materials provide only the rationale for the protest basis clearly stated in the initial protest.

Contracts—Protests—Interested Party Requirement—Protest to Contract Modification

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

General Accounting Office—Jurisdiction—Contracts—Modification

Although protests against contract modifications usually are matters of contract administration which we will not review, we will consider protests which contend that a modification went beyond the scope of the contract and should have been the subject of a new procurement.

Contracts—Modification—Beyond Scope of Contract—Options Exercised—Purchase Changed to Lease—New Competition Recommended

A modification which converts a contract for the acquisition of disk drives from a purchase, with virtually no post-acquisition Government right to assure equipment performance, to a 5-year lease-to-ownership plan, with expansive rights in

the Government to enforce newly added performance requirements over the full term of the lease, so substantially alters the rights of the parties as to be beyond the scope of the original contract and results in a contract substantially different from that for which the competition was held. Therefore, a new competition should be conducted.

Matter of: Memorex Corporation, October 23, 1981:

Memorex Corporation (Memorex) protests a modification issued by the Social Security Administration (SSA), Department of Health and Human Services, under a contract option for the acquisition of disk drives, a type of information storage device used with computers. The modification substituted a newer type disk drive and changed the terms of the contract. Memorex contends that SSA should have procured the newer model disk drives competitively rather than by modifying the option. We agree with Memorex.

Background

On January 18, 1978, SSA awarded a contract to Storage Technology Corporation (STC) for the purchase of STC 8800 disk drives to provide 30.4 billion characters of disk storage capacity. On October 28, 1978, SSA exercised an option in the contract to acquire additional STC 8800 disk drives to provide a further 30.4 billion characters of storage. SSA deferred delivery of the option quantity as the result of delays in the availability of SSA's new computer center. After SSA exercised the option, but prior to delivery of the option quantity, SSA experienced problems with the already installed initial quantity of STC 8800 drives and eventually decided it could not accept the option quantity. SSA also determined that it could not establish STC responsibility or liability under the purchase contract for the problems with the model 8800 drives. While SSA was debating whether to terminate the option and expect a claim from STC, or to negotiate a settlement, SSA declined to accept delivery under the option on the last extended delivery date. STC asserted that SSA's failure to take delivery was a breach of the contract. On September 23, 1980, SSA and STC agreed to modification 10 to STC's contract.

Modification 10 provides for the substitution of STC 8650 disk drives for the older model 8800 equipment and converts the option from an outright purchase to a "lease-to-ownership" plan which contemplates Government ownership of the disk drives at the end of a 5-year lease period. The cost of the 5-year lease of the 8650's is more than $200,000 greater in absolute terms than the purchase option cost of 8800's. (SSA asserts that the cost is lower when compared on a present value basis—purchase price of the 8800's versus the amount of cash, adjusted for interest, required to pay the lease costs for the newer 8650's over the

5-year period.) Approximately nine of modification 10's 46 pages establish stringent performance requirements for the 8650's over the 5-year lease and specify SSA's remedies for unsatisfactory performance.

Memorex contends (1) that the option was improper; (2) that the exercise of the option was improper; and (3) that modification 10 so changed the nature of the contract that it should have been the subject of a competitive procurement. SSA contends (1) that Memorex is not an interested party under our Bid Protest Procedures, 4 C.F.R. part 21 (1981); (2) that Memorex's various protests are untimely under our Procedures; (3) that the modification was a matter of contract administration not for consideration by our Office; and (4) that the modification was proper, in any event. STC has offered additional reasons as to why Memorex's protest is untimely. We will confine our discussion to those issues which we consider dispositive of the protest.

Timeliness of Memorex's Protest

Memorex filed an initial short protest with our Office on October 7, 1980, contesting, in part, SSA's "failure to obtain competition" under modification 10. On October 17, 1980, Memorex filed a substantial expansion of its protest, charging in part that the substitution of equipment, the change from straight purchase to lease-to-ownership, and the increase in price, so substantially changed the nature of the option that competition was required. SSA contends that this aspect of Memorex's protest cannot be deduced from Memorex's October 7 protest and is therefore untimely because it was not raised until October 17, more than 10 working days after Memorex received a copy of modification 10 on September 26. STC adds that we should not consider Memorex's letter of October 17 because Memorex did not submit these "details" of its protest within the 5 working days contemplated under our Procedures.

Our Bid Protest Procedures, 4 C.F.R. part 21 (1981), generally require that initial protests to our Office contain a concise statement of the grounds for the protest, supported to the extent feasible, and also provide that any additional details required by our Office must be furnished within 5 working days of the protester's receipt of our request for the statement. 4 C.F.R. §§ 21.1(c), 21.2(d). With certain exceptions not relevant here, protests must be filed within 10 working days of the date on which the protester knew or should have known of the basis for its protest. 4 C.F.R. § 21.2(b)(2). Although each new basis for protest must independently satisfy our timeliness criteria, we will generally consider later-filed materials and/or arguments which merely provide further support for an already timely protest. *Kappa Systems, Inc.*, 56 Comp. Gen. 675 (1977), 77-1 CPD 412.

We find this protest to be timely. Memorex's timely initial protest letter of October 7 specifically objects to SSA's failure to conduct a competition for the disks acquired under the modified option. Despite STC's suggestion to the contrary, we find Memorex's October 17 submission to be only an explanation of the rationale for Memorex's fundamental objection which, we note, the protester provided voluntarily and not at our request. Consequently, this material will be considered.

Interested Party

SSA argues that Memorex is not an "interested party" as required under our Procedures (4 C.F.R. § 21.1(a) (1981)) in order to have its protest considered by our Office because Memorex did not compete in the original procurement.

The protest is that changes to the contract were so substantial that the contract should be terminated and a new competition conducted for the modified requirements. As a potential offeror on a new procurement, Memorex has a direct and established interest in the opportunity to compete for the award. Consequently, Memorex is an interested party. *Webcraft Packaging, Division of Beatrice Foods, Co.*, B–194087, August 14, 1979, 79–2 CPD 120.

Contract Administration

We do not consider protests against contract modifications unless it is alleged that the modification went beyond the scope of the contract and should have been the subject of a new procurement. *Webcraft Packaging, Division of Beatrice Foods Co., supra; Brandon Applied Systems, Inc.*, 57 Comp. Gen. 140 (1977), 77–2 CPD 486. This contention is the substance of Memorex's protest. Therefore, the protest is appropriate for our consideration.

Change v. New Procurement

We have consistently held that preservation of the integrity of the competitive procurement system requires that contracting parties not make changes to contracts which have the effect of circumventing the competitive procurement statutes. *Lawson Division of Diebold, Incorporated*, B–196029.2, June 30, 1980, 80–1 CPD 447; *American Air Filter*, 57 Comp. Gen. 285 (1978), 78–1 CPD 136. This principle is violated when a modification so substantially changes the purpose or nature of a contract that the contract for which the competition was held and the contract which is to be performed are essentially different. *Webcraft Packaging, Division of Beatrice Foods Co., supra.* We find this to be the case here.

Modification 10's conversion of the option from a purchase to a 5-year least-to-ownership plan with continuing performance requirements has shifted the burden and risk of nonperformance from the

Government to the contractor. STC's only continuing responsibility in connection with the original option was to provide maintenance services and SSA's only remedy for an inoperable disk was to obtain credits against the maintenance agreement. Under modification 10, however, STC has a continuing obligation to assure continuous satisfactory performance of the disks measured by objective standards; if a piece of equipment fails and cannot be repaired, STC must replace it. If a piece of equipment is unsatisfactory, even though it is repaired, SSA may deduct a portion of the rental charge. If deficiencies warrant, SSA may terminate the contract for default and hold STC liable for the excess costs of reprocurement. In effect, SSA now has acquired a right to continued satisfactory performance which it did not possess under the original option. STC has assumed correspondingly enlarged contractual obligations. We conclude that a change of this magnitude in the fundamental relationship of the contracting parties goes beyond the scope of the original contract and has resulted in a contract which is substantially different from that originally competed.

Memorex's protest is sustained.

SSA should initiate a competitive procurement for the disk drives. Because SSA has expressed a particular need for uninterrupted system availability, we will not object if in conducting the competitive procurement SSA elects to provide for the phased introduction of the replacement equipment. If STC is the successful offeror at a price lower than that under which STC is presently performing, STC's contract should be modified to reflect the lower price. If STC is unsuccessful, the lease should be terminated for the convenience of the Government in accordance with the "no-cost" termination provisions in the contract option. We recognize that implementation of this decision may result in the revival of STC's breach claim. However, that matter is for consideration under the Disputes Clause of the contract.

[B-201518]

Officers and Employees—Transfers—Temporary Quarters—Absences—Effect on Subsistence Expense Reimbursement

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

Matter of: Jon C. Wade—Subsistence expenses while occupying temporary quarters, October 28, 1981:

This responds to a request for an advance decision by Lupe Calabaza, an authorized certifying officer of the Department of the Interior. She seeks an opinion on the propriety of paying the claim of Jon C. Wade, an Interior employee, for subsistence expenses while occupying temporary quarters incident to a permanent change of duty station. The claim may be paid subject to an agency determination as explained below.

Mr. Wade was transferred from Phoenix, Arizona, to Albuquerque, New Mexico, and was authorized reimbursement for temporary quarters subsistence expenses (TQSE). Mr. Wade and his family moved into temporary quarters in Albuquerque on June 8, 1975, and remained in such quarters through June 13, 1975. He has been reimbursed for this period. It is the period following June 13, 1975, for which the certifying officer has requested our decision.

On June 14, 1975, Mr. Wade departed Albuquerque at his own expense to travel with his family to Aberdeen, South Dakota. The Wades spent the night of June 14, 1975, in Ogallala, Nebraska, and arrived in Aberdeen on June 15, 1975. Mr. Wade's family remained in Aberdeen through July 5, 1975, arriving back in Albuquerque on July 7, 1975, after staying overnight in Dodge City, Kansas. Mr. Wade departed Aberdeen on June 17, 1975, on official business travel, returning on June 28, 1975, at which time he began a period of annual leave through July 3, 1975. On July 6, 1975, Mr. Wade traveled with his family to Albuquerque, arriving on July 7, 1975.

Mr. Wade and his family had access to lodging at no cost to them during the period they spent in Aberdeen, June 15–July 5, 1975. Thus, his claim is limited to meal expenses for this period, in addition to TQSE for June 14 in Ogallala, July 6 in Dodge City, and July 7 in Albuquerque.

Under the provision of 5 U.S.C. § 5724a(a)(3), an employee may be reimbursed subsistence expenses for himself and his immediate family for up to 30 days while occupying temporary quarters. The implementing regulations contained in the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) provide that the period for temporary quarters should be reduced or avoided if the employee has had adequate opportunity to complete arrangements for permanent quarters (FTR para. 2–5.1), and that temporary quarters are to be regarded as an expedient to be used only if or for so long as necessary until the employee can move into permanent residence quarters (FTR para 2–5.2d).

Our decisions have held that the location of the temporary quarters need not be in the vicinity of either the old or new official duty stations so long as the quarters constitute temporary quarters under the applicable regulations. See *James W. Nicks*, B–191374, September 21, 1978, and decisions cited therein. We have also held that an employee may be reimbursed for subsistence expenses while on annual leave. *Henry J. Kessler*, B–185376, July 23, 1976.

Many of our prior decisions in this area concerned employees who had taken annual leave during the period of temporary quarters which raised the question of whether they were on "personal business." Because the regulations provide that temporary quarters should be regarded as an expedient for only so long as necessary until the employee can move into permanent residence quarters, that determination is dependent on whether the employee's taking of annual leave and traveling away from his new duty station caused an unwarranted extension of the period of temporary quarters or a delay in occupying permanent quarters. See *Russell E. Archer*, B–184137, December 29, 1975. If the employee has acted expeditiously in attempting to locate permanent quarters and has occupied permanent quarters as soon as available, he is entitled to temporary quarters expenses for the days he was on annual leave away from his old and new duty stations, since under those circumstances, he would have occupied temporary quarters regardless of whether he had taken leave. In this context, the term "personal business" refers to the necessity for the employee's occupancy of temporary quarters. *Andrew J. Howard*, B–195506, October 26, 1979.

We are unable to determine from the record if Mr. Wade's taking of leave during the days in question caused an unwarranted extension of the period of his occupancy of temporary quarters. For example, there is nothing in the record that indicates when his household goods were shipped, or when it was necessary that he vacate his old residence and occupy his new residence. If it is administratively determined that his actions did not cause an unwarranted extension of the period of temporary quarters occupancy, the voucher may be paid.

[B–203539]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester—Doubtful

Protest that evaluation was improper, filed within 10 working days from the time the protester was informed by the agency that another bidder had been awarded the contract, is timely even though protester could possibly have discovered

grounds of protest earlier since doubts as to timeliness are resolved in favor of protester and timeliness is measured from the time protester learns of agency action or intended action which protester believes to be inimical to its interests.

Contracts—Awards—Delayed Awards—Awardee No Longer Low Bidder

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

Matter of: Alliance Properties, Inc., October 28, 1981:

Alliance Properties, Inc. protests the award of a contract to The McMillan Corporation by the U.S. Air Force at Wright-Patterson Air Force Base under invitation for bids (IFB) No. F33601-81-B-0022. The solicitation called for bids to provide maintenance for military family housing. Alliance contends the award to McMillan requires the Air Force to pay more than it would have to pay Alliance for the same services. For reasons discussed below, this protest is denied.

When the solicitation was issued on March 3, the agency intended to make award by May 1 and to have the contractor start work on June 1. The original bid opening date of April 2 was extended to April 10 by an amendment dated March 30. The solicitation called for fixed prices for a four-month base period in fiscal year 1981, for each of two one-year options and for a third option of six months for a total of 34 months. The solicitation stated that bids would be evaluated by adding the total price of all options to the price for the basic quantity and that award would be made to the responsible bidder whose bid, conforming to the solicitation, would be most advantageous to the Government, price and other factors considered. The solicitation also provided that the contract period would be from June 1 or date of receipt of the executed contract, whichever was later.

Because of a delay in conducting a preaward survey of McMillan, the contract was not awarded to that firm until May 27. Since the contract required a one-month phase-in period, this made it impossible for McMillan to start work until July 1, thus eliminating one month from the planned base performance period of four months. Although McMillan's bid was low under the specified 34-month evaluation period, all parties agree that if the evaluation were based on a three-month base period and a 33-month total period reflecting the actual performance time caused by the delay in the award, Alliance would be low. McMillan's bid was evaluated at $965,764.66 for the 34-month period; $3,404.54 below Alliance's bid for that period. Alliance's bid

would have been evaluated at $937,319.18 were the 33-month period used; $699.48 under McMillan's bid for the same period.

Alliance contends that since the award did not include the month of June as originally planned, its bid, as evaluated using the shortened three month base period and 33-month total, is low and should have been accepted. The Air Force maintains that since the solicitation did not provide for an evaluation on any basis other than the 34-month period, its only alternative would have been to reject the bids and resolicit. In view of the cost of resolicitation, which would include the cost of extending the incumbent's contract, and considering the fact that the prices had been exposed and that there was no great difference between them, the Air Force did not consider this alternative desirable or feasible. The Air Force also contends Alliance's protest is untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981), because it was submitted four days after award and more than ten days after Alliance should have known (May 1) that the actual period of performance would be less than 34 months.

We believe Alliance's protest, which was received by this Office within three working days of that firm's receipt of notification of award, should be considered timely. The record is not clear as to what transpired during the evaluation period. Alliance did submit a letter dated May 13 which set forth its view that it considered itself the low bidder under the 33-month evaluation scheme. The Air Force never provided Alliance a written answer to the letter but contends that during several telephone calls it informed Alliance that that firm's analysis had not been accepted and the evaluation would be made on the basis of 34 months. Alliance, however, maintains it was told the Air Force was checking its mathematics and that the implications of Alliance's letter were unclear and would receive appropriate consideration. Under such circumstances, we believe any doubt should be resolved in favor of the protester. *Dictaphone Corporation*, B–196512, September 17, 1980, 80–2 CPD 201. Moreover, timeliness is measured from the time the protester learns of an agency action or intended action which the protester believes is inimical to its interests. *Werner-Herbison-Padigett*, B–195956, January 23, 1980, 80–1 CPD 66. That final action did not take place until the Air Force actually made award to McMillan based on the 34-month evaluation period.

As the solicitation clearly stated that the evaluation would be based on the total price for the 34 months, the Air Force had no authority to base its evaluation on 33 months or on any other basis than that set forth in the IFB. *Jacobs Transfer, Inc.*, 53 Comp. Gen. 797 (1974),

74–1 CPD 213; *Refre and Associates*, B–196097, April 25, 1980, 80–1 CPD 298, affirmed upon reconsideration July 7, 1980, 80–2 CPD 13. Therefore, when the Air Force found that unforeseen delays prevented start of performance until July 1, it was faced with the question as to whether it should solicit new bids or make an award for 33 months including the 3-month base period and 30-month option period.

The general rule is that an award must be made on the basis of the most favorable cost to the Government measured by the work actually to be performed and the evaluation should not include any period greater than that for which a contract could be awarded. See *Linolex Systems, Inc., et al.*, 53 Comp. Gen. 895 (1974), 74–1 CPD 296; *Crown Laundry and Cleaners*, B–196118, January 30, 1980, 80–1 CPD 82; *Chemical Technology, Inc.*, B–187940, February 22, 1977, 77–1 CPD 126.

We have held, however, that this general rule does not have to be strictly applied to all cases. *International Technical Services Corporation*, B–198314, January 13, 1981, 81–1 CPD 18. Here, all competitors, including the protester, competed on the basis of 34 months, which was clearly required by the terms of the solicitation. The prices had been exposed and the difference in the prices was less than the probable cost to the agency of a resolicitation. Under these circumstances, we believe the agency acted reasonably in not following the general rule and making award under the original solicitation. *International Technical Services Corporation, supra.*

The protest is denied.

[B–204729]

Compensation—Downgrading—Saved Compensation—Effect of Civil Service Reform Act of 1978

Employee who held a GS–13 position with the Department of the Air Force transferred to a GS–12 position with the Department of Energy after receiving notice that his GS–13 position would be transferred from Colorado to Virginia incident to a transfer of function. He is not entitled to grade and pay retention under 5 C.F.R. 536.202(a), since he was not placed in a lower-grade position as a result of declining to transfer with his function but, rather, as a result of his voluntary action based on his behalf that he might be separated.

Matter of: R. Dewayne Noell—Claim for Grade and Pay Retention, October 28, 1981:

Mr. R. Dewayne Noell has appealed our Claims Group's denial of his claim for grade and pay retention. Mr. Noell accepted a lower-grade position with another agency after receiving notice that his posi-

tion would be transferred to another area incident to a transfer of function. Mr. Noell is not entitled to grade and pay retention since he was not placed in a lower-grade position as a result of his declining to transfer with his function, but rather as a result of his voluntary action.

Mr. Noell was employed as a grade GS–13 Realty Officer with the Aerospace Defense Command, Peterson Air Force Base, (AFB), Colorado. By letter dated May 11, 1979, entitled "Preliminary Offer of Transfer of Function" Mr. Noell was advised by the Air Force that the function with which his position was identified was scheduled to transfer to Langley Air Force Base, Virginia, on or about October 1, 1979. He was asked to return the letter and indicate whether he was interested in accompanying the transfer of function. Mr. Noell replied that he was interested in accompanying the transfer of function. Mr. Noell received another "Preliminary Offer of Transfer of Function" dated September 4, 1979, wherein he was advised that his function was scheduled to transfer to Langley AFB no earlier than January 4, 1980. On September 5, 1979, he informed the Air Force that he declined the offer to transfer with his function.

By letter dated September 5, 1979, Mr. Noell was offered employment in Montrose, Colorado, with the Western Area Power Administration, Department of Energy, as a grade GS–12 Realty Specialist. The letter stated in part that it confirmed an earlier verbal offer and Mr. Noell's acceptance. Effective September 23, 1979, Mr. Noell transferred to the grade GS–12 position with the Western Area Power Administration.

Mr. Noell contends that he is entitled to grade and pay retention since he accepted the lower grade position rather than waiting to be separated.

Title VIII of the Civil Service Reform Act of 1978 amended title 5 of the United States Code to provide grade and pay retention for certain Federal employees who have been subject to reductions in grade as a result of grade reclassification actions or reductions in force. 5 U.S.C. §§ 5361–5366 (Supp. III, 1979). A qualifying employee who is reduced in grade as the result of a reduction in force is entitled to retain his grade for 2 years and thereafter retain his pay indefinitely unless his entitlement ceases under prescribed conditions. Under its authority at 5 U.S.C. § 5365(b)(3) to provide for application of all or portions of the statutory grade and pay retention provisions of that subchapter to justifiable situations, the Office of Personnel Management, at 5 C.F.R. § 536.202(a) (1980), has extended grade retention and pay retention to individuals who decline to transfer with their

functions and who, prior to separation "for declining the transfer" are placed in a lower-grade position, provided:

(1) The transfer of function is to a location outside the employee's commuting area; and
(2) The employee has served for 52 consecutive weeks or more in one or more positions at a grade or grades higher than that of the lower-graded positions in which placed.

In this instance, Mr. Noell was not placed in a lower-grade position as a result of declining to transfer with his function, but rather as a result of his applying for and accepting a lower-grade position with the Western Area Power Administration prior to the scheduled transfer of function. As pointed out by Mr. Noell, he chose to avoid the risk of being separated from Government service as a result of not being able to find suitable employment subsequent to the transfer of function. While this was an understandable decision in view of the preliminary notices of a transfer of function, the fact remains that Mr. Noell voluntarily accepted a lower-grade position prior to any definite action by the agency that would have separated him or placed him in a lower-grade position as a result of the prospective transfer of function. We have held that such circumstances do not qualify an employee for the remedy of grade and pay retention. See *Louis Rubinstein*, B–198941, August 19, 1980, *Albert D. Minear*, B–201775, August 3, 1981.

Mr. Noell also contends that he should be entitled to grade and pay retention because the personnel office at Peterson AFB advised employees that they would be eligible for all the benefits and protection normally afforded employees during a reorganization or a reduction in force. While it is not precisely clear what Mr. Noell may have been advised with respect to entitlement to grade and pay retention, any erroneous or incorrect advice he may have received would not expand the circumstances under which he would be entitled to grade and pay retention not authorized by the applicable statute and regulations. See *Elton L. Smalley*, B–181311, August 21, 1974, and court cases cited therein.

Accordingly, Mr. Noell is not entitled to grade and pay retention and our Claims Group's disallowance of his claim is sustained.

[B–196275]

Claims—Assignments—Erroneous Payments to Assignor—After Notice of Assignment—*Tuftco* Case—Lease Payments

Where the Government has received notice of a valid assignment, but thereafter erroneously pays assignor, it remains liable to assignee for the amount of the erroneous payment.

Claims—Assignments—Assignment of Claims Act—Notice Requirements—Noncompliance—Waiver Evidence

Although assignment did not comply with requirements of the Assignment of Claims Act, the record establishes that the Government was aware of, assented to and recognized the assignment of a contract. Therefore, the Government should pay money owed under contract to assignee.

Matter of: Centennial Systems, Incorporated, October 29, 1981:

The Department of Health and Human Services (HHS) requests our decision as to the propriety of paying Centennial Systems, Incorporated's (Centennial), claim for $8,654, arising from the apparent assignment to the firm of the proceeds from two HHS purchase orders, Nos. FPH-78-29 and RO II-79-79, under contract No. GS-005-43360.

In our view, HHS should pay Centennial's claim for $3,258 under purchase order FPH-78-29 and the $5,387 under purchase order RO II-79-79.

In fiscal year 1978, HHS contracted with LCS Corporation (LCS) for the lease of word processing equipment for its New York regional office. In July of 1978, LCS sold the equipment to Centennial and assigned the remaining proceeds of its contract lease with HHS under purchase order No. FPH-78-29 to Centennial.

Under this agreement, Centennial leased back all the purchased equipment to LCS, with the understanding that this equipment would be subleased to the Government. The parties agreed that all proceeds due LCS under the LCS-Government leases would be assigned to Centennial, and that LCS would issue the necessary Notices of Assignment for subsequent orders to effect the assignment of orders under the Assignment of Claims Act (Act), 31 U.S.C. § 203 (1976), 41 U.S.C. § 15 (1976). Centennial or its assignee was to receive all proceeds from all orders during the period involved here. In exchange for financing the leases, American Security Bank (ASB) was to receive the lease rental proceeds at issue here. The GAO has approved a similar lease-financing arrangement in *Alanthus Peripherals Incorporated*, 54 Comp. Gen. 80 (1974), 74-2 CPD 71. In that decision, an assignment of lease payments (under certain ADPE leases) to a lease-financing company which purchased title to the underlying equipment was recognized since the purchaser could be regarded as a "financing institution" under the Act.

The notice of assignment was served on the contracting officer and the assignment was acknowledged by the contracting officer in writing. However, ASB was not paid the rental for August and September of 1978. Apparently, the rental was paid to LCS instead.

For fiscal year 1979, beginning October 1, 1978, HHS renewed its leasing agreement with LCS under the same contract number, but with a new purchase order No. RO II–79–79 (renewal agreement). There is no evidence submitted to show that a valid assignment of the renewal agreement exists. HHS retained the payments owed under this contract because of its dissatisfaction with the equipment and service and its belief that LCS was no longer in business. HHS attempted to exercise its cancellation option with LCS beginning in November 1978, but it was not until February 1979 that HHS discovered that Centennial was the current owner of the equipment.

In April 1979, however, LCS sent HHS an invoice for $4,887, representing the rental for October through December 1978, under the renewal agreement. LCS apparently accepted the validity of the HHS cancellation notice of November. The LCS invoice directed that payment be made to ASB as assignee for Centennial.

HHS has refused to pay the $4,887 to ASB without proof of assignment of the renewal agreement by LCS to Centennial or ASB. Centennial and ASB have submitted a copy of the assignment of FPH–78–29 and HHS's acknowledgment of the assignment. In a letter to this Office, Centennial and ASB agree to hold the Government harmless from any other claims against monies due and owing under either purchase order.

Centennial claims $3,258 for the contract period of August and September 1978, $4,887 for the contract period October through December 1978, and $500 for an equipment removal charge. While HHS does not question the amounts owed, it requests our determination whether Centennial's claim to the money is valid.

Centennial's Claim of $3,258

This claim is for rental proceeds from August and September 1978, under the initial purchase order FPH–78–29. LCS assigned the proceeds from this contract-purchase order on June 30, 1978, to ASB. Notice of this assignment was given to and acknowledged by the contracting officer in compliance with the Act. HHS does not dispute the fact that the contract was performed for those 2 months. Centennial claims that it has not received the payments from HHS. HHS states that payment to the party it contracted with, LCS, constitutes satisfaction of its obligation to Centennial.

Ordinarily, once the Government has received notice of a valid assignment and thereafter erroneously pays the assignor, it remains liable to the assignee for the amount of the erroneous payment. See *Tuftco Corporation* v. *United States*, 614 F. 2d 740 (Ct. Cl. 1980);

Central National Bank of Richmond v. *United States*, 91 F. Supp. 738 (Ct. Cl. 1950).

Here, HHS had notice of a valid assignment to ASB, but apparently paid the assignor, LCS, not the assignee. Therefore, once HHS verifies these facts, it should pay ASB the $3,258 for the August and September 1978 rental. See *Tuftco*, *supra*, and *Central National Bank*, *supra*. HHS should take steps to recover the monies erroneously paid to LCS, if feasible.

Centennial's Claim for $5,387

Centennial also claims $4,887 as the rental fee for October through December 1978 and a $500 equipment removal fee under the renewal agreement. The problem concerning this claim is that a valid written assignment under the renewal agreement was not executed.

Although neither Centennial nor HHS has found a copy of an assignment for the renewal agreement acknowledged in writing by HHS in accordance with the Act, Centennial contends that it is entitled to this money nonetheless. It refers to a March 6, 1981, letter from HHS wherein HHS apparently recognizes Centennial's right to the rental from October through December as assignee in interest of LCS. (In an earlier letter, dated December 15, 1980, also cited by Centennial, HHS recognized that it owed "LCS or its rightful assignee" the monies, not referring specifically to Centennial's right as assignee to the money.) Centennial argues that since HHS recognized the assignment's existence, it is binding upon HHS, despite the fact that notice of the assignment was not given as required under the Act. Centennial cites *Tuftco*, *supra*, in support of its position.

In *Tuftco*, *supra*, the court held that, although an assignment did not comply with the requirements of the Act, the assignment was nevertheless binding on the Government where the Government was aware of, assented to and recognized the assignment. Here, in its March 6, 1981, letter, HHS, in effect, recognized the assignment of the renewal agreement. The LCS invoice of April 1979 sent to HHS, prepared after the original assignment, states that payment for October through December 1978, under the renewal agreement, should be made to ASB as assignee to Centennial. Centennial and ASB have offered to issue hold-harmless letters indemnifying the Government against any claims for the money claimed. In our view, the evidence substantiates Centennial's claim under the *Tuftco* decision. HHS should pay the claim upon receipt of the hold-harmless letters.

We authorize payment of Centennial's claim.

[B-201633]

Statutes of Limitation—Claims—Date of Accrual—Relocation Expenses—Erroneous Separation—Back Pay Act Applicability

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

Officers and Employees—Transfers—Expenses—Relocation, etc.—Erroneous Separations—Back Pay Act Applicability

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

Matter of: Ralph C. Harbin, October 29, 1981:

Mrs. Irene N. Harbin has submitted an appeal of our Claims Group's settlement dated June 24, 1980, which disallowed the claim of her late husband (Ralph C. Harbin) for reimbursement of certain relocation expenses including those of travel, transportation of household goods, and purchase and sale of residences. As will be explained below, the claim for travel expenses and transportation of household goods may be allowed in part, but the claim for the expenses of purchase and sale of residences may not be allowed.

Background

During the period November 1971 to August 1973, Mr. Harbin was a civilian employee with the Army Defense Attache Office in Saigon, Vietnam. By travel orders dated August 14, 1973, he was authorized return travel for separation and transportation of not in excess of 5,000 pounds of household goods from Saigon to Downey, California, his place of residence in the United States. His resignation from his position with the Army became effective October 31, 1973. On December 17, 1973, Mr. Harbin reported for duty as an employee of the Department of the Navy, Supervisor of Shipbuilding, in Seattle, Washington. He also moved his dependents and household goods to Seattle, with him, from their home in Downey. However, their home

in Downey was not sold until November 14, 1975. Also, a piano was shipped from Los Angeles, California, to their residence in Seattle during November 1975.

In November 1973 Mr. Harbin appealed his October 31, 1973, resignation from his Army position, arguing that he had not expected to resign but to be separated as a retired annuitant, apparently as a result of a reduction in force. Thus, he alleged that his separation was involuntary, and had been accomplished erroneously. Eventually, the Federal Employees Appeals Authority, Civil Service Commission, by decision of November 17, 1978, ruled in his favor in that regard. As a result, by memo dated March 23, 1979, the Chief of Naval Operations informed the Director of the Consolidated Civilian Personnel Office (Naval Support Activity) that Mr. Harbin's 1973 separation from his position with the Army had been cancelled, that "he must be considered as being appointed SUPSHIP [employee of Supervisor of Shipbuilding. Seattle] without a break in service" and that "Mr. Harbin is entitled to reimbursement of expenses incurred in his movement from Viet Nam to Seattle." Accordingly, the Director issued an amendment dated September 9, 1979, to Mr. Harbin's 1973 travel orders, which retroactively authorizes reimbursement for travel and relocation expenses. The amendment to his travel authorization contains the following notation:

> Based on the decision of the Federal Employees Appeals Authority, Mr. Harbin's resignation processed by the Army in 1973 was in error. Therefore, his travel orders for his return to U.S. for separation were inappropriate. *These* orders are to amend the original orders and move him from Saigon to Seattle, WA vice Saigon to Downey, CA. Based on CNO decision * * * Mr. Harbin's travel entitlement is not to exceed the constructed cost from Saigon to Seattle.

As a result, Mr. Harbin claimed relocation expenses incident to his move in December 1973 from Downey to Seattle, including a house hunting trip in November 1973, the expenses of purchase and sale of residences in 1974 and 1975, transportation of dependents and household goods in 1973, and transportation of a piano in 1975.

The Navy forwarded the claim to our Office for settlement where it was first received on March 21, 1980. In its June 23, 1980 settlement, our Claims Group stated that any expenses incurred prior to March 21, 1974 (6 years prior to receipt of the claim in our Office) are barred by the act of October 9, 1940, ch. 788, 54 Stat. 1061, as amended, 31 U.S.C. 71a (1976). Also, our Claims Group disallowed the real estate expenses on the basis that reimbursement of such expenses is not authorized for a transfer from Vietnam. In the absence of evidence that the piano was owned by Mr. Harbin or one of his dependents prior to December 17, 1973, the claim for its transportation was disallowed.

Mr. Harbin died January 4, 1980, and Mrs. Harbin has pursued the claim since that time.

Essentially, Mrs. Harbin maintains that we should consider payment of those travel and relocation expenses incurred prior to March 21, 1974, because no basis existed upon which to file a claim until December 6, 1978, when the Navy decided to retroactively issue an amendment to the original travel orders.

As is indicated previously, Mr. Harbin submitted an appeal of his separation. In its November 17, 1978 decision, the Federal Employees Appeals Authority, of the Civil Service Commission, in response to his appeal concluded that Mr. Harbin had been misinformed concerning his eligibility to retire and since he apparently had no intention to leave his position in Vietnam except for the purpose of retirement, he was involuntarily separated from his position without the benefit of procedures required in 5 C.F.R. Part 753B. Accordingly, the Appeals Authority directed the following:

> * * * that the action terminating appellant from his position of Supervisory Marketing Specialist, GS-1104-12, effective October 31, 1973, by resignation be canceled. In addition, the official personnel records should be changed to show appellant continuously in a duty and pay status from the date of resignation until the date of his actual return to a duty and pay status when he received a reinstatement career appointment to the position of Contract Price Analyst, GS-1102-11, effecive December 17, 1973, with Thirteenth Naval District, Seattle, Washingon.

The Appeals Authority had authority to make final decisions on appeals to the Commission, subject to agency petition for reconsideration. See 5 C.F.R. §§ 772.101 and 772.309 (1978). Apparently the agency involved made no such request, and the decision of the Appeals Authority became final. Accordingly, the employee's status became fixed by the record as corrected and he became entitled to travel and relocation expenses due upon application of the authorizing statute to the facts of his case as shown by the corrected records.

The Back Pay Act and the Barring Act

Backpay is authorized under 5 U.S.C. 5596 (1976) for an employee who is found by an "appropriate authority under applicable law, rule, regulation, or collective bargaining agreement," to have been affected by 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. Section 5596(b)(1)(A) (Supp. III, 1979) provides in part that such an employee—

> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred * * *

The regulations prescribed under 5 U.S.C. 5596 to carry out its provisions (in effect when the Appeals Authority issued its decision) provided at 5 C.F.R. § 550.803(d) (1978) that the "appropriate authority" to make the finding that an employee had suffered an unwarranted personnel action included the Civil Service Commission of which the Appeals Authority was a part.

As is indicated above, the Appeals Authority rendered its decision on Mr. Harbin's case in 1978 and, pursuant thereto, the Navy took its corrective action in 1979. We have held that backpay claims accrue at the time the work is performed and the 6-year barring act, 31 U.S.C. 71a, begins to run at that time. However, when a claim is based on another agency's determination of the validity of the claim, we have held that the claim does not accrue, for the purposes of the barring act, until the designated agency makes its determination. See 58 Comp. Gen. 3, 4 (1978).

It is our view that this claim falls into the latter category. That is, while the expenses for which reimbursement is claimed were incurred in 1973, 1974, and 1975 incident to the move to Seattle, any right to reimbursement was not established until 1978 when the Appeals Authority acted. Therefore, since any claim Mr. Harbin had incident to that move must have accrued under the Appeals Authority decision in 1978, and his claim was filed in our Office in 1980, it is not barred by 31 U.S.C. 71a.

As is indicated above, Mr. Harbin's claim arose under the Back Pay Act, 5 U.S.C. 5596. That act, as applicable here, authorizes payment only of the "pay, allowances or differentials" the employee would have received but for the unwarranted personnel action. Apparently, Mr. Harbin was paid the backpay he lost between the time of his involuntary resignation and his reemployment in Seattle since the current claim is for travel and transportation expenses and the costs of buying and selling residences.

Entitlement to Travel, Transportation and Relocation Allowances

We have held that the Back Pay Act does not authorize payment of travel, transportation, or moving expenses when they are incidental expenses incurred by an employee as a consequence of the unwarranted personnel action. Such expenses are not allowances that the employee would have received if he had not undergone the improper personnel

action. See B–181514, May 9, 1975; B–182282, May 28, 1975; and B–184200, April 13, 1976. However, in this case, as a result of the improper personnel action, Mr. Harbin was denied certain travel and transportation allowances which he would have received but for the improper personnel action. Those allowances may be paid under the Back Pay Act.

Under the revised travel order issued by the Navy to carry out the Appeals Authority's decision, Mr. Harbin was transferred from Vietnam to Seattle, Washington, in lieu of Vietnam to Downey, California. His travel and transportation entitlements must be determined based on the revised travel order and the applicable statutes and regulations. Travel and transportation entitlements of civilian employees of Department of Defense agencies are set out in Volume 2, Joint Travel Regulations (2 JTR), which effectuates the Federal Travel Regulations for such employees.

When Mr. Harbin was transferred to Vietnam, he was not authorized to bring his dependents with him and he was authorized transportation of not in excess of 5,000 pounds of household goods. Apparently his dependents remained at his actual place of residence in California during his overseas assignment. The record does not show the weight of the household goods he took overseas or returned to California at Government expense.

Under the revised travel order, incident to his employment in Seattle, he was entitled to travel and transportation allowances for himself and his household goods directly from Vietnam to Seattle, less what he already received in allowances for travel and transportation from Vietnam to California. He is also entitled to the transportation of his dependents at Government expense from his residence in Downey, California, to Seattle, not to exceed the constructive cost of such travel from Vietnam to Seattle. 2 JTR paragraph C7003–3a. Claim is made for such travel for his wife and daughter as his dependents. His wife qualifies as a dependent and the claim for her travel may be allowed. However, his daughter was 24 years old when the travel was performed in 1973. To qualify as a dependent child, the daughter would have had to have been under 21 years of age or physically or mentally incapable of self-support. 2 JTR Appendix D, Dependent. Since those conditions have not been shown to exist, reimbursement for the daughter's travel may not be allowed.

As to transportation of household goods, Mr. Harbin was entitled to the return of not in excess of 5,000 pounds of his goods from Vietnam to his new official duty station in Seattle. He is also entitled to the transportation of his goods from California to Seattle to the extent

that the combined weight of the shipments does not exceed this maximum entitlement of 11,000 pounds. 2 JTR paragraphs C8000 and C8003–6.

Claims have been submitted for the transportation of 4,290 pounds of household goods from California to Seattle. This amount consists of 1,670 pounds which Mr. Harbin moved himself, 2,080 pounds moved by household goods carrier, and a piano weighing 540 pounds shipped separately from storage by household goods carrier. While previously it was unclear as to whether the piano was owned by Mr. Harbin or his dependents prior to December 1973, Mrs. Harbin has now furnished information satisfactorily establishing that it was owned by them prior to that time. Since the claim for shipment of the 4,290 pounds of household goods would be within the total allowable weight even if the full shipment from overseas had been made it may be allowed.

Claim is also made for travel allowances for Mr. Harbin and his wife to travel from Downey to Seattle on a house-hunting trip prior to their move there, temporary quarters subsistence expenses while occupying temporary quarters following their move to Seattle, and the expenses of purchase and sale of residences incident to that move. Under the authorizing statute the expenses of a house-hunting trip may be paid only when *both* the old and the new official stations are located within the United States, and the expenses of purchase and sale of residences may be paid only when *both* the old and the new stations are within the United States, its territories and possessions. See 5 U.S.C. § 5724a (a) (2) and (4); 54 Comp. Gen. 1006 (1975) and 47 Comp. Gen. 93 (1967). Since Mr. Harbin's old official station was in Vietnam, he did not qualify for these allowances upon the move to his new official station in Seattle and, thus, the claim for these allowances may not be paid. However, since the new station was located within the United States, temporary quarters subsistence expense may be paid. See 5 U.S.C. § 5724a(a) (3) and 58 Comp. Gen. 606, 608–609 (1979). Accordingly, this allowance may be paid for the 10-day period for which it is claimed.

A settlement will be issued on this basis in due course.

[B–202543]

Joint Travel Regulations—Proposed Amendments—Military Personnel—Overseas—Return Transportation of Ex-Family Members—Time Limitation Extension

Proposed amendment to the Joint Travel Regulations, to increase from 6 months to 1 year after relief of uniformed services member from his overseas duty station

during which transportation of ex-family members must take place, should not be implemented. Any extension of time for travel beyond that currently allowed may be authorized only if justified on an individual case basis when it can be shown that the return took place as soon as reasonably possible after the divorce and departure of the member from the overseas station.

Matter of: Return travel to United States for dependents of uniformed services member following divorce, October 29, 1981:

The Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) has requested our decision as to whether Volume 1 of the Joint Travel Regulations (1 JTR) may be amended to eliminate the requirement that in cases where a member's marriage is dissolved, entitlement to transportation of ex-family members will terminate 6 months after the relief of the member from the overseas duty station incident to a permanent change of station. The request has been assigned Control No. 81–2 by the Per Diem, Travel and Transportation Allowance Committee. Since return to the family members must be reasonably related to the termination of the family member status, we cannot authorize a general increase in the time allowable. However, a provision which would authorize the granting of exceptions to the 6-month limit would not be objectionable if those exceptions were allowed only in cases where the delay was not merely a matter of personal preference and return to the United States was accomplished as soon after the divorce or annulment as was reasonably possible.

In decision 53 Comp. Gen. 960 (1974), we stated that we would have no objection to an amendment to Volume 1 of the JTR that would permit members of the uniformed services stationed overseas to be reimbursed for the return travel to the United States of a spouse who traveled to the foreign post as a dependent but ceased to be dependent as of the date the member became eligible for their return travel because of divorce or the annulment of the marriage. The decision also applied to a member's minor children who because of custody and support agreements would not qualify as the member's dependents after the divorce or annulment. The JTR was amended accordingly and currently includes this entitlement in paragraph M7104. Paragraph M7104–7 also provides that such transportation "must be completed within 1 year after the effective date of the final decree of divorce or annulment as applicable, or 6 months after the date of relief of the member from the overseas duty station incident to a permanent change of station, whichever occurs first."

The proposed change to paragraph M7104–7 would eliminate the 6-month time limitation and in lieu thereof entitle the member to the transportation of the ex-family members up to 1 year after the final

divorce decree regardless of when the member departed from the overseas duty station, provided the divorce occurred prior to the member's permanent change of station. The legality of that part of the proposed revision which would provide an entitlement 1 year after the member travels has been questioned. Since the return travel must be linked to the member's entitlement to return his dependents, we cannot approve of the proposed revision.

The change to the regulation is proposed because, it is stated, the 6-month requirement is creating hardships for many ex-family members who, for legitimate reasons such as being hospitalized, and having medical problems, and completion of the school year, desire to remain in the overseas area beyond the 6-month period allowed. The proposal would provide authority for the ex-family members to remain overseas up to 1 year after the final divorce decree without regard to the reason for the delay.

In 52 Comp. Gen. 246 (1972) we stated that the travel regulations recognize an obligation on the part of the Government to return members of certain civilian employees' families who were transported overseas for the convenience of the Government although the families ceased to be dependents of the employees when they became eligible for return travel. In subsequent decisions, citing 52 Comp. Gen. 246 as support, we have not objected to proposed revisions to the travel regulations extending return travel to ex-family members of other civilian employees and military personnel. See 53 Comp. Gen. 960 (1974) and 53 Comp. Gen. 1051 (1974). Regarding the children, we noted that amendments to the regulations approved in those decisions were not a radical departure from the previous practice since the employee or member would, in many cases, continue to be responsible for their support and they would remain members of his family. See B-163138, January 17, 1968. Also, although an ex-wife would not technically be a dependent of the member following a final divorce, often the member would be responsible for her support and it would impose a financial hardship upon him to provide for her return travel. We took into consideration the legislative history of 37 U.S.C. § 406(h), under which the change in the military regulations was authorized, which indicated that Congress was aware of the potential problems that could result for both a member and the United States if dependents were to remain overseas because the member could not afford to provide for their return travel to the United States after marital difficulties had arisen. Also, the providing of return travel avoids the potential embarrassment to the United States caused by the presence

overseas of ex-family members who are unable to return home due to lack of funds.

However, the entitlement to travel is related to the status of the spouse and children as dependents of the member. It is not a travel entitlement any such dependent has in his or her own right. Thus, when the marriage ends there is no further right to travel except as recognized in 52 Comp. Gen. 246. Under that authority travel is allowed incident to the divorce and this must be accomplished within a reasonable time after that event. Although we do not now question the time allowed under current regulations, it does not appear to be within the intent of the holding in 52 Comp. Gen. 246 to permit the ex-spouse of a member to remain overseas for 1 year after the member has been transferred without regard to the reason for such an extended stay. Accordingly, if the length of time specified is considered inadequate in some instances, provision should be made for granting exceptions to the general rule on the basis of a showing that the delay was not merely a matter of personal preference and that the return to the United States was accomplished as soon after the divorce or annulment as was reasonably possible in the circumstances.

The regulations should not be amended except in accordance with the above.

[B-205087]

Officers and Employees—Contracting With Government—Public Policy Objectionability—Exception—Unwarranted

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

Matter of: Valiant Security Agency, October 29, 1981:

Valiant Security Agency, through its owner, Lawrence W. Bartolo, protests rejection of its low bid for security services under invitation for bids No. 82-01-09-11-81 issued by the National Institute for Occupational Safety and Health, Department of Health & Human Services. The bid was rejected because Mr. Bartolo has been employed by the Federal Government since 1968, and the contracting officer relied on Federal Procurement Regulations (FPR) § 1-1.302-3 (1964 ed. amend. 95) which provides as follows:

(a) Contracts shall not knowingly be entered into between the Government and employees of the Government or business concerns or organizations which

are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied.

(b) When a contracting officer has reason to believe that an exception as described in paragraph (a) of this section, should be made, approval of the decision to make such an exception shall be handled in accordance with agency procedures and shall be obtained prior to entering into any such contract.

Valiant contends it has a proven performance record extending back to 1972 and the agency which employs Mr. Bartolo has awarded a contract to Valiant when no other bids were received. Valiant asserts it was not reasonable for the agency to award a contract to the awardee at a price $20,456 higher than the bid of Valiant and such a savings by itself should have compelled the contracting officer to make an award to Valiant.

We believe the issue presented may be decided on the basis of the protester's submission without further development under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981), because the material submitted by the protester, when read in the light most favorable to the protester, affirmatively demonstrates that the protester is not entitled to relief. See *Hawthorne Mellody, Inc.*, B-190211, November 23, 1977, 77-2 CPD 406.

Contracts between the Government and its employees are not expressly prohibited by statute except where the employee acts for both the Government and the contractor in a particular transaction or where the service to be rendered is such as could be required of the contractor in his capacity as a Government employee. 18 U.S.C. § 208 (1976); *Hugh Maher*, B-187841, March 23, 1977, 77-1 CPD 204. However, it has long been recognized that such contracts are undesirable because among other reasons they invite criticism as to alleged favoritism and possible fraud and that they should be authorized only in exceptional cases where the Government cannot reasonably be otherwise supplied. 27 Comp. Gen. 735 (1948); *Capitol Aero, Inc.*, 55 Comp. Gen. 295 (1975), 75-2 CPD 201; *Burgos & Associates, Inc.*, 59 Comp. Gen. 273 (1980), 80-1 CPD 155. The fact that a service would be more expensive if not obtained from an employee of the Government does not by itself provide support for a determination that the service cannot reasonably be obtained from other sources. 55 Comp. Gen. 681 (1976).

Therefore, we see no basis for questioning the contracting officer's decision not to seek approval for an exception to the basic policy set forth in FPR § 1-1.302-3.

The protest is summarily denied.

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