Decisions of The Comptroller General of the United States

Volume 64 Pages 435 to 500

April 1985

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300133800

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1985

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

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Cite Decisions as 64 Comp. Gen.—

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

[B-215998]

Officers and Employees—Life Insurance—Premiums—Refund

Reinstated employees who elected to retire when improperly removed from the Forest Service may be reimbursed for life insurance premiums deducted from their annuities during the period of erroneous retirement. However, in computing the backpay due the employees there must be deducted premiums for the same insurance coverage applicable to them as employees for the erroneous retirement period. Thus, they will be in the same financial position they would have been in absent the improper personnel action.

Officers and Employees—Life Insurance—Coverage During Periods of Suspension

Insurance coverage is determined on the basis of the election of the employee. Administrative errors in processing forms do not alter the rights and liabilities of the employee. Therefore, when the agency reimburses an employee for backpay for a period he was improperly separated and retired, the computation of his insurance deductions should be made on the basis of the insurance coverage actually elected.

Matter of: Robert L. Neal, Douglass F. Roy, April 1, 1985:

This action concerns whether or not two employees of the Forest Service, Department of Agriculture, who were improperly removed and retired and subsequently reinstated, should be reimbursed for deductions made from their annuities for life insurance premiums.[1]

The employees elected to retire when they were removed from the Forest Service and both elected to continue coverage under the Federal Employees Group Life Insurance Program. Premiums were deducted from their annuities. When the employees were reinstated, they included a claim for reimbursement for the insurance premiums in their claims for backpay. We find that the employees should be reimbursed for the premiums deducted from their retirement annuities, but the appropriate premiums applicable to them as employees for the same type of coverage must be deducted from their backpay award.

BACKGROUND

Mr. Robert L. Neal, Jr. and Mr. Douglass F. Roy are employees of the Forest Service, Department of Agriculture. On June 14, 1982, both employees were placed in an "absent without leave" status and were later removed from their positions for failure to accept assignments outside of their commuting areas. Both employees elected to retire at the time of removal. They appealed the removal actions to the Merit Systems Protection Board. The Board found that the employees had been improperly removed and ordered the Forest Service to reinstate the employees to their former positions as of June 14, 1982.

[1] The matter was presented as a request for an advance decision by Betty Deaver, Authorized Certifying Officer, National Finance Center, Office of Finance and Management, U.S. Department of Agriculture, New Orleans, Louisiana.

The employees were under age 65 during the period in question and were eligible for continued life insurance coverage when they retired. Both elected to carry the "No Reduction" or non-declining option for basic life insurance. In addition Mr. Neal also elected coverage under options A, B, and C. They now claim they should be reimbursed for the amounts deducted from their retirement annuities for insurance.

The authorized certifying officer, however, questions whether these credits may be allowed because the employees elected the insurance coverage, were covered by the insurance during the period of erroneous retirement, and therefore do not appear to be due a refund.

The issue involved is whether an employee who elects to retire at the time of an improper removal and elects to have premiums for life insurance deducted from his annuity is entitled to a refund of this amount upon his reinstatement.

LIFE INSURANCE PROGRAM

The statutory authority for Government life insurance for Federal employees is 5 U.S.C. § 8701–8716 (1982). Under this authority the Office of Personnel Management issues regulations which prescribe the time at which and the conditions under which an employee is eligible for coverage. These regulations are found at 5 C.F.R. Parts 870–873. See also Federal Personnel Manual (FPM) Chapter 870, and FPM Supplement 870–1.

An employee who retires from an insured position, who was insured for the 5 years immediately preceding retirement, who does not convert to an individual policy and who retires on an immediate annuity, may continue to be covered by Federal life insurance. 5 U.S.C. § 8706(b)(1) (1982). However, the eligible employee must make an election at the time of his retirement. The election affects the type of insurance coverage he will have after he reaches age 65 (or if the employee is over 65, it will affect the insurance coverage he will have when he retires).

The employee has three choices regarding the coverage for basic insurance he will have after age 65. He may elect "75 Percent Reduction" (after age 65, benefits are reduced monthly by 2 percent until they are 25 percent of the amount of insurance that would have been available at retirement). 5 C.F.R. § 870.601(c)(2). Employees who select the "75 Percent Reduction" pay no premiums for coverage after retirement. 5 C.F.R. § 870.501(g). He may elect "50 Percent Reduction" (after age 65 benefits are reduced monthly by 1 percent until they are 50 percent of the amount that would have been available at retirement) or "No Reduction" (benefits remain the same after age 65). 5 C.F.R. § 870.601(c)(3) and (4). For the 50 percent or the no reduction elections, the retiree's annuity is re-

duced by an amount based on the type of election made. 5 C.F.R. § 870.501(f)(2) and (3).

In addition, employees may elect to continue optional coverage. Option A provides standard life insurance, option B, additional life insurance in multiples of the employee's annual basic pay at retirement and option C provides insurance of family members. Payment for optional insurance is deducted from the retiree's annuity until he reaches age 65, at which time deductions cease and coverage is gradually reduced. 5 C.F.R. §§ 871.401(b), 871.601, 872.401(b), 872.601(a), 873.401(b) and 873.601.

ANALYSIS

As is indicated above, both employees selected the "No Reduction" option and Mr. Neal also elected optional coverage. Appropriate deductions were made from their annuities. They assert that since they were both under age 65 during the period in question, the amounts deducted for basic insurance purchased no "current" insurance, that is, no insurance for the period of erroneous retirement, and they should be reimbursed for the total amount that was deducted for that coverage. In addition it is argued that the law waives deductions for life insurance from backpay awards.

First, as to the waiver of premiums from backpay awards, the law, 5 U.S.C. § 8706(e), provides that if the life insurance of an employee stops because of a separation which is thereafter found to be erroneous, the employee is deemed to have been insured for the period of separation. This section also states that deductions for insurance that would have been made during that period should not be deducted from any backpay award, unless death or accidental dismemberment of the employee occurs during that period.

Since this statute directs waiver only in cases where insurance had been stopped, it is not applicable to the case before us where insurance coverage was continued during the period involved. This conclusion is supported by the legislative history of the statute which indicates that the purpose of the law was to remedy the specific problem of deduction of life insurance premiums from the backpay awards of reinstated employees to pay for insurance coverage for a period when the insurance had been stopped, the employee was not covered, and had he died during the period of separation, his beneficiaries would have received no benefits.[2]

The employees also argue that although the life insurance premiums were deducted from their annuities, they received no immediate or "current" benefit from the payments made during the period of erroneous retirement for basic coverage. Since both retired at an

[2] Pub. Law 92-529, October 21, 1972, 86 Stat. 1050, added the provisions now contained in 5 U.S.C. § 8706(e). The purpose of those provisions is discussed in S. Rep. No. 92-1301, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. and Ad. News, 4232-4233, and H.R. Rep. No. 92-1289, 92d Cong., 2d Sess.

age under 65 years old, had either of them died during the period of erroneous retirement, the benefits that would have been received by their beneficiaries under the "No Reduction" election would have been the same as they would have received if the employees had selected the "75 Percent Reduction" and nothing had been deducted from their annuities.

The agency points out that the employees elected insurance and were covered by the insurance during the entire period. They received the benefit of coverage under a nondeclining plan and should therefore not be reimbursed. (We note that regarding the basic life insurance, the employees would not have received any additional benefits under the "No Reduction" election had they died prior to reaching age 65; however, amounts paid for options A, B or C in addition to basic life insurance did provide "current" and additional insurance during the period of erroneous retirement).

Section 5596 of title 5 provides for backpay for an employee affected by an unjustified personnel action. The regulations implementing the statute are found in 5 C.F.R. § 550.801, *et seq.* A reinstated employee may receive an amount equal to all or any part of the pay, allowances and differentials which he would normally have earned during the period if the personnel action had not occurred, less certain deductions. The employee is deemed to have performed service for the agency during the entire period. In essence, to the extent possible, the employee is financially "made whole" through an award of pay, allowances and differentials. 5 C.F.R. § 550.805. However, the employee may not be granted more for pay, allowances and differentials than he would have received had the unjustified separation not occurred. 5 C.F.R. § 550.805(b).

In the present case, but for the erroneous retirement the employees would not have been receiving annuities and they would not have been paying premiums for insurance as annuitants. However, they presumably would have been paying for the insurance as employees.

The backpay award should place the employees in the same financial position they would have been in had the improper action never occurred. Therefore, in computing their backpay award, they should be refunded premiums withheld for insurance during the erroneous retirement period. However, the premiums for the same type of insurance chargeable to them as employees must be deducted from the backpay award.

Regarding Mr. Neal's case, the agency found that errors had been made in the deductions for options A and B of his insurance during the erroneous retirement period. The Office of Personnel Management neglected to deduct for option A for a period of months, and for option B, deducted at the rate for five times his annual pay at retirement rather than for three times his pay as he selected. The agency asks how this error should be dealt with.

It is well established that insurance coverage is determined on the basis of the election of the employee. An election or waiver by an employee if done in accordance with the applicable law and regulations, is determinative of his rights and liabilities. Administrative errors in processing forms or in making deductions do not alter those rights and liabilities. See 34 Comp. Gen. 257 (1954); *Bernard J. Killeen,* B-198207, January 14, 1981.

Since by virtue of his election, Mr. Neal was covered under option A, and had he died at any time during the period of erroneous retirement, his beneficiaries would have been entitled to the benefits under option A, properly calculated premiums for option A coverage applicable to an employee should be included in the premiums deducted from his backpay award. Of course, the full amount he actually paid for option B while he was erroneously retired should be included in the amount refunded to him.

Accordingly, the amounts creditable to Mr. Neal and Mr. Roy for insurance coverage should be calculated as outlined in this decision.

[B-216516.2]

Contracts—Negotiation—Cost-Plus-Award-Fee Contracts—Award Fees—Regulatory Limit

Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must be based on the amount specified in the contract.

Matter of: CACI, Inc.—Federal, April 1, 1985:

The Navy request reconsideration of our decision in *CACI-Inc.—Federal,* B-216516, Nov. 19, 1984, 64 Comp. Gen. 71, 84-2 CPD ¶542, in which we sustained the protest of CACI against an award of a contract to Bechtel Operating Services Corporation under a request for proposals issued by the Naval Supply Center, Oakland, California. This cost-plus-award-fee contract, No. N00228-84-C-5005, was for warehousing and associated services for portable hospital units. As indicated below, we modify that decision on one point.

In our decision, we sustained the protest on two separate grounds. First, we held that the Navy had performed a deficient analysis of CACI's costs proposal by adding, as a direct cost, personnel proposed by CACI as part of its indirect cost pool, without properly verifying how the particular cost was treated under CACI's Accounting system and the Cost Accounting Standards.

Second, we held that Bechtel's proposed award fee violated a 10 percent regulatory limitation. This was because the Navy, in its cost realism analysis, estimated that Bechtel's cost of performance would be $15,818,637, and based its selection on this amount. The subsequently-awarded contract, however, was for $16,739,709, the

full amount proposed by Bechtel. This means, we stated, that a proposed award fee of $1,673,961 is 10.59 percent of the estimated cost of the contract, and thus exceeds the 10 percent limitation in Defense Acquisition Regulation (DAR) § 3-405(d), reprinted in 32 C.F.R. pts. 1-39 (1984).

Based on the foregoing, we recommended that the Navy conduct further negotiations with the offerors in the competitive range and then solicit revised cost proposals. Unless Bechtel was the successful offeror on this recompetition, we recommended that its contract be terminated.

The Navy requests reconsideration of the portion of our opinion concerning the fee limitation, asserting that our decision is legally incorrect on this point and has no regulatory support. However, the Navy also states that it intends to follow our recommendations in this matter. The decision was requested by the United States District Court for the District of Columbia in connection with *CACI, Inc.—Federal v. United States et al.* (Civil Action No. 84-2971). The court has subsequently dismissed this action without prejudice. Since the matter has been dismissed without prejudice by the court, we will reconsider the fee limitation portion of our decision. See *Optimum Systems, Inc.*, 56 Comp. Gen. 934 (1977), 77-2 CPD ¶165; *Planning Research Corporation Public Management Services Inc.*, 55 Comp. Gen. 911 (1976), 76-1 CPD ¶202.

As noted above, DAR § 3-405(d) states that the maximum fee (base fee plus award fee) on cost-plus-award-fee contracts shall not exceed the limitations stated in DAR § 3-405.6(c)(2), as follows:

> * * * 10 U.S.C. 2306(d) provides that in the case of a cost-plus-fixed-fee contract, the fee shall not exceed ten percent (10%) of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary concerned at the time of entering into such contract * * *.

We stated in *CACI:*

> As indicated in DAR § 3-405.6(c)(2), *supra,* the estimated cost is to be determined by the *government at the time of entering into a contract.* This government determination could only be done by a price or cost analysis. * * *

The Navy's basic disagreement with our decision in *CACI* concerns the interpretation of the phrase "estimated cost of the contract," as used in the regulation. The Navy asserts that a "cost realism estimate" such as it used to evaluate CACI's and Bechtel's proposals is separate and distinct from the "estimated cost" for which it has contracted and which it used to determine the award fee. The Navy concludes that it determined the "estimated cost of the contract" when it accepted Bechtel's proposal, including proposed costs, and that this was a matter within the Navy's discretion.

The Navy's action in this case, *i.e.,* executing a contract in an amount that is $920,000 more than it expected performance to cost, was unusual. Indeed, in most cases the estimated cost for award selection purposes would be the same as or higher than the estimated

cost specified in the contract. Consequently, we believe such a discrepancy between proposal and agency-anticipated costs would ordinarily warrant reopening price negotiations.

In our prior decision, we interpreted DAR § 3-405.6(c)(2) as requiring the same estimate used for award selection purposes to be used for determining the fee limitation. However, upon further reflection, we now agree that the Navy has a valid point and that the regulation must be interpreted such that the controlling figure for calculating an award fee should be that objective estimated cost figure specified in the contract. In this case, this amount appears to be *bona fide* as CACI's intended estimated cost of the contract; there is no indication here that this higher estimated cost was intended solely to justify a fee in excess of what would otherwise be the fee limitation. Our original recommendation, as the Navy points out, would require the agency unilaterally to set the contract price, which it legally could not do. Here, without further negotiations, the Navy could only have accepted the best and final price proposed by Bechtel. This "estimated cost" is then the maximum amount that will be funded, and an award fee that does not exceed 10 percent of this amount does not violate DAR § 3-405.6(c)(2). This is so even if this estimated cost ultimately turns out to be erroneously high, so that actual fee earned may exceed ten percent of the actual costs incurred.

To the extent indicated, we modify our prior decision.

[B-216707]

Bids—Mistakes—Corrections—Propriety

Agency acted reasonably in allowing correction of a mistake in bid where the bidder's worksheets show an inadvertent error in failing to add a $7.00 item, thus clearly establishing that a mistake was made, how the mistake occurred, and the amount of the intended bid.

Bids—Unbalanced—Propriety of Unbalance—"Mathematically Unbalanced Bids"—Materiality of Unbalance

Bid that was grossly unbalanced mathematically should have been rejected since acceptance of the bid was tantamount to allowing an advance payment.

Matter of: Riverport Industries, Inc., April 1, 1985:

Riverport Industries, Inc. protests an award to B-K Manufacturing Company, Inc., under invitation for bids (IFB) No. DAAH01-84-B-0090 issued by the United States Army Missile Command. Riverport contends that B-K was improperly permitted to correct a mistake in its bid after bid opening. Riverport also contends that B-K's bid was unbalanced and should have been rejected as nonresponsive.

We deny the protest in part and sustain it in part.

The IFB solicited bids to furnish 38,431 TOW Missile overpacks plus two units for first article testing. Five bids were submitted; B-

K and Riverport submitted the two lowest bids, as set out in an Appendix to this decision. Riverport submitted a single unit price for the overpacks and a price ($250.00 each) for first article testing. B-K bid a price for first article testing ($185,000.00 per unit) and two unit prices, one to be applied if first article testing was required and another to be applied if first article testing was waived.

After bid opening, B-K notified the contracting officer that a mistake had been made and requested an opportunity to correct its bid. B-K explained that it had made an error in addition by inadvertently failing to add a $7.00 item identified on its work papers. The item in question concerned the cost of plywood, wire and miscellaneous materials. B-K was allowed to correct its bid after the agency determined from the worksheets and supporting statements that the nature and existence of the mistake and the bid actually intended had been proven by clear and convincing evidence.

Riverport contends that the correction of B-K's bid was improper because it allowed B-K two opportunities to bid on the contract. Riverport questions B-K's evidence, which it does not find to be convincing. However, Riverport has not explained why it thinks this is so.

In our view, the Army acted properly in allowing correction of B-K's bid. A bid that would remain low after correction may be corrected where the bidder provides clear and convincing evidence of the existence of a mistake, the manner in which the mistake was made, and of the intended price. *Butler Corp.*, B-212497, Oct. 31, 1983, 83-2 CPD ¶ 518. We have examined B-K's worksheets and the other evidence provided to the Army. The worksheets clearly show that B-K broke out the cost of the material in question but failed to add this cost when it calculated its unit cost for the 38,431 overpacks. Since B-K relied on its erroneously calculated unit cost to calculate its bid prices with and without first article testing, these prices were in error by similar amounts. In the circumstances, we agree with the Army that the evidence of the mistake, of how the mistake was made and of the amount of B-K's intended bid is clear and convincing. Therefore, this portion of the protest is denied.

Riverport also argues that B-K's bid should have been rejected because it was unbalanced. Riverport says that B-K bid $185,000 each on the two first article units while other bids ranged from no charge to $1,000 per unit. Also, B-K's bid on the 38,431 production units was low compared to the other bidders' prices. Riverport argues that B-K's bidding allows it "to receive payments for a substantial portion of its contract prior to performing an equivalent amount of work under said contract." According to Riverport, this will result in a windfall for B-K and will deprive the government of the use of its funds earlier than would a more balanced bidding structure.

A bid to be rejected as unbalanced must be both mathematically and materially unbalanced. While a bid is said to be mathematical-

ly unbalanced if it does not carry its share of cost plus profit, it is materially unbalanced if, for example, there is reasonable doubt that award will not result in the lowest ultimate cost to the government. *Jimmy's Appliance,* 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542. The Army correctly points out that B-K's overall bid offers the lowest cost and urges, therefore, that B-K's bid be viewed as not materially unbalanced.

We think, however, that when a bid is grossly unbalanced mathematically it should be viewed as materially unbalanced since acceptance of the bid would be tantamount to allowing an advance payment. Advance payments, that is payments made in advance of performance of work, are prohibited by 31 U.S.C. § 3324 (formerly 31 U.S.C. § 529), except as otherwise expressly authorized by law. 10 U.S.C. § 2307 (1982) allows the Secretary of the Army to make advance, partial, progress or other payments under contracts in cases where the contractor gives adequate security and the Secretary determines such action would be in the public interest. However, requests for advance payments generally must be separately approved under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 32.408 (1984).

In view of the significantly lower value placed on first articles by the other bidders, it is implausible on this record that first articles are worth anything like $370,000. Since B-K's first article price is far in excess of the value of the first articles, its first article price does not appear to be related to the work required to produce first articles, but rather, appears to include a substantial additional payment. Accordingly, we think B-K's bid should have been rejected as unbalanced.

We have been informed by the Army that first articles have been delivered and approved under B-K's contract and that delivery of production units has begun. Because the government has already incurred the cost of first article testing, contract termination and reprocurement at this time would only increase its costs and would not be in its best interests. *Solon Automated Services, Inc.,* B-206449.2, Dec. 20, 1982, 82-2 CPD ¶ 548, aff'd, *Crown Laundry and Dry Cleaners, Inc.; Solon Automated Services, Inc.—Reconsideration,* B-206449.3, B-206449.4, Apr. 5, 1983, 83-1 CPD ¶ 355. Accordingly, while we will not recommend corrective action, we are by separate letter, bringing our concerns regarding the award of this contract to the attention of the Secretary of the Army.

The protest is sustained in part and denied in part.

[B-216820]

Travel Expenses—Constructive Travel Costs—Limited to Cost of Common Carrier

An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However,

for computing constructive travel costs, only the usual taxicab or airport limousine faries, plus tip, should be used for comparison purposes.

Travel Expenses—Constructive Travel Costs—Limited to Cost of Common Carrier

An employee and his agency disagree over the proper computation of the cost of a Government vehicle in determining the employee's constructive travel claim between his headquarters and temporary duty station. However, for the purposes of the constructive cost of common carrier transportation, the cost of a Government vehicle may not be used since it is defined in the Federal Travel Regulations as a special conveyance and not a common carrier.

Travel Expenses—Temporary Duty—Commuting Expenses—Constructive Per Diem *v.* Mileage Reimbursement

An employee, in computing his constructive travel claim, claims parking fees at the temporary duty location. Paragraph 1-4.3 of the Federal Travel Regulations provides a limit on reimbursement based on the constructive cost of traveling to and from the temporary duty area. Thus, local travel costs at the temporary duty area are separate from constructive travel costs to and from the temporary duty area. The employee should be reimbursed for only those local travel costs actually incurred without limitation by constructive cost.

Matter of: Thomas L. Wingard-Phillips—Computing Constructive Cost of Travel, April 1, 1985:

ISSUES

The issues in this decision involve the proper computation of constructive travel by common carrier where, for reasons of personal preference, the employee traveled by his privately-owned vehicle (POV). We hold that for constructive travel to and from the common carrier terminal, the employee must determine constructive travel on the basis of the usual taxicab or airport limousine fares, not on the basis of mileage and other expenses incurred in using the employee's privately-owned vehicle. In addition, we hold that in determining the constructive cost of travel to and from the temporary duty location, a Government-owned or leased vehicle may not be used in the cost comparison. Finally, we hold that local travel costs at the temporary duty area are separate from the constructive travel costs to and from the temporary duty location; such local travel costs may be paid only as they are actually incurred.

BACKGROUND

This decision is in response to a request from Robert A. Carlisle, Director, Division of Accounting, Fiscal and Budget Services, Region X, Social Security Administration (SSA), concerning the travel claim of Mr. Thomas L. Wingard-Phillips, an SSA employee.

Mr. Wingard-Phillips was authorized to travel from Seattle, Washington, to Salem, Oregon, in order to perform temporary duty during November 13-18, 1983. His travel order authorized travel by airplane to Portland and Salem, or General Services Administra-

tion (GSA) vehicle from Portland to Salem, but Mr. Wingard-Phillips chose to drive his own POV.

Mr. Wingard-Phillips claims reimbursement for actual travel and per diem in the amount of $371.35, and he computed his constructive travel on the basis of air travel from Seattle to Portland, Oregon, and use of a GSA vehicle from Portland. According to Mr. Wingard-Phillips, the constructive travel would have cost $400.95, but the agency disputes this figure in three respects. First, the agency denied his claim for $4 in constructive travel for parking at the Seattle airport on the basis that an employee can claim either parking or mileage but not both.

Second, the agency denied his constructive claim for $39.65 as the daily rental charge ($7.93/day for 5 days) for the GSA car on the basis that the "Park and Fly" GSA vehicles at the Portland airport are leased to the agency and the rental charge is paid regardless of the use of the vehicle.

Finally, the agency denied the constructive travel claim of $22.50 for parking at the Salem office since it was unclear why the employee did not incur this cost under his actual travel. Mr. Wingard-Phillips states that the cost of parking at the Salem office would have been $4.50 per day ($22.50/week), except when his spouse accompanied him and drove his POV to and from the Salem office each day.

OPINION

Under the provisions of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), para. 1-2.2d and 1-4.3, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1983), an employee who uses a POV as a matter of personal preference instead of a common carrier may be reimbursed for actual travel plus per diem, but limited to the total constructive cost of common carrier transportation and constructive per diem by that method of transportation. The comparison is between total actual costs and total constructive costs. *Carl H. Cotterill,* 55 Comp. Gen. 192 (1975), and *Rand E. Glass,* B-205694, September 27, 1982.

Airport parking

We note that the agency denied the $4 claim for parking on the basis that Mr. Wingard-Phillips can either claim round-trip mileage to and from the airport (drop-off by spouse) or mileage and parking at the airport (POV left at the terminal), but not both. However, the applicable regulation contained in FTR para. 1-2.3c provides that for local transportation to and from carrier terminals, reimbursement is allowed for the usual taxicab and airport limousine fares, plus tip, between the terminal and the employee's home or place of business. We believe, in computing Mr. Wingard-Phillips' constructive travel, that the usual taxicab or airport lim-

ousine fare must be used for comparison purposes, rather than the mileage and other costs associated with use of a POV to and from the common carrier terminal. The issue of airport parking is therefore not relevant to Mr. Wingard-Phillips' constructive travel claim, and his constructive travel cost should be recomputed on the basis of the usual taxicab or limousine fares to and from the airport terminal.

GSA rental car

Mr. Wingard-Phillips also claims as part of his constructive travel claim the daily rental charge of $7.93 for use of the GSA rental vehicle plus a mileage charge of 9 cents per mile. The agency allowed him a higher rate of 12 cents per mile, but denied his claim for the daily rental charge since the "Park and Fly" vehicles leased by the agency are charged to the agency whether or not they are in use.

As noted above, FTR para. 1-4.3 provides that when a POV is used for official purposes as a matter of personal preference instead of common carrier transportation, the employee is reimbursed for the actual travel performed, based on the mileage rate prescribed in para. 1-4.2(a) plus per diem, not to exceed the total constructive cost of travel by common carrier. Paragraph 1-4.3a describes the modes of travel to be used for comparison, airplane, train, and bus, but there is no reference to GSA-leased vehicles.

In our decisions in *Cotterill,* 55 Comp. Gen. 192, and *Glass,* B-205694, cited above, we held that rental cars and taxis may not be included in the constructive cost of common carrier transportation under FTR para. 1-4.3, except for the usual transportation costs to and from the common carrier terminals. The rationale behind this is that rental cars and taxis are special conveyances under the FTR rather than common carriers. See FTR para. 1-1.3c(5) and 1-2.2c(4). We believe the same rationale applies to Government-owned or Government-leased vehicles. See FTR para. 1-1.3c(5) which includes Government-furnished transportation in the definition of special conveyances. Therefore, such vehicles are not forms of common carrier transportation and are not listed for comparison purposes under FTR para. 1-4.3a.

Accordingly, we conclude that Mr. Wingard-Phillips' constructive travel should be computed on the basis of common carrier transportation between Seattle and Salem, plus the usual transportation to and from the terminals. The agency's comparison using the constructive cost of a GSA vehicle is improper and may not be followed. Mr. Wingard-Phillips' claim for constructive costs should be recomputed based on the above discussion.

Parking at temporary duty location

The last item in Mr. Wingard-Phillips' claim is the constructive cost of parking at the temporary duty location, Salem, Oregon. Mr.

Wingard-Phillips claims that when his spouse accompanies him on his trip to Salem, instead of parking his POV at the Salem office each day at a cost of $4.50 per day, she drives him to and from the office. The agency denied his claim for the constructive cost of parking in Salem (if he had used the GSA vehicle) since it was unclear that Mr. Wingard-Phillips spouse accompanied him on this trip.

It is the purpose of FTR para. 1-4.3, previously cited above, to provide a limitation on reimbursement based on the constructive costs of traveling to and from the temporary duty area. Thus, our decisions have held that local travel costs in the temporary duty area are separate from constructive travel costs to and from the temporary duty area, and such local travel costs are not to be considered as a unit in determining the constructive cost of travel by common carrier. *Glass,* B-205694, cited above, and *Albert L. Hedrich,* B-181046, November 12, 1974. Therefore, we need not consider the constructive cost of parking at the temporary duty location; Mr. Wingard-Phillips should be reimbursed only for those expenses he actually incurred at the Salem location, in this instance local mileage to and from the office each day (30 miles for the week).

Accordingly, Mr. Wingard-Phillips' travel voucher may be paid consistent with the above discussion.

[B-217011]

Subsistence—Actual Expenses—Maximum Rate

The Department of Housing and Urban Development (HUD) requests a decision on whether foreign delegations on invitational travel and their official HUD escorts may be paid subsistence expenses exceeding the statutory limitation for Federal travel reimbursement. We find no basis to make an exception to the statutory limitation in this case. *United States Information Agency,* B-219375, December 7, 1982, is distinguished.

Subsistence—Per Diem—Headquarters—Prohibition Against Payment

The Department of Housing and Development (HUD) requests a decision on whether HUD employees escorting foreign delegations may be paid subsistence expenses at their official duty stations. The Federal Travel Regulations provide that an employee may not be paid per diem or actual subsistence expenses at his or her permanent duty station. There are certain exceptions, but we find no exception that would apply in this case. Therefore, employee escorts at their permanent duty stations may not be paid subsistence expenses.

Matter of: Department of Housing and Urban Development—Excess Subsistence Expenses—Subsistence at Official Duty Station, April 1, 1985:

The Director, Office of Finance and Accounting, Department of Housing and Urban Development (HUD), has requested a decision concerning subsistence expenses for foreign delegations on invitational travel and their agency escorts. In essence, the Director asks

for our determination that HUD be permitted to rent hotel accommodations via purchase orders for members of foreign delegations and the HUD employees assigned as escort officers at a cost exceeding the allowable subsistence expense limitation under 5 U.S.C. § 5702 (1982). The Director cites as precedent for this our decision in *United States Information Agency-Excess Cost of Hotel Rooms,* B-209375, December 7, 1982. The Director also requests our determination that subsistence expenses may be authorized for the HUD escort officer when a foreign delegation travels to his or her official duty station.

For the reasons stated below, we conclude that HUD's foreign delegations and their official escorts are subject to the applicable statutory limits on daily reimbursement of subsistence expenses. Therefore, HUD may not rent lodgings for the performance of official business on a basis that would cause the subsistence expense limitation to be exceeded for the foreign visitors or escorts. Also, we conclude that the HUD escorts cannot be authorized subsistence expenses at their official duty stations.

I. Applicability of the Subsistence Expense Limitation

Under the provisions of 5 U.S.C. § 5702 (1982), and the Federal Travel Regulations, FPMR 101-7 (September 1981), *incorp. by ref.,* 41 CFR § 101-7.003 (1983) (FTR), Parts 7 and 8, maximum subsistence expense reimbursements are established for Federal employee travel. Generally, the same travel allowances apply for invitational travel as for travel by Federal employees. See 5 U.S.C. § 5701(2); *Category "Z" Travel,* B-187402, May 19, 1977. Also, we have held that while agencies may contract for lodgings and meals outside of the District of Columbia,[1] they cannot thereby avoid the subsistence expense limitations. *Bureau of Indian Affairs,* 60 Comp. Gen. 181, 182-183 (1981):

> * * * since it is well established that officers of the Government may not do indirectly that which a statute or regulation forbids doing directly, we conclude that the statutory and regulatory limitations on per diem rates or actual expense rates are equally applicable to contracts or purchase orders entered into by agencies for lodgings or meals. Thus, appropriated funds are not available to pay for subsistence expenses in excess of the amounts authorized by statute or the implementing regulations, regardless of whether the employee is reimbursed for such expenses or the agency has procured lodgings or meals by contract.* * *

While apparently recognizing the general applicability of the above rules, HUD submits that an exception is warranted in the case of the foreign delegations sponsored by HUD based on our decision in *United States Information Agency,* B-209375, *supra.* This decision held that the United States Information Agency (USIA) could contract for lodgings and meals without regard to the subsistence limitations in certain situations, including the situation when

[1] See 40 U.S.C. § 34 (1982) concerning the rental of space in the District of Columbia.

USIA invites foreign dignitaries to the United States and assigns an agency official to act as an escort officer. We stressed that the exception is limited to situations where "(a) use of the particular accommodations is an integral part of the employee's job assignment, and (b) failure to provide such accommodations would frustrate the ability of the Agency to carry out its statutory mandate." Moreover, USIA proposed to authorize exceptions only in response to individual applications setting forth the specific circumstances justifying the request and incorporating further safeguards. The decision also pointed out that this approach was consistent with USIA's past practice.

The HUD letter states that, in many instances, the subsistence requirements of its foreign delegations and their official escorts may be in excess of the current maximum statutory rate of $75 per day. Further, HUD states that use of the particular accommodations required is an integral part of the Department's mission and that failure to reimburse the excess subsistence expenses of its foreign visitors and their agency escorts would frustrate the ability of HUD to carry out its statutory mandate.

In responding to the HUD request, we note, preliminarily, that our *United States Information Agency* decision was not intended to have general application. Instead, it recognized a narrow exception to the normal rules based on USIA's particular statutory mission. For the reasons stated hereafter, that decision does not apply here.

First, the HUD letter offers no explanation or information to show how the conditions set forth in the *United States Information Agency* decision are met. It merely submits a conclusory statement without further support. This is not a sufficient basis upon which we could justify extending the narrow exception stated in our *United States Information Agency* decision.

Second, the statutory authority that HUD uses for its foreign delegation travel program precludes any exception to the $75 per day statutory maximum. Section 1701d-4 of Title 12, United States Code (1982) authorizes the Secretary of Housing and Urban Development to exchange data and participate with other nations in carrying out his responsibilities and to pay the travel expenses of foreign delegations engaging in advisory activities. Subsection (a)(1) of that section specifically provides that "* * * such travel expenses shall not exceed those authorized for regular officers and employees traveling in connection with said activities * * *." In view of this provision, we do not believe HUD can reasonably maintain that the conditions present in the *United States Information Agency* decision apply to it.

II. Subsistence Expenses at Official Duty Station

With regard to HUD's second question, we observe that the HUD employee escorts may be reimbursed the same rates for hotel ac-

commodations and meals/miscellaneous expenses as members of the foreign delegation. However, HUD employee escorts at their permanent duty stations may not be paid subsistence expenses. In FTR paras. 1-7.6a and 1-8.1a (Supp. 1, September 28, 1981), it is provided that an employee may not be paid per diem or actual subsistence expenses at his permanent duty station.

Applying this requirement in *Richard Washington,* B-185885, November 8, 1976, we denied an employee's claim for subsistence expenses at his permanent duty station in the absence of specific statutory authority, even though his continued presence at a local hotel was required as the coordinator of a Federal forum there. Also, in *Ronald Erickson,* B-213970, April 4, 1984, we denied an employee's claim for subsistence (meal) expenses at his permanent duty station where he was serving as an escort to a tourism official of a foreign government and his duties included being present during meals.

The circumstances presented by HUD appear to be indistinguishable from those in *Ronald Erickson,* B-213970, *supra.* We have been advised of no specific statutory authority for HUD to pay employee escort subsistence expenses at their permanent duty stations. Therefore, HUD employee escorts at their permanent duty stations may not be paid subsistence expenses.

[B-218232.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—"Good Cause" Exception Applicability

Reliance on agency advice that a protest could be filed with General Accounting Office within 30 days of denial of a protest to the agency is not good cause for filing an untimely protest by the protester's attorney where material accompanying the agency's letter clearly stated that such protests must be filed within 10 days.

Matter of: Shannon County Gas—Reconsideration, April 1, 1985:

Shannon County Gas requests reconsideration of our dismissal of its protest concerning the award of a contract for bottled and propane gas to Blu-Gas of Rushville, Nebraska, under invitation for bids (IFB) No. A00-0426, issued by the Bureau of Indian Affairs, Department of the Interior. We affirm our dismissal of the protest.

By letter dated February 19, 1985, received here on February 25, an attorney for Shannon County Gas filed a protest with this Office complaining about the agency's failure to award the firm a contract under the IFB and to comply with agency procedures that implement the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975) 25 U.S.C. 450, (codified in numerous titles of the U.S. Code) and the Buy Indian Act, 25 U.S.C. § 47 (1982). We dismissed the protest as untimely because it was filed more than 1 month after the denial on January 21 of Shannon County Gas' protest to the agency. Our Bid Protest Regula-

tions provide that, in such circumstances, protests to this Office must be filed within 10 days of when the protester learns of adverse agency action on its agency protest. 4 C.F.R. § 21.2(a)(3) (1985).

In requesting reconsideration, the protester contends that the reason its protest here was untimely was because of a statement in the agency's January 21 decision advising the protester that it could file a further protest with this Office within 30 days of receipt of the agency's decision. The protester says it was misled by this advice and therefore we should consider its protest under section 21.2(c) of our Regulations which provides for consideration of an untimely protest when the protester shows that it had good cause for filing late. The protester also urges us to consider its protest because the issues raised are significant.

In our view, the protester has not shown that it had good cause for not filing its protest in a timely manner. The good cause exception contained in both our former Bid Protest Procedures, 4 C.F.R. § 21.2(c) (1984), and in our current Regulations, which were effective January 15, generally refers to situations where some compelling reason beyond the protester's control prevents the protester from timely filing its protest. *Owl Technical Associates, Inc.—Reconsideration,* B-206753.2, Oct. 29, 1982, 82-2 CPD ¶ 382. In this case, although the agency's January 21 decision incorrectly stated that the protester could file a protest with our Office within 30 days, the decision cited our Bid Protest Procedures, and indicated that a copy was attached. It is not clear whether the copy actually attached was of our former procedures or of our new Regulations. Regardless of which was attached, however, a reading of either would have revealed that the period within which to file a protest here was 10 not 30, days from receipt of the adverse decision on the agency protest. In addition, since our Regulations have been published in the *Federal Register,* the protester was charged with at least constructive knowledge of our filing requirements. See *Holmes Ambulance Service Corp.,* B-213743, Feb. 2, 1984, 63 Comp. Gen. 186, 84-1 CPD ¶ 143. While the agency's incorrect advice to the protester is regrettable, we do not think it is sufficient to relieve the protester from complying with our timeliness rules, see *Peter A. Tomaino, Inc.,* B-208167, Oct. 29, 1982, 82-2 CPD ¶ 385, particularly since the protester was represented by counsel.

We also decline to consider the merits of this protest under the significant issue exception to our timeliness rules. In order to prevent our timeliness requirements from becoming meaningless, this exception is strictly construed and seldom used, *Kearflex Engineering Co.,* B-212537, Feb. 22, 1984, 84-1 CPD ¶ 214, and generally applies only to issues of widespread interest to the procurement community that have not been considered previously. *Sequoia Pacific Corp.,* B-199583, Jan. 7, 1981, 81-1 CPD ¶ 13. In this case, while we recognize the importance of the issues to the protester, it does not

appear that our resolution of these issues would benefit anyone other than the protester. See *Universal Design Systems Inc.—Reconsideration,* B-211547.3, Aug. 16, 1983, 83-2 CPD ¶ 220.

Moreover, we note that the regulations under section 7(b) of the Indian Self-Determination and Education Assistance Act with which the protester claims the agency did not comply involve procedures for the award of subcontracts to Indian-owned firms, not prime contracts. See *American Indian Technical Services, Inc.,* B-207275, May 17, 1982, 82-1 CPD ¶ 470. We further note that, to the extent the protester is contending that the Buy Indian Act required the procurement to be set aside for Indian-owned firms, this Office will not review the broad discretion to implement such a set-aside that the agency enjoys under the Act unless there is a clear showing that this discretion may have been abused. *Wakon Redbird & Associates,* B-205995, Feb. 8, 1982, 82-1 CPD ¶ 111. There has been no such showing here.

We affirm our dismissal of the protest.

[B-218188]

Buy American Act--Waiver—Agency Determination—Not Reviewable by GAO

Agency head has statutory authority to waive application of Buy American Act restrictions after bid opening where he determines such action to be in the public interest.

Matter of: Lear Siegler, Inc., April 8, 1985:

Lear Siegler, Inc., protests the award of a contract for aircraft fuel tanks by the Naval Air Systems Command (Navy) to Israel Military Industries (IMI), an Israeli firm, under invitation for bids (IFB) No. N00019-84-B-0004. Lear contends that the Navy should have added a 50-percent evaluation factor to IMI's low bid price pursuant to the Buy American Act, 41 U.S.C. § 10a, *et seq.* (1982), which would have made IMI's evaluated price higher than the price offered by Lear.

Lear also filed suit in the United States District Court for the Central District of California, *Lear Siegler, Inc., Energy Products Division v. John Lehman, et al.,* Civil Action No. 85-1125, seeking injunctive and declaratory relief and raising substantially the same issues as raised in the protest. The court has indicated an interest in our decision. We deny the protest.

The Memorandum of Agreement

Under the Buy American Act, supplies which have been manufactured in the United States are to be acquired by the United States government unless the head of the procuring agency determines it to be "inconsistent with the public interest" or "the cost to be unreasonable." 10 U.S.C. § 10a (1982). In accordance with Department of Defense Federal Acquisition Regulations Supplement

(DOD FAR Supplement) § 25.205(71) (Defense Acquisition Circular No. 84-1, March 1, 1984), an offer of goods from a "non-qualifying country" is to be evaluated by adding a 50-percent evaluation factor to its price. A "qualifying country" is defined in DOD FAR Supplement § 25.001 as including a defense cooperation country that has an agreement with the United States for which the Secretary of Defense has made a determination and finding waiving the Buy American Act restrictions for specified items. In the case of IMI, a Memorandum of Agreement (MOA) was entered into between the United States Secretary of Defense and the Israeli Defense Minister on March 19, 1979. The MOA states that it only applies to manufactured items which are listed in Annex "B" to the MOA and that for such manufactured items, no price differentials resulting from "Buy National Laws and Regulations" will be applied for evaluation of offers.

On March 19, 1984, the United States and Israel amended and renewed the MOA, but subsequently experienced delays in finalizing a revised Annex "B." Therefore, as an interim measure, the Under Secretary of Defense (Research and Engineering) issued the following instructions:

> [T]he Services will consider exemption of the Buy American Act/Balance of Payments Program on a purchase-by-purchase basis if absent these penalty factors the offer of an Israeli product is the lowest price. My intent is not to exclude competition from Israeli products only because a new Annex "B" has not been published. This is consistent with the provisions of the 1984 MOA.

The Under Secretary of Defense (International Programs and Technology) reaffirmed this position in subsequent correspondence with the Israeli Defense Mission to the United States. On January 16, 1985, 2 months after bid opening, and with the revised Annex "B" still not finalized, the Assistant Secretary of the Navy (Shipbuilding and Logistics) issued a determination and findings pursuant to the interim instructions exempting IMI from the application of the Buy American Act differential because he found that it would be "inconsistent with the public interest to apply the restrictions of the Buy American Act" to IMI's low offer. Award was thereafter made on February 19, 1985, notwithstanding the pendency of Lear's protest.

Contentions by Lear

We have recognized that a determination of whether a particular purchase from a domestic source under the Buy American Act is inconsistent with the public interest is a matter of discretion vested in the head of the department or agency concerned. *Keuffel & Esser Co.*, B-193083, July 17, 1979, 79-2 CPD ¶ 35. Lear nevertheless contends that any agency discretion to grant a Buy American Act waiver to a foreign firm ceases at the time of bid opening. According to Lear, any post-bid-opening waiver constitutes a change in the stated evaluation criteria and compromises the integrity of the formal advertising system inasmuch as bid evaluation factors

"must be objectively determinable, rigidly applied, and may not lawfully be changed after bid opening." Thus, Lear objects to the "secret" internal waiver granted by the Navy approximately 2 months after bid opening which, according to Lear, improperly displaced the firm as the true low bidder under the evaluation scheme existing at the time of bid opening.[1] Lear insists that there must be some point at which discretion ceases. Lear cites regulations referenced in the solicitation which provide (DOD FAR Supplement § 25.7502(b)):

> The Buy American Act and the Balance of Payments Program restrictions are waived only for items listed in appropriate annexes to the agreements with the defense cooperation country. However, the absence of an item from the defense equipment list is without prejudice to the authority of the Secretary to determine in any individual case that application of the restrictions to that item would be inconsistent with the public interest.[2]

Lear believes that this regulation neither authorizes the Secretary to "change" evaluation criteria after bid opening nor provides notice to bidders of such a possibility. Therefore, Lear requests that our Office recommend termination of IMI's contract as illegally awarded.

GAO Analysis

For the reasons that follow, we find this protest to be without merit. First, the Buy American Act, *supra,* expressly provides that "[n]otwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable * * * only [domestic goods] shall be acquired for public use." As explained below, we find nothing in the language of the act or its legislative history which limits the authority of the agency head to grant waivers before or after bid opening. Further, we find that agency regulations implementing the Act have consistently recognized the authority of the agency head to make determinations under the Act in particular instances after bid opening.

Concerning the restriction imposed on foreign purchases, we find pertinent the following legislative history (H.R. Rep. No. 882, 72d Cong., 1st Sess. 1 (1932)):

> "This is a restriction upon the governmental purchasing officers and agents, but permits the exercise of judgment on the part of any such officer or agency in allowing him to purchase goods not complying with such requirements if he determines that compliance *in a given case* is inconsistent with the public interest, or if he de-

[1] The Israeli Ministry of Defense submitted a request to the Department of Defense to include the subject fuel tanks in Annex "B" 1 week prior to bid opening. Lear notes that the MOA itself states that requests for exemption by each government "shall" be submitted to its "opposite Annex "B" Subcommittee chairman at least two weeks before proposals are due." Both the Navy and IMI contend that this language is inoperative until finalization of a revised Annex "B." We need not resolve this question.

[2] Similar language also appears in the MOA.

termines that the cost of complying with the requirement would be unreasonable * * *

We first note that an agency head, under the statutory scheme, must determine whether cost is "unreasonable" in a "given case" by examining bid prices after bid opening and then exercising the discretion he has under the statute to make the necessary determination. (Imposing a fixed percentage factor to the price of a foreign bid on a governmentwide basis only began after the issuance of Executive Order No. 10582, December 17, 1954, 19 F.R. 8723.) Thus, we stated in 48 Comp. Gen. 487 (1969):

* * * It was stated in 39 Comp. Gen. 309, at page 311, that "it is obvious from a review of the legislative history of the Buy American Act that the unreasonableness of domestic bid prices was to be determined by comparison with foreign bid prices." See, also, A-48328, April 28, 1933, which held, soon after the enactment of the Buy American Act, that "the question whether there may be accepted and used foreign articles is one to be determined after the bids have been received and not before, as it cannot be determined whether the difference in price be unreasonable."

We also recognized soon after the enactment of the Buy American Act that Congress imposed upon the agency head a "specific duty involving the exercise of judgment and discretion" to determine whether the purchase of domestic articles "in the particular instance" would be inconsistent with the public interest. 14 Comp. Gen. 601 (1935). Thus, prior to 1954, the agency head clearly had authority to waive Buy American restrictions in a particular procurement after bid opening.

Even if we assume that Executive Order No. 10582, by establishing formulas for evaluating foreign bids, ended the discretionary authority of the agency head to determine in a particular instance whether the offered price of a domestic good was unreasonable in relation to an offered foreign price, we think that the agency head retained authority under the statute to determine whether the purchase of domestic articles in a given procurement would be inconsistent with the public interest. Executive Order 10582 provided:

Sec. 3. Nothing in this order shall affect the authority or responsibility of an executive agency:
(a) To reject any bid or offer for reasons of the national interest not described or referred to in this order . . .

Further, implementing military services procurement regulations since 1954 typically provide as follows (Armed Services Procurement Regulation (ASPR) §§ 6-103.3, 6-104.4 (1955 ed. Rev. 45)):

6-103.3 Unreasonable Cost or Inconsistency with the Public Interest. The restrictions of the Buy American Act do not apply when it is determined by the Secretary concerned that the cost of a domestic source end product would be unreasonable or that its acquisition would be inconsistent with the public interest. Such determination shall be made in accordance with ASPR 6-104.4.

* * * * * * *

6-104.4(3) Proposed awards shall be submitted, in accordance with Departmental procedures, to the Secretary concerned for decision where:
(i) Rejection of an acceptable low foreign bid is considered necessary to protect essential national security interests, such as maintenance of a mobilization base; or
(ii) Rejection of any bid or proposal for other reasons of the national interest is considered necessary.

See also ASPR §§ 6-103.3, 6-104.4 (1963 ed.); ASPR §§ 6-103.3, 6-104.4 (1976 ed.)

Any such rejection of an acceptable foreign bid or rejection of any domestic bid or proposal must necessarily occur after bid opening. We see no distinction between rejection of a domestic bid because of national interest considerations or acceptance of a foreign bid through waiver of the Buy American restrictions after bid opening because of public interest considerations. We therefore will not question the Secretary's determination to exempt IMI's bid from the Buy American Act restrictions.

Lear also asserts that the Navy's internal determination to waive the Buy American restrictions was based on a consideration of IMI's total price, including options, contrary to the terms of the solicitation which provided only for evaluation of the price of the basic requirements. However, since IMI's bid price was low by about $1.6 million for the basic requirement and about $3.7 million with the options, we find no abuse of discretion here.

Finally, Lear complains that the Navy failed to follow applicable procedures in making an award notwithstanding a protest under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 41 U.S.C. 2151 note. We merely note that the Department of Justice is contesting the constitutionality of this act, the matter is currently in litigation, and we therefore see no need to further comment on this matter.

The protest is denied.

[B-208604]

Checks—Travelers—Travel Advances

Blank travelers checks obtained by the Government for issuance to its employees in lieu of cash travel advances do constitute official Government funds, the physical loss or disappearance of which would entail financial liability for the accountable officer involved. That liability may be relieved by General Accounting Office, under 31 U.S.C. 3527 (1982), in the same manner as liability for a loss involving cash or other Government funds.

Matter of: Accountable officer liability for lost or stolen travelers checks, April 9, 1985:

The Acting Director of the Office of Finance and Management of the United States Department of Agriculture (USDA), has requested our opinion concerning the liability of imprest fund cashiers for lost, stolen, or otherwise unaccounted for commercial travelers checks which USDA is now issuing to its employees in lieu of cash travel advances. USDA asks whether we agree that blank travelers checks which have been entrusted to imprest fund cashiers under this program constitute official Government funds. If so, USDA also asks whether the cashiers would have the right, under 31 U.S.C. § 3527 (1982), to obtain relief from GAO for liability arising

from a loss or shortage in cashiers' accounts with regard to the checks entrusted to them.

As explained below, we conclude that blank travelers checks obtained by the Government for issuance to its employees in lieu of cash travel advances do constitute official Government funds, the loss of which would entail financial liability for the accountable officers involved. We also conclude that an accountable officer's liability for a physical loss involving blank travelers checks is relievable under 31 U.S.C. § 3527 in the same manner as liability for a loss involving cash or other Government funds.

BACKGROUND

In May 1984, USDA began issuing travel advances [1] to its employees in the form of travelers checks, rather than cash. This action was undertaken by USDA in accordance with the provisions of a General Services Administration (GSA) requirements contract (No. GS-00T-42299) with Citicorp Services, Inc. Under the contract, Citicorp agreed to provide blank travelers checks, as needed, to agencies of the Federal Government for use, in lieu of cash, when making authorized travel advances to Government employees.

The GSA contract provides that agencies will accept delivery of Citicorp travelers checks in accordance with the terms and conditions of a "Trust Receipt/Trust Agreement." Among other things, this trust receipt agreement contains provisions:

—Requiring the Government to safeguard the travelers checks, "giving them the same protection as cash and to hold the Checks at the [Government's] own sole risk of loss resulting from employee dishonesty or negligence or disappearance of any or all of the Checks. (paragraph (e));

—Requiring the Government to reimburse Citicorp for "the face value of any Checks which have disappeared or which the [Government] fails to return to [Citicorp] upon demand due to employee dishonesty or negligence" (paragraph (g));

—Requiring the Government to "maintain at all times insurance providing adequate coverage for any and all losses resulting from employee dishonesty or negligence or the disappearance of any or all of the Checks" (paragraph (h)); [2] and

—Specifying that "notwithstanding any notice to [Citicorp] that a Check has been lost, stolen, or destroyed, [Citicorp] may, at its sole

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[1] Under various statutes, *e.g.*, 5 U.S.C. § 5705 (1982), the Government is authorized to give cash advances to employees assigned to official travel in order to cover their reimbursable expenses.

[2] We are not aware that any Government agency under this program has actually purchased, or has been expected to purchase, commercial insurance. We understand that the trust receipt agreement is the same form Citicorp uses in dealing with private sector customers, and assume that the Government's policy of self-insurance would be viewed as compliance with the quoted provision. Further, in view of that policy, we question whether the purchase of commercial insurance in this context would be a permissible use of appropriated funds.

discretion, pay such Check upon presentation, whether or not it is legally liable therefor (paragraph (j)).

According to USDA, GSA has issued no guidance concerning the liability of accountable officers for the loss of travelers checks before they have been issued to and signed by traveling employees.[3] USDA added that:

> While the contractor, Citicorp Services, Inc. (CSI), takes responsibility for losses or shortages up to a CSI-approved limit, absent employee malfeasance or negligence, we can envision certain circumstances where CSI would not take responsibility and for which we feel the cashier, as an accountable officer, would be able to request relief from [GAO].[4]

Accountable officers are automatically and strictly liable for Government funds entrusted to them. *E.g., Serrano v. United States*, 612 F.2d 525, 528 (Ct. Cl. 1979); 54 Comp. Gen. 112, 114 (1974). However, under the provisions of 31 U.S.C. § 3527, GAO is authorized to relieve accountable officers from liability for "the physical loss or deficiency of public money, vouchers, checks, securities, or records" when GAO concurs with the determination of the head of the employing agency that the loss occurred in the course of the accountable officer's official duties, and was not the result of fault or negligence on the part of the accountable officer.

DISCUSSION

Legal commentators suggest that travelers checks were created in 1891:

> * * * in response to the need for an instrument with the marketability of cash and yet the safety of a bank draft. The important feature of a traveler's check is the signature-countersignature scheme, and because of it the owner may carry the check without fear of suffering a financial setback if it is lost or stolen, but nevertheless may properly cash it without proving his identity. To assure continued acceptance of traveler's checks by the public, issuers often absorb losses rather than assert possible defenses against redemption * * *. Annot., 42 A.L.R. 3d 846, 848 § 2 (1972) (citations omitted).

Travelers checks are generally regarded as negotiable, bearer instruments which were intended to be, and have become, widely accepted by the public as substitutes for cash.[5] The GSA contract and the trust receipt agreement reflect these facts. Citicorp travelers checks are to be issued in place of, and as the functional equivalent

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[3] GSA has promulgated a "Temporary Regulation" which sets the policies and procedures governing use of travelers checks in lieu of cash travel advances. 49 Fed. Reg. 33248 (1984) (to be codified in 41 C.F.R. ch. 101). However, that regulation does not discuss accountable officer liability for travelers checks.

[4] The situations in which Citicorp is contractually obligated to "take responsibility for losses or shortages" are not entirely clear to us. For purposes of this decision, however, it is sufficient to recognize that there will be situations in which the Government may be required to pay for lost or stolen checks.

[5] See, e.g., *American Express Co. v. Anadarko Bank & Trust Co.*, 67 P.2d 55, 58 (Okla. 1937); *Transcontinental & Western Air, Inc. v. Bank of America*, 116 P.2d 791, 795-96 (Cal. Dist. Ct. App. 1941); *American Express Co. v. Rona Travel Serv.*, 77 N.J. Super. 566, 187 A.2d 206, 210-11 (N.J. Super. Ct. Ch. Div. 1962); *Ashford v. Thomas Cook & Son (Bankers) Ltd.*, 471 P.2d 530, 533-34 (Hawaii 1970). *See also* Note, 41 Georgetown L.J. 91 (1952); Annot., 42 A.L.R. 3d, *supra*, §§ 2, 3 at 848-55.

to, cash travel advances. Moreover, the contract and trust receipt agreement require the Government to "safeguard the Checks * * *, giving them the same protection as cash and to hold the Checks at the [Government's] sole risk of loss * * * or disappearance." Since the Government is liable for the loss of Citicorp travelers checks as though they were cash,[6] it stands to reason that accountable officers should be held liable for, and relievable from, losses of travelers checks as though they were cash.[7]

Another approach is reflected in our decision B-190506, December 20, 1979, in which we concluded that the disappearance of Treasury bonds and interest coupons resulted in a loss to the United States. In that case, the accountable officer argued that the United States suffered no loss for which the accountable officer might legally be held liable. Her argument was based on the fact that the bonds had not yet been cashed and that a "stop payment" notice had been placed on them. We disagreed and pointed out that the bonds and coupons were negotiable, bearer instruments, and that a "stop payment" notice neither prevents the cashing of the bonds and coupons, nor completely extinguishes the Government's liability to pay on them. We think the analysis used in B-190506, *supra,* may be applied with equal force to the facts of the present case. Both cases involve negotiable, bearer instruments.[8] In neither case can the Government effectively prevent the payment of the stolen bonds or travelers checks.[9]

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[6] Cf., e.g., *American Express Co. v. Rona Travel Serv.,* 187 A.2d at 211-12 (terms of contract between travelers check company and travel agency selling checks on commission basis determined the liabilities of the parties and were construed to mean that travelers checks were the equivalent of cash, the loss of which must be borne by the travel agency, not the issuer of the checks). See also, *Mellon Nat'l Bank v. Citizens Bank & Trust Co.,* 88 F.2d 128, 133 (8th Cir. 1937); *Transcontinental & Western Air, Inc.,* 116 P.2d at 795.

[7] Cf., e.g., *Ashford,* 471 P.2d at 534 ("[I]f travelers checks are intended by the issuer and accepted by the public as a medium of exchange to take the place of money, they should be subject to the same rules of law applicable to money under like circumstances.")

[8] In *Transcontinental & Western Air, Inc.,* 116 P.2d at 795-96, travelers checks are compared to and treated in the same manner as "Government bonds." Similarly, in *Ashford,* 471 P.2d at 534, quoting from *Cooke v. United States,* 91 U.S. 389 (1875), the court found that travelers checks should be treated in a manner similar to "Treasury notes." Cf., e.g., *Peoples Savings Bank v. American Surety Co.,* 15 F. Supp. 911, 913-14 (D. Mich. 1936) (travelers checks are held to be "securities," for the purposes of an indemnity bond agreement covering losses that might be suffered by the bank).

[9] The contract, as quoted earlier, specifically provides that, notwithstanding any notice by the Government to Citicorp, stolen travelers checks may be paid by Citicorp. Even had the contract not so provided, there is case law to support the proposition that Citicorp might be required to honor stolen travelers checks if the signatures on the travelers check matched each other. See e.g., *Transcontinental & Western Air, Inc.,* 116 P.2d at 795-96; *American Express Co. v. Anadarko Bank & Trust Co.,* 67 P.2d at 57-58; *Ashford,* 471 P.2d at 533-34. *See also,* Annot., 42 A.L.R. 3d at 850-51 (discussing Uniform Commercial Code §§ 3-115, 3-407(3)).

CONCLUSIONS

Based on the foregoing, we conclude that the loss or disappearance of a travelers check while in the custody of an accountable officer, to the extent the Government is obligated to pay for it (i.e., to the extent the issuer, in this case Citicorp, has not accepted responsibility under the governing agreements), does give rise to a loss of Government funds for which the accountable officer involved would be liable. In addition, the relief authority provided in 31 U.S.C. § 3527 would be available in appropriate cases, just as with other losses of public funds.

As a final note, we emphasize that this decision is concerned solely with the liability and relief of accountable officers, and not the employee performing the travel. The "custody" of the accountable officer ends when the travelers check is properly turned over to the traveler. The traveler, while accountable for the funds, is not eligible for relief under the accountable officer statutes. 54 Comp. Gen. 190 (1974); B-183489, June 30, 1975. However, under the terms of Citicorp's Travelers Checks Purchase Agreements, Federal employees who receive their travel advances in the form of travelers checks may be reimbursed by Citicorp for travelers checks that are lost or stolen.

[B-216421]

Contracts—Modification—Beyond Scope of Contract—"Cardinal Change" Doctrine

Protest contending that a contract modification was beyond the scope of the contract and thus improperly suppressed competition is sustained where the modification resulted in the procurement of services materially different from that for which the competition was held.

Matter of: Indian and Native American Employment and Training Coalition, April 16, 1985:

The Indian and Native American Employment and Training Coalition (Coalition) has protested a task order issued by the Department of Labor, Office of the Inspector General (OIG) under contract No. J-9-M-3-0119 whereby the contractor, Rodriguez, Roach & Assoc., P.C., is to provide specified technical assistance and training to Native American grantees. The Coalition believes that the modification to the contract by the task order is improper since the services to be provided under the task order are outside the scope of the request for proposals on which the contract is based. Furthermore, the Coalition contends that the contractor's additional responsibilities under the contract as modified place the contractor in an organizational conflict of interest with respect to the contractor's duties under the original contract. We sustain the protest on the first basis; the second therefore is academic.

The contract, as originally awarded to Rodriguez, Roach, provided that the contractor would provide professional accounting/audit services on a task order basis, supportive of the OIG. The contract was for a 1-year period with an option for the government to extend the contract for 1 additional year. On July 23, 1984, task order No. 101 was added to the contract, pursuant to which Rodriguez, Roach discussed with representatives of the OIG and the Department of Labor's Employment and Training Administration (ETA) the latter's plans for providing technical assistance and training to Native American and farmworker grantees. On September 28, 1984, the OIG added modification No. 3 to task order No. 101 whereby Rodriguez, Roach would provide technical assistance and training to Native American grantees on financial management and management information systems. This technical assistance and training for approximately 194 Native American grantees would be in the form of training workshops and also on-site technical assistance and training to approximately 35 of the grantees. Task order No. 101 added a cost of approximately $433,000 to the prior total amount of the contract of about $990,000.

The Coalition objects to the modification of the contract by task order No. 101 to include the technical assistance and training services to grantees on the basis that such services are outside the scope of the request for proposals (RFP) on which the contract is based. The Coalition contends that every aspect of the RFP for the contract created the impression that the OIG was procuring audit services, not technical assistance and training services, and that the procurement of specialized technical assistance and training services through the modification improperly suppressed competition.

We generally do not review protests concerning contract modifications because they involve contract administration which is primarily the responsibility of the contracting agency and beyond the scope of our bid protest function. *Sierra Pacific Airlines,* B-205439, July 19, 1982, 82-2 C.P.D. ¶54. We will consider such a protest, however, where it is alleged that the modification is outside the scope of the original procurement and should have been the subject of a new procurement. *Nucletronix, Inc.,* B-213559, July 23, 1984, 84-2 C.P.D. ¶82. In this regard, we have stated that if a contract as modified is materially different from the contract for which competition was held, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. *Department of the Interior—Request for an Advance Decision,* B-207389, June 15, 1982, 82-1 C.P.D. ¶589. Whether a modification is outside the scope of the original procurement is determined on the facts of each case, taking into account the circumstances attending the procurement that was conducted and whether the changes accomplished by the modification are of a nature which would be rea-

sonably anticipated under the changes clause in the original contract. *CPT Corp.*, B-211464, June 7, 1984, 84-1 C.P.D. ¶606.

The Department of Labor asserts that the on-site technical assistance and training and the workshops on financial management and management information systems (financial) are within the scope of the contract as shown by the following language contained in the RFP's Scope of Work provision:

> In addition, the contractor may be required to conduct surveys, *provide technical expertise,* prepare audit plans and reports, and perform such other work required by the OIG to carry out the Inspector General Act of 1978 including audit coordination, *training* and orientation. [Italic supplied.]

The quoted sentence is extracted from the following Scope of Work provision:

> The Contractor shall provide professional accounting/audit services, on a Task Order basis, supportive of the U.S. Department of Labor, Office of the Inspector General (OIG). The principal officers of the public accounting firm hereinafter referred to as "contractor" must be independent Certified Public Accountants. The contractor must also be certified or licensed by a regulatory authority of a State or other political sub-division of the United States and must meet applicable State Board of Accountancy requirements. The contractor may perform financial and compliance audits, economy and efficiency audits, program results audits, full scope audits and other types of audits required by the OIG. The contractor may perform pre-award surveys, pricing reviews, quality control evaluations, analyses, and follow-up required by the OIG. In addition, the contractor may be required to conduct surveys, provide technical expertise, prepare audit plans and reports, and perform such other work required by the OIG to carry out the responsibilities placed on the Inspector General by the Inspector General Act of 1978 including audit coordination, training, and orientation. The contractor may be required to provide services relating to any or all Department of Labor organizations, programs, activities and functions, including, but not limited to the Employment and Training Administration (ETA), Employment Standards Administration (ESA), Labor-Management Services Administration (LMSA), Mine Safety and Health Administration (MSHA), and Occupational Safety and Health Administration (OSHA). The contractor may also be required to provide services relating to other Federal Agencies especially in those instances in which the Department of Labor has been designated as the cognizant audit agency.

Following the Scope of Work was another provision, the Statement of Work, which began with this paragraph:

> A. Requirements
> The Contractor shall provide qualified personnel to perform the audits, surveys, reviews and other tasks needed by the Office of Inspector General, U.S. Department of Labor, to carry out the responsibilities placed on the Inspector General by the Inspector General Act of 1978.

The other paragraphs of the Statement of Work were:

B. Administrative Reporting Requirements
C. Reports
D. Submission of Reports
E. Workpapers
F. Entrance and Exit Conference
G. Auditee Notification
H. Audit Resolution

As these headings indicate, the Statement of Work focused upon the conduct of audits.

Those who responded to this RFP were to submit technical proposals. The instructions for the preparation of those proposals ad-

vised each offeror that by submitting a proposal the offeror was granting the Department of Labor authorization to check references of the offeror's principal clients for which "*financial and/or investigative audit services*" had been provided in the last two years. (Emphasis in original.) Each offeror was further advised that its proposal would be evaluated in accordance with the following criteria:

	Maximum points
Section A—General Qualifications	10
Section B—Client Experience	30
Section C—Personnel Qualifications and Experience	25
Section D—Project Management	20
Section E—Understanding Scope of Work	15
Total Possible	100

In satisfaction of the single most important criterion, "Client Experience, " the offeror was to "provide a list of its principal clients * * * for which *financial and/or investigative audit services* have been provided in the last two years." (Emphasis in original.) With regard to the second most important criterion, "Personnel Qualifications and Experience," offerors were to submit resumes of senior staff including information concerning "years of auditing experience," "years of supervisory auditing experience if appropriate," "prior experience * * * in performing pre-award surveys, pricing reviews, indirect cost audits, and *financial and investigative audits* of Federal, State, County or local governments and non-profit organization * * *" and "prior experience pertaining to commercial enterprises." (Emphasis in original.)

The "Project Management" evaluation criterion was described in the RFP as follows:

> The offeror must describe the management structure and supervision to be exercised over the work to be performed under the contract, including the proposed system for field audit review and office review of reports and workpapers. The offeror must identify the personnel that are to provide the management and supervision. In addition, the offeror must provide an estimate of each individual's time to be spent overall along with an estimate of the percent of time that each individual is to spend at the audit site managing/supervising the work to be performed under this contract (the individuals who are to conduct the quality control review of the workpapers and audit before submission of the reports to the Government must be specifically identified).

In addition, the final evaluation criterion, "Understanding Scope of Work," stated in pertinent part:

> The offeror shall provide a narrative to demonstrate the offeror's technical understanding of the work to be performed under this contract by describing the various

types of audits that may be performed under this contract. The offeror must also provide an analysis of the distinctions between each of the various types of audits and describe how statistical sampling may be used to accomplish the audits.

Finally, we note that the RFP advised that the successful offeror would be required to attend a postaward conference "held to review the terms of the contract; to discuss the Department's audit requirements, especially those requirements relating to the understanding of the work to be performed and the attainment of quality audits; and to provide an orientation session for the auditors of the successful firm."

As we have indicated above, in three places within the RFP the agency emphasized, through underscoring, the importance of an offeror's experience in financial and investigative audits. In contrast, the word "workshops" does not appear in the RFP's Instructions for Preparing Technical Proposals and Contract Schedule. "Training" appears only in the sixth sentence of the Scope of Work provision, quoted above. "Technical assistance" appears only in the following context in the Statement of Work:

H. *Audit Resolution*
The Contractor is required to provide technical assistance in resolving audit findings to the DOL/OIG and testify [at] ALJ hearings, in accordance with the terms of the task orders issued under this contract.

Offerors were not asked to describe, nor advised that they would be evaluated upon, their experience in on-site technical assistance and training or in conducting workshops.

Rodriguez, Roach's technical proposal, which subsequently was incorporated into the contract, was consistent with the RFP's emphasis upon experience in financial and investigative audits. Although there is mention in the firm's statement of its experience that it has trained accounting personnel and the resumes of several of its members indicate that they have instructed at a seminar, the firm placed no particular emphasis on this aspect of its experience. We note, too, that in responding to the last evaluation criterion—the firm's understanding of the work to be performed—Rodriguez, Roach primarily focused upon the conduct of audits and made no mention of providing on-site training and technical assistance or conducting workshops.

Task Order No. 101, the subject of this protest, consists of an initiating memorandum and several subsequent modifications, under which Rodriguez, Roach was paid almost $29,000:

—To travel to Washington, D.C. to conduct preliminary discussions with the Department of Labor: "the details [of the proposed on-site visits and workshops] will be discussed in this session and a modification to this Task Order developed based on the agreement reached to expand on the Statement of Work, Period of Performance, and Compensation, and to add sections for deliverables and progress reports."

—To attend an additional meeting with the Department of Labor to "review the firm's proposal on how it plans to conduct the train-

ing" and to attend two meetings with grantee representatives "to solicit their input and to evaluate the progress made in developing the training program."

—To expand the Statement of Work to include the following tasks:

A. Review ETA monitoring reports relating to program.

B. Review audit reports relating to program.

C. Identify grantees and issues related to grantees.

D. Discuss program weaknesses related to financial management areas with ETA and OIG officials.

E. Compile profile of grantees.

F. Compile data for meetings.

G. Compile data for workshops agenda.

H. Coordinate efforts with another contractor.

A subsequent modification to task order No. 101 amended the contract's Statement of Work, in detail, to provide for the conduct of up to four regional training workshops, and for on-site training and technical assistance for approximately 35 grantees (as designated by ETA), at a cost of approximately $405,000.

In contending that the work to be performed under task order No. 101 was within the scope of Rodriguez, Roach's contract and therefore need not have been separately competed, the agency notes that the RFP's Scope of Work provision states that the contractor may be required, among other things, to "provide technical expertise" and to "perform such other work required by the OIG to carry out the responsibilities placed on the Inspector General by [statute] including audit coordination, training, and orientation." These references, the agency argues, evidence its "intent to have the discretion and flexibility to provide training and technical assistance when deemed necessary." The contract modification is consistent with the statutory responsibilities of the OIG, the agency maintains, "to promote economy, efficiency and effectiveness in the administration of . . . programs and operations."

We agree with the protester that there is nothing in the RFP upon which Rodriguez, Roach's contract is based which would have indicated to potential offerors that the contractor could be called upon to provide more than $400,000 in on-site training and technical assistance to approximately 35 grantees and four regional workshops on financial management matters to Native American grantees receiving funds under the Job Training Partnership Act. This concept does not appear in the RFP even in the briefest outline. Although the agency contends that its intention to procure such services is evidenced by the RFP's statement that the contractor may be required to provide "technical expertise" and "training," this language appears in the context of a solicitation almost wholly devoted to audit services and, therefore, more reasonably would be read as referring to services to be provided to agency personnel rather than to grantees.

The language which the agency underscored in the RFP, the instructions to offerors for preparing proposals and the content and weighting of the factors used in evaluating proposals, all focused upon experience in conducting financial and investigative audits. Rodriguez, Roach's proposal was consistent with this emphasis and nowhere addressed the possibility of conducting the kind of training later added to the contract by modification. In this regard, we note that the contractor essentially developed its proposal for conducting the on-site training and technical assistance and the workshops through the performance of some $29,000 in preliminary tasks under task order No. 101. The magnitude of the preliminary work required of the contractor before it was in a position to begin this work, and the fact that the contractor's Statement of Work had to be amended by task order No. 101 to include this effort, suggest to us that it was not within the scope of the original contract. We note, too, that the funds for this effort were appropriated under the Job Training Partnership Act—not normally administered by the OIG—and this effort was added to the contract only in conjunction with the transfer of the necessary funds from the Employment and Training Administration. It is not clear to us how at the time of award the contract could have included within its scope an effort in support of a program administered by another entity within the Department of Labor using funds appropriated for that purpose.

Accordingly, we conclude that the modification made by task order No. 101 was outside the scope of the contact. The issue now, therefore becomes whether, in effect, a sole-source award to Rodriguez, Roach for the technical assistance and training services was appropriate.

A sole-source acquisition is authorized when the legitimate needs of the government so require, *e.g.*, when time is of the essence and only one known source can meet the agency's needs within the required timeframe. *W.H. Mullins,* B-207200, Feb. 16, 1983, 83-1 C.P.D. ¶ 158. It is well-established that administrative expediency or convenience by itself provides no basis for restricting competition. *W.H. Mullins,* B-207200, *supra*. The agency does not attempt to justify a sole-source award here and we see nothing in the record which would justify a sole-source procurement of the technical assistance and training services. We therefore sustain the protest on this issue.

The Coalition also contends that the technical assistance and training responsibilities involved in task order No. 101 place Rodriguez, Roach in an organizational conflict of interest with respect to its audit duties under the same contract. The Coalition asserts that such a conflict exists since the audits to be conducted by the contractor involve expressing opinions on the same financial management practices that the contractor is to assist the grantees/auditees in developing.

The agency has advised us that in order to avoid a conflict of interest situation it has established procedures to assure that the contractor that provides on-site training to a grantee would not in any instance later conduct an audit of that same entity. Since we sustain the Coalition's protest on the basis that task order No. 101 is outside the scope of the contract, we need not decide the conflict of interest issue.

Task order No. 101 was formally effected on September 28, 1984, notwithstanding the Coalition's protest. The Department of Labor has indicated that the workshops have been completed but that the contractor has not yet commenced providing the on-site technical assistance and training to designated grantees. Accordingly, we are recommending to the Secretary of Labor that the contract modification under task order No. 101 be terminated for the convenience of the government and that a new solicitation be issued for the procurement of the on-site technical assistance and training services.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganizational Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-215145]

Payments—Voluntary—No Basis for Valid Claim

Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expense to bank offices certified as "nonself-sustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are available only after certification. Bank, as voluntary creditor of the Government, is not authorized to recover cost of goods allegedly purchased on behalf of the Government where direct expenditure by the Navy would not have been authorized.

Matter of: Bank of Bethesda—Claim Against Navy for Reimbursement of Costs, April 17, 1985:

This responds to a request by the Bank of Bethesda that we review its claim for reimbursement of expenses incurred in purchasing and installing equipment, including a vault and an alarm system, for a new branch office at the Naval Medical Command in Bethesda, Maryland. The Bank's claim was originally filed with the Navy, which denied it based upon the Bank's status as a voluntary creditor of the Government. For the reasons discussed below, we agree that the Bank is not entitled to reimbursement.

BACKGROUND

According to its submission, the Bank of Bethesda was required by the Navy to move its branch office at the Naval Medical Command as part of an overall facilities relocation in 1983. Although original notification of the proposed move came as early as July 1979, the Bank apparently received no instructions to relocate until March of 1983. At that time, the Navy informed Bank officials that the branch office would be required to move to temporary space by April 11, 1983, and to a new permanent location by June 1983.

The Bank states that, because of the restrictive time requirements imposed upon it by the Navy, it was required to make immediate arrangements to order a vault, alarm system, and counter-equipment for the new facility. According to the Bank, its officers approached the Navy during March 1983, about the possibility of obtaining financial support from the Government to cover the costs of this equipment, particularly since the branch office was not making any significant profit at the time. The Bank indicates that Navy officials assured Bank officers that, if the branch was indeed unprofitable, the vault and related equipment could be paid for or provided by the Government. The Bank says that it immediately ordered the vault and alarm system in reliance on these representations. The details of how the Navy would contribute, however, were not made clear to the Bank (through provision of a copy of the applicable Navy regulation) until well after it had ordered the equipment in question.

By letter dated May 18, 1983, Commander Q.E. Crews of the Naval Medical Command provided the Bank with a copy of Secretary of the Navy Instruction (SECNAVINST) 5381.1G March 7, 1983, which governs the rights and requirements of banking institutions operating on Navy and Marine Corps installations. Section 8(c) of that instruction provides that any bank office on a Navy or Marine Corps installation, once certified as "nonself-sustaining," may be provided Government-owned property and services (including vaults and other necessary equipment) without charge. Commander Crews informed the Bank that, because the Naval Medical Command had received no evidence to the contrary, the Bank of Bethesda branch at the Command was presumed to be self-sustaining and therefore ineligible for the benefits accorded to nonself-sustaining bank offices. He also noted that a self-sustaining bank may use its own funds to modify or renovate on existing Government space.

On August 29, 1983, the Bank of Bethesda wrote to Commander Crews, requesting that the Naval Medical Command branch be certified as nonself-sustaining, based upon a review of the branch's finances by the Bank's accountants. The Bank also requested that the Navy reimburse the Bank for vault and equipment costs incurred during the move in June. According to the Bank, the Navy

certified the branch's nonself-sustaining status on December 12, 1983, but denied the request for reimbursement on the grounds that (1) the equipment was ordered before the branch was certified, and (2) the Bank failed to follow competitive bidding requirements. The Bank responded on December 21, 1983, with a request that the specific requirements of the applicable regulation be waived so that reimbursement might be granted. The Navy, on March 12, 1984, again declined to reimburse the Bank, this time on the basis of a legal opinion of the Office of Counsel for the Navy Comptroller, stating that the regulation in question could not be waived by the Navy and that, even if it could, the claim could not be paid under the so-called "voluntary creditor rule." The Bank of Bethesda has appealed the question to this Office.

DISCUSSION

The applicable Navy regulation, SECNAVINST 5381.1G, March 7, 1983, delineates two separate categories of banking offices on Navy or Marine Corps installations: self-sustaining and nonself-sustaining. The distinction is significant, as bank offices falling under the latter classification are eligible for such benefits as free rent and utilities. All offices are considered to be self-sustaining—

> * * * until the banking institution provides NCD4 [Office of the Navy Comptroller, Banking and Contract Financing Director], through the installation commander, profit-center financial statements (certified by the Bank's certified public accountant) indicating that the profitability of that office has fallen below seven (7) percent of gross expenses incurred for four (4) consecutive calendar quarters. Free rent and utilities may then be authorized by NCD4. At this time the banking office is categorized as a nonself-sustaining office. SECNAVINST 5381.1G § 8(b)(1).

Once categorized as nonself-sustaining, the banking office is to be furnished "space in government-owned buildings" under a 5-year no-cost license, subject to cancellation upon a change in the status of the banking office. The regulation further states that:

> Adequate space shall be made available [to nonself-sustaining bank offices]—including steel bars; grillwork; security doors; a vault, safes, or both; burglar alarm system; other security features normally used by banking institutions; construction of counters and teller cages; and other necessary modifications and alterations in existing buildings. *Id.* § 8(c)(3).

The Bank of Bethesda's original request for reimbursement was based upon a construction of SECNAVINST 5381.1G that would have permitted the benefits conveyed therein to be provided on a retroactive basis, that is, for the period prior to actual certification of nonself-sustaining status by the Navy. We agree, however, with the Navy that the regulation in question is, by its own terms, applicable on a prospective basis only. Entitlement to the benefits provided under the regulation is not based upon achievement of the nonself-sustaining status described in the regulation, but rather upon recognition of that status through certification by the Navy. As the regulation states, "[f]ree rent and utilities *may then* [i.e. after certification] be authorized" by the Navy. SECNAVINST

5381.1G § 8(b)(1) [Italic supplied]. The language of the regulation is clear on its face, and provides no authority to award benefits for periods prior to certification by the Navy. There is no basis under the authorizing regulation for payment under the Bank's claim.

Once it became apparent that the Navy would not apply the regulation on a retroactive basis, the Bank of Bethesda sought a "waiver" based upon the equities of the circumstances involved, in particular the Navy's pressure on the Bank to move rapidly, together with its assurances as to the availability of reimbursement. As indicated previously, the Navy denied the Bank's "waiver" request on grounds that it had no authority to waive a DOD-wide policy. The Navy's ultimate disposition of the claim, however was on the basis that the Bank acted as a "voluntary creditor"—i.e. one who pays what is perceived to be an obligation of the Government to a third party, with the belief that his actions would thereby create a valid claim in his favor. A voluntary creditor, as a general rule, is not entitled to reimbursement except when public necessity can be established. 62 Comp. Gen. 419, 424 (1983).

The voluntary creditor rule is related to the Antideficiency Act's prohibition against the acceptance by the Government of voluntary services. *See* 31 U.S.C. § 1342 (1982). Its underlying rationale is that, where a valid obligation of the Government exists, specific procedures and mechanisms exist to see that that obligation is fulfilled; to permit a volunteer to intervene in the process would interfere with the Government's interest in seeing that its procedures are followed. *See* 62 Comp. Gen. 419 (1983), for a thorough review of the origins and applications of the voluntary creditor rule.

The voluntary creditor rule is not an absolute bar to recovery. Under certain exceptional circumstances, one who makes a payment on behalf of the Government may recover the amount paid. In 62 Comp. Gen. 419, *supra,* we delineated guidelines for determining when the rule would or would not be applied. We stated that, as a preliminary matter, there are three types of cases in which we will continue to apply the rule strictly. They are:

—Cases in which the underlying expenditure is unauthorized;

—Cases in which the claimant requests reimbursement for purchasing an item to be used primarily for his or her own use, where the item is authorized—but not required—to be furnished at Government expense; and

—Cases involving claims not involving the procurement of goods or services. 62 Comp. Gen. at 423.

If a claim by a voluntary creditor does not fall into any of these categories, it may be considered for payment, although certain other stringent requirements (particular a showing of public necessity) must also be met. *Id.* at 424.

In the present case, we find it unnecessary to proceed beyond the initial inquiry. As indicated above, we agree with the Navy's con-

clusion that SECNAVINST 5381.1G provided no legal authority to reimburse the Bank for expenses incurred prior to certification. Consequently, as the Navy would not have been authorized to purchase the equipment directly for the Bank, the voluntary actions of the Bank can have no legal effect. This case thus falls within the first of the three categories, outlined above, for which we have stated the voluntary creditor rule should be strictly applied.[1]

Because of our conclusion that the Bank's claims are barred under the voluntary creditor rule, it is unnecessary to address the *quantum meruit* or estoppel arguments at any length. We should point out, however, that while it is true that the Comptroller General may authorize payment on a *quantum meruit* basis to a person who has provided services to the Government, pursuant to the Comptroller General's claim settlement authority (31 U.S.C. § 3702), he too must first make the threshold determination that the procurement would have been authorized at the time it was made. As stated above, the procurement would not have been permissible when made even if the Bank had secured a written commitment to reimburse it for its purchases. *See* B-207557, July 11, 1983; B-212430, June 11, 1984. Moreover, a Government agency may not be estopped by unauthorized representations of its employees (even if such representations have actually been made), particularly when they purport to waive binding agency regulation. See *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947).

Finally, it is our view that any bank operating an office on a military installation is responsible for familiarizing itself with those regulations, issued by the military service, specifically governing the establishment, operation, and termination of such banking facilities. The regulation in question, SECNAVINST 5831.1G, is comprehensive in nature, and covers a wide range of requirements, from the types of banking services which are to be rendered to the use of promotional material by the Bank. The regulation's predecessor was in fact specifically incorporated by reference in the Bank of Bethesda's support agreement with the Navy dated August 30, 1982, and the Bank therefore had constructive notice of the regulation. We thus give little weight to the Bank's complaint that the Navy did not furnish it a copy of the regulations until after it had made the purchase for which it now seeks reimbursement. The Bank should have been familiar with the regulation, and had it been so, could not have claimed to rely on any Navy official's mistaken assertion of the availability, under the regulation, of reimbursement.

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[1] The present situation also appears comparable to those cases falling within the second category, as the items for which the Bank requests reimbursement are goods purchased primarily for its own use.

CONCLUSION

Based upon the foregoing, we affirm the Navy's conclusion that reimbursement of the purchase value of the vault and related equipment is not authorized.

[B-217519]

Officers and Employees—Transfers—Transportation for House Hunting—Disallowance

Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for several househunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a) (2) (1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law.

Matter of: Riva Fralick, *et al.*—Multiple Househunting Trips, April 18, 1985:

This decision is in response to a request by Mr. Don E. Hansen, Manager, Fiscal Standards Branch, Office of Accounting, Federal Aviation Administration (FAA), United States Department of Transportation, for a determination as to whether multiple househunting trips by employees and their spouses are reimbursable. For the reasons hereafter stated, only one round trip, not several trips, by the employee and spouse may be reimbursed. The claims of the employees for reimbursement of additional househunting trips are, therefore, denied.

The facts, briefly stated, are as follows. In January 1983, the employees of the Miami Airports District Office (ADO), FAA, were notified that they would be relocating to Orlando, Florida. In a telephone conference between the ADO employees and the Southern Region travel office concerning the 1982 changes to relocation allowances, the ADO staff was advised that the advance househunting trip by employee and spouse could be split into separate trips but that reimbursement of the costs would still be limited to one round trip.

Apparently the employees interpreted this advice to authorize multiple househunting trips by employee and spouse together, rather than a separate househunting trip by the employee and spouse traveling at different times. Consequently, five ADO employees and their spouses made multiple househunting trips and incurred costs for each trip. The five employees submitted travel vouchers claiming reimbursement of the costs of the multiple househunting trips made to the Orlando area. The FAA declined to pay for more than one househunting trip by an employee and spouse based upon the provisions of paragraph 2-4.1a, Federal Travel Regulations, FPMR 101-7 (Supp. 4, October 1, 1982) FTR *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1983), and our decision, 47

Comp. Gen. 189 (1967). In 47 Comp. Gen. 189, we held that house-hunting could not extend over several trips until the then-applicable maximum of 6 days' per diem reimbursement for employee and spouse was exhausted.

The employees believe they should be reimbursed for the costs of the multiple househunting trips for the following reasons:

1. Misinformation was given them by FAA travel office personnel.

2. Our decision in 47 Comp. Gen. 189 was decided prior to the 1982 changes to the FTR.

3. The FAA discouraged absences from the office for extended periods of time; therefore, multiple househunting trips made on weekends were advantageous to the government.

Section 5724a(a)(2) of title 5, United States Code, 1982, provides that the expenses incurred in seeking permanent residence quarters at a new official station may be allowed "only for one round trip" in connection with each change of station of the employee. The implementing regulation, paragraph 2-4.1a of the FTR, Supplement 4, effective October 1, 1982, provides that:

> Payment of travel and transportation expenses of the employee and spouse traveling together, or the employee *or* spouse traveling individually instead of travel by the other or together, for one round trip between the localities of the old and new duty stations for the purpose of seeking residence quarters, may be authorized when circumstances warrant. Separate round trips by the employee *and* spouse may be allowed provided the overall cost to the Government is limited to the cost of one round trip for the employee and spouse traveling together. (Emphasis in original.)

In our decision, 47 Comp. Gen 189, *supra,* we interpreted the statutory provision and the predecessor regulatory provision to mean that only one round trip, not several trips, is contemplated. While that decision was rendered prior to the 1982 changes to the FTR, the statutory provision has not changed and the above-quoted regulation still contemplates only one round trip of the employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. See 47 Fed. Reg. 44567 (1982), where the revised regulation was explained, in part, as follows:

> Paragraph 2-4.1a is revised to allow reimbursement for separate househunting trips for the employee and spouse provided the cost is limited to the cost of one round trip for employee and spouse traveling together (expenses of only one round trip are allowed by statute) * * *.

We therefore affirm our holding in 47 Comp. Gen. 189 in regard to this issue.

Although the ADO employees may have been misinformed as to the meaning of the 1982 changes to the FTR, it is a well-established rule that, in the absence of specific statutory authority, the United States is not liable for the erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. See 55 Comp. Gen. 747 (1975), and cases cited therein. The erroneous advice or authorization does not, in itself, create a

right to reimbursement where the expenses claimed are precluded by law. *Eugene B. Roche,* B-205041, May 28, 1982.

Finally, the fact that the ADO employees performed the multiple househunting trips on weekends so as to avoid extended periods of absence from the office, and such actions may have been advantageous to the government, does not establish a basis for derogation or waiver of the express provisions of the statute and regulations or create additional entitlement to reimbursement.

Accordingly, in a change of official station, reimbursement of travel and transportation expenses may be made for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. Therefore, the claims of the five employees for reimbursement of the expenses of additional househunting trips by an employee and spouse are denied.

[B-216845]

Bonds—Bid—Form Variance

Use of bid bond form other than required Standard Form 24 is not objectionable where intent of surety and principal to be bound and identity of United States as intended and true obligee is clearly shown by bond itself. Contrary interpretation of regulation by protester is inconsistent with underlying concept of responsiveness, rejected.

State Laws—Federal Programs, etc. Effect

Where applicable federal law exists, General Accounting Office will not look to state law to determine the validity of a bid bond submitted for a federal procurement.

Matter of: Nationwide Roofing and Sheet Metal, Inc., April 22, 1985:

Nationwide Roofing and Sheet Metal, Inc. (Nationwide), protests the termination for the convenience of the government of the contract awarded it under Wright-Patterson Air Force Base invitation for bids (IFB) No. F33601-84-B-9094 and the subsequent award of the contract to the low bidder, ABCO Roofing & Sheet Metal, Inc. (ABCO), whose bid had been originally found to be nonresponsive. Nationwide requests that the contract be reawarded to itself.

We deny the protest.

The contracting agency originally found the ABCO bid to be nonresponsive because ABCO submitted the required bid guarantee on United States Postal Service (USPS) Bid Bond Form 7324 rather than the General Services Administration (GSA) Standard Form 24 (SF-24) specified in the IFB. The USPS form stated that ABCO and its surety were liable to the "United States Postal Service" rather than to the "United States Government," as would have been the case had ABCO submitted the SF-24. The contracting agency subsequently reversed its opinion on the basis of our decisions B-170694, December 3, 1970, and B-178824, August 16, 1973, in which

our Office held, in factual situations similar to the one here, that the defect was not sufficient to render a bid nonresponsive.

The Nationwide protest is basically twofold. First, Nationwide contends that finding the ABCO bid to be responsive is inconsistent with the two cited decisions of our Office. In this regard, Nationwide points out that the regulation (paragraph 10-102.5 of the Armed Services Procurement Regulation) then in effect stated that "* * * noncompliance with a solicitation requirement that the bid be supported by a bid guarantee will require rejection of the bid * * *," whereas this procurement is governed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28-101.4 (1984), which states that "Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid. * * *" Nationwide asserts that the latter provision mandates bid rejection for failure to comply strictly with any solicitation requirement regarding bid guarantees. Thus Nationwide contends, the ABCO bid was nonresponsive because it was not submitted on the specified form. Second, Nationwide contends that the controlling law is that of the state in which contract formation occurred. The state law involved here, Nationwide asserts, requires finding the ABCO bid to be nonresponsive.

As a threshold matter, we do not agree with Nationwide's assertion that state law govern this matter. The general rule is that the validity and construction of contracts of the United States and their consequences on the rights and obligations of the parties present questions of federal law not controlled by the law of any state. *R.H. Pines Corp.*, 54 Comp. Gen. 527 (1974), 74-2 CPD ¶ 385, and cases cited therein. While we have looked to state law in our consideration of complaints involving procurements conducted by state and private grantees under federal grants, see, e.g., *Bradford National Corp.*, B-198117, Jan. 6, 1981, 81-1 CPD ¶ 5, in considering protests against direct federal procurements, such as this one, we view federal statutes, regulations, contract terms and decisions, including the decisions of this Office, as applicable federal law, and look to state law for guidance only in the absence of a source of federal law. See, e.g., *HLI Lordship Industries, Inc.*, B-197847, Aug. 4, 1981, 81-2 CPD ¶ 88. In our judgment, the FAR and our decisions provide the proper basis for consideration of this matter.

Contrary to Nationwide's view, we interpret the current language of the FAR pertaining to solicitation bond requirements as little more than a restatement of the predecessor requirement. The position which Nationwide advocates would lead to the rejection of legally binding—and therefore responsive—bonds solely for matters of form without regard to their legal sufficiency. In our opinion, this would be inconsistent with the underlying concept of responsiveness, *i.e.*, whether the bid is a binding offer to do or deliver the thing called for in accordance with the terms of the solicitation, see, e.g., *Astronautics Corporation of America*, B-216014, Dec. 13,

1984, 84-2 CPD 663; *Lamari Electric Co.*, B-216397, Dec. 21, 1984, 84-2 CPD ¶689, and must be rejected.

Moreover, we believe that the contracting agency's application of our decisions to this procurement was correct. In each of the two decisions on which the agency relied (see also *Perkin-Elmer*, 63 Comp. Gen. 529 (1984), 84-2 CPD ¶158), the bidder used a bid bond which listed a state rather than the United States as the obligee of the principal and surety. We held that while the bid bond did not list the United States as the obligee, it identified the correct principal, the correct location and type of work to be done, the correct invitation for bids, and was in all other respects identical to SF 24. Thus, since the intention of the surety and the principal to be bound by the bond and the identity of the United States as the intended and true obligee were clearly shown by the bond itself, we did not believe that the surety could successfully defend a suit by the United States on the bond. Consequently, we concluded that the bid bond was enforceable as submitted.

In this case, USPS bid bond form 7324 is the same as SF-24, with the exception of the name of the obligee. The bid bond submitted by ABCO on this form identified the correct principal, the correct location of and type of work to be done, and the correct IFB number of the contracting agency. We therefore believe that the surety would be bound by the bond and, consequently, that the ABCO bid was responsive.

Nationwide states that, should we rule against its request to be reawarded the contract, the procurement should be recompeted since the Nationwide contract was awarded during the 1984 fiscal year and no award in fiscal year 1985 could be made under the original solicitation to any party other than Nationwide without violating funding limitation statutes. The contracting agency has advised that under the terms of the invitation for bids, either fiscal year 1984 or fiscal year 1985 funds may be utilized. Nationwide does not contest this nor does it explain why a second award using fiscal year 1985 funds would, in view of the invitation provision, be improper.

Accordingly, the protest is denied.

[B-216950]

Officers and Employees—Transfers—Real Estate Expenses—Reimbursement

An employee was transferred back to a former duty station after a 12-year absence. He temporarily occupied a residence at that station which he had purchased 14 years before, but had rented out during most of that time. He then purchased another residence there and claims real estate expenses for this purchase. The agency disallowed his claim based on *Warren L. Shipp*, 59 Comp. Gen. 502 (1980), which held that, once an employee is officially notified of retransfer to a former duty station, reimbursement of real estate expenses is limited to those already incurred or which cannot be avoided. *Shipp* is hereby limited to situations where the employee is notified of retransfer to a former duty station before expiration of the time al-

lowed for reimbursement of real estate expenses incident to the original transfer. Since this time period had expired years before the retransfer in the present case, *Shipp* does not apply and the claim is allowed.

Matter of: Robert T. Celso—Real Estate Expenses—Return to Former Duty Station, April 22, 1985:

This decision is in response to a request from J.R. Goldston, Jr., Finance and Accounting Officer, Corpus Christi Army Depot, Department of the Army. It concerns the entitlement of a civilian employee to be reimbursed for real estate expenses incurred incident to a permanent change of station in June 1981. We hold that the employee may be reimbursed for the following reasons.

BACKGROUND

The employee, Mr. Robert T. Celso, was transferred by the Army to the Corpus Christi Army Depot, Corpus Christi, Texas. He reported for duty there on June 15, 1981. Incident to that transfer, he was authorized reimbursement of real estate expenses.

According to Mr. Celso, upon his arrival in Corpus Christi, he rented quarters for himself and his family, pending the purchase of a residence in the Corpus Christi area and the sale of his former residence at his old duty station. In July 1981, he was informed by the real estate broker handling the sale of his former residence that due to market conditions, there was virtually no chance that his residence could be sold before spring 1982.

Mr. Celso was not new to the Corpus Christi area. He had been stationed there previously and he owned a house in Corpus Christi which he had purchased in 1967 and had used then as his residence. However, he had not resided in that home since 1969, renting it out instead. Since the purchase of a new residence in Corpus Christi was dependent on the sale of his residence at his former duty station and since the tenant in the rental house vacated it during July 1981, Mr. Celso and his family moved into that house in July 1981, and remained there until September 1982. At that time, Mr. Celso obtained a second mortgage on the rental property and purchased another dwelling in Corpus Christi as his residence.

Mr. Celso filed a claim for $1,950.50, representing his expenses incident to the purchase of his new residence in Corpus Christi. Mr. Celso's claim was disallowed by the Army, based on our decision in *Warren L. Shipp,* 59 Comp. Gen. 502 (1980), in which we held that once an employee is notified of a transfer back to a former duty station, the Government's obligation to reimburse real estate expenses is limited to those already incurred or those which cannot be avoided.

DECISION

The statutory provisions governing reimbursement of residence transaction expenses of transferred employees are contained in 5

U.S.C. § 5724a (1982). The implementing regulations are contained in Chapter 2, Part 6 of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), and, to the extent applicable, restated in the September 1981 edition of the FTR.[1]

Pursuant to paragraph 2-6.1e of the FTR, prior to its amendment by Supplement 4, August 23, 1982, a transferred employee had a maximum of 2 years in which to buy or sell a residence. The 1982 amendment to FTR paragraph 2-6.1e extended the 2-year period for an additional year when necessary.

As noted, the agency referred to our decision in *Warren L. Shipp,* cited above, as the basis for disallowance. The *Shipp* case involved the transfer of an employee from one duty station to another and then a transfer back to the original duty station approximately 1 year later. We recognized in that case that the initial transfer created a right in the employee to sell his residence at his original duty station and to be reimbursed those expenses since the transfer was in the interest of the Government. The record in that case showed that Mr. Shipp did not enter into a contract to sell that residence until after he had received official notice of his transfer back to his original station. However, he succeeded in selling that residence prior to his actual return to his former duty station. He submitted a claim for and was reimbursed the expenses of that sale. Since he no longer owned a residence at his original duty station, upon his actual return to that location he purchased a new residence there and sought reimbursement for the purchase expenses.

Shipp was submitted to this Office by the employing agency because of its doubts about the propriety of reimbursing Mr. Shipp for the purchase of a home at his new duty station under those circumstances. Although we authorized reimbursement because our cases then permitted it, we also reexamined those cases and changed our views prospectively. We applied the rationale of mitigation of costs based upon our decisions involving canceled transfers. In those decisions we analogized a canceled transfer to a transfer to another duty station and an immediate retransfer to the old duty station, and held that an employee whose transfer was canceled must mitigate his costs and do all he can to limit the expenses he incurs. Thus, reimbursement was limited to those expenses that the employee was legally obligated to pay at the time he was notified of his transfer back to his former duty station.

While not expressly stated therein, our *Shipp* decision was based on the fact that the period between an employee's original transfer from a particular duty station and the later transfer back to that duty station was relatively brief. Therefore, it was reasonable to assume that upon transfer back, the property remained a suitable residence for the employee. This assumption clearly is not reasona-

[1] *Incorp. by ref.,* 41 C.F.R. § 101-7.003 (1984).

ble when there is an intervening period of many years, as in the present case. To apply *Shipp* in such circumstances would go beyond the rationale and intent of that decision. Accordingly, the *Shipp* doctrine must be limited by an objective standard that can be reasonably applied by the appropriate accountable officers.

As set out above, there is a maximum time within which a transferred employee must complete his transfer-related real estate transactions if he is claiming reimbursement. As expanded by Supplement 4 to the FTR (August 23, 1982), the maximum time available is now 3 years. This limitation provides the basis for an objective standard to use in determining the applicability of our holding in *Shipp*. If an employee is notified of his or her transfer back to a former duty station after the time has expired for completion of real estate transactions which qualify for reimbursement incident to the original transfer, then the rationale in *Shipp* is not applicable and the employee may be reimbursed for the purchase of a residence at what is both his former and his new duty station, even if he owns another house there.

Establishment of a limited time for the application of the holding in *Shipp*, provides both employees and employing agencies with an objective standard governing reimbursement of real estate expenses when employees are returned to their former duty stations. This standard will enable agencies to practice prudent travel management policies, while allowing employees to return to former duty stations without undue burdens being placed on their real estate transactions, when such transfers to former duty stations are in the Government's interest.

Thus, since Mr. Celso was transferred back to Corpus Christi long after the time limit had expired for any reimbursement of real estate expenses connected with his transfer away from Corpus Christi, he may be reimbursed for the expenses of purchasing a home there in September 1982. In that regard, the record shows that Mr. Celso reported for duty in June 1981. In April 1982 he requested and was granted a 1-year extension of the time limit contained in former FTR, paragraph 2-6.1e. In September 1982 he purchased his new residence.

Accordingly, since the extension of time was approved and he purchased a new residence within the then maximum 2-year period, Mr. Celso's expenses for its purchase in September 1982 are properly reimbursable, subject, of course, to administrative determination as to the propriety of the expense items claimed and the amounts involved.

[B-217174]

Contracts—Negotiation—Sole-Source Basis—Procedures—*Commerce Business Daily* Notice Procedures

A protest is sustained where the agency rejected a potential source of supply by making award on a sole-source basis prior to the expiration of the mandatory 30-day Commerce Business Daily (CBD) publication requirement outlined in the Small Business Act, as amended by Pub. L. 98-72, and where the protester's offered products comply with the requirements of the procurement as outlined in the CBD synopsis.

Matter of: Harris Corporation, April 22, 1985:

Harris Corporation (Harris) protests the sole-source award of delivery order (DO) DABT-84-F-7882, to IBM Corporation (IBM), by the United States Army, Fort Dix, New Jersey (Army), for the purchase and installation of video display terminals, matrix printers, remote controllers and other related automatic data processing equipment (ADPE). Harris contends that the Army improperly failed to consider its equipment because the Army made award in less than the required 30-day period after synopsizing the procurement.

We sustain the protest.

On August 24, 1984, the contracting officer forwarded to the Commerce Business Daily (CBD) the synopsis of the procurement. CBD did not publish the notice, however, until September 12, 1984. On September 21, 1984, the Army issued a delivery order to IBM. Four days later, on September 25, 1984, the Army received Harris' response to the CBD notice.

By letter dated October 9, 1984, the Army notified Harris that award was made to IBM without considering Harris' offer because the offer was not received by September 12, 1984. That date was calculated based on the Army's belief that award could be made after the 15th day after the date in which the synopsis could be presumed to be published in the CBD. The Army relied on Department of Defense Federal Acquisition Regulation Supplement (DOD FAR Supp.) § 5.203, 48 C.F.R. § 205.203 (1984), which provides that when a synopsis is required, the contracting officer shall not issue a competitive solicitation until at least 15 days after the date of publication of a proper notice in the CBD and that the contracting officer may presume that notice has been published 5 days following transmittal to the CBD.

Pub. L. 98-72, 97 Stat. 403 (1983), which amends section 8(e) of the Small Business Act, requires all government agencies not to foreclose competition until at least 30 days (rather than 15 days as relied on by the Army) have elapsed from the date of publication of a proper CBD notice of intent to place an order under a basic ordering agreement or similar arrangement. *See* 15 U.S.C. § 637 (e)(2)(B) (Supp. I 1983); *Math Box Inc.*, B-217098, Mar. 28, 1985, 85-1 C.P.D. ¶ ——. We have held that GSA ADPE schedule contracts,

such as the one involved here, are in the nature of basic ordering agreements, do not involve the issuance of a competitive solicitation, and therefore the 30-day CBD notice requirement, stated above, applies. *Math Box Inc.*, B-217098, *supra.* Therefore, the Army should not have placed an order until after September 28, 1984, 30 days after it could presume that the CBD published its notice. Harris' September 25, 1984, response to the CBD notice was timely received and should have been considered.

In its report on the protest, the Army contends that even if it failed to comply with the 30-day CBD notice requirement, this error did not prejudice Harris because Harris' offer, which was eventually evaluated by the Army, did not evidence compliance with all of the technical requirements established in the synopsis.

The Army's evaluation, dated November 13, 1984, states that the terminals and printers offered do meet all of the technical requirements. The evaluation, however, states that insufficient information concerning the 9116 communications controller is provided. Specifically, the Army argues that the controller is required to have the ability to interface with an IBM 4331 mainframe using Synchronous Data Link Control (SDLC) communications protocol while the information provided specifies interface with an IBM mainframe using Systems Network Architecture (SNA).

Harris contends that the Army has attempted to coverup its initial error by ruling out Harris' controller in the evaluation. Harris argues that its statement of interest letter shows that the 9116 model offered is a substitute for the IBM 3274 which was ultimately purchased. Harris contends that since its brochure stated that the 9116 had IBM SNA compatibility it automatically implied compatibility with IBM SDLC communications protocol. Harris states that SNA and SDLC are industry standards and their relationship is well known. Harris has submitted a brochure for the 9116 with its protest which lists as a standard feature, "SNA/SDLC communication protocol." The Army argues, however, that the information in the proposal was inadequate to show that the Harris 9116 would function using SDLC communications protocol. The Army, citing *Informatics, Inc.*, B-194926, July 2, 1980, 80-2 C.P.D. ¶ 8, states that technical evaluations are made on the basis of information submitted with a proposal and the offeror cannot instead expect it to be evaluated on the basis of industry knowledge.

While we agree that generally proposals received in response to requests for proposals are evaluated on the basis of information submitted rather than on industry knowledge, we believe that the products offered by Harris did not receive fair consideration here. First, the evaluation document clearly states that the "terminals and printers offered *do* meet all required technical" requirements. Second, while the CBD announcement stated that all items must be compatible with IBM 4331, it did not state that offerors must show that their controllers had SDLC compatibility. We believe that the

Army could have found that Harris' 9116 controller had SDLC compatibility by the fact that SNA compatibility was stated, or if any doubt existed, it could have easily resolved the matter by contacting Harris. This is particularly so because Harris' letter of interest indicated that its 9116 is a substitute for the IBM 3274 which was purchased. In our view, it was the Army's duty to make its essential requirements clear to potential offerors and allow them an opportunity to demonstrate their ability to comply before rejecting them as potential sources of supply. See *Masstor Systems Corporation,* 64 Comp. Gen. 118 (1984), 84-2 C.P.D. ¶ 598. We conclude that the Army lacked a reasonable basis for rejecting Harris as a source of supply, and that Harris was prejudiced by the premature award to IBM.

The protest is sustained.

The Army advises us that all of the ordered equipment, except the terminals and printers, have been delivered, installed, and paid for and that the terminals and printers have been delivered. Therefore, it is impracticable to recommend termination of the contract. By letter of today, however, we are recommending to the Secretary of the Army that steps be taken to prevent the recurrence of the procurement deficiencies found in this case.

[B-218055]

Contracts—Protests—Interested Party Requirement—Nonresponsive Bidder

The fact that the protester may have submitted a nonresponsive bid does not prevent the protester from being considered an interested party where the protester seeks resolicitation of a procurement allegedly conducted on the basis of defective specifications and would have the opportunity to rebid if the requirement is resolicited.

Contracts—Awards—Erroneous—Remedy—Termination Not Recommended—Criteria Applied

A contract awarded on the basis of defective specifications should not be terminated and the requirement resolicited where no competitive prejudice to any bidder is apparent and the government met its minimum needs at reasonable prices after adequate competition.

Matter of: Big State Enterprises, April 22, 1985:

Big State Enterprises protests the award of a contract to JLS Rentals by the Department of the Air Force under invitation for bids (IFB) No. F41685-84-B-0023 for the rental and maintenance of clothes washers and dryers. Big State contends that the washers offered by JLS and accepted by the agency do not comply with the specifications, and that the specifications are impossible to meet and did not reflect the agency's actual need. The protester asserts that the contract awarded to JLS should therefore be terminated for the convenience of the government and the requirement resolicited.

We deny the protest.

The agency contends that Big State's bid was nonresponsive for failure to acknowledge receipt of a material solicitation amendment, and that Big State therefore is not an interested party to have its protest reviewed by our Office. We disagree. Assuming that the bid was nonresponsive and not eligible for award under the solicitation, that does not automatically preclude Big State from being considered an interested party. Where, as here, the protester seeks resolicitation of a procurement allegedly conducted on the basis of defective specifications, it is an interested party since if it prevails, it would have an opportunity to bid under the resolicitation. See *Olympia USA, Inc.*, B-216509, Nov. 8, 1984, 84-2 CPD ¶ 513. Therefore, we will review the merits of Big State's protest.

The IFB specifications required heavy-duty, commercial-type washers with an 18 pound tub capacity, and specifically stated that household type and coin-operated machines would not be acceptable. The washers also had to have built-in, self-cleaning lint filters. Of the four bids received, that of Big State, the incumbent contractor, was second low and that of JLS was the lowest. Neither took any exceptions to the specifications.

After bid opening, the agency, Big State, and JLS for the first time became aware of the fact that the specification requirement for an 18 pound tub capacity was defective because the capacity of washers has been rated by the manufacturers since 1977 in terms of cubic feet, rather than in pounds. This resulted from a rule issued by the Federal Energy Administration that prescribed test procedures to be used by manufacturers in determining the energy efficiency of their washers.[1] Nevertheless, the agency determined that it would be less prejudicial to the bidders whose prices had been exposed to proceed with the award than it would be to resolicit. The award was made to JLS on January 17 and Big State's protest was received by our Office on January 24.

In addition, after the award, the agency discovered that the washers furnished by JLS did not have the specified self-cleaning filters. The agency found that the lint filters were nonessential since even the best are only 15 percent effective and washing can reasonably be done without them. It concluded that contract termination was not necessary because the contract was not awarded with the intent to modify it, and the washers meet its minimum needs.

The Federal Acquisition Regulation (FAR) provides that the preservation of the integrity of the competitive bidding system dictates that after bid opening, award must be made to the responsible bidder with the lowest, responsive bid, unless there is a compelling reason for not doing so. 48 C.F.R. § 14.404-1(a)(1) (1984). Inadequate

[1] Those requirements are now found in the regulations of the Department of Energy. 10 CFR Part 430 (1984).

or ambiguous specifications is one of the bases on which a contracting officer may determine to cancel a solicitation after bid opening. 48 C.F.R. § 14.404-1(c). The use of inadequate specifications, however, does not itself provide a compelling reason to cancel a solicitation and resolicit. If acceptance of a bid will satisfy the government's needs without prejudice to any bidder, award should be made notwithstanding the deficiency. *Dunlin Corp.*, B-207964, Jan. 4, 1983, 83-1 CPD ¶ 7. The contracting officer's decision as to whether the circumstances warrant cancellation will not be disturbed by our Office unless that decision was arbitrary, capricious or not supported by substantial evidence. *Chamberlain Mfg. Corp.*, B-209187, Mar. 10, 1983, 83-1 CPD ¶ 243.

On the basis of the facts presented here, we have no reason to question the reasonableness of the agency's decision to proceed with the award after discovering the deficiency in the specification requirement for an 18 pound tub capacity. Although Big State asserts that it was prejudiced by this decision because it could have offered cheaper machines at a lower price if it did not have to meet the 18 pound capacity requirement, we are not persuaded by this contention. Big State concedes that washers with capacity expressed in pounds are no longer available and that there is no meaningful way that capacity expressed in cubic feet can be converted to its equivalent in pounds. Thus, Big State's bid could not have been based on supplying washers with tub capacities of 18 pounds, and there is no basis for concluding that Big State was uniquely prejudiced by the solicitation defect here. Further, the agency obtained adequate competition, reasonable prices and washers which meet its minimum needs. Accordingly, we believe that in spite of the specification deficiency, the determination to make an award was reasonable and less of a compromise to the competitive bidding system than resolicitation after exposure of all prices would have been. See *GAF Corp. et al.*, 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68.

With respect to Big State's contention that the lack of self-cleaning lint filters on the JLS machines requires resolicitation, we note that the fact that JLSA' washers did not have self-cleaning filters was not known to the agency until after the contract award. Therefore, the decision as to whether the contract should be modified rather than terminated involves a matter of contract administration. We do not review contract administration matters except in limited circumstances not present here. *See BVI, Engravers, Inc.*, B-208830, Oct. 20, 1982, 82-2 CPD ¶ 351.

The protest is denied.

[B-216958]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Adverse Agency Action Effect

Protest that agency's specifications for equipment are unduly restrictive is untimely under General Accounting Office's (GAO) Bid Protest Procedures where the protester filed a timely protest with the contracting agency before responses to the specifications were due, but waited almost 4 months to file with GAO after the agency received responses from vendors without taking the action requested in the protest to the agency.

Equipment—Automatic Data Processing Systems—Acquisition, etc.—Evaluation—Reasonableness

In reviewing an agency's evaluation of written responses to a Commerce Business Daily notice of intent to place an order against a particular vendor's nonmandatory automated data processing equipment schedule contract, GAO's role is to ascertain whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking a competitive solicitation, if possible, of the agency's requirements.

Matter of: Systems Associates, Inc., April 24, 1985:

Systems Associates, Inc., protests the Department of Health and Human Services' (HHS) purchase under NBI, Inc.'s nonmandatory automated data processing (ADP) schedule contract of equipment, plus installation, for a shared resource, integrated word processing system for the Social Security Administration's claims modernization project. Systems Associates complains that HHS's purchase requirements were unduly restrictive because they specified NBI's equipment. Systems Associates contends that it has equipment which meets the agency minimum needs at a price lower than NBI's.

We dismiss the protest in part and deny it in part.

HHS had published in the Commerce Business Daily (CBD) notice of the agency's intent to place an order against an ADP schedule contract. The notice identified the requirement as an NBI system 64, or equivalent, and listed the various items of equipment for the system. Interested schedule and nonschedule vendors were invited to request a copy of the request for information (RFI) listing the detailed functional requirement and desirable features and were advised that any responses would be used for assessing capable sources.

Sixteen companies, including Systems Associates, asked for copies of the RFI. Immediately after receiving the RFI, Systems Associates filed a protest with HHS alleging that certain technical specifications were overly restrictive and that the requirement for NBI or equivalent equipment constituted an unjustified sole-source procurement. At the RFI's listed closing date, a total of five companies, including Systems Associates and NBI, responded with technical information and equipment prices. Systems Associates, shortly after submitting its information and prices, again protested the RFI's equipment specifications to the agency.

After evaluating the responses of the five companies, HHS determined that only NBI's equipment met its needs. With regard to Systems Associates, HHS found that the company did not provide for (1) a required equipment cabling length of 5,000 feet; (2) "a floppy diskette drive with at least 1 [megabyte] of storage on the [central processing unit]," for individual document archiving and storage purposes; (3) a stand-alone workstation with a 1-megabyte disk drive; and (4) a stand-alone/shared resource workstation with 1-megabyte disk drives. A delivery order for the equipment was issued to NBI at a price of $142,938.

Following notification of the award, Systems Associates protested to HHS that its equipment met the government's needs. Systems Associates filed a protest with our Office after HHS denied the protest at that level.

Systems Associates contends that the RFI's specifications were unduly restrictive of competition, in that they essentially describe NBI's equipment. The protester asserts that it has copies of two other solicitations under which NBI competed that described the requirements the same as does the RFI—according to Systems Associates, NBI gave the contracting activities sample specifications as guides for writing equipment requirements and "the wording between these three specifications leave little doubt that they were originated from the same source document."

Systems Associates also objects to HHS's finding that the company's equipment did not meet the government's minimum needs. Specifically, Systems Associates alleges that the system it described to HHS showed a cable length that could support a computer terminal at a distance of 6,000 feet, exceeding HHS's requirement of 5,000 feet. With regard to the need to provide 1-megabyte of floppy diskette storage with the central processing unit, Systems Associates argues that neither it nor NBI actually is capable of providing 1-megabyte diskette storage, since the operating software stored on a 1-megabyte diskette uses part of the storage capability, but both companies are capable of storing documents with 350 or more pages; Systems Associates suggests that HHS's real need is for the capability to store "archive documents" up to 350 pages in length. In addition, Systems Associates states that the system it described to HHS has a 17-megabyte cassette drive on the central processing unit, and the 17-megabyte cassette is "more practical" than a floppy diskette drive in dealing with a large storage requirement.

HHS argues that Systems Associates' protest with regard to the restrictiveness of the agency's equipment requirements is untimely. Since Systems Associates initially objected to HHS with respect to the specifications, the agency takes the position that any subsequent protest had to be filed with our Office within 10 working days of initial adverse agency action. According to HHS, initial adverse action occurred when time specified in the RFI for receipt of responses passed without amendment of the RFI. HHS asserts that

Systems Associates therefore should have filed a protest with us within 10 working days after the RFI closed.

As to the equipment offered by Systems Associates, HHS states that it was essential that an offeror's equipment conform in all material aspects to the RFI's requirements. Since Systems Associates' equipment was found to be noncompliant in four material areas, HHS argues that the company's equipment was properly determined to be unacceptable.

We dismiss as untimely the protest that the specifications were unduly restrictive, for the reason proffered by HHS. Our Bid Protest Procedures require that where a timely protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of the contracting agency's initial adverse action on the protest. 4 CFR §21.2(a) (1984). Here, System Associates properly protested against the specifications to HHS before responses to the RFI were due. 4 CFR § 21.2(b)(1). The time for filing with our Office, however, started when HHS received the responses without taking the action requested by Systems Associates; we consistently have held that type of inaction by an agency to be initial adverse action within the meaning of our Procedures. See *Castle/Division of Sybron Corp.*, B-216551, Oct. 15, 1984, 84-2 C.P.D. ¶ 407. Since Systems Associates did not protest to our Office within the required time—the firm waited almost 4 months to file—we dismiss the protest on this issue as untimely.

System Associates' complaint that HHS improperly rejected the firm's response and accepted NBI's is timely, since the firm protested that matter to HHS within 10 working days after it learned of these actions, *see* 4 CFR § 21.2(b)(2), and appealed to our Office within 10 working days after HHS's adverse response. Nevertheless, we find no legal merit to System Associates' position.

Initially, we point out that nonmandatory ADP schedule contracts are not awarded on a competitive basis. The reason for testing the ADP market through a CBD notice and evaluation of responses in a situation like this one is to determine whether there are vendors without schedule contracts who are interested in competing for the requirements at prices that would make competition practicable. *See CMI Corp.*, B-210154, Sept. 23, 1983, 83-2 C.P.D. ¶ 364. In reviewing an agency's evaluation of responses to its announced intention to place an order against a nonmandatory ADP schedule, our concern is whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking the maximum practicable competition. *Id.*

In our view, there was a reasonable basis for HHS's evaluation of the protester's response to the RFI. The RFI set forth in detail the mandatory functional requirements for the word processing system intended to be purchased. The RFI also cautioned that the written response of any source had to show that its equipment met all the mandatory functional requirements. Systems Associates competed

against the specification for a 1-megabyte storage capability, yet admits that it is not capable of meeting that requirement. Further, Systems Associates has offered nothing to refute HHS's finding that its written response made no provision for either stand-alone workstations, or a stand-alone/shared resource workstation with 1-megabyte disk drives.

The protester has the burden of proving its case, that is, that its ADP system is qualitatively equivalent to the schedule vendor's equipment. *NCR Corp.*, B-215048, Dec. 26, 1984, 84-2 C.P.D. ¶ 698. Here, System Associates simply has not shown that HHS's evaluation of the firm's response to the RFI was unreasonable. The protest on this issue therefore is denied.

The protest is dismissed in part and denied in part.

[B-218178]

General Accounting Office—Jurisdiction—Contracts—District of Columbia Procurements

Competition in Contracting Act of 1964, Pub. L. No. 98-369, sec. 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property on services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protest concerning solicitation issued by the District and which is filed after the Jan. 15, 1985, effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed.

Matter of: P.O.M. Inc., April 24, 1985:

P.O.M. Inc. (P.O.M.) protests any award to another firm under invitation for bids No. 0066-11-35-0-5-EJ, issued by the District of Columbia (District), Department of Public Works, for the supply of parking meters. P.O.M. alleges that the District unfairly evaluated the offered parking meters, testing for characteristics not provided for in the specifications, and maintains that it submitted the low, responsive bid. We dismiss the protest.

The Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. §§ 3551-3556), provides for the consideration of protests filed with the General Accounting Office by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. By definition, the government of the District of Columbia is not a "federal agency." 40 U.S.C. § 472 (1982). With respect to other, nonstatutory protests, such as those filed in regards to procurements by the District, section 21.11 of our new Bid Protest Regulations, 4 C.F.R. § 21.11 (1985), provides that our Office may consider the protests "if the agency involved has agreed in writing to have its protests decided by the General Accounting Office."

The District has recently informed us in writing of its decision that we no longer consider protests filed with our Office concerning procurements by the District.

Since this protest was filed after the January 15, 1985, effective date of the provisions in the Competition in Contracting Act pertaining to bid protests submitted to the Comptroller General, we will not consider it.

The protest is dismissed.

[B-216971]

Travel Expenses—Military Personnel—Temporary Duty—Authorization Requirement

Travel allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service over which they have no control. Expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are thus nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken. Hence, two Navy officers who traveled to their home towns to perform temporary recruiting duty under orders clearly stating that the duty was permissive rather than directive in nature and that no travel allowances were authorized for such duty are not entitled to reimbursement of the travel expenses involved.

Orders—Permissive *v.* Mandatory—Travel

There is nothing inherently objectionableabout directive military and naval travel orders which contain separate provisions for the performance of permissive temporary duty for which travel allowances will not be paid. The Bureau of Naval Personnel therefore acted properly in issuing directive change-of-station orders to two Navy officers with provisions authorizing them while en route to undertake permissive temporary recruiting duty assignments in their home towns. The officers' travel allowance entitlements are for computation on the basis of constructive travel performed over a direct route in compliance with the directive change-of-station provisions of the orders.

Matters of: Ensign Cheryl R. Dallman, USNR, and Ensign Linda J. Brake, USNR, April 26, 1985:

The issue presented here is whether two Navy ensigns are entitled to travel allowances based on their performance of temporary recruiting duty in their home towns under permissive orders.[1] We conclude that they are not entitled to the travel allowances at issue.

Facts

Ensign Cheryl R. Dallman, USNR, was commissioned as an officer of the Navy in November 1983 upon her graduation from Offi-

[1] This action is in response to a request from the Associate Disbursing Officer, Navy Personnel Support Activity, Corpus Christi, Texas, for an advance decision concerning the payments to be made on travel vouchers submitted by Ensign Cheryl R. Dallman, USNR, 263-51-2395, and Ensign Linda J. Brake, USNR, 495-66-9677. The request was forwarded here by the Per Diem, Travel and Transportation Allowance Committee after being assigned control number 84-20.

cer Candidate School at the Naval Education Training Center, Newport, Rhode Island. The Bureau of Naval Personnel issued orders directing her to proceed to Naval Air Station, Chase Field, Beeville, Texas, for permanent duty. The orders stated that in addition to allowable travel time she could take up to 15 days of advance leave en route. The orders also contained this provision:

* * * YOU ARE AUTHORIZED TO REPORT CO NRD [2] MONTGOMERY ALA TEMPORARY DUTY ABOUT ONE MONTH WITH THE UNDERSTANDING THAT YOU WILL NOT BE ENTITLED TO REIMBURSEMENT FOR ANY TRAVEL TRANSPORTATION PER DIEM OR MISCELLANEOUS EXPENSES IN EXCESS OF THAT ALLOWED BY THE ABOVE ORDERS. IN CASE YOU DO NOT DESIRE TO PERSONALLY BEAR THESE EXPENSES YOU MAY CHOOSE NOT TO EXECUTE THIS AUTHORIZATION AND WILL CONSIDER IT CANCELLED.

In compliance with these orders, Ensign Dallman departed Newport, Rhode Island, on November 18, 1983, and she reported to her permanent duty station at Beeville, Texas, on January 3, 1984. She spent the period from November 21 to December 30, 1983, at home in Pensacola, Florida, as a participant in the Navy's Hometown Area Recruiting Program under the quoted provision of her orders which permitted temporary duty en route for that purpose. The other days spent en route apparently involved necessary automobile travel time, so that she was not charged with having taken any leave.

The other Navy officer concerned in this matter, Ensign Linda J. Brake, USNR, was graduated from Officers Candidate School at Newport, Rhode Island, on February 17, 1984. In compliance with her orders from the Bureau of Naval Personnel, she reported to Naval Air Station, Chase Field in Beeville, Texas, for permanent duty on March 16, 1984. While en route she spent 3 weeks at Springfield, Missouri, performing temporary recruiting duty in her home town under a permissive authorization in her orders similar to the one contained in Ensign Dallman's orders.

Issue

To settle their claims for travel allowances, Ensign Dallman and Ensign Brake filed vouchers containing descriptions of their itineraries with their disbursing officer after their arrival in Texas. The issue presented is whether they should be paid travel allowances based on constructive change-of-station travel by automobile over a direct route between Newport, Rhode Island, and Beeville, Texas, or whether instead they should be paid enhanced travel allowances based on their actual intineraries involving additional automobile travel and the temporary duty at their home towns.

Navy disbursing officials essentially indicate that this issue has arisen because of their doubts concerning the validity of the provisions contained in the two ensigns' orders authorizing the perform-

[2] Meaning "Commanding Officer, Navy Recruiting District."

ance of temporary recruiting duty without entitlement to travel allowances. They note that the Joint Travel Regulations contain no provisions specifically treating the subject of directive change-of-station orders with permissive temporary duty en route. They also note that in two previous decisions involving Army members on temporary recruiting duty, we held that provisions in the members' orders purporting to limit their travel allowance entitlements were invalid.[3] The disbursing officials therefore question whether it was proper for the Bureau of Naval Personnel to authorize the two ensigns to perform temporary recruiting duty without travel allowances while en route on a directed change-of-station assignment.

Analysis and Conclusion

Subsection 404(a) of title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services are entitled to travel and transportation allowances for travel performed under orders upon a change of permanent station or when away from their designated posts of duty. Under subsection 404(b) the Secretaries concerned are authorized to prescribe the conditions under which travel allowances are authorized and the allowances for the kinds of travel.

Implementing regulations are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Those regulations contain provisions prescribing the monetary allowances to be paid to service members to reimburse them for the expenses of travel performed under orders. The decisions referred to by the disbursing officials concerned Army members who were required by directive orders to perform temporary duty assignments involving recruiting activities, and in those decisions we essentially concluded that the order-issuing officials could not properly provide for the payment of travel allowances in the orders at rates lesser, or other, than as prescribed by the governing provisions of regulation contained in 1 JTR.[4]

Regarding permissive rather than directive travel orders, however, paragraph M6453, 1 JTR, specifically provides as follows:

M6453 TRAVEL UNDER PERMISSIVE ORDERS

An order permitting a member to travel as distinguished from directing a member to travel does not entitle him to expenses to travel.

This provision of the regulations is consistent with the fundamental general principle long followed by our Office and the courts of the United States that the travel allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service

[3] With specific reference to 53 Comp. Gen. 454 (1974); and B-177676, May 17, 1973.
[4] See 53 Comp. Gen. 454 and B-177676, *supra* (footnote 3).

over which they have no control.[5] It is well settled that the expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken by the service member.[6] Moreover, there is nothing inherently objectionable about directive orders containing separate provision for the performance of permissive temporary duty for which travel allowances will not be paid.[7]

In the present case, the optional temporary duty assignments appear to have been offered to Ensign Dallman and Ensign Brake partly for their personal convenience and benefit, since the arrangement provided the two newly appointed officers with an opportunity for a respite at home, without being charged with advance leave, following their completion of Officer Candidate School.[8] Furthermore, it appears that the assignments were determined to be beneficial, but not necessarily essential to Navy recruiting activities, since the two ensigns were placed under no requirement to accept those assignments. In any event, our view is that the overriding circumstances for consideration in this case are that the temporary duty was clearly permissive rather than directive, and in those circumstances the provisions of paragraph M6453, 1 JTR, plainly preclude payment of the travel expenses involved.

Accordingly, we conclude that the two ensigns' orders are valid, and that they are, therefore, entitled only to travel allowances under those orders based on constructive change-of-station travel by automobile over a direct route between Newport, Rhode Island, and Beeville, Texas, rather than on the basis of their actual itineraries. The vouchers and supporting documents are returned for further processing consistent with the conclusion.

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[5] See, generally, 49 Comp. Gen. 663, 666 (1970); 33 Comp. Gen. 196 (1953); 6 Comp. Dec. 93 (1899); *Perrimond v. United States*, 19 Ct. Cl. 509 (1884); and *United States v. Phisterer*, 94 U.S. 219, 221-222 (1876).

[6] See, e.g., 45 Comp. Gen. 245 (1965); 39 Comp. Gen. 718 (1960). See also 54 Comp. Gen. 387, 388-389 (1974).

[7] Compare, for example, 51 Comp. 691 (1972), involving an Air Force officer's directed permanent change-of-station transfer from Hawaii to Virginia with permissive temporary duty authorized en route at the University of Southern California. In such cases, it has long been the rule that reimbursement is limited to the constructive cost of officially required travel over a direct route. See 7 Comp. Gen. 840 (1928); and 6 Comp. Dec. 93, *supra* (footnote 5).

[8] Service members earn 30 days' paid leave per year, and newly appointed or enlisted members who take advance leave which they have not yet earned are left with negative leave account balances, resulting in curtailed leave opportunities and possible financial liability thereafter. See, generally, 10 U.S.C. §§ 701, 704; and Department of Defense Directive 1327.5.

[B-214679]

Debt Collections—Procedure for Collection and Accounting—Waiver, Alteration, etc.

Debtor may contractually agree to procedures different from those specified in 31 U.S.C. 3716(a), or may completely waive entitlement to those procedures, as long as the variance or waiver is made voluntarily, knowingly, and intelligently.

Set-Off—Debtor-Creditor—Relationship

Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement.

Matter of: Greenstreet Farms, Inc., April 29, 1985:

The Soil Conservation Service (SCS) of the Department of Agriculture has requested our decision on two questions concerning the impact of section 10 of the Debt Collection Act of 1982, 31 U.S.C. § 3716 (1982), on the authority of the United States to take administrative offset.

The first question concerns the need to promulgate regulations prior to taking administrative offset. The second question concerns offsets taken under contractual agreements which provide for offset after completion of specified due process-styled procedures which differ from those contained in section 10. As is explained below, we conclude that the procedures in section 10 do not apply to this case, and therefore it is not necessary for us to answer the first question at this time. Instead, we find that the debt at issue here is governed by contractual agreements which provided the substantial equivalent of the section 10 procedures. Upon completion of those procedures, and the valid waiver of any further rights under them, SCS was authorized to collect the full amount of the debt.

FACTS

On June 17, 1977, SCS entered into a contract (No. AG48SCS04589) with Greenstreet Farms, Inc. pursuant to the Great Plains Conservation Program, as authorized by 16 U.S.C. § 590p(b), and implemented by 7 C.F.R. pt. 631 (1977). Under the contract, and in accordance with the implementing regulations, Greenstreet Farms agreed to take certain measures intended to properly conserve, develop, and utilize the soil and water resources of property it owned, in return for which SCS agreed to finance those measures. The contract specifically provided that Greenstreet Farms:

> * * * agrees to all of the regulations issued by the Secretary of Agriculture governing the [Great Plains Conservation] program, which regulations are hereby made a part of this contract [and] to forfeit all rights to further payments or grants under

the contract and refund to the United States all payments or grants received thereunder upon [its] violation of the contract * * *.

The implementing regulations which were incorporated by reference into the contract specified the procedures to be followed by SCS when determining whether the contract had been violated, including detailed requirements for notice and an opportunity for hearing on the issue of whether a violation had occurred, as well as procedures for administratively appealing the agency's initial decision. 7 C.F.R. § 631.25. The regulations also provided that if a farm accused of violating a contract admits to the violation and agrees in writing to accept a forfeiture, refund, payment adjustment, or termination of the contract, then "no further [due process-styled] proceedings shall be undertaken." 7 C.F.R. § 631.25(a). Finally, the implementing regulations authorized the taking of administrative setoffs against amounts payable under the program in order to recover any indebtedness owed to any agency of the United States. 7 C.F.R. § 631.29.

According to SCS, the contract was modified on several occasions to afford Greenstreet Farms additional time to carry out the specified measures. However, on November 24, 1981, SCS advised Greenstreet Farms in writing that the contract could not be modified again and that, if Greenstreet failed to take the agreed upon measures by June 1, 1982, it would be considered to have violated the contract. On July 22, 1982, SCS advised Greenstreet Farms in writing that it believed that the contract had been violated. Subsequently, on October 1, 1982, Greenstreet Farms signed a document entitled "Agreement Covering Non-Compliance with Provisions of Contract [under the] Great Plains Conservation Program." This non-compliance agreement stipulated that Greenstreet Farms had failed to carry out certain provisions of the contract; that the nature and effect of that non-compliance warranted termination of the contract; that Greenstreet Farms thereby forfeited all rights to further payments under the contract; and that Greenstreet Farms should refund $4,493.20 to SCS for payments that it had previously received under the contract. The non-compliance agreement concluded with the statement that Greenstreet Farms:

> * * * agrees that [the] forfeiture or refund * * * is proper and any amounts in connection therewith * * * are due and owing. [Greenstreet Farms] waives the right to any further proceedings under the regulations governing contract violations.

A notation on the non-compliance agreement indicated that Greenstreet Farms sought permission to pay back the agreed refund by means of a 3-year installment work-out agreement with the first payment due on August 1, 1983. On October 14, 1982, SCS sent a letter to Greenstreet Farms agreeing to the installment proposal. However, SCS stated that such an arrangement would require the assessment of "late charges" on any payment that might become past due.

A year later, on August 11, 1983, when Greenstreet Farms failed to make its first installment payment, SCS wrote Greenstreet

Farms to request a payment of the past due principal, plus interest. SCS warned Greenstreet Farms that if the past due amount was not received by December 1, efforts would be taken to collect the amounts owed through administrative offset, or any other means available to the agency. On September 28, 1983, when payment still was not received, SCS sent another letter to Greenstreet Farms to advise it that, in view of Greenstreet Farms' failure to make payment as agreed, "the [work-out] agreement is now void." Therefore, SCS demanded payment of the entire debt, plus interest. SCS stated that action had been taken to begin collection by means of administrative offset.

On December 20, 1983, administrative offset was effected against a $2,126.15 payment owed to Greenstreet Farms by the Commodity Credit Corporation under the Feed Grain, Rice, Upland Cotton, and Wheat Programs for Crop Years 1982-1985. In order to participate in those programs, Greenstreet Farms had filed a form ASCS-477, "Intention to Participate and Application for Payment." On that form, Greenstreet Farms agreed "[t]o comply with the regulations governing the applicable program and payment limitations," which may be found in 7 C.F.R. pt. 713. Those regulations specifically authorize the use of administrative offset against payments to be made under those programs in order to collect any debts owed to any agency of the United States Government. 7 C.F.R. § 713.113. Those regulations also set out the procedures to be followed in order to obtain reconsideration and review of the agency's actions. 7 C.F.R. § 713.114.

At no time since it breached the original contract and the work-out agreement has Greenstreet Farms ever attempted to dispute its debt or invoke the due process-styled procedures in any of the relevant regulations. However, Greenstreet Farms did write to SCS to protest the offset. Although it still did not dispute the amount or validity of its debt, or the fact that payment was past due, Greenstreet Farms explained that adverse weather conditions had prevented it from earning the funds necessary to make the first installment payment. Greenstreet Farms requested that SCS return the offset funds and agree to enter into a new repayment plan, to begin in August 1984. Greenstreet Farms also asserted that the SCS offset activities were illegal on several grounds, including the failure to promulgate regulations under section 10 of the Debt Collection Act of 1982 prior to taking administrative offset; the assessment of interest on the debt without Greenstreet Farms' agreement; the absence of authority to "accelerate" its debt (as opposed to collecting only the past due installment payments) and the failure to properly serve Greenstreet Farms with legal "notice" prior to the taking of offset.

In view of these facts and the assertions of Greenstreet Farms, SCS seeks our answers to two questions:

1. Does the Debt Collection Act of 1982 preclude the SCS from the use of administrative setoff until agency regulations have been promulgated to implement the act?

2. If SCS is not precluded from the use of administration offset pending promulgation of rules, in your opinion, will SCS have provided [Greenstreet Farms] due process after response to its January 17, 1984, letter has been made, or do you feel that something additional should be done?

DISCUSSION

Because we think the Greenstreet Farms debt is governed by the provisions of its contractual agreements with SCS (and the regulations incorporation by reference therein), we need not answer the first question posed by SCS at this time. For this reason, we proceed directly to the second question. In order to answer that question, we must first determine what procedures, if any, are applicable to this case; second, whether SCS complied with these procedures; and finally, if all else was proper, whether SCS could take offset to collect the full amount of Greenstreet Farms' debt.

1. *The applicable procedures*

Greenstreet Farms has suggested that, regardless of the procedures set out in the contract and incorporated regulations, before it may take offset, SCS is required to follow the procedures set forth in section 10 of the Debt Collection Act of 1982 (DCA). The DCA amended the Federal Claims Collection Act of 1966. Both acts have been codified in title 31 of the U.S. Code, chapter 37. According to its legislative history, the DCA was intended to "put some teeth into Federal [debt] collection efforts" by giving the Government "the tools it needs to collect these debts, while safeguarding the legitimate rights of privacy and due process of debtors." 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (statement of Sen. Percy). Section 10 of the DCA provides that agencies may collect claims owed to the United States by means of administrative offset, after the debtor has been accorded certain procedural rights 31 U.S.C. § 3716(a).

In the absence of particular statutory [1] or contractual provisions authorizing offset and specifying the procedures to be followed, we would agree that an agency is required to follow the procedural provisions of section 10, as implemented in section 102.3 of the Federal Claims Collection Standards (FCCS), as amended, 49 Fed. Reg. 8889 (1984). B-215128, Dec. 14, 1984, 64 Comp. Gen. 142. The procedures prescribed by section 10 are mandatory and, in our view, apply to already outstanding debts, as well as to debts arising after enactment of the DCA.

[1] Section 10 specifically provides that it shall not apply "when a statute *explicitly* provides for or prohibits using administrative offset to collect the claim or type of claim involved." 31 U.S.C. § 3716(c)(2). [Italic supplied.] With this in mind, we note that 16 U.S.C. § 590p(b)(v) requires farmers who participate in the Great Plains Conservation Program to enter into contractual agreements containing "such additional provisions as the Secretary [of Agriculture] determines are desirable * * * to effectuate the purposes of the program or to facilitate the practical administration of the program." We do not view 16 U.S.C. § 590p(b)(v) as providing the statutory authority necessary to satisfy the exception to section 10 just mentioned, because the former statute does not "explicitly" provide for or prohibit administrative offset.

In this case, however, there were contractual provisions which, together with the regulations incorporated therein, authorized offset and specified the procedures be followed. For the reasons given below, we find that these procedures, rather than those prescribed by section 10, govern collection of the Greenstreet Farms debt.

In essence, Greenstreet Farms is arguing that, rather than follow the contractual agreements which it entered into before the enactment of the DCA, section 10 of that act should be applied "retrospectively" to govern the collection of its debt. The traditional view has been that statutes are to be given prospective application absent clear indication to the contrary. However, in *Bradley v. School Board,* 416 U.S. 696, 711, 715 (1974), the Supreme Court established that "a court is to apply the law in effect at the time it renders its decision [i.e., retrospectively], unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

We are not aware of anything in the language or legislative history of section 10 which addresses the question of prospective/retrospective application. Thus, the question becomes whether retrospective application of the procedural requirements of section 10 would result in "manifest injustice" in this case. This, according to the *Bradley* Court, requires consideration of "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717.

We have carefully considered the *Bradley* decision and conclude that it does not require retrospective application of the section 10 procedures in this case. Unlike *Bradley,* this case involves the simple collection of a debt, and is analogous to a "routine private lawsuit." *Bradley,* 416 U.S. at 718. Also, retrospective application here would affect the Government's "matured unconditional right" to collect a debt owed to it. *Id.,* at 720. Further, retrospective application would impose a significant additional burden upon the Government with no corresponding benefit to Greenstreet Farms except to produce additional delay in the payment of an admittedly past due debt. A key factor in our conclusion is our finding, to which we now turn, that the procedures SCS actually followed in this case provided the substantial equivalent of what section 10 now requires.

2. Adequacy of the procedures followed by SCS

The purpose of the procedural protections in section 10 was to guarantee that debtors receive their "due process" rights. According to the legislative history of section 10:

> In establishing these procedures, it is the [Congress'] intention to provide the debtor with his full due process rights. It is not the [Congress'] intention to unrea-

sonably delay the set off procedure when it has been [properly] determined that it should be used. * * *" S. Rep. No. 378, supra, at 24.[2]

Clearly, the section 10 procedures were intended to assure that debtors receive only their "full due process rights," not duplicative procedures that would "unreasonably delay the set off." This conclusion is consistent with the provisions of the revised FCCS which provide:

> In cases where the procedural requirements specified in [section 102.3 of the FCCS] have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority,* * * the agency is not required to duplicate these requirements before taking offset. FCCS, § 102.3(b)(2)(ii), 49 Fed. Reg. at 8898.[3]

In order to evaluate the adequacy of the procedures followed by SCS prior to offset against Greenstreet Farms, we compared those procedures to the procedures specified in section 10. The procedures followed by SCS were prescribed in the various contractual agreements between Greenstreet Farms and the Government which incorporated by reference the provisions of the governing regulations, 7 C.F.R. pts. 631 and 713. In the original contractual agreement, Greenstreet Farms agreed to be bound by the SCS regulations which governed the Great Plains Conservation Program. Those regulations include detailed provisions for a due process-styled notice and opportunity to be heard, as well as provision for administrative setoff. 7 C.F.R. § 631.25. In the non-compliance agreement, Greenstreet Farms admitted that it had violated the contract and agreed to refund to SCS the amount that it had received in violation of the contract. Greenstreet Farms was then allowed to enter into an installment repayment agreement.

Up to this point, we think it is clear that the procedures followed in this case were substantially equivalent to those required by section 10, and did provide "full due process rights." *Compare* 31 U.S.C. § 3716(c); S. Rep. No. 378, *supra,* at 24. The next step, the waiver by Greenstreet Farms of any further rights of notice and appeal, was also proper. The Supreme Court has recognized that constitutional and statutory rights to notice and hearing may be waived, so long as the waiver is voluntarily, knowingly, and intelligently made. E.g., *D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185–86 (1972), *citing National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 311, 315–16 (1964). Thus, for example, even though section 10 is mandatory, debtors and agencies implicitly retain the authority to contractually agree to, and become legally bound by, different procedures. While Greenstreet Farms, of course, did not waive any rights under section 10 (it could not have done so since both

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[2] These comments were originally made with regard to language contained in section 5 of the Senate version (S. 1249) of the bill which became the DCA. Virtually identical language was subsequently inserted into the new section 10 of the final version which became the DCA. *Compare* S. 1249 97th Cong., lst Sess. § 5 (July 17, 1981) *with* DCA, § 10, Pub. L. No. 97-365, 96 Stat. 1749, 1754–55 (1982).

[3] *See also* the Supplementary Information statement which accompanied the revised FCCS. 49 Fed. Reg. 8889, 8891 ("Another commenter pointed out that an agency should not be required to provide procedural protections twice on the same debt. We agree, and have added a new § 102.3(b)(2)(ii) to reflect this).

the original agreement and the non-compliance agreement were executed before section 10 was enacted), it could and did waive its rights under the substantially equivalent provisions of the relevant contracts and regulations. Consequently, we think Greenstreet Farms (1) received its "full due process rights" under the procedures followed by SCS, and (2) effectively waived its rights to any further notice or procedures.

3. *Collecting the full amount*

When it acknowledged its debt, Greenstreet Farms asked SCS to enter into a 3-year installment work-out agreement with a year delay built into it. At that time, SCS was legally entitled to take any action available to it, including offset, to recoup the entire amount owed by Greenstreet Farms. SCS did not have to accede to the request of Greenstreet Farms. Nevertheless, SCS chose to forebear on its right to immediate collection of the full amount, and agreed to enter into an installment work-out agreement, conditioned upon certain rights to which SCS would have been entitled under the common law, including the assessment of interest on past due amounts.[4] Greenstreet Farms did not object to the terms specified by SCS and thus apparently agreed to the offer put forth by SCS.

Greenstreet Farms failed to live up to its obligations under the work-out agreement which it had requested. Payment was not made on the date due or at anytime thereafter. After affording Greenstreet Farms ample time and opportunity to make up the late payment or offer an explanation of its failure, SCS considered the work-out agreement "void" and proceeded to initiate collection on the original debt. Contrary to the assertions of Greenstreet Farms, the actions of SCS did not constitute an illegal acceleration of the installment work-out agreement. Under long-settled ruling of the Supreme Court, except when expressly agreed by the parties, the acceptance of a work-out agreement does not discharge indebtedness arising under the original contract unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement did not exist.[5]

Consequently, SCS was fully justified in treating the work-out agreement as void and initiating collection pursuant to the terms of the original contract and non-compliance agreement. the argument that SCS failed to properly serve notice upon Greenstreet Farms prior to taking offset is equally without merit. Under the terms of the various contracts, agreements, and incorporated regu-

[4] *See* B-212222, Aug. 23, 1983, *citing Young v. Godbe,* 82 U.S. (15 Wall.) 562, 565 (1873) (common law authority to assess interest).

[5] See, e.g., *The Kimball,* 70 U.S. (3 Wall.) 37, 45 (1865); *Segrist v. Crabtree,* 131 U.S. 287, 289-90 (1889). See also *Mid-Eastern Electronics v. First National Bank of Southern Maryland,* 455 F.2d 141, 144-45 (4th Cir. 1970); *In re Mid-Atlantic Piping Products of Charlotte,* 24 Bankr. 314 (Bankr. W.D.N.C. 1982).

lations, Greenstreet Farms had already waived any further notice rights, *see, e.g.,* 7 C.F.R. § 631.25(a), and had authorized the taking of offset against the payments due it under the Feed Grain, Rice, Upland Cotton, and Wheat Programs in order to collect any debt it owed to the United States, 7 C.F.R. § 713.113 (incorp. by ref., 7 C.F.R. pt. 13).

Accordingly, we conclude that SCS has satisfied the requirements for due process-styled procedures that are applicable in this case, and may use administrative offset to collect the debt of Greenstreet Farms.

[B-218313]

Contracts—Protest—Interested Party Requirement—Direct Interest Criterion

A potential subcontractor complaining about definitive responsibility criteria that a bidder would have to meet as a prerequisite to award of the prime contract is not an interested party since to be an interested party under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Matter of: Pacific Coast Welding & Machine, Inc., Apr. 30, 1985:

Pacific Coast Welding & Machine, Inc. protests any award under invitation for bids (IFB) No. N62467-83-B-0426, issued by the Department of the Navy. The basis for protest is that certain definitive responsibility criteria that relate to the experience of the contractor are unduly restrictive of competition. Pacific is reported to be a potential subcontractor.

We now consider bid protests pursuant to 31 U.S.C. § 3551 *et seq.*, as added by section 2741(a) of Pub. L. 98-369, title VII (the Competition in Contracting Act). The law defines an interested party as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award or by failure to award the contract." The language of our implementing Bid Protest Regulations mirrors the definition contained in the statute. 4 C.F.R. § 21.0(a)(1985).

In this case, the agency reports that Pacific was neither a bidder nor, according to its Vice President, a prospective bidder. Pacific's interest in the qualifications that a bidder would have to meet for award of the prime contract is that of a potential subcontractor only. Under the law and our implementing Bid Protest Regulations, Pacific's interest is not sufficient for it to be considered an interested party. Its protest therefore will not be considered.

The protest is dismissed.

U.S. GOVERNMENT PRINTING OFFICE : 1985 O - 483-210 : QL 3