Decisions of The Comptroller General of the United States

VOLUME 62 Pages 65 to 110

DECEMBER 1982
WITH
INDEX DIGEST
OCTOBER, NOVEMBER, DECEMBER 1982

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300130200

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1983

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

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Cite Decisions as 62 Comp. Gen. —

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

[B-206999.6]

Bids—Estimates of Government—Faulty—Cancellation of Invitation—Incumbent Contractor's Advantage—Unfairness Possibility

An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage.

Matter of: Downtown Copy Center, December 6, 1982:

Downtown Copy Center (DCC) protests the cancellation of solicitation No. IFB-82-03 by the Federal Communications Commission (FCC). The solicitation sought a contractor to supply services, including personnel and equipment, for the search, duplication, and sale to the general public of certain documents maintained by the FCC. The contractor was also to furnish coin-operated copiers for use by the public.[1]

DCC has also filed suit against the FCC in the United States Claims Court, seeking injunctive and declaratory relief.[2] *Downtown Copy Center* v. *The United States,* Civil Action No. 527-82C. By order dated October 29, 1982, the court requested an advisory opinion from our Office. This decision is in response to that request.

The central issue of the case is whether the existence of inaccuracies in the solicitation's volume estimates provided a reasonable basis for cancellation of the solicitation after bid opening. As discussed below, we conclude that the cancellation was justified. We therefore deny the protest.

The FCC issued the solicitation on February 18, 1982. Section C of the solicitation contained a bidding schedule for services for the initial year of the contract and two 1-year options. The schedule listed 13 categories of services, such as duplication services and search services, and provided an estimate of the yearly volume of work projected for each category. A footnote to the schedule cautioned that estimated volumes were not to be construed as actual requirements.

The solicitation specified that award would be made on the basis of the lowest bid as determined by multiplying the unit prices bid for each item by the estimated quantities specified and then adding the totals for each of the 3 years. The contractor would retain the revenue generated from sales under the contract. DCC was the in-

[1] This contract apparently falls within section 11 of the Federal Advisory Committee Act, 5 U.S.C. Appendix (1976). While we have held that the act does not require the application of any particular procurement procedures, *CSA Reporting Corporation,* 59 Comp. Gen. 338 (1980), 80-1 CPD 225, this procurement was conducted under the Federal Procurement Regulations.

[2] The Federal Courts Improvement Act of 1982, Pub. L. 97-164, which became effective October 1, 1982 (28 U.S.C. 1 note), established the United States Claims Court and the United States Court of Appeals for the Federal Circuit, replacing the United States Court of Claims and the United States Court of Customs and Patent Appeals. Under the Act, the United States Claims Court has jurisdiction "[t]o afford complete relief on any contract claim brought before the contract is awarded * * *." 96 Stat. 39, § 133(a), April 2, 1982, 28 U.S.C. 1491(a).

cumbent contractor and had held the contract, through option exercises and extensions, for the previous 7 years.

At a pre-bid conference on March 4, prospective bidders requested copies of DCC's quarterly reports, which were the source of some of the solicitation's volume estimates. On that same day, the FCC issued an amendment to the solicitation substantially increasing the estimated volumes. The FCC subsequently received additional requests from prospective bidders to make available DCC's quarterly reports. In a letter dated March 18, the FCC responded by stating that it only had on file three quarterly reports for 1981 and one for 1977. The letter set forth figures from those reports for April 1981 to December 1981.

The FCC opened bids on April 16. DCC's low bid of $1,087,777.50 was the lowest of the six received. On April 29, the third low bidder, TS Infosystems Inc. (TSI), filed a protest with this Office contending that the solicitation contained inaccurate volume estimates and that DCC was nonresponsible because of allegedly poor service it was rendering under the current contract.[3] Automated Datatron Incorporated (ADI), the second low bidder at $1,093,291, protested to this Office on April 30, alleging that DCC's bid was mathematically unbalanced.

After bid opening, the FCC requested the Defense Contract Audit Agency (DCAA) to audit DCC's records to determine whether the firm had submitted an unbalanced bid and whether DCC's quarterly reports were accurate.

The DCAA reviewed DCC's records for the last quarter of 1981 and, in a July 2 report, stated that it found no basis to challenge DCC's proposed prices. The DCAA cautioned, however, that its conclusion was based on the assumption that the solicitation's volume estimates were accurate. That assumption, the DCAA explained, might not be realistic for the following reasons:

1. The audit of duplication services for the last quarter of 1981 revealed a disparity of 38 percent between DCC's quarterly report figure of 457,428 copies and DCAA's audit figure of 632,695 copies.

2. The DCAA was unable to verify the volume of copies from coin-operated machines since DCC did not maintain independent meter readings for those machines but relied on meter readings from maintenance records.

3. DCC was unable to provide time records to substantiate the charges for search services. In addition, invoices for those services were not always consistent with respect to the method of billing.

4. DCC did not retain the supporting data that were the bases of its quarterly reports.

On September 8, the FCC canceled the solicitation, stating that "the estimates * * * were probably in error and could have given

[3] We dismissed TSI's protest on procedural grounds. *TS Infosystems, Inc.*, B-206999.3, May 18, 1982, 82-1 CPD 479. On June 11, TSI requested that we reconsider our decision and that request was pending when the FCC canceled the solicitation.

an unfair advantage to the incumbent contractor." TSI and ADI subsequently withdrew their protests. On September 21, DCC filed a protest with the FCC, challenging the cancellation. The FCC denied the protest on September 30. DCC subsequently brought its action before the Claims Court on October 13 and filed this protest on October 15.

The FCC contends that it was reasonable to assume, based on the DCAA report, that the solicitation's volume estimates were inaccurate and that the inaccuracies could have been prejudicial to the other bidders *vis-a-vis* DCC. In this regard, the FCC asserts that the Government had a duty to include in the solicitation the most accurate information available. Since one of DCC's quarterly reports was shown to be inaccurate and the supporting data for the report inconsistent or missing, the FCC continues, it was reasonable to conclude that the volume estimates based on those reports did not represent the most accurate information. The FCC also asserts that since DCC had access to accurate volume estimates, it was reasonable to believe that DCC might have had an unfair advantage, particularly since the difference between the bids of DCC and ADI was only $5,513.50.

DCC challenges the FCC's assertion that the inaccuracies in the volume estimates were sufficient to justify cancellation. First, DCC alleges that the FCC's reliance on the 38 percent disparity in one category of services for one quarter of the year was improper. In this regard, DCC offers the affidavit of Dr. Charles R. Mann, a statistical analyst who reviewed DCC's duplication services records for all of 1981. Dr. Mann states that his review of the records indicates that, while the DCAA's figures for the last quarter of 1981 were essentially correct, DCC's volume of duplication services for that entire year was 2,309,362 copies, or only 17.73 percent more than the estimate of 1,900,000 copies that the solicitation projected for the first year of the contract.

DCC also asserts that inaccuracies in the solicitation's overall volume estimates were minimal. DCC states that Dr. Mann examined DCC's records for the volume of coin-operated copying in 1981 and found that the solicitation underestimated that volume by only 106,533 copies, or approximately 7 percent. Since the FCC did not allege that any of the remaining solicitation estimates were inaccurate, DCC believes that it can be assumed that they are correct. On this basis, DCC calculates the overall percentage of error in the solicitation's volume estimates at 10.11 percent. Neither 10.11 percent nor 17.73 percent, DCC asserts, represents a substantial error.

DCC also argues that it clearly had no prejudicial "insider's" advantage since the figures in its reports represented the volume of work that the firm believed to be accurate. In addition, DCC asserts that, since the FCC failed to show that DCC would have been displaced as low bidder or that any bidder would have altered its

prices based on different estimates, the FCC has not proved the existence of prejudice here.

The cancellation of an invitation for bids after bid prices have been exposed can have a deleterious effect on the competitive bid system. For that reason, cancellation is improper unless there is a cogent and compelling reason which justifies the cancellation. *Massman Construction Co.* v. *United States,* 60 F. Supp. 635 (Ct. Cl.), *cert. denied* 325 U.S. 866 (1945); Federal Procurement Regulations (FPR) § 1-2.404-1(a). A contracting officer, however, has broad discretion in determining whether a cogent and compelling reason exists, *Marmac Industries, Inc.,* B-203377.5, January 8, 1982, 82-1 CPD 22, and thus a determination to cancel a solicitation after bid opening is not legally objectionable unless there clearly is no reasonable basis for it. *Central Mechanical, Inc.,* B-206030, February 4, 1982, 82-1 CPD 91.

Cancellation obviously is appropriate where the supplies or services sought by the solicitation are no longer needed, *see* FPR § 1-2.404-1(b)(2), or where, because of deficient specifications, award under the solicitation would not satisfy the Government's needs. *Keco Industries, Inc.,* B-191856, April 5, 1979, 79-1 CPD 234. In addition, there are certain situations where, despite the strong public policy against cancellation after bid opening, such cancellation is appropriate in light of other equally important considerations concerning the competitive bid system. For example, under certain circumstances an agency's failure to solicit its incumbent contractor would prevent the full and free competition envisioned by the procurement statutes; cancellation and resolicitation to remedy that problem is appropriate. See *Scott Graphics, Inc.; Photomedia Corp.,* 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Similarly, where estimates in a solicitation are found to be other than a reasonably accurate representation of actual anticipated requirements, cancellation is required to preclude the possibility of an award that would not result in the lowest cost to the Government and to provide bidders an opportunity to structure their bids on a more realistic representation of anticipated needs. *Edward B. Friel, Inc.,* 55 Comp. Gen. 231 (1975), 75-2 CPD 164; *Photo Data, Inc.,* B-188912, July 29, 1977, 77-2 CPD 62. Perhaps even more significantly, cancellation is appropriate whenever it reasonably appears that for some reason fair and equal competition—or competition on an equal basis—might have been thwarted. *Photo Data, Inc., supra;* 49 Comp. Gen. 251 (1969); see also *The Franklin Institute,* 55 Comp. Gen. 280 (1975, 75-2 CPD 194.

In this case, we believe the contracting officer had a reasonable basis for the determination to cancel. Although the DCAA report reflected DCC's records for only one quarter of 1 year and concerned only four of the 13 categories under the solicitation, the report did indicate a 38 percent discrepancy between the volume of duplication reported by DCC during the last quarter of 1981 and

the DCAA's audit figures for that period, and that discrepancy was substantial. In addition, the DCAA found DCC's recordkeeping to be so lacking that the DCAA was unable to verify the incumbent's quarterly estimates for search services and coin-operated copying, the other two categories in which DCC's quarterly reports formed the basis for the solicitation's volume estimates. Those three categories represented the major items of work under the solicitation, as exhibited by the fact that the bid prices for that work constituted between 77 and 80 percent of the total price bid by each of the three lowest bidders. Finally, the FCC, for whatever reason, apparently, did not have on file a complete set of quarterly reports for any one of the 7 years that DCC had been performing the contract. Thus, the FCC had no historical data by which to verify the volume estimates but, practically speaking, had only volume figures from DCC's quarterly reports filed in 1981, a portion of which the DCAA report called into question.

The record does not indicate whether the FCC's lack of data stems from the agency's apparent failure to demand continuous and more complete information from DCC during the contract or from DCC's apparent failure to supply that information. In either case, it resulted in a situation where, we think, the contracting officer could reasonably view the validity of the solicitation estimates as questionable. While the DCAA's conclusion regarding one quarter of 1 year did not automatically warrant a conclusion that a 38 percent discrepancy was likely for the other quarters, neither did it provide the contracting officer with any basis for confidence in the reliability of the other figures reported to the agency by DCC. Moreover, while DCC's statistical expert states that his review showed a 17.73 percent discrepancy for the entire year and not a 38 percent discrepancy, we cannot say that the contracting officer acted unreasonably in relying on the reported 38 percent disparity or that, given the large volume (1.9 million copies) involved, even a 17.73 percent variation is not a significant one.

Moreover, given the small difference between the DCC and ADI bids (approximately $5,500 on bids exceeding $1 million), we think the contracting officer could reasonably believe that DCC could have had an unfair advantage, or at the very least could appear to have had such an advantage, in light of the apparent understated estimates. While DCC argues that no bid would have been different if more accurate estimates had been used, we think it is more reasonable to conclude otherwise and that DCC could have had the benefit of an unfair advantage as a result. This advantage, we think, could have manifested itself in how DCC, as the only bidder in a position to know that significantly more duplicating work and perhaps other work would be required than indicated by the invitation for bids, chose to structure its pricing. Obviously, given the small difference between the two low bids, if DCC chose to bid lower than it otherwise would have on the basis of its superior

knowledge, it might well have been the low bidder solely for that reason. Similarly, if the second low bidder would have bid lower on the basis of more realistic higher estimates, DCC might have been displaced as low bidder. See *Photo Data, Inc., supra.* Although the record doesn't establish that either of these possibilities in fact would have occurred, the importance of protecting the integrity of the competitive bidding system and of preventing even the appearance of an unfair competitive advantage provides sufficient basis for canceling a solicitation in the face of a reasonable possibility that a bidder had an unfair advantage. *See* 49 Comp. Gen. 251, *supra.*

We note DCC's further assertion that it could have gained no undue competitive advantage because it did not know, any more than its competitors did, that the data in its quarterly reports was inaccurate. The simple answer to that is that it is just not reasonable to expect that DCC would not or should not have known the actual volumes of work provided. Even if DCC in fact was not aware of the discrepancies when it computed its bid, DCC must be charged with constructive knowledge of the actual figures.

In the course of these proceedings, the FCC has advanced various other reasons for canceling the solicitation. DCC challenges them on the basis that they were developed in response to the Claims Court suit and the protest and were not identified by the contracting officer in the notice of cancellation as a basis for cancellation. We point out that while the cancellation notice did only refer to inaccurate estimates and unfair competitive advantage, that would not estop the agency from establishing that it did have other reasons for canceling. The record before us, however, is not fully developed with respect to these other reasons, and we were not able to develop the record further in view of the court's request that we issue this decision by December 6. Therefore, we have not considered whether the other reasons advanced by the FCC independently justify the cancellation.

The protest is denied.

[B-207994]

Miscellaneous Receipts—Special Account *v.* Miscellaneous Receipts—Refund of Excess Payments *v.* Sale Proceeds—Membership in International Organizations

Repayments of money the United States has contributed to the International Natural Rubber Organization (INRO), which have been returned as excess due to the contributions of new members to the INRO or due to a reduction in the amount of rubber imported by the United States, are refunds and may be credited to the appropriation enacted for contributions to INRO. Repayments which constitute proceeds of the sale of rubber may not be credited to the account but must be deposited into the Treasury as miscellaneous receipts.

International Organizations—International Natural Rubber Organization—Excess Membership Contributions—Retention and Investment

General Accounting Office (GAO) has no legal objection to the retention of excess funds in an account where they will be invested by the INRO for the benefit of individual member governments, as the fund will be in custody of the INRO itself rather than of the United States. However, any earnings or interest from these investments received by the United States must be deposited in the Treasury as miscellaneous receipts.

Miscellaneous Receipts—Interest—Investments—Interest/Earnings Paid to U.S.—Excess Funds in International Organization's Custody

General Accounting Office (GAO) has no legal objection to the establishment of a separate account for deposit of excess funds pursuant to the International Natural Rubber Agreement under which the United States has management and investment control yet physical custody of the funds remains with the INRO. However, any funds actually received by Treasury must be deposited into miscellaneous receipts.

Matter of: International Natural Rubber Organization—Return of United States Contribution, December 6, 1982:

The Deputy General Counsel of the Department of the Treasury has requested this Offices's advice on the disposition of certain temporary excess funds now held by the International Natural Rubber Organization (INRO) and available for distribution to several INRO member countries, including the United States. The funds in question include a portion of the United States' initial contribution to the INRO's buffer stock account for the acquisition and maintenance of a stockpile of natural rubber as provided for in the International Natural Rubber Agreement, U.N. Doc. No. TD/rubber/15/Rev. 1 (effective October 1, 1980). Funds currently are available to return to the original member countries either (1) because additional members have joined the Agreement and their initial countributions have increased the total organization funds beyond what is immediately necessary for current buffer stock operations; or (2) because the United States' proportionate share has been reduced based on a comparison of the amount of rubber it has imported in relation to the amount imported by other member countries (a "reduction in trade share," as termed by the Department of Treasury). It is also possible that proceeds from the sale of rubber might be returned to the United States, although it is not clear that the INRO has the authority to do so prior to the termination of the Agreement.

The Department of the Treasury anticipates that in the future the INRO will ask member countries for additional contributions to the buffer stock fund. It also expects that from time to time the INRO will continue to distribute excess funds resulting from buffer stock operations.

The Treasury Department received an appropriation for $88 million for contributions required by the Agreement, under Pub. L. No. 96-369, 94 Stat. 1351 (1980), Pub. L. No. 96-536, 94 Stat. 3166 (1980), and Pub. L. No. 97-12, 95 Stat. 95 (1981) (each incorporating H.R. 7583, 96th Cong., 2d Sess. (1980)). The full amount has been obligated for the United States' fulfillment of its obligations under the Agreement. The appropriation was charged with the initial United States contribution of about $5 million to the INRO.

The issue on which Treasury has requested our opinion involves the treatment of excess funds. The INRO has offered its members three options for the distribution of excess funds. At the request of the members, the INRO will (1) physically return the funds to the member country; (2) retain the funds in an account where they will be invested by INRO for the benefit of individual member governments or (3) establish a separate account for the particular member's excess funds, over which the member will retain investment control.

The Treasury Department would prefer Option One, but only if the funds could be redeposited into the account set up to fund the INRO. If Option One would necessitate the deposit of the monies into the general fund of the Treasury, it is our understanding that the Treasury Department would prefer either Option Two or Option Three.

In our opinion, the Treasury Department may legally exercise any of the three options. If Option One is exercised, the returned funds may be recredited to the appropriation account only if they represent a reduction in the United States contribution due to increased membership in the INRO or the reduction of the United States trade share. If, on the other hand, any portion of the repayment is derived from the sale of rubber, the entire repayment must be deposited in the Treasury as miscellaneous receipts. Our reasons are discussed below.

Option One

As a general proposition, absent specific statutory authority all funds received for the use of the United States must be deposited in the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302 (formerly § 484).[1] However, there are two instances in which this general rule does not apply. The first is in the case of a revolving fund. In a revolving fund, Congress authorizes the continuous provision of a service and, after an initial capital contribution to the fund, permits the continuing services to be financed by the income generated by the activity itself. By specific statutory authority, payments to a revolving fund are recredited to the fund account and are immediately available for obligation.

[1] Title 31 was recodified by Pub. L. 97-258, September 13, 1982.

The appropriation for United States contributions to the INRO's buffer stock account does not contain authority to set up a revolving fund. Further, such authority was not sought at the time the appropriation was requested. *See,* FY 1981 Budget Estimate, Treasury Department, *reprinted with,* 4 Hearings on H.R. 7583 before H. Subcomm. on Treasury, Postal Service and General Government Appropriations, 96th Cong., 2d Sess. 431-32 (1980) ("House Hearings").

The second exception to the general rule requiring deposit of funds into miscellaneous receipts relates to certain permitted repayments to appropriations. These repayments to appropriations are classified into two specific categories: reimbursements and refunds. See *GAO Policy and Procedures Manual for the Guidance of Federal Agencies,* Title VII, section 13. Reimbursements are sums received as a result of commodities sold or services furnished either to the public or to another Government account, which are authorized by law to be credited directly to a specific appropriation. GAO, *Glossary of Terms Used in the Federal Budget Process,* p. 74 (PAD-81-27, March 1981). In the case of the INRO Agreement, the return of money directly to the appropriation has not been authorized by law. Thus, the question narrows itself to whether the funds returned by INRO are refunds.

Refunds are defined in Title VII, section 13.2(2) of the Policy and Procedures Manual as follows:

> Refunds are repayments for excess payments and are to be credited to the appropriation or fund accounts from which the excess payments were made. * * * [R]efunds must be directly related to previously recorded expenditures and are reductions of such expenditures.

Refunds are also explained in Treasury Department—GAO Joint Regulation No. 1, reprinted as Appendix B to Title VII of the Policy and Procedures Manual. The Joint Regulation description is as follows:

> Refunds to appropriations * * * represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed * * *.

If the funds to be distributed by the INRO can be classified as refunds, they may be recredited to the appropriation account to be available for obligation when future contributions are required.

When the return of funds is due to the reduction of the initial United States contribution, either because of the addition of new member countries or the lowering of the United States trade share, the return can be considered an adjustment to an amount previously disbursed, and, therefore, a refund. Thus, amounts returned from the INRO for those reasons may be credited to the appropriation and used for future contributions without congressional action. *Cf.* 39 Comp. Gen. 647 (1960) (amounts refunded to the United States due to contract violations may be credited to the appropriation from which the payments were made. Deposit of the

funds into Treasury as miscellaneous receipts would deplete the appropriation and defeat the purpose of the program).

However, a return of funds which results from the buying and selling of natural rubber by the INRO may not be considered a refund. Proceeds from a sale are not excess payments. Once a contribution has been used to purchase rubber, its purpose is fulfilled. Were the money returned to the appropriation account, a revolving fund would be established without Congressional authority. The proceeds from the purchase and sale of natural rubber are more like interest earned on trust funds (B-108439, April 13, 1978) or user fees received from AID employees for Government-provided overseas housing (B-192035, August 25, 1978), both of which we required to be deposited in miscellaneous receipts.

Thus, if Treasury chooses Option One, proceeds of sales must be deposited in miscellaneous receipts. However, returns due to the additional membership of countries or the reduction of the United States trade share may be credited to the appropriation.

We understand that the Treasury Department's intention is to establish a single procedure to be followed for all future disbursements by the INRO. Clearly, if all the funds returned at a given time are due to additional members or a reduction of the trade share (and adequate tracing exists to verify this), the money can be redeposited into the appropriation account. However, as has been informally discussed with the Treasury Department, a problem exists when these funds are commingled with the proceeds of sales of rubber and returned to the U.S. without an adequate means of tracing the basis for the returns. If the basis for the funds cannot be determined, all commingled funds must be deposited into the general fund of the Treasury as miscellaneous receipts.

Option Two

Option Two involves the retention and investment of excess contributions and future earnings by the INRO for the benefit of member nations which elect such treatment. Under Option Two, the INRO would retain the excess funds in the Buffer Stock Account. The INRO would invest the excess funds for the benefit of individual member governments, with income resulting from the retained funds accruing to the individual accounts. Reinvestment of the earnings presumably would result in reduced need for future contributions and increased distribution at the end of the Natural Rubber Agreement.

We have no legal objection to this proposal. In fact, the Congress appears to have contemplated that the INRO would retain accumulated excess fund. During the appropriations hearings at which the Natural Rubber Agreement contribution was discussed, the following interchange occurred between Subcommittee Chairman Steed and two State Department witnesses.

Mr. STEED. * * * [S]uppose you find yourself in a lucrative profitable position. Now you have enough stock on hand to meet your future needs, and you have a lot of cash, what happens with the cash?

Mr. CALINGAERT. Before termination of the agreement?

Mr. ODGEN. Any profits the organization makes would be invested in high-yield bonds or whatever investment the agreement felt was most appropriate. Then at the end of the agreement, any profits would be redistributed to all the member countries on the basis of their contributions to the agreement. So the money would stay in the agreement until the end. House Hearings, *cited above*, at 418.

The INRO itself has not yet determined whether it is authorized to pay out either principal or accrued interest to member countries under Option Two prior to the termination of the agreement. Assuming that the INRO does have this authority, any funds disbursed to the United States, including earnings or interest, must be deposited as miscellaneous receipts (excluding refunds, as discussed above). *See* B-108439, April 13, 1978.

Option Three

Option Three involves retention of credits in the Buffer Stock Account, with the establishment of a separate account in which the investment of funds is controlled by the individual member country. It is basically indistinguishable from Option Two except that INRO would not maintain control over the investments. We have no legal objection to Option Three, as long as INRO maintains physical custody of the funds. As with Option Two, any funds over which Treasury gains physical control must be deposited into miscellaneous receipts.

Conclusion

In summation, the Department of the Treasury may choose Options One, Two, or Three. If it selects Option One, monies returned to the United States due to increased membership in the INRO or the reduction of the United States trade share may be recredited to the appropriation account. However, if any of the returned funds constitute proceeds from the sale of rubber which cannot reasonably be segregated from refunds due to increased membership or reduction of trade share, the entire amount of the return must be deposited as miscellaneous receipts. Options Two and Three present no legal difficulties, as INRO would maintain custody of the funds. However, any funds paid out to the United States prior to the termination of the agreement as a result of the investment, such as earnings or interest, must be deposited as miscellaneous receipts.

[B-208393]

Sales—Bids—Deposits—Insufficiency—Waiver—*De Minimus* Rule

In solicitation for a contract of sale requiring a bid deposit of 20 percent of the bid, a deficiency of $100 on a deposit of $73,522 is *de minimus*, and properly may be waived.

Sales—Bids—Deposits—Personal Checks—Sufficiency of Funds Verification—Right to Financial Privacy Act (1978)

When both Department of Defense manual covering disposal of property and solicitation for contract of sale specifically permit bid deposit to be in the form of a personal check, contracting officer may accept such a check and need not attempt to determine whether it is backed by sufficient funds.

Agents—Of Private Parties—Authority—Contracts—Time for Submitting Evidence—Bid Deposits in Sales Solicitation

Evidence of agent's authority may be established after bid opening, even when solicitation attempts to make submission of such information a matter of bid responsiveness. Alleged back-dating of statement of agent's authority therefore does not affect validity of award.

Contracts—Protests—General Accounting Office Function—Independent Investigation and Conclusions—Speculative Allegations

It is not part of General Accounting Office's bid protest function to conduct investigations to determine whether protester's speculative allegations are valid.

Matter of: Marine Power and Equipment Company, Inc., December 7, 1982:

Marine Power and Equipment Company, Inc. protests the sale of three surplus vessels—two large, covered lighters and an aircraft transportation lighter—under Invitation for Bids No. 60-2048, issued by the Defense Logistics Agency's Defense Property Disposal Service (DPDS). On an "all or nothing" bid for the three items, Alaska Towing Company was high at $367,611.11. Marine Power makes a number of arguments regarding the alleged nonresponsiveness of the high bid. We find these arguments without legal merit, and consider Marine Power's other grounds of protest, including Alaska Towing's alleged violation of criminal statutes, to have no effect on the validity of the award. We therefore deny the protest.

Facts:

The sale in question took place in Pearl City, Hawaii, with bid opening at 9 a.m. on June 22, 1982. The record shows that on June 18, Alaska Towing called from its Seattle, Washington office to ask whether DPDS had received its bid, sent by priority mail; subsequent telephone calls established that up to the morning of bid opening, the bid had not been received. For this reason, the record further indicates, Alaska Towing arranged for an agent to submit its bid. This individual offered his personal check in the amount of $73,422.22 as a bid deposit. When Alaska Towing's bid package arrived on June 23, the firm requested the contracting officer to open it and substitute the bid deposit contained therein for the agent's check. The contracting office refused, on grounds that late bids must be returned unopened to the bidder; Alaska Towing, however,

arranged for an agent (unidentified in the record—possibly the same one who submitted the bid) to pick up the bid package and present the firm's check to the contracting officer. This substitution, the record indicates, was accomplished on either June 23 or June 24.

Marine Power argues that Alaska Towing's bid should have been rejected as nonresponsive because the deposit submitted by the agent was $100 less than the required 20 percent of the bid. In addition, Marine Power alleges that the agent's check was drawn on insufficient funds, and that DPDS improperly accepted the substitute check. Marine Power also argues that Alaska Towing's bid was nonresponsive because it was not accompanied by a notarized statement of the agent's authority, as required by the solicitation, and that such a statement, provided by Alaska Towing after bid opening, was back-dated, so that its submission to DPDS was a criminal act, warranting cancellation of the award. Finally, Marine Power alleges that Alaska Towing's presumed payment to the agent constituted an improper contingent fee.

Bid Deposit Amount:

Marine Power argues that the $100 deficiency on the bid deposit is material, and should not have been waived by the sales contracting officer. However, the agency correctly points out that the Defense Disposal Manual specifically authorizes contracting officers to waive "inconsequential" deficiencies in bid deposit amounts when rejection of the bid would not be in the best interest of the Government. *See* DOD 4160.21-M, Ch. XII, par. C.3.a. (July 1979).

While Marine Power argues that this manual is without the force and effect of law, it is issued pursuant to the Federal Property and Administrative Services Act of 1949, as amended, and we have recognized and applied it previously. *See,* for example, *Marine Power & Equipment Co., Inc.,* B-189693, January 17, 1978, 78-1 CPD 36. Thus, the first issue for our consideration is whether the $100 deficiency in Alaska Towing's bid deposit was "inconsequential."

Since at least 1975, we have given clear expression to the *de minimis* doctrine in protests concerning procurements where bid bonds are required. In *Arch Associates, Inc.,* B-183364, August 13, 1975, 75-2 CPD 106, we held that a bid bond of $55,000, or $284 less than the required 20 percent of the bid—a deficiency of .514 percent—was *de minimis* and could be waived as a minor informality. We see no reason not to apply this rationale to bid deposits, since the purpose of either a bid bond or bid deposit is to protect the Government's interests in the event of the bidder's default. *See generally* 39 Comp. Gen. 796 (1960). A bid bond guarantees that a bidder will execute all documents necessary to create a binding procurement contract; a bid deposit, while applied to the purchase price of the goods being sold by the Government, obligates the bidder not to

withdraw before award and to pay the full purchase price. If the bidder fails to fulfill these obligations, the Government may retain the deposit as liquidated damages. *See* DOD 4160.21-M, Ch. XII, par. M.4.

Alaska Towing's deficiency amounts to .136 percent of the required bid deposit. We see no way in which this deficiency could adversely affect the Government's ability to protect its interests. It is clearly *de minimis,* or in the language of the DOD Manual, "inconsequential," and we find that it was probably waived by the sales contracting officer. Compare *Davisville Construction Co.,* B-190080, December 12, 1977, 77-2 CPD 456 (refusing to apply the *de minimis* doctrine to a 50 percent deficiency); *Capital Coatings,* B-186608, June 28, 1976, 76-1 CPD 416 (refusing to apply *de minimis* to a 16 percent deficiency).

Bid Deposit Check:

1. Alleged Insufficient Funds:

Marine Power's allegation that the personal check of Alaska Towing's agent was not backed by sufficient funds is based on a letter of June 28 from the business partner of the agent to DPDS, protesting rejection of another bid. The letter suggests that the contracting officer either knew or should have known that the agent's check would be dishonored. In advancing this as a basis of protest, Marine Power implies that the contracting officer had an affirmative duty to determine that the check was backed by sufficient funds before making award to Alaska Towing.

Although some of our decisions, B-158864, May 16, 1966, and B-154922, September 23, 1964, for example, indicate that in the past, sales contracting officers have attempted to make such determinations by contacting banks on which personal checks were drawn, we question whether such information would be available today without the agent's authorization because of the restrictions on disclosure of financial records in the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3402 (Supp. IV 1980). Moreover, there is nothing in the Defense Disposal Manual that requires the contracting officer to make this type of determination. Rather, deposits on property sold by the Department of Defense may be in any one or a combination of forms, specifically including personal checks. *See* DOD 4160.21-M, Ch. XII, par. M.4. The general terms and conditions of sale (Standard Form 114C), incorporated by reference in the solicitation for the protested sale, require only that uncertified personal or business checks be first party instruments. If an uncertified check is not paid by the drawee for any reason, 114C states, this form of deposit will no longer be accepted from the bidder who tendered the check. We cannot conclude that the contracting officer should have rejected the agent's personal check, since it was a first

party check and the agent had not, to our knowledge, previously presented uncertified checks that had been dishonored.

We note, however, that both Defense Acquisition Regulation § 7-2003.25 (DAC 76-26, December 15, 1980) and Federal Procurement Regulations § 1-10.102-2 (1964 ed. amend. 184, October 1977) require bid guarantee checks to be in certified or cashier's form, and we are suggesting that, at least for sealed bid sales, DPDS consider adopting a similar policy. Personal checks may not adequately protect the Government's interests, since they are subject to such events as insufficient funds and stop payment orders, and do not represent the firm commitment required to form binding legal contracts. See *Edward D. Griffith,* B-188978, August 29, 1977, 77-2 CPD 155.

2. *Substitution of Checks:*

Marine Power argues that the substitution of Alaska Towing's check for that of the agent on the day following bid opening constituted an improper acceptance of a late bid deposit. In the absence of clear evidence that the agent's check would have been dishonored, and in view of our determination that it was an adequate bid deposit, both as to amount and form, we believe the substitution was simply the replacement of one valid negotiable instrument acceptable as a bid deposit by another. Therefore, we do not agree that the acceptance of Alaska Towing's check was improper.

Evidence of Agent's Authority:

Marine Power further argues that Alaska Towing's bid was nonresponsive because it was not accompanied by a notarized statement from the agent detailing the arrangement between the principal and the agent, together with a copy of the agency agreement. Although such a statement was required by the solicitation, the record shows that the only evidence of the agent's authority at the time of bid opening on June 22 was the individual's signature as "agent for Alaska Towing." However, in a telephone call to the sales contracting officer on June 23, the president of Alaska Towing referred to both his "agent" and his "agent's check." DPDS received a notarized statement of agency from Alaska Towing, dated June 18, on July 1, 1982.

Despite specific solicitation provisions that attempt to make evidence of an agent's authority a matter of bid responsiveness, we have repeatedly held that such evidence may be submitted after bid opening. See *Cambridge Marine Industries, Inc.,* 61 Comp. Gen. 187 (1981), 81-2 CPD 157, citing 49 Comp. Gen. 527 (1970). Thus, Marine Power's protest on this basis is without legal merit.

Alleged Criminal Activities:

Marine Power also alleges that the statement of agency was back-dated, and that its submission to the Government by Alaska

Towing violates the False Statements Act, 18 U.S.C. § 1001 (1976). Regardless of the date it was executed, this notarized statement of agency could have been submitted any time before award, and in our opinion the June 18 date therefore is irrelevant with regard to the validity of the award. If Marine Power believes its evidence of a false statement is sufficient to warrant submission of the matter to the Attorney General, we see no reason why it may not take such action.

As for Alaska Towing's alleged breach of the convenant against contingent fees, Marine Power has no direct knowledge of the arrangements between Alaska Towing and its agent, and merely presumes that the agent was paid for his services. Payment for services rendered, however, would not necessarily constitute a contingent fee. Marine Power's statement is speculative, and it is not part of our bid protest function to conduct investigations in order to establish the validity of such allegations. See *Alan Scott Industries,* B-201743 *et al.,* March 3, 1981, 81-1 CPD 159, *aff'd on reconsideration,* April 1, 1981, 81-1 CPD 251.

The protest is denied.

[B-206105]

Statutes of Limitation—Claims—Filing in Other Than GAO—Does Not Meet Requirements of 10/9/40 Act, As Amended

Employee of Forest Service claims per diem in connection with transfer to seasonal worksite every 6 months for period from May 7, 1973, through Nov. 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office (GAO) until Jan. 18, 1982. Portion of claim arising before Jan. 18, 1976, may not be considered since Act of Oct. 9, 1940, as amended, 31 U.S.C. 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act.

Subsistence—Per Diem—Headquarters—Permanent or Temporary—Seasonal Worksites—Transfer Orders Not Issued

Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained their permanent homes at their official duty station while living in Government quarters at the seasonal worksite.

Matter of: Frederick C. Welch—Per diem entitlement—Barring Act, December 8, 1982:

ISSUE

We have been asked to decide whether the Department of Agriculture may implement a Grievance Examiner's award requiring the retroactive payment of per diem to an employee during a 6 month tour of duty at a seasonal worksite. Pursuant to the following analysis the grievance award may be implemented in a modi-

fied amount only with respect to that period of the claim which is not barred by operation of 31 U.S.C. § 71a (1976), now § 3702.

HISTORY OF CASE

Anita R. Smith, an Authorized Certifying Officer with the National Finance Center of the United States Department of Agriculture, has petitioned this Office, under 31 U.S.C. § 82d (1976), now § 3529, for a review of a Grievance Examiner's recommended award—accepted by the final decision of the Acting Director of Personnel—in an agency grievance filed by Mr. Frederick C. Welch. The essential facts will only be summarized here as a composite of materials submitted by the certifying officer, Mr. Welch, and the Acting Director of Personnel's final decision.

Mr. Welch, now a former employee of the Forest Service, Department of Agriculture (agency), filed an informal grievance with the agency on October 12, 1976, claiming per diem and mileage entitlements for the period May 7, 1973, through November 19, 1976. During this period Mr. Welch was an employee of the Idaho Panhandle National Forest, St. Maries, Idaho, Ranger District. Mr. Welch had a permanent residence in St. Maries, Idaho, and from October to May he worked in St. Maries. From May to October of the years in question, Mr. Welch was assigned to the Red Ives Ranger District (RIRD) which was about 90 miles away from St. Maries. The agency authorized official travel for one trip in and out of the RIRD each season. The record shows that for the years 1971 and 1972 the agency processed personnel actions at the beginning and end of each season changing Mr. Welch's official station from St. Maries to the RIRD and back again. However, for the years 1973 through 1976 the agency required Mr. Welch to move from St. Maries to the RIRD every summer and back to St. Maries in the winter, but did not process any personnel actions as had been done in the previous years. During this time Mr. Welch received living quarters and utilities free from the Government at RIRD.

Mr. Welch's grievance alleged that the move every summer from St. Maries to the RIRD placed a hardship and extra expenses on him and he contended that since all of his personnel documents during the period of his claim showed St. Maries as his official duty station he should have been considered in a travel status while at the RIRD. As a result he grieved an entitlement to per diem while at the RIRD including travel from and to St. Maries during these periods. The Forest Service took the position that Mr. Welch had "dual official stations"; and as a result, he was not entitled to per diem at either St. Maries or RIRD because paragraph 1-7.6a of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), precludes reimbursement expenses at an employee's official duty station.

On December 13, 1976, the Forest Supervisor denied Mr. Welch's informal grievance. Mr. Welch then filed a formal grievance with the head of the Forest Service on February 22, 1977. On December 12, 1979, the Grievance Examiner issued his findings and recommended decision on Mr. Welch's grievance, concluding that Mr. Welch was in a temporary duty status while he was at the RIRD and thus, he was entitled to per diem. In this regard the Grievance Examiner found that Mr. Welch was entitled to a per diem rate figured on the lodgings plus $16, not to exceed $35 per day; and, since the lodging was furnished at no cost to Mr. Welch, his per diem rate would be $16 per day less $4 for each meal furnished at no cost to him. The Grievance Examiner's recommended decision was that Mr. Welch file vouchers for those periods he was assigned to RIRD and that the agency process the vouchers.

The agency challenged the recommended decision on the grounds that Mr. Welch was not in a travel status; the RIRD was not considered a temporary duty location for Mr. Welch but rather his permanent duty site for an assigned period of time; and that if the recommended decision was to be followed, the agency would be paying per diem at the employee's official station which would not be proper. In bringing the grievance at the next stage to the Director, Office of Personnel, Department of Agriculture, for a final decision, the agency again emphasized that the RIRD seasonal worksite was not considered temporary duty location for Mr. Welch. The agency admitted that Mr. Welch was directed to and from the RIRD each year and that they did not process personnel actions at the beginning and end of each season changing Mr. Welch's official station. However, citing our decision in 32 Comp. Gen. 87 (1952), the agency argued that an employee's permanent duty location is a matter of fact and not necessarily one of administrative designation, thus, as a matter of fact, the RIRD was Mr. Welch's official duty station while he was there.

On February 11, 1981, the Acting Director of the Office of Personnel, Department of Agriculture, issued his final decision concurring with the Grievance Examiner's recommendation that Mr. Welch was in temporary duty status while assigned in the RIRD and, therefore, entitled to per diem. In so concluding the Acting Director addressed the agency's argument concerning Mr. Welch's official duty station as follows:

> In the case cited by the Agency the Comptroller General held that an employee in Washington, who maintained a residence in Philadelphia to which he traveled for personal reasons but who performed all his work in Washington, has an official duty station at the latter place and was not entitled to per diem in lieu of subsistance at either place. In the case at hand the employee is asked by the Agency to move every summer and fall.
>
> Other than stating in its rebuttal to the recommended decision that "Red Ives Ranger Station seasonal worksite was not considered a temporary duty location for Mr. Welch, but rather his permanent duty site for an assigned period each year," the Agency has submitted no evidence to substantiate this claim. It must be pointed out the Agency has not reconciled this statement with the one made in its Request for Remote Duty Location memorandum quoted above. [That memorandum stated

"* * * Living quarters and utilities are furnished in lieu of per diem for those employees whose official duty station is shown as St. Maries, Idaho."] The Agency has admitted that it did not process AD-350's showing the change in duty station and the AD-350's in the file show that St. Maries was Mr. Welch's official duty station, it follows, therefore, that Mr. Welch's official duty station was St. Maries throughout the year from 1973 onwards.

The Acting Director decided that Mr. Welch was entitled to per diem as stated in the Grievance Examiner's recommended decision.

BARRING ACT

The Act of October 9, 1940, Chapter 788 §§ 1, 2, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, 88 Stat. 1965, approved January 2, 1975, 31 U.S.C. § 71a, provides that every claim or demand against the United States cognizable by te General Accounting Office must be received in this Office within 6 years from the date it first accrued or be forever barred.

Under that provision of law, as a condition precedent to a claimant's right to have his claim considered by the General Accounting Office, his claim must have been received in this Office within the 6-year period. Filing a claim with any other Government agency does not satisfy the requirements of the Act. *Nancy E. Howell,* B-203344, August 3, 1981, and *Russel T. Burgess,* B-195564, September 10, 1979. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. *Nancy E. Howell* and *Russel T. Burgess* above.

This is so even though the delay at the agency level was the fault of the agency and not that of the employee. *Jerry L. Courson,* B-200699, March 2, 1981. After the enactment of Public Law 93-604, which was effective July 2, 1975, reducing the limitation period from 10 years to 6 years, the director of our Claims Division, by letter dated March 14, 1975, instructed the heads of all agencies that claims received by them 4 years after the date of their accrual should be forwarded to our Claims Division. This instruction was later incorporated in an amended section 7.1, title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies. If, however, this instruction is not complied with, we are without authority to waive or modify the application of 31 U.S.C. § 71a. *Jerry L. Courson,* above.

Since Mr. Welch's claim was received in this Office on January 18, 1982, that portion of his claim arising before January 18, 1976, is barred by the above-cited Act and may not be considered by this Office.

OPINION

Regarding that portion of Mr. Welch's claim accruing after January 18, 1976, the certifying officer indicates that the Forest Service remains opposed to the final decision of the agency grievance proc-

ess. Again citing our decision in 32 Comp. Gen. 87 (1952) the agency maintains that Mr. Welch's official duty station is a matter of fact, and not necessarily one of administrative designation. We agree that Mr. Welch's official duty station is a matter of fact but we do not disagree with the judgment made in the agency grievance process that St. Maries was Mr. Welch's official duty station during the period of his claim.

The authority for the payment of a per diem allowance to employees traveling on official business away from their designated post of duty is contained in 5 U.S.C. § 5702 (1976) and the implementing regulations contained in Part 7, Chapter 1, of the FTR. The purpose of per diem is to reimburse an employee for meals and lodging while on temporary duty while he also maintains a residence at his permanent duty station. B-185932, May 27, 1976. Per diem is payable only for periods during which an employee is on official business away from his designated post of duty, and, therefore, an "itinerant" employee must have some place designated as his headquarters or official station. 23 Comp. Gen. 162 (1943).

While the applicable regulation (FTR para. 1-7.1a) states that per diem allowances shall be paid for official travel (except where reimbursement is made for actual subsistence expenses), our decisions have long held that per diem is not a statutory right and that it is within the discretion of the agency to pay per diem only where it is necessary to cover the increased expenses incurred arising from the performance of official duty. 55 Comp. Gen. 1323 (1976); 31 *id.* 264 (1952).

Under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem at his permanent duty station nor at his place of abode from which he commutes daily to his official duty station. The determination of what constitutes an employee's permanent duty station or headquarters involves a question of fact and is not limited by administrative determination. 31 Comp. Gen. 289 (1952) and decisions cited therein. An employee's headquarters has been construed to be the place where the employee expects and is expected to spend the greater part of his time. 32 Comp. Gen. 87 (1952) and 31 *id.* 289 (1952). Such a determination is made based upon the employee's orders, the nature and duration of his assignment, and the duty performed. B-172207, July 21, 1971; 33 Comp. Gen. 98 (1953).

In Mr. Welch's case, he was moved to a site 90 miles away from his permanent abode in St. Maries to a site in the RIRD. The distance from RIRD to St. Maries was so far as to preclude commuting. While at the RIRD Mr. Welch and the other permanent employees so assigned resided in seasonal facilities while maintaining their permanent residences in St. Maries. The record also shows that the Government provided housing facilities at RIRD was rudimentary.

Under the circumstances we find that the final grievance decision was correct to conclude that Mr. Welch did not change his official station from St. Maries when he went to RIRD in the summer. Even though Mr. Welch spent 6 months of the year at RIRD, his assignment there was in the nature of a long term temporary assignment away from his official duty headquarters. See generally 57 Comp. Gen. 147 (1977), allowing per diem for 15 months and 26 months assignments which ran consecutively. It is plain that both the agency and the employees treated the assignment as temporary and treated St. Maries, where the employees' permanent houses were, as the real official duty station. Accordingly, we will not object to the establishment of a per diem entitlement for Mr. Welch in connection with his transfer to the RIRD after January 18, 1976.

We are, nevertheless, required to reduce the amount of the daily per diem entitlement in accordance with the agency's controlling regulation. The final decision in Mr. Welch's case allowed a $16 daily per diem rate predicated on the lodgings plus method set out in an advisory opinion from the agency's fiscal management division. However, paragraph 6543.04a(a) of the Forest Service Manual provides the following per diem rate effective April 15, 1976:

a. A rate of $8.00 for trips within the Idaho Panhandle National Forests when in travel status at points where *-Government-owned cooking and sleeping ("batching") facilities are available for use by the employee.*

Since Mr. Welch was in a travel status while at the RIRD and since he was provided with housing and utilities, his per diem entitlement for the period he was stationed at the RIRD after January 18, 1976, is limited to $8 in accordance with the agency's regulation.

Finally, in a separate submission to this Office dated February 12, 1982, Mr. Welch claims miscellaneous expenses associated with the documented changes in his official duty station in 1971 and 1972 and interest due on any amounts determined to be allowed in connection with the adjudication of his claim. Mr. Welch's claim for miscellaneous expenses must be denied because this claim was filed here more than 6 years after its accrual. 31 U.S.C. § 71a (1976). As for his interest claim, it is well settled that interest may be assessed against the Government only under express statutory or contractual authority. *Fitzgerald* v. *Staats*, 578 F. 2d 435 (D.C. Cir. 1978). The authority to pay per diem and reimburse travel expenses incurred by an employee while traveling on official business found in Chapter 57 of title 5, United States Code (1976), does not include express statutory authority by which interest may be paid on employee travel claims. This aspect of Mr. Welch's claim must be denied.

[B-207028]

Attorneys—Fees—Equal Access to Justice Act—Recovery of Fees, etc. Incurred in Pursuing Bid Protest—Not Authorized by Act—Adversary Adjudication Requirement

Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA.

Matter of: Ex-Cell Fiber Supply, Inc., December 14, 1982:

Ex-Cell Fiber Supply, Inc. requests that the Government Printing Office (GPO) or our Office reimburse it for attorney's fees and costs incurred in pursuing a bid protest filed with our Office. Ex-Cell filed its protest on April 8, 1982, contending that GPO improperly determined that it was nonresponsible and refused to award it a contract under GPO Waste Paper Sale No. 32. GPO subsequently reversed its determination of nonresponsibility and awarded the contract to Ex-Cell. Ex-Cell then withdrew its protest. Ex-Cell contends that under section 203(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504 (Supp. IV 1980), it is entitled to reimbursement of the costs incurred in pursuing the protest.

The Act authorizes the award of attorney's fees and other costs to certain parties who prevail against the United States in adversary adjudications conducted by Federal agencies. Eligible prevailing parties are entitled to awards of fees and expenses, unless the presiding officer or judge finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Eligible parties include sole owners of an unincorporated business, or partnerships, corporations, associations, or organizations with a net worth of no more than $5 million and which employ no more than 500 persons.

The Act defines an adversary adjudication as a proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1976 and Supp. IV (1980)), in which the position of the United States is represented by counsel or otherwise. Our bid protest proceedings, however, are not held under or governed by the APA since that law does not apply to the legislative branch, of which our Office is a part. *See* 5 U.S.C. § 551(1)(A). Moreover, in rendering bid protest decisions, our Office is not engaging in an adjudication as contemplated by the APA. See *Dorman Electric Supply Co., Inc.*, B-196924, May 20, 1980, 80-1 CPD 347; *compare* 4 C.F.R. Part 21 (1982) with 5 U.S.C. §§ 554-557.

Accordingly, there is no authority under the Equal Access to Justice Act to allow recovery of attorney's fees and costs incurred in pursuing a bid protest before this Office. The claim is denied.

[B-208185]

Leaves of Absence—Court—Witness—Employee-Defendant—State or Local Government-Plaintiff—Traffic Violation

Employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant.

Matter of: Entitlement of Employee-Defendant to Court Leave, December 14, 1982:

Mr. John J. Kominski, General Counsel of the Library of Congress (Library), has requested an advance decision as to whether an employee of the library is entitled to court leave under 5 U.S.C. 6322 in connection with his appearance in court in Arlington County, Virginia, pursuant to a summons for a traffic violation. For the reasons set forth below, the employee is not entitled to court leave under 5 U.S.C. 6322 for his appearance in court as a defendant.

Section 6322 of title 5, United States Code, provides in pertinent part that an employee is entitled to leave, without loss of, or reduction in, pay, or leave to which he otherwise is entitled, when in response to a summons in connection with a judicial proceeding, he serves as a juror or as a witness on behalf of any party when the United States, the District of Columbia, or a state or local government is a party to the proceeding.

We have held that the authority of 5 U.S.C. 6322 to grant court leave to a Government employee summoned as a witness in certain proceedings does not extend to an employee who is the plaintiff in such action. See *Matter of Pasake,* 59 Comp. Gen. 290 (1980), and *Matter of Sweeney,* B-201602, April 1, 1981. We note that the above-cited cases involved discrimination actions against the employing agency under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.).* We further note that by Federal Personnel Manual Bulletin 630-38, August 4, 1980, the Office of Personnel Management has provided Federal agencies instructions consistent with the holding in Pasake.

We see no reason why the rule adopted in the *Pasake* and *Sweeney* cases should not be for application where the employee is a defendant in the court action concerned. Neither the language of 5 U.S.C. 6322 nor the legislative history indicates that court leave is available to an employee who is a party in the court action for which he is summoned and in which the Government of the United States is not involved.

Accordingly, we do not consider a defendant in a court case to be entitled to court leave as a witness under 5 U.S.C. 6322. Thus, the employee concerned is not entitled to court leave in connection with his appearance in court as a result of his summons for a traffic violation.

[B-203762]

Subsistence—Actual Expenses—Maximum Rate—Reduction—Meals, etc. Cost Limitation—Lodging Costs Incurred

Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred. A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied.

Matter of: R. Edward Palmer, December 15, 1982:

An accounting and finance officer for the Defense Logistics Agency, Marietta, Georgia, requests an advance decision regarding his authority to limit an employee's reimbursement for meal expenses in a high cost area. The submission was approved by the Per Diem, Travel and Transportation Allowance Committee and has been assigned Control No. 82-3.

The voucher that gives rise to this decision was submitted by Mr. R. Edward Palmer in connection with his temporary duty assignment to Philadelphia, Pennsylvania. Philadelphia is a high cost area for which actual subsistence expenses not in excess of $75 per day may be reimbursed. Mr. Palmer's claim for May 27, 1981, is based on lodging costs of $31.80 and $45.50 for meals, including $38 for a single dinner. Considering this meal expense to be excessive and based on information indicating that the General Accounting Office limits its employees' daily reimbursement for subsistence expenses other than lodgings to $28, the accounting and finance officer disallowed Mr. Palmer's claim for meal expenses in excess of $28. In submitting his reclaim voucher for $15.20, Mr. Palmer states that the meal expenses in question are consistent with what he would incur if traveling on personal business. He questions the accounting and finance officer's authority to limit reimbursement for meal costs actually incurred.

In response to an initial inquiry concerning the extent of his authority to limit reimbursement for meal expenses, the Per Diem, Travel and Transportation Allowance Committee advised the accounting and finance officer that Volume 2 of the Joint Travel Regulations does not give individual Department of Defense (DOD) components authority to establish a maximum amount which may be reimbursed for meals purchased in high cost areas. The Committee pointed out that each disbursing officer, nevertheless, has a responsibility to question unreasonable meal costs and that it is the responsibility of the DOD component involved to make a determination of reasonableness in any given case. In asking that the matter be submitted to this Office for decision, the accounting and finance officer explains that the case-by-case determination con-

templated by the Committee results in almost continual confrontation with travelers over the reasonableness of subsistence expenditures. For the purpose of reviewing actual subsistence expense claims and to provide guidance to those assigned to temporary duty in high cost areas, he asks whether he may treat the $28 maximum prescribed for travel by General Accounting Office employees as *de facto* guidance as to the reasonableness of amounts spent for meals. In addition, he questions the claimant's suggestion that it is appropriate to consider an individual employee's income level and lifestyle in determining whether an expenditure is reasonable and prudent.

Under 5 U.S.C. 5702(c), a DOD employee may be reimbursed actual and necessary expenses for travel to a high cost area in an amount not to exceed the maximum rate prescribed by the Administrator of General Services in the Federal Travel Regulations (FPMR 101-7) (May 1973, as amended) (FTR) and reflected at Appendix E of Volume 2 of the Joint Travel Regulations (2 JTR). Within that maximum, an employee's reimbursement is subject to the following general limitations set forth at FTR para. 1-1.3:

a. *Employee's obligation.* An employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business.

b. *Reimbursable expenses.* Traveling expenses which will be reimbursed are confined to those expenses essential to the transacting of official business.

See also 2 JTR para. C4464. Under these authorities, we have held that employees are only entitled to be reimbursed for reasonable meal expenses. *Matter of Frisch,* B-186740, March 15, 1977.

The agency's responsibility for the authorization and reimbursement of actual subsistence expenses is outlined in paragraph 1-8.3b of the FTR as follows:

b. Review and administrative controls. Heads of agencies shall establish necessary administrative arrangements for an appropriate review of the justification for travel on the actual subsistence expense basis and of the expenses claimed by a traveler to determine whether they are allowable subsistence expenses and were necessarily incurred in connection with the specific travel assignment. Agencies shall ensure that travel on an actual subsistence expense basis is properly administered and shall take necessary action to prevent abuses.

This regulation serves a dual function. It requires an agency determination of the reasonableness of actual subsistence expenses and it gives the agency authority to issue written guidelines to serve as a basis for review of an employee's expenses. *Matter of Davis,* B-197576, September 8, 1980, and *Matter of Kephart,* B-186078, October 12, 1976.

As discussed in *Matter of O'Brien,* B-187344, February 23, 1977, the regulations of the General Accounting Office impose a limitation by dollar amount (currently $28) on the actual subsistence expenses other than for lodgings that may be reimbursed incident to travel to a high cost area. In the absence of unusual circumstances justifying a higher amount, this limitation is applicable regardless

of whether the employee incurs or does not incur lodging costs. We have also recognized that an agency may limit reimbursement to a percentage of the maximum rate, provided that limitation does not serve as an absolute bar to payment of additional amounts that can be adequately justified. Thus, in *Matter of Bayne,* B-201554, October 8, 1981, 61 Comp. Gen. 13, we sustained agency action imposing a limitation of 46 percent of the statutory maximum on meals and miscellaneous expenses incurred while lodging at no cost with friends or relatives in a high cost area. In each of these instances, the limitation was imposed by agency action and not by the individual certifying or disbursing officer.

Department of Defense guidance concerning actual expenses reimbursement is contained in 2 JTR, Chapter 4, Part M. Some criteria are contained in these regulations regarding maximum expenses allowable for meals when actual expense reimbursement is authorized. For example, actual subsistence expense reimbursement is limited to 50 percent of the maximum amount prescribed for a particular high cost area on any day during which lodgings are not required, a lodging cost is not incurred or Government quarters are available. 2 JTR para. C4611-1e. The same 50 percent limitations on meals and miscellaneous expenses is imposed when an employee performs temporary duty at the place of his family's domicile or when he stays with friends or relatives. 2 JTR 4611-1h, 4611-1i. Larger expenditures are allowable in unusual circumstances as justified in the individual case. However, these regulations do not specify a maximum amount that may be reimbursed for meals and miscellaneous expenses when an employee also incurs lodging expenses in a high cost area. And, as indicated by the Per Diem, Travel and Transportation Allowance Committee, the regulations do not delegate to individual DOD components or disbursing officers the authority to establish specific maximums for this purpose.

We feel that the regulatory provision cited would provide a reasonable basis for an accounting and finance officer to adopt a 50 percent guideline for the purpose of reviewing claims for actual subsistence expenses for meals and miscellaneous expenses, when lodgings costs are involved. The disbursing officer in this case did not use that guidance but adopted another criteria based upon the General Accounting Office practices. On July 10, 1981, he issued a command policy which adopted the $28 subsistence limitation used in Mr. Palmer's case. While the Joint Travel Regulations do not establish maximum guidelines for meal reimbursement, we do not find that those regulations restrict the action of an individual disbursing officer to the extent that the action taken in this case to limit reimbursement to Mr. Palmer was prohibited. However, the July 10, 1981 policy appears to be inconsistent with the views expressed by the Committee.

Mr. Palmer submitted a meal claim which the disbursing officer considered to be excessive. His only explanation of the high cost of the meal was that he was accustomed to pay that much for meals because of his overall lifestyle. We agree with the disbursing officer's conclusion that this explanation is not sufficient to justify payment of the excessive costs. The effect of his use of the $28 maximum was to allow the sums actually expended for breakfast and lunch ($7.10) and the balance for dinner. Absent a further justification for the high dinner cost, our Office will not question the action taken.

Accordingly, no additional amount is payable to Mr. Palmer for reimbursement of his actual expenses on May 27, 1981.

Regarding Department of Defense policy and regulation concerning the disallowance of excessive meal costs when individuals are entitled to subsistence on an actual expense reimbursement basis, we reaffirm that it is the primary responsibility of the approving official within the guidelines established by his agency to determine when excessive meal costs are claimed and to establish allowable reimbursement.

Regarding the disbursing officer's attempt to fix a dollar limit for reimbursement of meal expenses which he would pay without further explanation, we have suggested that agencies adopt guidelines in order to put individual travelers on notice of the amount which may be claimed for meals without providing specific justification for their high cost. We feel that guidelines in terms of a percent or a specific dollar figure can benefit both the traveler and the approving official. The Department of Defense has provided guidelines for determining excessive meal costs only in limited situations. Officials responsible for approving travel vouchers are subject to those guidelines. In this case specific guidelines were not applicable. By letter of today we have asked the Per Diem, Travel and Transportation Allowance Committee to consider giving DOD components more definitive guidance in the travel situation covered in this decision.

[B-206589, B-206579, B-201286]

Treasury Department—Treasurer of United States—Relief—Duplicate Check Losses—Appropriation Adjustment—Statutory Authority Status

Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted.

Accountable Officers—Accounts—Settlement—Statutes of Limitation—Duplicate Check Losses

In duplicate check case (loss resulting from improper negotiation of both original and replacement checks), 3-year statute of limitations contained in 31 U.S.C. 82i (now sec. 3526) begins to run when loss is reflected in disbursing officer's statement of accountability following receipt of Treasury Department's debit voucher, not when replacement check was issued.

Accountable Officers—Relief—Debt Collection—Diligence in Pursuing

Granting of relief under 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) does not relieve agency from duty to pursue collection action against recipient of improper payment, and GAO may deny relief if agency has failed to diligently pursue collection action. Exactly what constitutes diligent collection action may vary according to facts and circumstances of particular case, but as general proposition, a single letter to debtor is not enough.

To the U.S. Army Finance and Accounting Center, Department of the Army, December 16, 1982:

This responds to four separate requests for the relief of various Army Finance and Accounting Officers under 31 U.S.C. § 82a-2 (1976).[1] For the reasons stated below, relief is granted in three of the cases and is no longer necessary in the fourth. The cases are all "duplicate check" cases in which a payee has negotiated both an original check and a replacement check. In the typical situation (the facts of the four specific cases will be discussed later), a check is issued in payment of some valid obligation. The payee alleges non-receipt and is issued a replacement check. Subsequently, the payee negotiates both checks, resulting in a loss to the Government.

These specific cases have served to focus our attention on a difficult and complex question concerning the proper way to handle "duplicate check" cases in general, and it is necessary to address this issue in some detail before resolving the specific cases at hand.

Pertinent Statutory Relief Provisions

Before reaching the merits of any particular case, the threshold question is the proper statutory authority under which to account for duplicate check losses. The four subject cases were submitted under 31 U.S.C. § 82a-2 (1976). This statute authorizes the General Accounting Office to relieve disbursing officers from liability for illegal, improper, or incorrect payments upon finding, either independently or in concurrence with written determinations by the agency concerned, that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer. The granting of relief does not affect the liability of the recipient of the payment, and GAO may deny relief if it determines that the agency

[1] Title 31 of the United States Code was recently recodified by Pub. L. No. 97-258, enacted on September 13, 1982. Since the new Title 31 has not yet been widely circulated, we have used the "old" 31 U.S.C. citations throughout the text for convenience. The new citations for statutes cited in the text are as follows: § 82a-2 is now § 3527 (c) and (d); § 156 is now § 3333; § 528 is now § 3331.

has not diligently pursued collection action to recover the improper payment.

The question arises by virtue of the existence of another statute, 31 U.S.C. § 156, under which GAO relieves the Treasurer of the United States for losses resulting when checks drawn on the Treasurer are "paid in due course and without negligence by or on behalf of the Treasurer of the United States."

Requests for relief under 31 U.S.C. § 82a-2 are made individually by the agency whose disbursing officer is accountable for the loss. Requests under 31 U.S.C. § 156 are made by the Treasury Department. Treasury's practice has been to accumulate the cases and to submit them in large groups. See, *e.g.,* B-115388, October 12, 1976. The Treasurer of the United States is not a "disbursing officer" for purposes of 31 U.S.C. § 82a-2. B-141329, February 26, 1960.

Under 31 U.S.C. § 82a-2, GAO is authorized to restore the accountable officer's account by charging the loss to the agency's operating appropriations available at the time the adjustment is made. 31 U.S.C. § 156 contains no similar authority.

On the surface, either statute appears available, at least in theory, to handle duplicate check losses. The issue here thus becomes which one is proper and under what circumstances.

The Duplicate Check Problem: Analysis and Observations

Accounting for duplicate check losses has caused perplexing problems for many years. In a 1981 report to the Congress entitled "Millions Paid Out in Duplicate and Forged Government Checks," AFMD-81-68, October 1, 1981, we discussed the problems in detail. Some of the problem areas we noted which are relevant to this discussion are as follows:

(1) There are at present no appropriations against which to charge duplicate check losses that are handled under 31 U.S.C. § 156. The Treasury Department has not requested appropriations to cover the expenditures and, as noted above, the statue does not authorize charging the losses to current operating appropriations. Treasury has thus been carrying the losses indefinitely as "accounts receivable."

(2) Treasury has "charge-back" agreements with some agencies, under which Treasury transfers the collection and accounting responsibility back to the agencies. Some agencies charge the losses to appropriations but others apparently do not. Also, there are many agencies with which Treasury has no such agreements.

We concluded that the problems resulting from duplicate check payments are complex and warrant congressional involvement. We made a number of recommendations both to the Congress for legislative revisions and to the Treasury Department for administrative action. Pending action on these recommendations, we also concluded that it would be inappropriate for us to disturb existing practice. We said on page 14 of the report that "we do not object to the con-

tinued issuance of the checks, provided the problems we cited are resolved within a reasonable time."

Against this background, we now proceed to make several observations about the various statutes. As will be seen, no solution we can devise at this time is wholly satisfactory.

One approach would be to hold simply that 31 U.S.C. § 82a-2 is the proper vehicle for handling duplicate check losses. This would have two advantages: first, it would permit losses to be charged against current appropriations, and second, it would place primary collection responsibility with the agencies, who are in a better position to take effective collection action.

However, we are inclined to view 31 U.S.C. § 82a-2 as inappropriate for dealing with duplicate check losses. The responsibility for issuing replacement checks lies primarily with the Treasury Department. 31 U.S.C. § 528. For the most part, the agency disbursing officer acts as little more than a "middle-man" to transmit the payee's request to Treasury. Also, as we stated in B-71585, August 15, 1956:

> The shortage in the account of the Treasurer here involved arose not from the issuance of the substitute checks, which issuance was proper and authorized by law, but rather from the payment by the Treasurer of both the original and substitute checks in due course and without negligence.* * * Accordingly, the provisions of [31 U.S.C. § 82a-2] are not applicable here.

Thus, the loss in a duplicate check case occurs when the second check is wrongfully presented and paid. (The actual sequence in which the payee negotiates the original check and the replacement check is immaterial.) This happens because Treasury, contrary to 31 U.S.C. § 156, honors the second check even where the first check has already been paid. Although an improper payment has clearly occurred, it is totally beyond the responsibility and control of the agency disbursing officer and is something for which he should incur no liability. Also, treating these as "§ 82a-2 cases" would have the effect of rendering 31 U.S.C. § 156 largely meaningless, and we must assume that Congress enacted § 156 to serve a purpose.

Another approach would be to hold that 31 U.S.C. § 156 is the proper vehicle for handling duplicate check losses. This also has several advantages: it gives meaning to both statutes; it protects agency disbursing officers against potential liability for a loss over which they have absolutely no control; and it is logical since it is Treasury that pays the replacement check and it is Treasury that has the opportunity to avoid the improper payment. However, this approach would exacerbate the appropriation problem noted above and would have the effect of negating Treasury's charge-back agreements.

Underlying either approach is the basic question of whether an agency's appropriations are available to pay both checks. Whatever the answer to this question may be, we think it should apply equal-

ly to all agencies and should not vary depending on whether a given agency has voluntarily entered into, or refused to enter into, a charge-back agreement with Treasury.

In two earlier decisions, one before and one after the enactment of 31 U.S.C. § 82a-2, we held that duplicate check losses could be charged to the appropriations against which the original checks were drawn, even though relief had been granted to the Treasurer under 31 U.S.C. § 156. B-71585, August 15, 1956; B-109397, November 24, 1952. (Both cases involved trust funds.) While this combination of concepts—relief under § 156 and a charge to agency appropriations—may well form the nucleus of the ultimate resolution of the problem, our review of the cases now suggests that the premise upon which they were based may have been incorrect. The basis for our holdings in B-71585 and B-109397 was the clause in 31 U.S.C. § 528(a) authorizing Treasury to issue replacement checks "against funds available for the payment of the original check." However, on reflection, this clause seems to contemplate that, since the original check was presumably lost or destroyed, only one check and not two would be paid. This view is reinforced by another portion of 31 U.S.C. § 528(a) which prohibits payment of the replacement check if the original check has already been paid. We doubt that the quoted clause was intended to authorize charging both checks to agency appropriations.

Taking all of these factors into consideration, we are on the one hand reluctant to hold that 31 U.S.C. § 82a-2 is the proper statute since this result would ignore 31 U.S.C. § 156, a statute apparently designed to deal with precisely this type of situation. Yet on the other hand, we are equally reluctant to negate Treasury's charge-back agreements by holding that 31 U.S.C. § 156 is the proper statute, at least without more extensive discussions with Treasury and the other agencies involved.

In sum, we continue to think, as we said in our 1981 report to the Congress, that the duplicate check problem is one that warrants congressional attention and that we should not object to current practice for a "reasonable time." Therefore, while this is admittedly an imperfect solution, and without attempting to define what that "reasonable time" may be, we will continue to observe the *status quo*, at least for the present, in order to give Congress and the Treasury Department adequate time to develop permanent solutions. Thus, if an agency submits a duplicate check case to us under 31 U.S.C. § 82a-2, presumably pursuant to a charge-back agreement with Treasury, we will continue to treat it under that statute. We will also continue to apply 31 U.S.C. § 156 to those cases submitted by Treasury.

We emphasize that the absence of a charge-back agreement does not relieve an agency from its duty to cooperate with the Treasury Department in pursuing aggressive collection action to recover the duplicate payment.

Delegation of Authority Under 31 U.S.C. § 528

The Secretary of the Treasury is further authorized, by 31 U.S.C. § 528(h), to delegate the authority to issue replacement checks in whole or in part to the head of any other department or agency.

The Secretary of the Treasury has delegated the authority to issue replacement checks to the Secretary of Defense in limited circumstances. 31 C.F.R. § 245.8 (1981). Pertinent responsibilities and procedures as they relate to the Department of the Army are contained in Army Regulation (AR) 37-103. Army finance and accounting officers are authorized to issue replacement checks if the request by the payee is made within 15 days from the issue date of the original check for checks mailed to addressees in the continental United States, and within 30 days for checks mailed to overseas addressees, including Alaska and Hawaii. AR 37-103, para. 4-164.

Although this delegation introduces factual distinctions into some of the cases, we do not think it makes a difference in the way the losses should be treated. Even where the replacement check is issued by the Army, it is still paid by Treasury. The replacement check situation is different from other types of "improper payments" in that 31 U.S.C. § 528 requires Treasury to determine whether the first check has been paid before paying the second check. It is Treasury's failure to do this, or its payment on the second check notwithstanding prior payment of the first check, that results in the improper payment. Accordingly, our treatment of duplicate check cases will be the same regardless of which agency actually issues the replacement check since issuance of the replacement check is authorized in either event.

Having made the foregoing observations, we now proceed to the specific cases. As discussed above, since Army has accepted accountability for losses of this type, we will treat all of the cases under § 82a-2.

B-206589: Richard C. Mero

In the first case, to which we have assigned file designation B-206589, a check in the amount of $4,731.32 was issued to Richard C. Mero on June 16, 1980, representing civilian pay. Mr. Mero was stationed in West Germany. On July 1, 1980, Mr. Mero reported that he had not received the check. A replacement check was issued on July 17. Since Mr. Mero requested the replacement check within the time limit established by AR 37-103, the replacement check was issued by the Army. In December 1980, the Treasury Department notified the Army that Mr. Mero had negotiated both checks.

Army sought to recoup from Mr. Mero but attempts to locate him were unsuccessful. It appears that he had been removed from Government service for a variety of offenses such as falsification of travel vouchers, submission of a forged travel voucher, and unau-

thorized absence from duty, and that the check in question had been his final check.

The accountable officers are Lt. Col. A. T. Holder, former Finance and Accounting Officer, U.S. Army Missile Command, Redstone Arsenal, Alabama, and his successor, Lt. Col. G. D. Miller.

Based on our review of the record, we find that Army personnel followed applicable regulations, made reasonable collection efforts under the circumstances, and that there is no indication of bad faith or lack of due care on the part of any Army disbursing officer. Accordingly, relief is granted. Reasonable collection efforts, of course, should continue.

B-206579: Daniel Martinez

In the second case, a check in the amount of $645.88, representing military pay, was issued to Daniel Martinez on March 26, 1980. Mr. Martinez alleged non-receipt and a replacement check was issued on May 2 (by Treasury). Mr. Martinez subsequently negotiated both checks and the Army has been unable to locate him to obtain recoupment. The accountable officers are Lt. Col. D. I. Walter, former Finance and Accounting Officer, 4th Infantry Division and Fort Carson, Fort Carson, Colorado, and his successor, Lt. Col. D. H. Parrish.

As with the Mero case, our review of the record indicates that Army personnel followed applicable regulations and discloses no evidence of bad faith or lack of due care. While it appears that the Army could have done more to attempt to locate Mr. Martinez (see, *e.g.,* 4 C.F.R. § 104.2), in view of the relatively small amount of the shortage, and since further delay in submitting the relief request would have been undesirable in view of the 3-year statute of limitations (31 U.S.C. § 82i), we grant relief here also. As mentioned above, the granting of relief does not eliminate the agency's responsibility to continue reasonable collection efforts.

B-201286: David L. Thatcher

In this case, a check in the amount of $773, representing military pay, was issued to David L. Thatcher on April 29, 1977. Mr. Thatcher claimed non-receipt and Army issued a replacement check on May 2, 1977. Mr. Thatcher negotiated both checks. Alleging inability to locate Mr. Thatcher, Army requested relief for Lt. Col. P. G. Davies, former Finance and Accounting Officer, 9th Infantry Division and Fort Lewis, Fort Lewis, Washington, and his successor, Lt. Col. J. E. Rusk.

The time period involved in this case raises the issue of the applicability of the 3-year statute of limitations found in 31 U.S.C. § 82i. As noted, both checks were issued in 1977. However, the 3-year period did not begin to run until later. Treasury forwarded its Debit Voucher to the Army on November 1, 1978, and the shortage was reflected in the disbursing officer's Statement of Accountabil-

ity for November 1978. (See generally AR 37-103, Chapter 18.) As we have often pointed out, we consider the date of receipt by the agency of substantially complete accounts as the point from which the 3-year period begins to run. *E.g.,* B-198451.2, September 15, 1982. Thus, the 3-year period began to run when the Army Finance and Accounting Center received the disbursing officer's Statement of Accountability in November 1978. (Army would have no way of knowing that there was a loss for which anyone might be accountble until it received Treasury's Debit Voucher, the event which triggers inclusion on the Statement of Accountability.) Nevertheless, although Army submitted a timely relief request, the 3-year period has now elapsed, the accounts in question must now be regarded as settled, and there is no longer a need for us to grant relief. B-199542, November 7, 1980.

Having said this, two points merit further comment. First, we note that Army issued the replacement check only 3 days after the date of the original check. While we understand the Army's desire to accommodate its personnel, this in our view is not sufficient time to justify a determination that the original check was lost, stolen, or destroyed, when the sole basis for the determination is the payee's allegation of non-receipt.

Second, according to the record, the sole attempt to recover from Mr. Thatcher seems to have been one letter that was returned unclaimed. This in our view does not constitute diligent collection action. Had the statute of limitations not expired, we might be inclined to deny relief on these grounds. In any event, 31 U.S.C. § 82a-2(b) provides that the granting of relief does not relieve the department or agency from its responsibility to pursue collection action against the payee. Accordingly, we suggest that the Army resume efforts, within reason, to locate Mr. Thatcher. The Army might wish to pursue some of the devices specified in 4 C.F.R. §§ 104.2 and 102.6, many of which entail minimal administrative burden and expense.

B-201286: John M. Yarbrough

The fourth case, which we have included under file designation B-201286, is similar to the others. On November 30, 1975, the Army issued a check in the amount of $724.45 to John M. Yarbrough in payment of retired pay. Mr. Yarbrough alleged non-receipt, and a replacement check was issued on January 23, 1976. Both checks were negotiated. Mr. Yarbrough died on September 14, 1976. The accountable officers are Lt. Col. R. J. Withington, former Finance and Accounting Officer, Retired Pay Operations, Army Finance and Accounting Center, Indianapolis, Indiana, and his successor, Lt. Col. R. J. Hinton. (The replacement check here was issued by Treasury because it was not within the Army's delegated authority. The check represented retired pay, which is specifically exempted from the delegation. AR 37-103, para. 4-163c.)

Again, the passage of time raises a question under 31 U.S.C. § 82i, the statute of limitations. Although the replacement check was issued in January 1976, Army did not receive Treasury's debit voucher until January 1980, and the loss was reflected in the disbursing officer's Statement of Accountability for March 1980. Thus, we are well within the 3-year period (see discussion of Thatcher case above) and may proceed to the merits.

As with the other cases, we have no indication of bad faith or lack of due care and it appears that Army personnel followed applicable regulations. Thus, relief is proper unless we conclude that Army failed to diligently pursue collection action.

The Army's request for relief states that "Numerous attempts at collection from Mr. Yarbrough and also from his estate * * * have proved unsuccessful." The only collection attempt documented in the record submitted to us is a single letter sent to Mr. Yarbrough's surviving spouse on December 17, 1980, which was returned as undeliverable. Also, if we understand the matter correctly, it is not clear to us how Army could have attempted collection from Mr. Yarbrough himself since it presumably did not know about the duplicate payment until it received Treasury's debit voucher several years after he died.

While we again caution that diligent collection action generally requires more than a single letter, the circumstances here do not warrant denying relief. (The statutory authority for us to deny relief based on lack of diligent collection action is discretionary, not mandatory.) Mr. Yarbrough died in September 1976; Army received Treasury's debit voucher in early 1980. If Mr. Yarbrough left an estate subject to probate, barring unusual circumstances, the probate proceedings would most likely have been terminated before Army had the opportunity to file a claim against the estate. By the time Army learned of the shortage, it appears there was little Army could have done except to continue pursuing the widow. Considering these circumstances in relation to the amount of the loss, we will grant relief.

Problem Resulting From Title 31 Recodification

We have discovered one problem with the recodification of Title 31 which merits the attention of the Defense and Treasury Departments. The former 31 U.S.C. § 528 has become 31 U.S.C. § 3331 in the recodification (96 Stat. 955). Subsection (h) of the former § 528, which authorized the Secretary of the Treasury to delegate the authority to issue replacement checks to other Government departments or agencies or to Federal Reserve banks, is not included in the new 31 U.S.C. § 3331. A search of the Master Disposition Tables in the report accompanying the recodification reveals that the former subsection (h) was omitted. The reason given is that it is "Superseded by section 321 of the revised title that provides that the Secretary may delegate duties and powers to officers and em-

ployees of the Department of the Treasury." H.R. Rep. No. 97-651, Table 2A, page 298 (1982).

The new 31 U.S.C. § 321, as Table 2A indicates, authorizes the Secretary of the Treasury to delegate powers and duties *to other Treasury employees.* It does not authorize delegations to other agencies. Table 2A is thus incorrect in assuming that the new § 321 includes the former § 528(h). Therefore, while the results would certainly seem to have been unintended, the basis for the Secretary of the Treasury's delegation to the Secretary of Defense (31 C.F.R. § 245.8, discussed above) has been dropped from the statute. We have informally brought this to the attention of the Office of the Law Revisions Counsel, House of Representatives, and are bringing it to your attention (and will send a copy of this letter to the Treasury Department) in the event you wish to pursue the matter further.

[B-207629]

Contracts—Negotiation—Requests for Proposals—Cancellation—Reasonable Basis—Substantial Change in Specifications

A contracting officer in negotiated procurement need only establish a reasonable basis for cancellation of a solicitation after receipt of proposals; protest that such cancellation was improper is denied since record indicates increase in scope of work of about 46 percent was required.

Contracts—Negotiation—Requests for Proposals—Cancellation—Resolicitation Not Conducted—Arms Export Control Act Applicability

Protest that agency's failure to resolicit requirement after cancellation of initial solicitation is denied since procurement was conducted under Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and foreign government on whose behalf procurement was conducted requested award be made to a specific source.

Foreign Governments—Defense Articles and Services—Arms Export Control Act—Foreign Military Sales Program—Competition Requirement Inapplicability—Sole-Source Award Requested

Protest that provisions in Defense Acquisition Regulation requiring contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement.

Matter of: Allied Repair Service, Inc., December 16, 1982:

Allied Repair Service, Inc. protests the cancellation by the Department of the Navy of request for proposals No. N626-78-82-R-0026, which called for proposals for the overhaul of a Royal Saudi Naval Forces ship. Allied also protests the failure of the Navy to resolicit the requirement competitively and its sole source award to

the Norfolk Shipbuilding & Drydock Corporation. The protest is denied.

The procurement was conducted under the authority of the Arms Export Control Act, 22 U.S.C. 2751 *et seq.* (1976), and was funded by the government of Saudi Arabia. Three proposals were received and neither Allied nor Norfolk submitted the offer with the lowest price. After preaward surveys were conducted on Allied and the low offeror, the Navy concluded that the specifications required changes which would increase the scope of work by approximately 46 percent and determined the changes were so substantial as to require cancellation of the solicitation under the authority of Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.). It was further decided that the overhaul of two additional Saudi vessels should be combined with the first into one contract because the repairs required were similar. Thereafter, the Senior Representative, Royal Saudi Naval Forces, requested that overhaul of the three vessels be awarded to Norfolk on a sole-source basis. The contracting officer negotiated and awarded a sole-source contract to Norfolk for the overhaul of the three vessels pursuant to the Saudi request, under the authority of DAR § 6-1307(a), which provides that a Foreign Military Sales customer may request that a defense article or service be obtained from a particular source and that the contracting officer "shall honor" the request.

1. *The Cancellation*

The Navy contends that the cancellation was reasonable because the changes required an increase in the scope of work of about 46 percent on the first ship. We agree. In negotiated procurements, the contracting officer need only have a reasonable basis for cancellation as opposed to the "cogent and compelling" reason required for cancellation of advertised procurements. This distinction is based on the public exposure of competitive positions which occur as a result of the public opening of bids in advertised procurements—an event which does not occur in negotiated procurements. See *Management Services Incorporated,* B-197443, June 6, 1980, 80-1 CPD 394. In our view, a 46 percent change in its scope of work is a reasonable basis for cancellation.

Allied contends, however, that increases in the scope of work in ship repair contracts of 35-40 percent are considered normal and by general business standards are not unusual, and suggests that the changes here should have been handled through change orders after contract award. The "Changes" clause in Government contracts is designed to permit the agency and the contractor to modify the contract to reflect conditions which were not anticipated at the time of award. *Brumm Construction Company,* 61 Comp. Gen. 6 (1981), 81-2 CPD 280. However, a contracting officer may not award a contract under a specification knowing that the Government's needs are different from that identified in the specifica-

tion and that the specification must be changed after award. *Worldwide Direct Marketing,* B-200371, April 2, 1981, 81-1 CPD 253. We therefore find that the cancellation was proper.

2. *The Sole-Source Award*

Allied contends that the sole-source award to Norfolk is improper even if the cancellation of the original RFP was appropriate. Allied asserts that if the DAR authorized the Navy to award a sole-source contract in this case, the regulations are unlawful because they violate 10 U.S.C. 2304(a) which requires that procurements be competitive except in extraordinary circumstances where competition is not feasible, which it alleges is not the case here. We find no legal merit to this assertion.

The Department of Defense (DOD) acts as an agent for a foreign government when it conducts procurements under the authority of the Arms Export Control Act, using the foreign government's funds that have been deposited in the Foreign Military Sales Trust Fund Account in the Treasury. While the funds are appropriated in a technical sense, they are administered by the United States in the capacity of a trustee; by law, these funds can only be disbursed *in compliance with the term of the trust.* 31 U.S.C. § 1521 (formerly section 725s). DAR 6-1307(a), then, is no more than a reasonable implementation of the statutory requirement of 31 U.S.C. § 1521. For that reason, the legal framework for our review of these procurements is the DAR and not the procurement statutes that govern purchases made by the military departments on their own behalf using U.S. funds appropriated by the Congress for that purpose. See *Procurements Involving Foreign Military Sales,* 58 Comp. Gen. 81 (1978), 78-2 CPD 349, *Saudi Maintenance Company, Ltd.,* B-205021, June 8, 1982, 82-1 CPD 552.

Since the government of Saudi Arabia specifically requested the award of this contract to Norfolk, the contracting officer acted properly in negotiating the sole-source contract.

The protest is denied.

[B-209981]

Public Lands—Acquisition—Exchange Agreements—Bidding Rights—As Basis for State Payments Mineral Lands Leasing Act Requirements

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt.

Rattlesnake National Recreation Area and Wilderness Act—Exchange Agreements—Bidding Rights—Retirement by Payment—Legality

Under proposed "Exchange Agreement" where Montana Power Company's total payment is in cash but it is accompanied by notice of use of bidding rights, Treasury would be required to pay Company for the amount of rights used pursuant to the notice. Reimbursement to Company is not proper absent authority to retire bidding rights by payment and lack of available appropriation for that purpose.

Rattlesnake National Recreation Area and Wilderness Act—Exchange Agreements—Bidding Rights—Value Limitation—Interest on Unused Rights—Legality

Proposed "Exchange Agreement" calls for increase bidding rights for Montana Power Company at 10 percent interest rate on outstanding unused bidding rights. Increase in value of bidding rights is not legally permissible since their value is limited to fair market value of lands under sec. 4(b)(2) of the Rattlesnake National Recreation Area and Wilderness Act, 16 U.S.C. 460*ll*-3(b)(2) (Supp. IV. 1980).

Matter of: Proposed Agreement for Exchange of Lands for Federal Coal Lease Bidding Rights, December 30, 1982:

We received a request from the Director of the Bureau of Land Management (BLM), Department of the Interior (Interior), for our opinion as to whether he has the authority to agree to a proposal from the Montana Power Company (Company) relating to the exchange of its lands to be included in the Rattlesnake National Recreation Area, and Rattlesnake Wilderness, Montana.

The request indicates that under the Rattlesnake National Recreation Area and Wilderness Act of 1980, lands owned by the Company have been appraised at approximately $17.5 million and that one acquisition method provided for in the Act is for the exchange of the lands for bidding rights in an amount equal to the lands' value. These rights may be used to pay the bonus or other payment required of the successful bidder for a competitive Federal coal lease. Under the proposed "Exchange Agreement" the Company would use the bidding rights for only half of any lease payment, assuring a 50 percent payment in cash. The cash payment would be remitted to the State of Montana as its 50 percent share of money received from sales, bonuses, royalties and rentals of Federal public lands under section 35 of the Mineral Lands Leasing Act of 1920 (MLLA).

In his submission the Director states as follows:

The Department's informal position, since adoption of regulations authorizing the creation and use of bidding rights in 1977 (43 C.F.R. Subpart 3526), has consistently been that only cash receipts are to be distributed by the Treasury to the various states under section 35 of the MLLA. Thus, a 50 percent portion of bonuses in competitive coal sales or royalties paid in cash would be subject to redistribution to the state where the lease is situated, however, any portion of the bid that would be satisfied by the bidder or lessee tendering a certificate of bidding rights would simply not be "money received" and thus would not be subject to distribution. We describe this position as informal since, at the time the Rattlesnake Act was passed, no Departmental regulation or written opinion so stated, and no bidding rights had then

been created or exercised to establish the precedent on their treatment under section 35 of the MLLA.

According to the Director, it appears that establishment of the proposed method of payment was to have been accomplished by a "Statement of Intent" signed by the Company, the Regional Forester of the United States Forest Service, Region I, and the Montana State Director of BLM. This statement was incorporated by reference in the Rattlesnake bill, but was deleted prior to its passage. The Director's tentative conclusion is that the statement has no effect on the disbursement of cash to be received from the Company because all mention of the statement was removed before the bill was enacted and furthermore, the statement is ambiguous regarding the 50 percent payment.

The Director further states that he will not agree to the proposal for distribution of revenues under section 35 of the MLLA absent our concurrence. Subsequent to the Director's submission, at a meeting with his staff, we were requested to also consider an additional method of payment contained in a later proposal dated December 2, 1982. Under it the Company would pay 100 percent in cash for Federal coal lease payments, from which the State of Montana would receive 50 percent and the Federal Treasury would reimburse the Company for its cash payment, cancelling a like amount of bidding rights. In addition, the Director's staff informally requested our views concerning the interest provision of the proposed Exchange Agreement which would entitle the Company to 10 percent interest on the value of the bidding rights during the time they were unused.

For the reasons discussed below, it is our opinion that the Treasury may not remit to the State of Montana an amount based on the Treasury's receipt of money from the Montana Power Company when half of the amount due to the United States is satisfied by the Company's use of bidding rights. Additionally, the Treasury is not authorized to retire the bidding rights by payment to the Company nor is there an appropriation available for this purpose. Finally, an increase in the value of bidding rights because of interest on outstanding bidding rights is not permissible since it would increase their value beyond the fair market value of the exchanged lands, which is not authorized by statutes.

LEGISLATIVE BACKGROUND

Section 35 of the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 191 (1976), provides in pertinent part that:

> All money received from sales, bonuses, royalties, and rentals of the public lands under the provisions of this chapter * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury * * * to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; * * * 40 per centum thereof shall be paid into, reserved, appropriated, as part of the reclamation fund created by * * * the Reclamation Act, approved June 17, 1902, * * * All moneys received under the pro-

visions of this chapter * * * not otherwise disposed of by this section shall be credited to miscellaneous receipts.

The Rattlesnake National Recreation Area and Wilderness Act of 1980, Public Law No. 96-476, October 19, 1980, 94 Stat. 2271, 16 U.S.C. § 460*ll* (Supp. IV 1980), established the Rattlesnake National Recreation Area and Rattlesnake Wilderness Area. With regard to land acquisition and exchange, section 4 of the Act (16 U.S.C. § 460*ll*-3) provides in pertinent part as follows:

(a) Within the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, the Secretary is authorized and directed to acquire with donated or appropriated funds * * * by exchange, gift, or purchase, such non-Federal lands, interests, or any other property, in conformance with the provisions of this section. * * *

(b)(1) The Secretary of the Interior, in consultation with the Secretary of Agriculture, is authorized to consider and consummate an exchange with the owner of the private lands or interests therein within or contiguous to the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, * * * by which the Secretary of the Interior may accept conveyances of title to these private lands for the United States and in exchange issue bidding rights that may be exercised in competitive coal lease sales, or in coal lease modifications, or both, under sections 2 and 3 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 201(a), 203).* * *

(2) The coal lease bidding rights to be issued may be exercised as payment of bonus or other payment required of the successful bidder for a competitive coal lease, or required of an applicant for a coal lease modification. The bidding rights shall equal the fair market value of the private lands or interests therein conveyed in exchange for their issuance. The use and exercise of the bidding rights shall be subject to the provisions of the Secretary of the Interior's regulations governing coal lease bidding rights, to the extent that they are not inconsistent with this Act, that are in effect at the time the bidding rights are issued.

(3) If for any reason, including but not limited to the failure of the Secretary of the Interior to offer for lease lands in the Montana portion of the Powder River Coal Production Region * * * or the failure of the holder of the bidding rights to submit a successful high bid for any such leases, any bidding rights issued in an exchange under this Act have not been exercised within three years from the date of enactment of this Act, the holder of the bidding rights may, at its election, use the outstanding bidding rights as a credit against any royalty, rental, or advance royalty payments owed to the United States on any Federal coal lease(s) it may then hold.

(4) It is the intent of Congress that the exchange of bidding rights for the private lands or interests therein authorized by this Act shall occur within three years of the date of enactment of this Act.

S. 3072, 96th Cong., 2d Sess. which was enacted as Public Law No. 96-476, was introduced by Senator John Melcher of Montana on August 26, 1980. At a hearing on S. 3072 held by the Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources of the Senate on September 9, 1980 (96th Cong., 2d Sess. 21, 22), the Associate Director of BLM testified on section 4 of the bill. He indicated that Interior would support the bill if certain technical changes were made and if all reference to the statement of intent were deleted. He said that "Reference to an agreement that did not exist at this time was neither necessary or helpful." Additionally, he explained as follows:

Use of the bidding rights approach does nothing more than permit the Federal Government to obtain the private lands in question for a price to be paid in a medium other than cash. * * *

I must point out, however, that use of bidding rights would have an impact on the State of Montana or any other State where they are used. States are entitled to 50 percent of the receipts from Federal mineral leasing within their borders. To the extent that Montana Power applies its bidding rights to a coal lease sale or modification, or to other payments required of a lessee, cash receipts that the company would have paid for bonus bids, royalties or rentals, would be proportionately reduced and so will the State's share of those receipts.

In other words, if you are to protect the State's 50 percent of mineral leasing receipts, then you would have some language in there to do that.

The Senate Committee on Energy and Natural Resources favorably reported on S. 3072 with amendments, on September 25, 1980, S. Rep. No. 996, 96th Cong., 2d Sess. 1. Notwithstanding the Associate Director's comments, the bill as reported contained no additional provision regarding the State's share of receipts. It did include reference to the proposed statement of intent as follows: "In accordance with the agreement entitled "Statement of Intent" entered into by the Montana Power Company, the Regional Forester of the United States Forest Service, Region 1, and the State Director of the Bureau of Land Management, signed ———— 1980, * * *."

An Appendix to the Report contained a draft Statement of Intent signed only by the Montana Power Company. In the Appendix it was noted that the agreement was not in final form and was subject to change (Report, pages 7 & 8).

The bill as reported by The House Committee on Interior and Insular Affairs on September 17, 1980 (HR. Rep. No. 1340, 96th Cong., 2d Sess.) did not contain a similar provision, nor an appendix.

S. 3072 was considered by the Senate on October 1, 1980. Prior to its passage, Senator Melcher proposed an amendment which among other things (without explanation) deleted reference to the Statement of Intent. The amendment was agreed to by the Senate. 126 Cong. Rec. S 14206 (daily ed. October 1, 1980).

The next day the bill, as passed by the Senate, was considered by the House of Representatives. Prior to its approval Chairman Seiberling of the Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs inserted into the Congressional Record a "Statement of Intent" signed by all the parties, and dated October 2, 1980. The statement which differed from the draft appearing in the Senate Report reads in pertinent part as follows:

2 * * * (B) * * * Future royalty payments and rental may also be paid in cash or a combination of cash and bidding rights. All payments related to the Federal coal leases must include a minimum of 50 percent (½) cash. Cash portions of all receipts, up to 50 percent (½) of these [sic] total amount received by the Federal government, will be used to pay the State of Montana in accordance with the Mineral Leasing Act as amended. * * *

* * * * * * *

4. In the event a land exchange cannot be mutually agreed to, or if only a portion of the Montana Power Company lands are included in the exchange, the Montana Power Company may, at its option, obtain a cash payment for all of, or the remainder of, its "Rattlesnake Lands" subject to appropriation by the United States Congress." 126 Cong. Rec. H 10345-6 (daily ed. October 2, 1980).

PROPOSED EXCHANGE AGREEMENT

We have been provided with an unapproved draft "Exchange Agreement" dated December 2, 1982, between the Company and the Secretaries of Agriculture and the Interior. This differs from the two Statements of Intent mentioned above, which were agreements in principle to be used as the basis for a binding agreement between the parties—the Exchange Agreement. Under the Exchange Agreement the Company would agree to deed to the United States its Rattlesnake lands and in exchange the United States, through Interior, would issue bidding rights to the Company. This would entitle it to receive credit for coal-related bonus and royalties in the amount of $17.5 million. The bidding rights would also allow a rate of interest of 10 percent per annum, compounded daily, so that the current value of the bidding rights could be obtained by the Company. The current value would be reduced by the amount of bidding rights value applied to lease payments. (Section 3.1 & .2.)

Section 3.4(b) provides that:

> Lease payments which make use of Bidding Rights shall be (i) in cash, in a minimum amount of fifty percent (50%) of the total debt then due, and the remaining amount shall be represented by a Bidding Rights Use Notice ("Notice") * * * or (ii) one hundred percent (100%) in cash, upon receipt of which along with a Notice, USDI shall authorize immediate reimbursement to Montana Power by the United States Treasury by certified check in the amount indicated as "Amount Applied to Bidding Rights" on the Notice; or (iii) one hundred percent (100%) by conveyance of a Notice instead of cash payment.

Section 3.4(e) provides that:

> The USDI, upon receiving a Notice, shall notify the United States Treasury by normal notice procedures of receipt of full payment so that payments to the states in which the leases are located may be made in the same manner and amount as if the United States Treasury had received one hundred percent (100%) of the Lease payment in cash without application of Bidding Rights.

ANALYSIS

We first consider the proposed Exchange Agreement's requirement that the Treasury remit to the State 50 percent of the total debt due to the United States for coal-related bonuses and royalties including that portion of the debt for which bidding rights have been utilized. We understand the provision to mean that if, for example, the Company must pay $1,000 bonus on a lease, it utilizes bidding rights worth $500 and pays $500 for the remainder. The State of Montana's share would be one-half of the $1,000 debt, $500.

Section 35 of the MLLA requires that "All money" received from sales, bonuses, royalties, and rentals of public lands under the Act shall be paid into the Treasury of the United States with 50 per centum thereof to be paid by the Secretary of the Treasury to the State where the lands or deposits are located. Under the Rattlesnake Area Act coal lease bidding rights equal to the fair market value of the lands to be included in the recreation area and wilder-

ness may be exchanged for the lands. These rights may be used in competitive coal lease sales or coal lease modifications as payment for bonuses or other required payments. To the extent they are not exercised within 3 years of the date of the Rattlesnake Area Act's enactment, the holder of the rights may use them as a credit against any royalty, rental or advance royalty payments owed to the United States on Federal coal leases it holds.

It appears clear that the bidding rights which may be accepted in certain specific situations in lieu of money are not themselves money. "Money" as used in the MLLA, section 35, is not defined, but appears to be employed in the commonly understood sense of a general medium of exchange—ordinarily legal tender coin or paper money. See definition of "money" in 58 C.J.S. 844 (1948) and Webster's Third New International Dictionary 1458 (Unabridged ed. 1981).

The bidding rights created by the Rattlesnake Area Act are for the special purpose of barter or exchange for certain lands, a form of payment not requiring the appropriation of funds with which the lands might otherwise be purchased. They may only be used in connection with the amount due to the Government incident to Federal coal leases, as specified in the Act. They cannot, for example, be used to pay the Company's Federal or State taxes, or other obligations. Bidding rights under the Act are, in short, substitutes for money, to be given to the Company for its land, to be used only as prescribed in the Act.

Under the Rattlesnake Area Act, bidding rights may be received by Interior in lieu of some or all monies to be paid by the holder of the rights in connection with Federal coal leases. However, since they are not money, the rights should then be retired by Interior. Only *money* received by Interior under section 35 of the MLLA would be forwarded to the Treasury for appropriate disposition, including payment of 50 percent of the money to the appropriate State. Absent specific statutory authority to do so, we are aware of no appropriate basis for payment to the State of Montana of any amount in excess of 50 percent of the money received by the Treasury. To do so would result in both the Reclamation Fund and the miscellaneous receipts account receiving less than their appropriate shares of money obtained under section 35.

The legislative history of the Rattlesnake Area Act indicates that a similar view was expressed by the Associate Director of BLM during a Senate hearing on the bill. He clearly stated that the effect of the use of the bidding rights would be to reduce the money received by the Treasury from which the State of Montana's 50 percent share would be disbursed. As a result, the State would not receive revenues amounting to one-half of the fair market value of the Company's lands. He indicated the need for a specific statutory provision to provide for payment to the State of 50 percent of the

total amount due to the Government, including bidding rights. However, this was not done.

We note that the Statement of Intent which appeared in the Appendix of the Senate Report was silent as to Montana's share of the bonuses, royalties, etc. for which the bidding rights would be substituted. The second Statement of Intent, signed by all parties and dated October 2, 1980, was inserted in the Congressional Record of that day prior to the House approval of the Rattlesnake Area bill. It contained a provision which arguably might require the Treasury to remit to the State of Montana payment for 50 percent of the total payment received by Interior. In any event, the legislation as enacted included no authority for the Treasury to remit to the State of Montana payments under section 35 of the MLLA representing what amounts to 50 percent of bidding rights received by Interior. Without this or similar provision, we are aware of no authority under which the Treasury might properly make payment under section 35 to the State of Montana for other than money actually received, notwithstanding the existence of the October 2, 1980 Statement of Intent signed before passage of the Act.

In summary, the proposed Exchange Agreement would require the Treasury to pay a State as if 100 percent of a lease payment had been received in cash, even though some part of the lease payment would be made in bidding rights. To this extent it is not in accord with current statutory authority, and therefore there is no available appropriation to pay out more than 50 percent of the cash received.

The Exchange Agreement also provides that where the Company's lease payment is entirely in cash, and is accompanied by a "Bidding Rights Use Notice," the Treasury shall reimburse the Montana Power Company for the amount stated in the notice. This would permit the State of Montana to receive 50 percent of the entire cash payment. However, the Treasury would have to disburse to the Company an amount equal to the bidding rights used at that time. The Treasury has no authority to retire bidding rights by payment, nor are we aware of an appropriation which would be available for this purpose. It follows that this provision is legally objectionable.

Finally, we consider the proposed Exchange Agreement's requirement (section 3.1 & .2) that the bidding rights be adjusted in value to reflect "a rate of interest growth of ten percent (10%) per annum, compounded daily." This would appear to be computed on the outstanding amount of unused bidding rights. The rationale for this procedure is that legal title to the lands would be deeded to the United States on execution of the Exchange Agreement but that it might take a number of years before all of the bidding rights were used. (Both in the Statement of Intent included in the Senate Report and the Statement of Intent dated October 2, 1980,

and signed by all parties, legal title would not be conveyed to the Federal Government until the total fair market value of the lands was received by the company.)

The Rattlesnake Area Act states that, "The bidding rights shall equal the fair market value of the private lands or interests therein conveyed in exchange for their issuance." (Sec. 4(b)(2)). Bidding rights not exercised within 3 years from the date of the law's enactment may be used as a credit against any royalty, rental or advance royalty payments on any Federal coal leases it may then hold. (Sec. 4(b)(3)). It is apparent from these provisions that the value of the bidding rights exchanged for the Company's lands may not exceed the fair market value of the lands. Upon establishment of the lands' fair market value at $17.5 million, that became the maximum value of bidding rights that could be provided to the Company, regardless of when the bidding rights are exercised. Provision was made for bidding rights not used within 3 years of passage of the Act. In that case, the use of the bidding rights is broadened to include credit against any royalties, rents or advance royalty payments due on Company-held coal leases.

There is no statutory provision for an increase in the amount of bidding rights because of delay in using them. To allow for an increase in the value of bidding rights in excess of the agreed fair market value of the lands as proposed in the Exchange Agreement before us would exceed the authority conferred by the Rattlesnake National Recreation Area and Wilderness Act. This would be so even if we were to view the 10 percent annual value increase as establishing a new or updated fair market value since there is no authority to increase it because of the passage of time. For the reasons stated, the increase in the value of bidding rights called for in the proposed Exchange Agreement is not legally permissible.

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Employee of Forest Service claims per diem in connection with transfer to seasonal worksite every 6 months for period from May 7, 1973, through Nov. 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office (GAO) until Jan. 18, 1982. Portion of claim arising before Jan 18, 1976, may not be considered since Act of Oct. 9, 1940, as amended, 31 U.S.C. 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act 80

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Per diem

Headquarters

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Inapplicable

"Freight, all kinds"

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Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because the formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process 29

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Appropriation adjustment
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Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527(c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

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U.S. GOVERNMENT PRINTING OFFICE : 1983 O - 407-381 (QL 3)