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[B-208406]

Merit Systems Protection Board—Employees—Administrative Leave—Retroactive Application—Administrative Authority—Brief, Partial Office Shutdown

The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown.

Matter of: Merit Systems Protection Board—Administrative Leave—Partial Shutdown, October 6, 1982:

Mr. Richard Redenius, the Managing Director, Merit Systems Protection Board (MSPB or Board), has requested a decision as to the authority of MSPB to grant retroactive administrative leave to its employees who were ordered not to report for work during an administratively declared partial shutdown resulting from the Board's efforts to forestall a funding gap. For the reasons stated herein, we hold that the Board may grant retroactive administrative leave to its employees for the time in question.

BACKGROUND

On December 15, 1981, the Congress passed a continuing resolution which had the effect of cutting the MSPB's fiscal year 1982 appropriation by 16 percent. This unforeseen budgetary shortfall and the Board's uncertainty as to when or whether needed supplemental appropriations would be passed resulted in a management decision in the summer of 1982 to stretch fiscal year 1982 appropriations as far as possible by initiating a partial shutdown. The Board viewed the partial shutdown as an alternative to the potential of a full closedown in early August 1982 for the balance of fiscal year 1982. In order to forestall such a full closedown, the Board initiated a partial shutdown on July 6, 1982. All employees, with the exception of a small number of essential employees, were placed on half-time, half-pay status for the period from July 6, 1982, through July 14, 1982, with actual time missed ranging from a mimimum of 2 days to a maximum of 5 days. On July 18, 1982, the President signed into law the Urgent Supplemental Appropriations Act of 1982, Pub. L. 97-216, 96 Stat. 180, which in Title I, Chapter 4, added $4,006,000 to the MSPB's appropriations for salaries and expenses, an amount sufficient to fund the Board through fiscal year 1982 at full staff. Since the Congress had passed the bill the previous Thursday, July 15, 1982, and since the Board did not anticipate a veto, the Board called all staff back to full-time work on that date.

The question presented is whether, in view of changed circumstances stemming from enactment of the Urgent Supplemental Appropriations Act, the Board may now utilize funds which it reports were on hand at the time of the partial shutdown to grant retroactive administrative leave with pay to those employees who were ordered not to report to work during the partial shutdown.

OPINION

Neither the Office of Personnel Management nor its predecessor, the Civil Service Commission, has issued any general regulations on the subject of granting excused absences to employees without loss of pay or charge to leave (commonly called "administrative leave"). Further, there is no general statutory authority under which Federal employees may be excused from their official duties without loss of pay or charge to leave. However, excused absences with pay have been authorized in specific situations. For example, section 6326 of Title 5, United States Code, authorizes an absence of up to 3 days for an employee to participate in funeral services of an immediate relative who died as a result of military service in a combat zone.

In addition, over the years, it has been recognized that, in the absence of a statute controlling the matter, the head of an agency may in certain situations excuse an employee for brief periods of time without charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without charge to leave are discussed in Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. See 53 Comp. Gen. 582 (1974).

Additionally, the Federal Personnel Manual states that "[t]he closing of an activity for brief periods is within the administrative authority of an agency." FPM Chapter 610, S3-1(a). Examples of the appropriate use of such authority given by the FPM include (1) when normal operations are interrupted by events beyond the control of management or employees such as emergency conditions; and (2) when managerial reasons require the closing of an establishment or portions thereof for short periods of time.

We recognize, of course, that the MSPB case is not the normal situation. The Board's employees were placed on a partial nonpay status as the result of a considered management decision and not as the result of an uncontrollable interruption of normal operations or a breakdown of machinery or power failure. Nevertheless, we believe the partial closing of the Board's offices in the circumstances described above falls within the scope of the administrative authority of an agency to close an activity or part thereof for brief periods when required for managerial reasons, as described in FPM Chapter 610, S3-1, and in FPM Supplement 990-2, Book 610, S3-1.

We recognize also that this case involves the retroactive granting of administrative leave to a group of employees instead of the usual issue of a prospective grant of administrative leave. Here again, we have permitted retroactive administrative leave in proper cases. See 53 Comp. Gen. 582 (1974). In our view, the key issue here is whether the agency has the discretionary authority to allow administrative leave, not whether it is retrospective or prospective.

In the present situation, we believe that the Board, in its discretion, has the authority to grant excused absences to its employees. The purpose of the MSPB partial shutdown was to permit the agency's continued functioning at some level for an uncertain length of time. Thus, the MSPB, to stretch out funds, which it reports still remained under the previously enacted continuing resolution, made a management decision to place employees on half-time status. Administrative leave with pay, whether retroactive or prospective, when an agency is without funds would be in violation of the Anti-Deficiency Act, 31 U.S.C. § 665 (1976). Here, however, the MSPB reports that funds were not lacking; rather the problem was uncertainty as to whether promised additional funds for future operation would be made available.

The enactment of the supplemental appropriations bill has, however, made it unnecessary for the MSPB to retain these previously appropriated funds for later use and has made the funds available to pay the employees for the period of the partial closing. The legislative history of the supplemental appropriations legislation includes statements by Representative Conte, the ranking minority member of the House Committee on Appropriations, during the debate, noting that the supplemental appropriations would permit use of the remaining funds under the continuing resolution to compensate employees for the nonworkdays resulting from the emergency situation. He stated:

> It would be unfair to penalize the employees because of the failure of Congress to pass the necessary legislation to allow the Board to operate at full scale * * *. [I]n my opinion, once the supplemental is passed and available to the Board, the furlough should be treated as a situation justifying administrative leave or excused absence so that employees can be justly paid. 128 CONG. REC. H4027 (daily edition, July 13, 1982) (remark of Representative Conte).

Accordingly, we find that the Merit Systems Protection Board may, in its discretion, grant administrative leave retroactively to the employees affected by the partial shutdown, as a proper exercise of its administrative discretion to the extent to which funds had been appropriated and were available and adequate on the date in question to cover the amount of the gross salaries of the affected employees.

[B-203100]

Courts—Judgments, Decrees, etc.—Interest—Delayed Payment of Judgment—Not Due to Unsuccessful Government Appeal—Court of Claims Judgment

Interest is allowable on Court of Claims judgment under 28 U.S.C. 2516(b) only in cases of unsuccessful appeal by the Government. Delay resulting from consideration of whether to seek further review, or from filing of post-judgment motions, does not create entitlement to interest. Therefore, Plaintiffs are not entitled to interest on Court of Claims judgment where Department of Justice did not certify judgment to General Accounting Office for payment until after Court had denied Government's motion to vacate. 59 Comp. Gen. 259 and 58 *id.* 67 are explained.

Matter of: *Alyeska Pipeline Service Company* v. *United States*—Interest on judgment, October 12, 1982:

The plaintiffs in *Alyeska Pipeline Service Co.* v. *United States,* Ct. Cl. No. 384-78, claim that they are entitled to post-judgment interest. We hold that they are not for the reasons stated below.

Facts

Alyeska was an action filed by a group of pipeline companies against the United States in the Court of Claims. (The merits of the case are not relevant to this discussion.) The Court rendered a judgment on the issue of liability only on June 18, 1980, holding that the plaintiffs were entitled to recover on their first claim. The Government moved for reconsideration of the judgment, which the Court denied on October 3. On October 31, the Court entered a judgment of $12,253,730 based on the trial judge's recommendation and the stipulation of the parties. The plaintiffs filed a certified copy of the judgment with the General Accounting Office on November 13.

On January 19, 1981, the Government filed a motion to vacate the judgment with the Court of Claims. On March 4, 1981, the United States moved to withdraw its motion. The Court denied the motion to vacate on March 6.

During much of the time the Government's motion to vacate the judgment was pending in the Court of Claims, the Solicitor General was in the process of making his determination of whether to petition the Supreme Court for certiorari. The Government's deadline ordinarily would have been January 2, 1981, based upon the lower court's denial of the motion for reconsideration on October 3, 1980. However, on December 19, 1980, the Government requested, and was granted, a 60-day extension. Accordingly, the time for filing the Government's petition expired on March 2, 1981.

The Department of Justice informed GAO on February 27, 1981, that the Solicitor General had decided not to petition for certiorari. The Department also instructed GAO not to certify payment of the judgment, however, until the Court of Claims had disposed of the motion to vacate which was still before it. On March 12, the De-

partment notified GAO that the Court of Claims had denied its motion, that the Department did not intend to seek further review, and that it did not object to payment of the judgment. Our Claims group issued a Certificate of Settlement for payment of the judgment on March 16.

Discussion and Conclusion

The statutory provisions governing interest on judgments of the Court of Claims are 28 U.S.C. § 2516 and the second proviso of 31 U.S.C. § 724a. 28 U.S.C. § 2516(a) provides, in essence, that the Government may pay interest on Court of Claims judgments only as provided by contract or statute. Subsection 2516(b) provides:

> (b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed. * * *

The second proviso of 31 U.S.C. §724a later substituted the GAO for the Treasury Department as the agency with which the transcript must be filed. Accordingly, the statutes when read literally provide that the United States is liable for interest on Court of Claims judgments only when the Government appeals and loses, and then only from the date a copy of the judgment is filed with GAO to the date of the mandate of affirmance.

The plaintiffs contend that they are entitled to 4 percent interest from the date of the filing of the transcript until March 12, 1981—the date on which the Department of Justice notified GAO that the motion to vacate the judgment before the Court of Claims had been denied, and that the Department had no objection to payment. In support of their contention, the plaintiffs rely on two Comptroller General decisions in which we allowed interest even though the "mandate of affirmance" requirement had not been met literally—*Vaillancourt* v. *United States,* 58 Comp. Gen. 67 (1978) and *Edmonds* v. *United States,* 59 Comp. Gen. 259 (1980). (Both decisions actually involved district court judgments. However, as discussed in *Vaillancourt,* the district court provisions were patterned after the Court of Claims interest provisions and are essentially similar, except that interest in district court cases is triggered by the filing of an intermediate appeal rather than petition for certiorari to the Supreme Court.)

In *Vaillancourt,* the Government filed a notice of appeal and, after a delay of over a year, agreed to a stipulation to dismiss the appeal. We construed the requirement for a mandate of affirmance in light of the purpose of the interest provision which was to compensate a plaintiff for the delay in receiving payment of his judgment due to the Government's unsuccessful appeal. We held that it was consistent with this purpose to allow interest when the Government appeals and simply does not prosecute the appeal.

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In *Edmonds,* the United States appealed the denial of its motion to reopen a district court judgment so that taxes could be withheld from the judgment proceeds. The Government filed a notice of appeal and then agreed to a stipulation dismissing the appeal 3 weeks later. Following *Vaillancourt,* we allowed interest even though there was no mandate of affirmance because the Government's appeal had delayed the plaintiff's receiving payment.

In *Edmonds,* in the course of our discussion of our reasoning in *Vaillancourt,* we said that "the basic purpose of the [interest] statute, as supported by the legislative history, is to compensate a successful plaintiff for the delay in receiving his money judgment attributable solely to Government action or inaction." Citing this statement, the plaintiffs interpret the two cases as standing for the proposition that claimants are entitled to interest whenever there is *any* delay in receiving judgment proceeds attributable to the Government—not just when there is a delay because of an appeal. The plaintiffs cite the United States' motion for reconsideration, its request for extension of time, and its motion to vacate the judgment as actions attributable solely to the Government causing delay in payment.

Before preparing this decision, we solicited the views of the Justice Department. For essentially the same reasons discussed below, Justice concluded that there was no entitlement to interest. We agree.

Vaillancourt and *Edmonds* do not support the plaintiff's contention. An appeal is the only Governmental action causing a delay in receiving payment which entitles a plaintiff to post-judgment interest under 28 U.S.C. § 2516(b). In both *Vaillancourt* and *Edmonds* the Government appealed, and then consented to dismiss its appeal. The issue in the two cases was whether, in view of the "mandate of affirmance" requirement of the first proviso of 31 U.S.C. § 724a, the plaintiffs were entitled to post-judgment interest even though the appellate court had not conducted a review on the merits. We concluded that the filing of a notice of appeal and the subsequent stipulation to dismiss the appeal satisfied the statutory condition since, as discussed above, the essence of the provision is delay in receiving payment occasioned by an unsuccessful Government appeal. Our statement in the *Edmonds* case concerning delay should be read in the context of the facts of the case—delay occasioned by *appeal* by the Government. *Vaillancourt* and *Edmonds* stand for the proposition that a review of a case on its merits is not necessary to the payment of interest under 31 U.S.C. § 724a as long as the delay encountered by the plaintiff in receiving his money is caused by the United States' appeal of the case, and the ultimate resolution is the same as if there had been a mandate of affirmance—*i.e.,* where the appeal is dismissed by stipulation.

Moreover, the legislative history of 31 U.S.C. § 724a suggests that Congress did not intend that the appropriation it established be

available to pay post-judgments interest in every case in which a plaintiff suffers a delay in receiving payment of his judgment which may be attributable to the Government.

Rather, the history shows that Congress intended to provide interest only in cases in which the delay resulted from an appeal. When Congress established the permanent indefinite appropriation for the payment of judgments in 1956, it also changed the rule with respect to interest on district court judgments to make it the same as the rule for interest on judgments of the Court of Claims. In so doing, Congress showed that it did not want interest paid in cases such as this one. Prior to the change, interest was paid on most district court judgments, whether or not the case was appealed, from the date of the original judgment. See 28 U.S.C. § 2411(b). Under the old rule, any delay in the payment of the plaintiff's judgment such as those experienced in this case could cause additional interest to accrue. However, in view of the fact that Congress specifically eliminated the old district court rule when it was enacting the judgment appropriation, we see no basis to broaden our interpretation of the Court of Claims post-judgment interest provisions to include cases not appealed.

Congress was aware that eliminating post-judgment interest in cases not appealed would save the Government money. In fact, this was the very reason for the provision. The Bureau of the Budget (now Office of Management and Budget) had worked with GAO and the Justice Department in drafting the provision that became 31 U.S.C. § 724a. The Bureau prepared a report which explained the interest provisions and their purpose. The report was inserted into the record of the hearings on the 1957 Supplemental Appropriations Bill. The report stated:

Interest on judgments

The present situation with respect to the payment of interest is undesirable in two respects—first, the Government, because of the delay in making appropriations, bears the expense of interest which could be saved if appropriations were available for payment of the judgments when rendered; and second, there is a wide variance between the provisions of law respecting the payment of interest on judgments rendered by the district courts as compared with those rendered by the Court of Claims. Interest is paid on Court of Claims judgments only when the United States appeals and then only from the date when the transcript of the judgment is filed with the Treasury Department to the date of the mandate of affirmance. Interest is paid on judgments of the district courts, regardless of whether the Government appeals, from the date of the judgment to a date not later than 30 days after the making of an appropriation for payment of the judgment.

It is believed that the provision for payment for interest in cases where the Government appeals, as now prescribed by law with respect to judgments in the Court of Claims, is fair and equitable and need not be disturbed. If this belief is correct, it would follow that interest should be paid on judgments of the district courts on the same basis. If interest on judgments of the district courts were placed on the same basis as the Court of Claims, *interest on* district courts *judgments not appealed by the United States would be eliminated entirely.* In district court cases which are appealed by the Government, interest would be eliminated from the date the judgment was rendered to the date the plaintiff filed a transcript thereof with the proper Government agency, and from the date of the mandate of affirmance to the time when a specific appropriation could be secured for the payment of the judgment. This latter period averages about 6 months.

A specific study by the General Accounting Office in 1953 indicated that the interest savings in the 82d Congress would have been approximately $70,000 if the basis for payment of district court judgments were conformed to the Court of Claims practice and if appropriations were available for immediate payment of judgments when they become final. Since there is no indication that judgments are likely to decrease in number or amount, it appears that substantial amounts of interest could be saved in each Congress under such a procedure. Hearings on Supplemental Appropriation Bill, 1957, Before Sub-committees of the House Committee on Appropriations, 84th Cong., 2d Session, pt. 2, at 883-84 (1956). [Italic supplied.]

This statement makes it clear that providing interest in cases where the Government has not appealed but there has been delay was specifically considered and rejected.

Even if there were no relevant legislative history, the explicit language of the governing statute presents a barrier to the plaintiffs' claim which we find insurmountable. Quoted earlier in this decision, 28 U.S.C. § 2516(b) authorizes interest only on those Court of Claims judgments that are "affirmed by the Supreme Court after review on petition of the United States." This language leaves little if any room for interpretation. The term "petition" in this context can mean only a petition for certiorari, since this is the only vehicle by which the judgment may be "affirmed by the Supreme Court." A motion to vacate filed with the Court of Claims simply does not suffice. To hold otherwise would be to ignore the plain words of the statute.

In sum, absent explicit statutory or contractual authority, delay in payment, even where the delay is attributable solely to the Government, does not create an entitlement to interest. See, e.g., *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947); *Grey* v. *Dukedom Bank,* 216 F.2d 108, 110 (6th Cir. 1954); *United States* v. *James,* 301 F. Supp. 107, 132 (W.D. Tex. 1969); B-182346, February 4, 1975.

Delay in paying a judgment may be caused by a number of things: the Government's consideration of whether to seek further review, including any permissible extensions of time; the filing of various post-judgment motions with the trial court; or simple administrative delay. Our *Vaillancourt* and *Edmonds* decisions allowed interest only in the one situation recognized by the governing statutes—delay occasioned by a Government appeal. They were not intended to suggest that interest is allowable in any other situation, nor should they be so construed.

We note in this connection that Congress has recently amended the statutes governing post-judgment interest against the United States, Pub. L. No. 97-164, § 302, 96 Stat. 25, 55 (enacted April 2, 1982, effective October 1, 1982), 28 U.S.C. 1631. The thrust of the new law is to increase the rate of interest, where allowable, to a more equitable level. (The 4 percent rate specified in 28 U.S.C. § 2516(b) had been unchanged since 1890.) However, the new law expressly retains the essential prerequisite of an unsuccessful appeal by the Government. That this was clearly the intent of the

new law is confirmed by its legislative history. See Cong. Rec., December 8, 1981 (daily ed.), pp. S-14699-700, especially the two letters to Senator Dole from the Director, Office of Management and Budget.

Accordingly, since the Government did not file a petition for certiorari in this case, we conclude that there is no basis to allow the plaintiffs' claim for post-judgment interest.

[B-200923]

Appropriations—Continuing Resolutions—Availability of Funds—Unliquidated Obligations—Funding in Later Regular Appropriations—Absence/Insufficiency

Funds appropriated for appropriation accounts of the Departments of Agriculture and Transportation by fiscal year 1982 continuing resolutions, and properly obligated during the period the resolutions were in effect, remain available to liquidate the obligations incurred even though later regular appropriation acts provided no funding at all for these programs. Treasury is required to restore the applicable accounts established pursuant to the continuing resolutions at amounts sufficient to cover the unliquidated obligations. B-152554, Feb. 17, 1972, is overruled in part.

Matter of: Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, October 19, 1982:

In January of 1982, we were informally advised that the Department of the Treasury had withdrawn undisbursed balances, including sums previously obligated, from appropriation accounts established under authority of the fiscal year 1982 continuing resolutions for the Department of Agriculture and the Department of Transportation, National Highway Traffic Safety Administration. In taking this action, Treasury indicated it was required to do so by language in a 1972 GAO letter applicable when an annual appropriation act does not provide sufficient funds to cover obligations incurred under a continuing resolution. As a result of the withdrawal, both agencies were unable to pay the obligations they had previously incurred under authority of the resolutions.

Since Treasury relied on a GAO opinion to justify its action, we decided to reexamine our 1972 ruling. In doing so, we solicited the views of Agriculture and Transportation, as well as the Department of the Treasury and the Office of Management and Budget. All four agencies concluded that the obligated (but not yet paid) balances remaining in the accounts at the time the agencies' annual appropriation acts were enacted should not have been withdrawn. After considering all relevant arguments, we now conclude that to the extent an annual appropriation act does not provide sufficient funding for an appropriation account to cover obligations validly incurred under the terms of a continuing resolution, the funds made available by the resolution remain available to pay these obligations.

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Prior to December 23, 1981, when the regular appropriation acts for the Department of Agriculture and the Department of Transportation were enacted, programs of the Department of Agriculture and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) were funded under the several continuing resolutions for fiscal year 1982. Under the terms of these continuing resolutions, Agriculture was provided funding for the appropriation account, Scientific Activities Overseas (Special Foreign Currency Program), at an annual level of $5,000,000 and NHTSA was provided funding for the appropriation account, Territorial Highway Safety Program, at an annual level of $975,308. Of these total sums, the Office of Management and Budget apportioned and thereby made available for obligation for the period covered by the resolutions $450,000 for Scientific Overseas Activities of Agriculture and $136,540 for the Territorial Highway Safety Program of NHTSA. Thereupon, the Department of Treasury issued and this Office countersigned appropriation warrants in these amounts for the two accounts. As of December 23, 1981, Agriculture had obligated $434,016 of its available funds. Of these obligations, $196,016 had not yet been paid. NHTSA had obligated the entire amount of its available funds, but had not yet paid any of these obligations.

On December 23, 1981, the regular annual appropriation acts for both Agriculture and NHTSA were enacted. The Agriculture appropriation act made no provision for Scientific Overseas Activities and the Transportation appropriation act made no provision for NHTSA's Territorial Highway Safety Program. Accordingly, relying on language in a 1972 GAO letter to Senator William Proxmire, B-152554, February 17, 1972, Treasury withdrew the undisbursed balances in the appropriation accounts established for the two programs under the continuing resolutions.

The 1972 letter relied on by Treasury responded to a question raised by Senator Proxmire concerning the effect of an annual appropriation act that provided funds for a particular appropriation account (previously funded by continuing resolution) at an amount lower than the amount of obligations already incurred under the resolution. While we recognized that the obligations incurred under the authority of the continuing resolution remained valid, we concluded that "any appropriations warranted under the continuing resolution in excess of the final appropriations and not disbursed would be rescinded." In our letter we assumed that the agency confronted with this situation would be able "to negotiate downward the amount of such obligations so as to come within such sums as may be finally approved by the Congress." We did not mention that if the agency could not reduce its obligations the result of our decision would be that the obligations could not be liquidated without a supplemental appropriation.

In reaching our conclusion in 1972, we relied on a provision in the resolution that expenditures under its authority should be charged to the applicable appropriation account when a regular appropriation act was enacted. We concluded that when the annual appropriation act appropriated less funds than the amount of obligations already incurred, no expenditures in excess of this appropriation amount could be charged against the applicable account. Thus, any undisbursed funds in the account in excess of the amount of the regular appropriation would have to be withdrawn. The obligations previously incurred under the authority of the continuing resolution remained valid but there were insufficient funds available in the applicable account to liquidate them.

The provision we relied on in our 1972 letter is routinely included in most continuing resolutions. In the most recent fiscal year 1982 resolution it appeared as section 104, in the following language:

> Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation fund, or authorization is contained is enacted into law. Pub. L. No. 97-92, § 104, 95 Stat. 1193 (1981).

Upon reconsideration, we are convinced that our 1972 application of this provision was wrong. The provision's history indicates that its purpose is to make it clear that the amounts appropriated by the continuing resolution are not in addition to the funds later appropriated by the regular appropriation acts. *See e.g.,* H.R. Rep. No. 91-234, 91st Cong., 1st Sess. 2 (1969). Thus, to the extent possible, obligations incurred or expenditures made under the continuing resolution are to be charged against the funds provided by the regular appropriation act.

However, this does not mean that if the regular appropriation act provides insufficient funding to cover obligations made under the resolution that these obligations cannot be liquidated. Another provision generally contained in continuing resolutions covers this situation. In the most recent resolution, this provision is found in section 103. It provides as follows:

> Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution. Pub. L. No. 97-92, § 103, 95 Stat. 1193 (1981).

This section provides that funds appropriated by the continuing resolution are to remain available to liquidate obligations incurred within the availability period of the continuing resolution.

Reading these two provisions together, we reach the following results: When an annual appropriation act provides sufficient funding for an appropriation account to cover obligations previously incurred under the authority of a continuing resolution, any unpaid obligations are to be charged to and paid from the applicable account established under the annual appropriation act. Similarly, to

the extent the annual act provides sufficient funding, those obligations which were incurred and paid during the period of the continuing resolution must be charged to the account created by the annual appropriation act. On the other hand, to the extent the annual appropriation act does not provide sufficient funding for the appropriation account to cover obligations validly incurred under a continuing resolution, the obligations in excess of the amount provided by the annual act should be charged to and paid from the appropriation account established under authority of the continuing resolution.[1] Thus the funds made available by the resolution must remain available to pay these obligations.

Accordingly, Treasury should restore the applicable accounts established under authority of the continuing resolution to a level sufficient to liquidate the unliquidated obligations validly incurred by Agriculture and NHTSA.

[B-202083]

Housing and Urban Development Department—Mortgage Insurance Programs—Special Risk Insurance Fund—Availability—Judgments and Compromise Settlements

Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit*. In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236.

Matter of: *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*—Payment of Judgment, October 28, 1982:

The issue has arisen of whether the compromise settlement in *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block, et al.*, and the judgment in *Bronson and Popoli, Inc.* v. *Enoch Star Restoration Housing Development Fund Co., Inc.*, are payable from the permanent indefinite appropriation established by 31 U.S.C. § 724a or from funds available to the Department of Housing and Urban Development (HUD). The question of the proper source of funds first arose when the *Silberblatt* settlement was submitted to this Office for certification for payment under 31 U.S.C. § 724a in September

[1] That the Congress intended this result is confirmed by committee statements with respect to the Youth Conservation Corps, another program which was funded by the fiscal year 1982 continuing resolution but not by the regular annual appropriation act. In response to an agency proposal that obligations incurred under the resolution be charged to other accounts under the regular appropriation act, the House Appropriations Committee stated:

"* * * The Committee does not approve of that procedure. The Department is expected to charge the obligations to the proper account under authority provided in the continuing resolution. H.R. Rep. No. 97-673, 97th Cong., 2d Sess. 108.

The Senate Appropriations Committee agreed. *See* S. Rep. No. 97-516, 97th Cong., 2d Sess. 114 (1982).

1980. At that time, in view of the substantial legal issues involved, we agreed to certify the settlement for payment under 31 U.S.C. § 724a and HUD agreed to reimburse the appropriation if we later decided that it was not available. Subsequently, the judgment in *Bronson,* a case very similar to *Silberblatt,* was submitted. Our agreement with HUD was extended to cover *Bronson,* and we certified that judgment for payment on the same basis.

Since certification of the *Bronson* judgment, HUD has formally submitted its views concerning the proper source of payment, which we have fully considered. For the reasons stated below, we hold that the Special Risk Insurance Fund which is available to the Secretary is the proper source of funds in cases like *Silberblatt* and *Bronson.*

Facts

Silberblatt was a suit brought by a general contractor seeking payment for work he had performed on the Taino Towers housing project in New York. HUD had provided mortgage insurance for the project under the authority of section 236(j) of the National Housing Act, 12 U.S.C. § 1715z-1(j) (1976).

Construction of the project was halted when the owner, East Harlem Pilot Block, defaulted on its mortgage loan payments. The lender collected its mortgage insurance benefits from HUD and assigned the mortgage proceeds to HUD. HUD then entered into an agreement with the mortgagors that it would become mortgagee-in-possession and would contract with a private developer (Silberblatt) for completion of the projects. Under the agreement, the mortgagor would regain possession of the projects after the developer completed construction and HUD would restructure the mortgage to cure the default.

The contractor brought suit against the owner, the lender, and against HUD as insurer, seeking payment for the work he performed on the project. The United States District Court for the Southern District of New York granted motions for summary judgment in favor of the Secretary and the project owner, and dismissed the claim against the lender. 460 F. Supp. 593 (1978). The Court of Appeals for the Second Circuit reversed the granting of summary judgments in favor of the Secretary and the owner. 608 F.2d 28 (1979). The court found that HUD had been enriched by the contractor's efforts even though it technically was not the owner of the project. The court held that the contractor was not prohibited from seeking recovery from the Secretary on a theory of *quantum meruit,* and it remanded the case to the district court.

After the Second Circuit's decision, the parties entered into a settlement agreement in which HUD agreed to pay approximately $4.16 million to satisfy the claims of the general contractor and the subcontractors for the work done in completing the project.

The relevant facts in *Bronson and Popoli, Inc.* v. *Enoch Star Restoration Housing Development Fund Co., Inc.* are very similar to those in *Silberblatt. Bronson* was a suit by contractors for expenses incurred in the construction of the Enoch Star Housing Project. The District Court for the Eastern District of New York, in a memorandum decision dated July 1, 1980 (No. 77 C 44), followed *Silberblatt* and ordered judgment entered against the Secretary in the amount of $750,000.

Discussion and Conclusion

HUD provided mortgage insurance for the Taino Towers and the Enoch Star Housing Projects in furtherance of the program established under 12 U.S.C. §1715z-1(j). That subsection authorizes a Federal mortgage insurance program for multifamily rental and cooperative housing projects for lower-income, elderly or handicapped families. Congress established the Special Risk Insurance Fund as a revolving fund to finance the program as well as other Federal housing programs.

31 U.S.C. § 724a establishes a permanent indefinite appropriation to pay judgments against the United States generally. However, 31 U.S.C. § 724a expressly provides that the permanent appropriation is only available to pay judgments "not otherwise provided for." Accordingly, the permanent appropriation may not be used if another appropriation or fund is legally available to pay the judgment in question.

It has long been our view that when Congress authorizes an agency to conduct a "business-type" program, empowers the agency to "sue and be sued" with respect to that program, and creates a revolving or other special fund to finance the program, then judgments arising from the operation of the program (as opposed to judgments which are common to all agencies such as tort or discrimination judgments) should be paid by the agency from program funds. Such judgments are viewed simply as "necessary expenses" of the program for which program funds are available. See, for example, our letter to the Administrator of the Small Business Administration, B-189443, August 4, 1980. In this sense, payment is "otherwise provided for." In fact, as will be discussed later, the *Silberblatt* and *Bronson* holdings were based explicitly on the existence of funds under HUD's control or discretion.

The Special Risk Insurance Fund created by 12 U.S.C. § 1715z-3(b) is available for judgments like *Silberblatt* and *Bronson;* therefore, the permanent appropriation may not be used.

We have twice found that HUD Insurance Fund money may be used to pay project construction costs. In 54 Comp. Gen. 1061 (1975), we held that HUD's insurance funds—the Special Risk Insurance Fund or the General Insurance Fund (12 U.S.C. § 1735e), depending on the section under which the particular project was

insured—were available for the purpose of making repairs to multifamily projects after the HUD-insured mortgages had gone into default and subsequently been assigned to the Secretary. We issued the decision at the request of HUD's Office of General Counsel which urged that we allow such expenditures. We based our conclusion upon the last sentence of 12 U.S.C. § 1713(k) which governs the Secretary's rights as assignee of an insured mortgage. It provides:

> Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve and protect the lien of such mortgage.

We held that the provision did not require that the Secretary be contemplating foreclosure when he makes repair expenditures from the Fund. We concluded that the Secretary could make the expenditures until the default was cured or until HUD acquired title, provided that one event or the other occurred within a reasonable time after the expiration of 1 year from the default.

In August 1979, during the course of our audit work, we had occasion to consider informally whether our decision at 54 Comp. Gen. 1061 and the provisions of the National Housing Act allowed the Secretary to expend insurance funds to complete (in addition to repair) a project after the mortgagors defaulted and the mortgage was assigned. We found that several subsections of 12 U.S.C. § 1713 authorized such expenditures.

We noted that 12 U.S.C. § 1713(g) recognizes that the fund is available to pay project completion costs. The subsection governs the payment of insurance benefits to the original mortgagee after a default. It states that in addition to the amount of mortgage money expended, the mortgagee is entitled to reimbursement from the fund for taxes, property insurance and for reasonable expenses for the completion of the property. A memorandum from our General Counsel to our Community and Economic Development Division (B-171630-O.M., August 22, 1979), concluded:

> Thus, this provision recognizes that the rights of a mortgagee include the right to construct, improve, or repair the mortgaged premises. Significantly, these expenses are expressly reimbursable from the General Insurance Fund. Consequently, the Secretary's rights as mortgagee under section 1713(k) should also include these rights and the necessary expenditures should be chargeable to the General Insurance Fund.

The availability of the insurance funds for the types of payments involved in *Silberblatt* and *Bronson* is a logical application of our previous conclusions.

HUD argues that the legislative history of Pub. L. No. 87-187, 75 Stat. 416 (1961) indicates that the appropriation made by 31 U.S.C. § 724a was intended to be the source of payment in cases such as *Silberblatt* and *Bronson*. Public Law 87-187 amended section 724a

by adding the compromise settlements, in addition to final judgments, could be paid from the judgment fund. HUD refers to a letter from the Department of Justice which recommended the amendment (reprinted in [1961] U.S. CODE CONG. & AD. NEWS, pg. 2439). HUD interprets the Department's letter as stating that the purpose of the amendment was to prevent delay in the payment of compromise settlements which is caused by the agency concerned having to interpret its authorizing and appropriations legislation to determine if it has funds available. HUD points out that there would have been such a delay in *Silberblatt* if we had not agreed to proceed with payment and then settle the question as to the proper source of funds. HUD's view is, in effect, that agency funds are not available for compromise settlements if "time-consuming" legislative interpretation is required.

We disagree. An examination of the origin of the judgment fund indicates otherwise. Prior to the enactment of the statute which created the judgment fund, a person who had a judgment against the United States could be paid only if Congress appropriated funds specifically for the payment of his judgment. Congress viewed this method of paying judgments as unsatisfactory because it resulted in persons who had a right to Government funds having to wait an unduly long time to receive their money and because it resulted in unnecessary administrative expense and interest costs due to the delay. (Hearings on Supplemental Appropriations Bill, 1957, Before Subcommittees of the House Committee on Appropriations, 84th Cong., 2 Sess., pt. 2 at 883 (1956).)

Accordingly, Congress established a permanent indefinite appropriation which allowed for the immediate payment of judgments. However, in so doing, Congress provided that where another appropriation or fund was available to pay the judgment, the appropriation would not be used. The reason for this is that it would not be necessary to provide for the immediate payment of a judgment for which funds were already available.

The phrase "not otherwise provided for" should be interpreted in light of the congressional purpose for creating the judgment fund. The fact that it might be necessary to do some statutory interpretation to determine if a particular appropriation is available to pay a judgment or compromise settlement does not preclude use of that appropriation. We have, on a number of occasions, interpreted statutory schemes to find that the payment of a judgment was "otherwise provided for." 56 Comp. Gen. 615 (1977); 52 *id.* 175 (1972); B-129072, October 22, 1974.

In addition, the 1961 amendment which added "compromise settlements" to 31 U.S.C. § 724a (Pub. L. No. 87-187, *supra*) was intended to serve a very narrow purpose. When 31 U.S.C. § 724a was first enacted in 1956, it applied only to judgments and not to compromise settlements. Thus, as to situations not otherwise provided for, judgments could be paid promptly while compromise settle-

ments continued to require specific congressional appropriations. To avoid what many viewed as an incongruity, it became common in the late 1950's to reduce compromise settlements to consent judgments, for the sole purpose of taking advantage of the prompt payment mechanism of section 724a. The 1961 amendment cured this situation by making the judgment appropriation available for compromise settlements to the same extent that it was already available for judgments in similar cases. (It also added certain judgments and compromise settlements of State and foreign courts, not relevant here.) The "delay" referred to throughout the legislative history of 31 U.S.C. § 724a and subsequent amendments means delay in obtaining specific appropriations, not delay in analyzing and construing statutes to determine the proper source of funds.

HUD also contends that the Special Risk Insurance Fund is merely "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate." HUD argues that the legislative history of 12 U.S.C. § 1715z-3(b) which establishes the Fund does not indicate that Congress contemplated using it for broader purposes such as the payments in the *Silberblatt* and *Bronson* cases.

Our examination of the legislative history indicates otherwise. Congress passed section 1715z-3 creating the Special Risk Insurance Fund as part of the Housing and Urban Development Act of 1968, which added a new section 238 to the National Housing Act. (Pub. L. No. 90-448, section 104(a), 82 Stat. 487, Aug. 1, 1968.) The Banking and Currency Committee of the House of Representatives, in its report on the bill later enacted as Public Law 90-448, explained the section creating the fund as follows:

SPECIAL RISK INSURANCE FUND

Section 104 of the bill would establish, through a new section 238 of the National Housing Act, a "Special Risk Insurance Fund," which would not be intended to be actuarially sound and out of which claims would be paid on mortgages insured under the new sections 235—homeownership assistance (proposed by sec. 101 of the bill); 236—assistance for rental and cooperative housing (proposed by sec. 201 of the bill); 237—credit assistance (proposed by sec. 102 of the bill); as well as those mortgages insured pursuant to the authority contained in the amendments to section 223—properties in older, declining urban areas (proposed by sec. 103 of the bill) and section 233—development of new technologies for lower income housing (proposed by sec. 108 of the bill).

The fund would be established with a $5 million advance from the general insurance fund, which would be repayable at such time and at such interest rates as the Secretary of HUD deemed appropriate. Since these programs cannot be expected to be operated on an actuarially sound basis if the insurance premium charge is to be set at a reasonable level, appropriations to the fund would be authorized to cover any losses sustained by the fund in carrying out the mortgage insurance obligations of these programs. The term, losses, as used in this provision, is the same as presently appears in a similar authority under section 221(f) of the National Housing Act. In both instances, it is intended that the Secretary be able to obtain appropriations to cover anticipated or projected losses as well as actual losses, in order to provide adequate operating funds during the long period required to liquidate properties.

Insurance benefits would generally be similar to those authorized for mortgages insured under section 221 of the National Housing Act. Payments on claims would

be made either in cash or debentures and could be in an amount equal to the unpaid principal balance of the loan plus any accrued interest and any advances made by the mortgagee with approval of the Secretary and under the provisions of the mortgage, where permitted in the regulations prescribed by the Secretary. Income such as insurance premiums and service charges in connection with the covered programs would be deposited in the new fund. *Administrative expenses in connection with these programs and expenses incurred with respect to defaults would be charged to the fund.* H.R. Rep. No. 1585, 90th Cong., reprinted in U.S. CODE CONG. AD. NEWS, 2873, 2885). [Italic supplied.]

In view of the above-quoted language and legislative history, while HUD's contention that the fund is "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate" may be true for the most part, it does not exclusively define the limits of the fund's availability.

Finally, HUD contends that the fact that Congress saw fit to waive sovereign immunity for HUD by authorizing the Secretary to sue and be sued in connection with the section 236 program does not, in and of itself, mean that any judgments against the Secretary are not to be satisfied from the judgment fund. HUD notes that "allowing suits against an agency is an entirely different matter from appropriating the money to pay judgments and settlements of such suits."

This is an issue the *Silberblatt* and *Bronson* courts addressed. Following the Supreme Court's guidance in *F.H.A.* v. *Burr*, 309 U.S. 242 (1940), the *Silberblatt* court stated:

> For a claim to be against the Secretary, and therefore within the scope of the "sue and be sued" clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds. [Citation omitted.] This requirement is satisfied if the judgment could be paid out of funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary. * * * 608 F.2d at 36.

The *Bronson* court followed *Silberblatt*, holding as follows:

> The *Silberblatt* court also held that a judgment against the Secretary could be paid out of "funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary." * * * Because there are funds in the control of the Secretary which are available to pay the judgment in the present case, the Court need not consider whether it has the power to enter a judgment in the absence of such funds. E.D.N.Y., No. 77 C 44, mem. op. at 5–6 (July 1, 1980).

We are aware that the Ninth Circuit has taken a different view. *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979). However, the weight of judicial authority seems to be in accord with *Silberblatt. Industrial Indemnity, Inc.* v. *Landrieu*, 615 F.2d 644 (5th Cir. 1980); *Trans-Bay Engineers, & Builders, Inc.* v. *Hills*, 551 F.2d 370 (D.C. Cir. 1976). We agree with the "majority view" as expressed in *Silberblatt.*

In accordance with the foregoing, we conclude that judgments and compromise settlements in cases arising from HUD's various mortgage insurance programs, including situations like *Silberblatt* and *Bronson*, are payable from the insurance funds applicable to those programs, and not from the permanent judgment appropriation.

[B-206704]

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Constructive Weight Substitution—Weight Certificate Invalid

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations.

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Constructive Weight Basis—Computation Formula

To correct error resulting from invalidation of weight certificates, the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under para. 2-8.2b(4) is unobtainable, the weight of the shipment must be determined by other reasonable means. Here, mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight.

Matter of: James C. Wilson—Transportation of Household Goods—Excess Weight, October 28, 1982:

Mr. James C. Wilson has been notified by the Department of Health and Human Services of his obligation to reimburse the Government for excess weight charges in connection with the shipment of his household goods upon transfer of official duty station in November 1978. The mover admitted that the weight certificates for Mr. Wilson's shipment were invalid because they included a maximum of 200 pounds which were unrelated to Mr. Wilson's shipment. Mr. Wilson believes the weight is incorrect and that he is relieved from any liability for an alleged excess in the weight of his household goods shipment.

The invalidation of the weight certificates does not mean that the agency may not claim excess weight costs in the move. Where the parties have been unable to obtain a constructive shipment weight under paragraph 2-8.2b(4) of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973), and since the only substantive evidence of record on the weight of Mr. Wilson's shipment is the revised total submitted by the carrier, we find that Mr. Wilson has failed to meet the burden of proving his claim as to the actual weight of his household goods shipment and is liable for excess weight charges.

On November 30, 1978, Mr. Wilson's household goods were moved under Government Bill of Lading No. L-0364516 from Meridian, Idaho, to Kirkland, Washington, because of his transfer of official station as an employee of the Department of Health and

Human Services. The agency reports the development of Mr. Wilson's claim as follows:

> On December 26, 1978, an invoice was received from Cartwright Van Lines for shipment of household goods for Mr. James C. Wilson pursuant to GBL #L-O-364,516 (Attachment A). This invoice included charges for 4,300 pounds of excess weight. The invoice was paid in full, and Mr. Wilson was notified of his obligation to reimburse the government the amount of $714.23 for the excess weight (Attachment B). Mr. Wilson responded by disputing the weight charged by Cartwright and submitted a statement by his wife to the effect that the truck(s) on to which their household goods were shipped contained material which did not belong to them (Attachment C). Based upon this, the matter was referred to the General Services Administration for resolution. During this time, Cartwright sent a check to us in the amount of $33.22 for 200 pounds which they admitted had been erroneously billed to the government for the subject move (Attachment D). Mr. Wilson still believed that the weight was incorrect and refused to pay.

Authority for transporting the household effects of transferred employees at Government expense is found at 5 U.S.C. § 5724(a) (1976), which also establishes the maximum weight of the goods authorized to be transported at Government expense as 11,000 pounds. The implementing regulations to that statute are found in the FTR. Paragraph 2-8.2a of the FTR repeats the 11,000 pound maximum weight allowance found in the statute. Paragraph 2-8.4e(2) provides that the employee is responsible for the payment of costs arising from the shipment of excess weight. The implementing regulations are in accord with the statutory limitation and, thus, have the force and effect of law. Therefore, regardless of the reasons for the shipment of the excessive weight of household goods, the employee is required to pay the Government the charges incurred incident to the shipment of the excess weight, *George R. Halpin,* B-198367, March 36, 1981.

We have consistently held that whether and to what extent authorized shipping weights have been exceeded in the shipment of household goods and the excess costs involved are questions of fact primarily for determination by the administrative agency which, ordinarily, we will not question in the absence of evidence showing such determinations to be clearly in error. Where the transportation voucher prepared by a mover in support of its charges is supported by a valid weight certificate or weight tickets, in the absence of fraud or clear error in the computation, the Government must rely on the scale certifications of record in computing the excess costs. *Fredric Newman,* B-195526, November 15, 1979. Thus, absent computational errors, or fraud, the Government is bound by a weight certificate unless the certificate is shown to be invalid. In order to show invalidity, one must show that the certificate is clearly in error. See *Charles Gilliland,* B-198576, June 10, 1981.

In this case, the invalidity of the net weight has been established. Mr. Wilson has charged that after the shipment was weighed, the carrier's agents were seen transferring from the truck items that were not part of the Wilson's property. Statements filed by the drivers and the agent vertify that this was the case.

However, resolution of the issue of the validity of the weight certificate in Mr. Wilson's favor is itself not ultimately dispositive of whether and in what amount he is liable for excess weight charges.

Mr. Wilson argues that the agency's reliance in reimbursing the mover on such an improper weight certificate was clearly in error and he should not be bound by the agency's determination made on such a basis. Thus, he should be relieved from any liability for an alleged excess in the weight of his household goods shipment.

This argument must fail because the invalidation of the weight certificates does not mean that the agency may not claim excess weight costs in the move. In *William A. Schmidt, Jr.*, 61 Comp. Gen. 341 (1982), we held that where an error has been committed in determining the net weight of household goods shipped by the actual expense method under a Government bill of lading, a constructive shipment weight should be obtained based on 7 pounds per cubic foot as provided for by paragraph 2-8.2b(4) of the FTR. To correct the error, the constructive weight of the misweighed shipment should be computed and substituted for the incorrect actual weight. And, in *Major James S. True, USAF*, B-206951, July 12, 1982, we cited the *Schmidt* and *Gilliland* cases to show that after an invalidation of weight tickets occurs, the weight of the shipment must be determined by other reasonable means.

The constructive weight of Mr. Wilson's household goods shipment does not appear in the record and owing to the lengthy administrative consideration of this claim we must presume that such a computation under paragraph 2.8.2b(4) of the FTR is at this point unobtainable. Thus, we consider the following view of the Director, Transportation and Travel Management Division, General Services Administration (GSA), in his final report to the agency on Mr. Wilson's claim:

> The Government has a definite interest in resolving the matter, but since there was no Government representative on the scene at the time, the circumstances can only be determined as accurately as possible from those who were present. In this regard, it would seem that the next step would be for Mr. Wilson to present any statement or evidence he may have to establish a different net weight than that arrived at by the carrier.

The record shows that the carrier furnished copies of statement filed by the drivers and the carrier's local agent which identify the extraneous items as a copy machine and two boxes of office effects having a maximum weight of 200 pounds. The carrier revised the total billing weight down to 15,100 pounds and refunded $33.22 to the agency based upon this figure. We agree with GSA's observation that "the fact that the driver(s) apparently allowed contraband (personal non-revenue-property) to be weighed with the Wilsons' load, and did nothing to correct or explain their actions until asked to file statements several months later, may leave some question as to the reliability of such statements."

Nevertheless, these facts and explanations are themselves unrebutted in the record before us, and standing alone they are not unreasonable. Mr. Wilson has presented no substantive evidence beyond his allegation of an improper weight that refutes the carrier's explanation of unintended error. Nor has Mr. Wilson submitted any evidence to show that the actual weight of his household goods was any other figure than the revised weight determination established by the carrier. Further, we note from the driver's statement in the record that Mr. Wilson apparently shipped a boat and

a motorcycle. Both of these items are excluded from the definition of household goods and cannot be shipped at Government expense. See FTR paragraph 2-1.4h.

We are also mindful that Interstate Commerce Commission Regulations provide that the shipper or his representative can witness the original weigh or a reweigh for which he has a right to request. See 49 C.F.R. § 1056.6 (1978). Thus, Mr. Wilson could have witnessed the original weight or could have requested and witnessed a reweigh.

Mr. Wilson says that the weight of his household goods shipment is incorrect; however he adds nothing to the evidential record before us to support his contention. Thus, on the basis of the administrative record before us, we conclude that Mr. Wilson has failed to meet his burden of proof under section 31.7 of Title 4, Code of Federal Regulations, and is liable for excess weight charges computed as set forth below. See *Robert W. Dolch,* B-197008, February 20, 1980.

Paragraph 2-8.3b(5) of the FTR prescribes a procedure for determining the charges payable by the employee for excess weight when the actual expense method of shipment is used. That paragraph reads as follows:

(5) *Excess weight procedures.* When the weight of an employee's household goods exceeds the maximum weight limitation, the total quantity may be shipped on a Government bill of lading, but the employee shall reimburse the Government for the cost of transportation and other charges applicable to the excess weight, computed from the total charges according to the ratio of excess weight to the total weight of the shipment.

Applying the formula to the facts of Mr. Wilson's claim—using the revised figure of 15,100 pounds as the total weight, 4,100 pounds as the excess weight and $2,535.61 as the total charges—results in an excess weight charge of $688.42, computed as follows:

Step 1: Excess weight ÷ Total weight = Ratio to be applied
Step 2: Ratio × Total charges = Employee's share
Step 1: 4,100 ÷ 15,100 = 0.2715
Step 2: 0.2715 × $2,535.61 = $688.42

As our decision in the *Schmidt* case emphasized, the excess weight charge computation provided in paragraph 2-8.3b(5) of the FTR is predicated on the actual net excess weight as a percentage of the total weight of the shipment multiplied by the total charges. Thus, since the Federal Travel Regulations have the force and effect of law, the provision may not be waived or modified by the employing agency or the General Accounting Office regardless of the existence of any extenuating circumstances. We are unaware of any additional authority which would permit the agency to prorate transportation charges, origin charges, delivery or other shipment charges.

[B-207586]

Contracts—Modification—Beyond Scope of Contract—Subject to GAO Review

While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a pro-

test that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed.

Contracts—Modification—Scope of Contract Requirement—Obligation of Parties Unchanged—Advanced Technology Approaches—Price Unchanged

An agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation—furnish a system that would meet various performance specifications—is not outside the contract's scope, even if that change reflects a more advanced or sophisticated approach, where there is no change in the nature of the obligation of either party to the contract.

Matter of: Cray Research, Inc., October 28, 1982:

Cray Research, Inc., protests the Department of the Navy's modification of contract N66032-79-C-0004, which had been awarded to Control Data Corporation (CDC) on July 5, 1979, for a large-scale scientific computer system. Cray contends that the modification, which permits CDC to substitute a new central processing unit (CPU) for the one already installed, exceeds the scope of the contract for which the competition was conducted. We deny the protest.[1]

Facts

The Navy solicited offers for the system, intended to provide the Navy Fleet with environmental predictions, through request for proposals (RFP) N66032-78-R-0060, issued on March 17, 1978. The RFP, which required offerors to meet numerous performance specifications, provided for four benchmark tests, labeled A through D. Benchmark tests B, C and D had to be demonstrated before award. Benchmark test A, however, which involved the system's multi-programming feature, did not have to be demonstrated until just before acceptance of the feature, which was to be 12 months after installation. The reason, according to the Navy, was that at the time the contract was to be awarded the competitors did not possess the technology necessary to meet the Navy's ultimate multi-programming requirements, which the benchmark reflected. (Both CDC and Cray, however, could meet the Navy's multi-programming need for the first few years of the system's life.)

CDC offered to meet the RFP's performance specifications with a system that included a Cyber 203 CPU. Cray was involved in the competition as a proposed subcontractor to another firm, which offered a Cray computer. Both offerors passed benchmark tests B, C and D, and the Navy then awarded the contract to CDC based on its lease with purchase option plan, which offered the lowest evaluated cost over the 10-year life of the system.

[1] Cray also filed suit in the United States District Court for the District of Columbia (Civil Action No. 82-2515) to enjoin the Navy from accepting delivery of the new CPU until we could resolve the protest. By order of October 6, 1982, the court denied Cray's request for an injunction.

The Navy accepted the CDC system in December, 1980. In February of 1981, CDC offered to substitute for the Cyber 203, which by then no longer was in production, a central processing unit from the firm's new product line, the Cyber 205, at a significant increase in cost to the Navy. The Navy rejected CDC's offer as outside the scope of the contract. The Navy relied on paragraph L.13.10 of the contract, entitled "Equipment Substitutions and Additions," which provides:

> The Government may replace any equipment components (other than the Central Processing Unit and Central Memory), covered by this contract with substitute equipment whether or not such substitute equipment is obtained from or manufactured by the contractor. * * *

In rejecting CDC's proposal on that provision, the Navy explained that the provision's intent "was to enable the Government to replace peripheral components only and not the central processing unit.* * *"

Benchmark test A was delayed, for various reasons, until August 1981. CDC could not pass the benchmark test principally because the Cyber 203 lacked adequate central memory, but also because it did not meet the processing time requirement. CDC then offered alternate remedies to avoid termination of the contract. The first alternative was to replace the Cyber 203 with a Cyber 205-422, a significantly more powerful unit, at the same monthly lease cost but with a substantially higher purchase price if the Navy were to exercise the purchase option. The second alternative was to add memory to the Cyber 203 at no additional cost to the Government.

The Navy refused the offer to replace the Cyber 203 with a Cyber 205 at additional cost. CDC responded with an offer to replace the Cyber 203 with a Cyber 205-411 at no additional cost to the Government. The Cyber 205-411 essentially is a scaled-down version of the Cyber 205-422. The Cyber 205-411 has certain features not available in the outdated Cyber 203, and includes fifty percent more central memory (1.5 million words as opposed to 1 million words). Neither CDC nor the Navy pursued the offer to increase the Cyber 203 memory.[2]

The Navy accepted the CDC's offer of a Cyber 205-411 by the contract modifications in issue. None of the contract's terms, conditions, or performance specifications otherwise were changed. The Navy relied on paragraph L.18.4 of the contract, which provides:

> Processing Time Not Obtained
>
> In the event the required processing time is not obtained, through no fault on the part of the Government, the contractor shall provide, at no additional charge to the Government for the life of the system, whatever hardware or software is necessary to meet the required processing time.

[2] In comments on the protest, CDC states that upon its own reevaluation this option was deemed disadvantageous since the memory hardware for the Cyber 203 was out of production, and since the Cyber 203 memory was manufactured in one million word increments whereas CDC had determined that an additional central memory of less than one-half million words was necessary to pass the benchmark test. Also, the processing time failure was considered relatively easy to correct.

Protest

Cray protests that the modification to the contract to permit substitution of the Cyber 205-411 for the Cyber 203 exceeds the contract's scope. The reason essentially is that the Navy, through the substitution, has acquired a significantly upgraded system without a competition—Cray contends that the Navy either must accept CDC's offer of an increase in the Cyber 203 memory or afford other firms the opportunity to compete against the Cyber 205 model. Cray complains that CDC in effect is being rewarded for the failure to pass benchmark test A by the Navy's purchase of the firm's newer line of CPUs.[3] In this respect, Cray asserts that in view of the economies that generally accompany new computer technology, the Navy is getting no bargain in paying the Cyber 203 price for a Cyber 205 model.

Cray points out that the Cyber 205-411 represents a technology that was not even available when the contract was awarded to CDC, and which can be expanded to accomplish functions more advanced than the Cyber 203 could. In fact, Cray complains, the Navy always desired these additional functions, but since they could not be accomplished by the technology current during the initial procurement, they could not be included as performance requirements in the solicitation; Cray implies that once CDC offered the Cyber 205-411 replacement, the Navy thus was pleased to accept the upgraded systems notwithstanding the legalities of the matter. The effective result of the Navy's action, Cray argues, is an unjustified sole-source purchase from CDC.

Cray also argues that the Navy's contract with CDC itself precluded the substitution in issue. Cray relies on paragraph L.13.10, quoted above, which Cray suggests specifically precludes replacement of the CPU or the central memory. Cray argues that paragraph L.18.4, which the Navy relied on in issuing the modification,

> quite obviously has nothing whatever to do with the performance of equipment that has never been accepted in the first place, and it certainly does not contemplate substitution of an entirely different mainframe CPU and CM [central memory] for the one required by the contract's specifications. Otherwise there would be no meaning to Paragraph L.13.10.1, which would in effect be written out of the contract.

Analysis

We generally will not consider a protest against a contract modification, since modifications involve contract administration, which is the responsibility of the procuring agency, not this Office. *Symbolic Displays, Incorporated,* B-182847, May 6, 1975, 71-1 CPD 278. We will, however, review an allegation that a modification went beyond the contract's scope and should have been the subject of a new procurement. The reason is that such a modification could be

[3] As stated above, the parameters of benchmark test A reflect multi-programming needs anticipated to arise further into the system's 10-year life. To date, CDC has been meeting the Navy's actual multi-programming requirement with the Cyber 203.

viewed as an attempt to circumvent the competitive procurement statutes. *Aero-Dri Corporation*, B-192274, October 26, 1978, 78-2 CPD 304.

We often have pointed out that it is not a simple matter to determine whether a changed contract is materially different from the competed contract so that the contract as modified should have been the subject of a new competition (unless a sole-source acquisition was justified). For guidance, we have looked to Court of Claims decisions involving the "cardinal changes" doctrine, which was developed by the courts to deal with contractors' claims that the Government had breached its contracts by ordering changes that were outside the scope of the changes clause. See *American Air Filter Company—DLA request for reconsideration*, 57 Comp. Gen. 567, 572 (1978), 78-1 CPD 443.

The Court has defined the basic standard for determining whether there has been a cardinal change as whether the modified job is essentially the same work for which the parties contracted. See *Air-A-Plane Corporation* v. *United States*, 408 F.2d 1030 (Ct. Cl. 1969). In applying this standard to situations where a firm that is not a party to the contract complains that a modification is not within the scope of the competition that initially was conducted, we have stated:

> * * * the question * * * is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. *American Air Filter Company, Inc.*, 57 Comp. Gen. 285, 286 (1978), 78-1 CPD 136.

Seldom have we found that an agency's modification of a contract was an improper exercise of administration under that standard. In *American Air Filter Company, Inc., supra*, we did sustain a protest against a modification to a contract for gas powered and fired heaters that permitted diesel powered and fired heaters. We noted that the modification necessitated numerous other changes in the contract, including the substitution of a diesel engine for a gasoline engine; a substantial increase in the weight of the heater; addition of an electrical starting system, new fuel control and combustor nozzle design; alteration of various performance characteristics; a 29 percent increase in the unit price; and the doubling of delivery time. The magnitude of the technical changes and their overall impact on the price and delivery provisions compelled the conclusion that the modified contract was so different from the competed contract that the Government should have solicited new proposals for its modified requirement.

Another example where we objected to a contract modification is our decision, *Webcraft Packaging, Division of Beatrice Foods Co.*, B-194087, August 14, 1979, 79-2 CPD 120. There, a contract had been awarded to supply what was, in effect, a "specialty" product, produced only by a few sources. When the awardee could not secure the item, the agency modified the contract to relax the specifica-

tions. Because the record was clear that considerably more firms would have entered a competition based on the relaxed specification than competed for the initial contract, so that the fields of competition differed significantly, we concluded that the agency should have resolicited for its needs.

Finally, in *Memorex Corporation,* 61 Comp. Gen. 42 (1981), 81-2 CPD 334, an agency awarded a contract for disk drives with an option to purchase an additional quantity. The agency exercised the option but refused delivery because of difficulties with the drives that had been installed. When the contractor complained that this refusal was a breach of contract, the parties resolved their differences by modifying the contract to substitute a new model disk drive for the option quantity; convert the option from an outright purchase to a five-year "lease to ownership"; and establish stringent performance requirements for the disk drives over the lease term. We found the modification improper essentially because the change from the outright purchase of bare machines to the acquisition of guaranteed service was a significant change in the nature of the thing procured so that the contract was substantially different from that originally competed. See *Memorex Corporation—Reconsideration,* B-200722.2, April 16, 1982, 82-1 CPD 349.

The reasoning in these decisions compels us to deny Cray's protest. In *American Air Filter,* the contract obligation as modified simply was substantially different than that contracted. In *Webcraft,* the relaxation of the specification on which the award had been based clearly compromised the competition that led to that award. In *Memorex Corporation,* the agency's modification resulted in a substantially different obligation than reflected in the awarded contract. In each case, then, there was more than merely the contractor's offer of a superior way to meet its obligation under the contract than the one contemplated when the contract was awarded. Rather, there was a substantial change in the nature of the contractor's fundamental obligation.

Here, however, the contract basically required CDC to furnish a system that would meet various performance specifications. In the original competition, CDC offered to meet these specifications with the Cyber 203 and that offer was deemed most advantageous to the Government of those received based on the solicitation's award criterion. The Navy then judged CDC capable of meeting the agency's needs at the offered price, and the award to the firm legally bound CDC to do so. We do not believe that an agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation, even if that change reflects a more advanced or sophisticated approach, can be considered to be outside the contract's scope where there is no change in the nature of the obligation of either party to the contract. *See* 50 Comp. Gen. 540 (1971); *ConDiesel Mobile Equipment Division,* B-201568, September 29, 1982, 82-2 CPD 294.

Moreover, we fail to see how paragraph L.13.10 of CDC's contract, quoted above, precludes CDC's substitution of a Cyber 205-411 for the Cyber 203, as Cray argues. As the Navy explains, paragraph L.13.10 is a standard clause in contracts of this type to enable the Government unilaterally to replace or add equipment with the same or another manufacturer's in the event the original equipment wears out or for other reasons. The standard clause was amended for purposes of this procurement to preclude the Government's replacement of the CPU or the central memory. It does not on its face preclude an effort by the contractor to cure a performance problem. Regarding contract paragraph L.18.4, which the Navy relied on for the modification, that provision requires the contractor to provide "whatever hardware or software is necessary to meet the required processing time" if the contractor does not pass a benchmark test because of a processing time problem.

While the primary cause of CDC's failure to pass benchmark test A was the Cyber 203's lack of memory capacity, rather than the processing time requirement, the provision nonetheless does not preclude CDC from curing the deficiency with which the provision is concerned with an item that also enhances the overall system in other respects.

Finally, the suggestion that the users within the Navy were pleased to have the more advanced Cyber 205-411 instead of the Cyber 203 or, once it became clear that Cyber 203 could not pass benchmark test A, indeed encouraged the substitution rather than an increase in the memory of the out-of-production Cyber 203, does not make the action improper. The fact is that, as discussed, the change was within the contract's scope. The Government is not precluded from accepting a contractor's offer of a better or more advanced way to meet the contract's performance requirements than that contemplated when the contract was awarded, where the parties' basic contractual relationship is not otherwise altered. *See* 50 Comp. Gen., *supra,* where a change from electro-mechanical tuners and amplifiers to solid-state tuners, which interested the contracting agency because it would involve both cost savings and technical advantages, including improved performance and reliability, was within the contract's scope.

We note here that Cray is concerned that the change to the Cyber 205 model at this Navy location may afford CDC an advantage in future similar competitions at other locations. Even if that is so, however, a competitive advantage of that sort certainly is not unusual, and is not legally objectionable unless it is the result of unfair Government action. See *Honolulu Disposal Service, Inc.—Reconsideration,* 60 Comp. Gen. 642, 647 (1981), 81-2 CPD 126. A proper modification to a contract does not constitute unfair Government action. *Clifton Precision, Division of Litton Systems, Inc.,* B-207582, June 15, 1982, 82-1 CPD 590.

We conclude that the Navy's modification of CDC's contract to accept the Cyber 205-411 substitution was within the scope of the contract. The protest is denied.

[B-206942]

Transportation—Rates—Classification—Inapplicable—"Freight, All Kinds"—Class Rate in Quotation

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.

Transportation—Rates—Section 22 Quotations—Construction—NMFC Rule Applicability—Weight Consideration in Shipping Same Commodity

Generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight.

Matter of: Milne Truck Lines, Inc., October 29, 1982:

Milne Truck Lines, Inc. (Milne), requests our review of a General Services Administration (GSA) audit action concerning the carrier's bill No. 60-046896 for the transportation of a shipment of dry goods under Government Bill of Lading (GBL) No. K,7,376,583. GSA determined that Milne had overcharged the Government. Milne contends that it owes a lesser amount. We disagree with Milne.

GSA reports that Milne transferred the shipment to another carrier for delivery which produced higher transportation charges than if Milne had handled it as a single-line shipment. Milne does not dispute GSA's position that the carrier had the necessary operating authority to transport the shipment through to destination and, further, that reduced rates offered in a freight all kinds (FAK) tender, Rocky Mountain Motor Tariff Bureau, Inc., United States Government Quotation ICC RMB Q33-A (RMB Q33-A), are applicable to the shipment resulting in lower charges to the Government, although the delivering carrier did not participate in the tender. Apparently, Milne agrees that the shipment was misrouted, and that a partial refund of charges is due the Government. However, the carrier contends that the overcharges allegedly owed the Government are incorrect because of GSA's erroneous interpretation of the applicable tender.

GSA and Milne agree on the applicable tender provision for determining the rates. The applicable rate for this shipment is determined by the formula contained in item 1500 of RMB Q33-A. Item 1500 expressly provides rates on FAK shipments weighing less

than 10,000 pounds. It provides that one must first determine the applicable class 100 rate (and minimum charge), including any applicable increase, from the appropriate Rocky Mountain tariff. The appropriate Rocky Mountain tariff, Tariff ICC RMB 332-B, contains various class rate tables, which include class 100 rates that, generally, decrease as the weight of shipments increases. The weight scale corresponding to the highest rate is 0—less than (LT) 500 pounds, then the weights increase, as follows: 500—LT 1,000; 1,000—LT 5,000; 5,000—LT 10,000 pounds, and so forth. Then, as shown in the following table, the FAK rate is based on a percentage of the applicable class 100 rate depending on the weight of the particular shipment. Note that the percentage here, also, generally, decreases as the weight increases. One of the issues here is which weight scale applies.

When the weight of shipment (in pounds)		The rate will be the percentage shown of the applicable class 100 rate (subject to Note 2)
is	but less than	
0	500	86
500	1,000	77½
1,000	2,000	77½
2,000	5,000	77½
5,000	10,000	72

Although the weight of the shipment was 4,405 pounds, GSA, in calculating the overcharge, based transportation charges on 72 percent of the applicable class 100 rate for the weight group of 5,000, but less than 10,000 pounds under item 1500 of RMB Q33-A. From the tariff, GSA used the class 100 rate that applied to the 5,000 pounds weight scale of $12.41 per 100 pounds, which has been increased 3 percent by a blanket increase supplement to $12.78 per 100 pounds. Taking 72 percent of the $12.78 class 100 rate basis results in a rate of $9.20 per 100 pounds is multiplied by the constructive weight of 5,000 pounds. A $10.58 fuel surcharge was added to the $460; the total charges were $470.58, which was then subtracted from charges of $880.99 previously paid by the Government, resulting in the overcharge claim of $410.41.

Milne raises two objections to this procedure. Milne contends that GSA is required by the tender to use the National Motor Freight Classification (NMFC) to determine the shipped articles individual class rating which when applied to this shipment results in higher charges than the charges based on GSA's interpretation of the tender. We explicitly rejected this contention, upholding GSA's interpretation of this identical tender provision, item 1500, in *Yellow Freight System, Inc.*, 61 Comp. Gen. 589 (B-202596, September 7, 1982). We stated that since the formula for determining the FAK rate offered in RMB Q33-A provided for taking a percentage of the applicable class 100 rate from an appropriate tariff,

there was no intention to further refer to the NMFC to determine each article's individual class rating. We stated that the formula clearly implies a class 100 basis and that use of the NMFC ratings was unnecessary and 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.

Thus, in our view, GSA has properly applied the tariff class 100 rate in this case.

Since the shipment's actual weight is 4,405 pounds, Milne has also questioned GSA's use of 5,000 pounds as the weight used for the class 100 rate and for the determination of the percentage of that rate which produced a $9.20 per 100 pounds rate used by GSA in calculating the charges.

Milne's tender provides that it is governed, except as otherwise provided, by the NMFC. In prior cases, in the absence of a tender provision barring their application, (and no such provision apparently is involved here), for example, as in *Yellow Freight Systems, Inc., supra,* where incorporation would have defeated the purpose of the tender, we have incorporated by reference NMFC rules, specifically NMFC Rule 595. See *American Farm Lines,* B-199927, May 12, 1981; *American Farm Lines,* B-198433, July 28, 1980.

Section 1 of NMFC Rule 595 states that:

> * * * In no case shall the charge for any shipment from and to the same points, via the same route of movement, be greater than the charge for a greater quantity of the same commodity in the same shipping form and subject to the the same packing provisions at the rate and weight applicable to such greater quantity of freight.

Simply stated, this rule provides that, generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight. See *Regent Van and Storage, Inc.,* 51 Comp. Gen. 676 (1972); *cf.* maximum charge rule discussed in *American Farm Lines,* B-199927, May 12, 1981. For example, if under a given tariff the charge for a shipment of 3,000 pounds of a commodity would be $1,000, any shipment under 3,000 pounds must be transported for a charge no greater than $1,000.

Here, the use of the 5,000-pound constructive weight results in lower charges ($460) than charges applicable at the lesser actual weight (approximately $475) and, therefore, under the NMFC rule, GSA properly could base its calculations on the 5,000-pound weight.

We sustain GSA's audit action.

[B-208235]

Contracts—Two-Step Procurement—Step Two—Nonresponsive Bid—Deviation Apparent in Step One

A contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror. Therefore the acceptance of a firm's technical proposal under step one of a two-step proposal does not bind the Government to accept

that firm's step two bid if the bid is nonresponsive, even though the deviation from the terms of the solicitation was contained in the step-one technical proposal.

Contracts—Two-Step Procurement—Step Two—Terms and Conditions—Acceptance Time Limitation—Shorter Period Offered

Compliance with a mandatory minimum bid acceptance period established in an invitation for bids is a material requirement because a bidder offering a shorter acceptance period has an unfair advantage since it is not exposed to market place risks and fluctuations for as long as its competitors are. Therefore, a bid which takes exception to the requirement by offering a shorter acceptance period is nonresponsive and cannot be corrected.

Contracts—Two-Step Procurement—Step Two—Terms and Conditions—Defective Invitation—Cross-Referencing Necessity

A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required.

Matter of: International Medical Industries, Inc., October 29, 1982:

International Medical Industries, Inc. protests the award of a contract to Southeast Security Systems, Inc. by the Veterans Administration under invitation for bids (IFB) No. 509-38-82, the second step of a two-step advertised procurement. The Veterans Administration rejected International's bid as nonresponsive because the bid designated a shorter bid acceptance period than was required by the solicitation. We deny the protest.

Request for technical proposals (RFTP) No. 509-24-82, step one of this two-step procurement, was issued for the installation of a security surveillance system at the Veterans Administration Medical Center in Augusta, Georgia. The RFTP contained the essential terms and conditions of the anticipated step two solicitation, including a required bid acceptance period of 45 days. The technical proposal that International submitted in response to the RFTP designated a *bid* acceptance period of 30 days. The Administration found the proposal to be technically acceptable and invited International to submit a bid under step two of the procurement. International submitted a low bid of $84,612. The Administration rejected the bid, however, because it provided a 30-day bid acceptance period and awarded a contract to Southeast Security at a price of $89,126.

International cites in its favor decisions in which we have held that where there is some ambiguity associated with a step-two bid, a presumption of responsiveness exists with respect to the bid in view of the approval of step-one proposal. See, *e.g., Federal Aviation Administration,* B-193238, February 27, 1979, 79-1 CPD 136. This presumption, however, is not applicable here because there is

absolutely no ambiguity concerning the responsiveness of International's bid: the bid clearly deviates from the material terms of the solicitation by providing 30 days for its acceptance period.

International then concedes that its bid was nonresponsive but contends that the rejection of its bid was improper because, under the doctrines of finality and equitable estoppel, the Government was bound by the contracting officer's approval of the technical proposal it submitted in step one to accept its low step-two bid with the 30-day acceptance period. We reject this contention. Two-step formal advertising is a variation of standard formal advertising procedures designed to maximize competition when available specifications are not sufficiently definite to permit competition on the basis of price only. Step one is similar to a negotiated procurement in that unpriced technical proposals are submitted for evaluation. Those offerors whose proposals are found to be technically acceptable are invited to submit bids in step two on the basis of their technical proposals and the advertised terms and conditions set forth in the step-two invitation for bids. Those step-two terms and conditions cannot be considered to have been modified by the step-one evaluation, which is limited to consideration of what is proposed technically. Therefore, bidders must be charged with notice that the terms and conditions of a step-two solicitation will govern the ultimate award, and since a step-two competition is nothing more than a formally advertised procurement with the competition limited to those proposing technically acceptable approaches during step one, the standard rules of bid responsiveness and evaluation must apply.

As a general rule, a contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror; award to any other party is illegal. *Redifon Computers Limited—Reconsideration*, B-186691, June 30, 1977, 77-1 CPD 463. Therefore, a finding that a firm's technical proposal under step one of a two-step procurement is acceptable cannot bind the Government to accept the firm's bid under step two if that bid is nonresponsive to the terms and conditions of the invitation for bid, even though the exception to the terms of the solicitation was contained in the step-one proposal that was found to be acceptable. See *American Telephone and Telegraph Company*, B-193454, May 21, 1979, 79-1 CPD 365.

The protester next argues that the deviation should have been waived by the Administration under Federal Procurement Regulations § 1-2.405 (1964 ed.) as a minor informality, particularly in view of the fact that the Government actually awarded the contract well within 30 days of bid opening. We have consistently held, however, that a provision in an IFB which requires that a bid remain available for acceptance by the Government for a prescribed period of time is a material requirement and that the failure to meet such a requirement renders a bid nonresponsive. See,

e.g., Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145; 48 Comp. Gen. 19 (1968); compare, *Professional Materials Hauling Co., Inc.,* B-205969, April 2, 1982, 82-1 CPD 297 (where the IFB did not establish a minimum bid acceptance period). To hold otherwise would afford the bidder that offered a shorter bid acceptance than required to obtain an unfair advantage over its competitors because that bidder is exposed to the risk of the market place for a shorter period of time and therefore is taking less risk than the other bidders. *Esko & Young, Inc.,* B-204053, January 4, 1982, 82-1 CPD 5; *Hemet Valley Flying Service Co., Inc.—Reconsideration,* B-191390, July 26, 1978, 78-2 CPD 73. Mistake in bid procedures cannot be used to transform a nonresponsive bid into a responsive bid. *Goodway Graphics of Virginia, Inc.—Reconsideration,* B-193193, May 14, 1979, 79-1 CPD 342. Therefore, even though the Administration actually awarded a contract within the shorter acceptance offered by International, the bid was properly rejected as nonresponsive.

Last, the protester contends that the rejection of its bid is improper because the solicitation provisions concerning the bid acceptance period are defective. The first page of the IFB incorporates Standard Form (SF) 33, "Solicitation, Offer and Award" which contained on page one the following standard language concerning the bid acceptance period:

> * * * the undersigned agrees, if this offer is accepted within — calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

International inserted "30" in the space provided in this clause. The solicitation also contains a "Special Conditions" including at page 7, the following:

> Bid Acceptance Period:
> Bids offering less than forty-five (45) days for acceptance by the Government from the date set for opening will be considered non-responsive and rejected.

We have stated that where one provision of an invitation contains language specifying or inviting the designation of a bid acceptance period and another provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referred to specifically direct the bidders' attention to the fact that the insertion of a shorter period will cause the bid to be rejected. *See* 47 Comp. Gen. 769 (1968); B-154793, September 21, 1964. On two occasions, we have recommended that offending solicitations be canceled. *See* 52 Comp. Gen. 842 (1973) and *Hild Floor Machine Co., Inc.,* B-196419, February 19, 1980, 80-1 CPD 140. These decisions constitute an exception to the general rule that bidders are expected to scrutinize carefully the entire solicitation package, including the bid acceptance provisions, and respond accordingly. Therefore, we believe they should be narrowly construed. In both decisions the solicitations contained the same SF

33 provision used by the Administration and provided elsewhere that bids offering fewer than 90 days would be considered nonresponsive. In both cases, most bidders did not insert a number of days in the SF 33 clause and, consequently, nearly all bidders were found nonresponsive, thus depriving the Government of the benefit of competition in the procurements involved. In the course of sustaining the protests, we attached particular importance to the fact that bidders were not alerted that the two acceptance period clauses "had to be considered together and affirmative action taken with respect thereto," and that bidders were consequently ensnared into a state of nonresponsiveness. 52 Comp. Gen. 842, 845. We also stated that only a grossly misleading invitation would have caused almost all bidders to be nonresponsive.

In this case, the self-executing SF 33 period (60 days) exceeded the minimum period required (45 days). Thus, bidders were not ensnared into nonresponsiveness as they were in 52 Comp. Gen. 842, and *Hild Floor Machine;* rather, only by affirmative action concerning bid acceptance period could a bidder become nonresponsive. Moreover, International was the only one of the six firms that submitted bids to be found nonresponsive. Thus, although the IFB should have been cross-referenced to reduce the possibility of misinterpretation, we find that the IFB is not fatally defective.

The protest is denied. By letter of this date, however, we are recommending that the Administrator take action to ensure that bid acceptance period clauses are cross-referred in future procurements.