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[B-215102]

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Agency In-House Estimate—Basis

Protest by incumbent contractor providing laundry services from its own facility is denied where the protester has not shown that the procuring agency has unreasonably understated the cost to the government of making an award on the basis of using a Government-owned facility.

Matter of: Crown Laundry and Cleaners, Inc., January 7, 1985:

Crown Laundry and Cleaners, Inc., protests the terms of invitation for bids No. DABT01-84-B-1005, issued by the Department of the Army for laundry services at Fort Rucker, Alabama. The specifications allowed the contractor to provide the laundry services from either a government-owned, contractor-operated (GOCO) facility using existing equipment and space at Fort Rucker, or from a contractor-owned, contractor-operated (COCO) facility. Crown, the incumbent COCO contractor, challenges the provisions made in the solicitation for adding to the evaluated total of a GOCO bid the costs the Government was expected to incur if award was made on a GOCO basis, alleging that the Army had understated such costs. The Army has postponed bid opening pending our decision. We deny the protest.

As indicated above, the solicitation provided for the consideration of offers submitted on either a GOCO or a COCO basis. In the event of an award on a GOCO basis, the Army agreed to provide to the contractor without charge (1) approximately 39,008 square feet of space for use as a laundry plant, office space for the contracting officer's representative, and a laundry pick-up point, (2) assorted laundry equipment, and (3) support services for the GOCO facility, including utilities (gas, electricity and water), insect and rodent control, on-post telephone service, building maintenance, and operation of a steam production and distribution system. However, the Army indicated in the solicitation that certain costs associated with providing the above space, equipment and services would be added to a GOCO bid for purposes of evaluation. The Army set forth the estimated amount of nine such costs, including, among others, the costs of utilities, repairs and maintenance, boiler start-up and rent. The nine costs total $146,914 (but stated to be $146,824) for the base year, $151,870 for the first option year and $159,138 for the second option year. Bids were to be evaluated by adding the total price for the option year items to the total price for the base year items.

Prior to bid opening, Crown protested to our Office the amount of the GOCO evaluation penalty, alleging that the actual cost to the Government of award on a GOCO basis would total $358,937 for the base contract year, $362,246 for the first option year and

$379,936 for the second option year. The Army subsequently amended the solicitation to provide for a total of $162,180 for the base year, $159,947 for the first option year and $167,751 for the second option year to be added to GOCO bids.

Crown initially observes that the Army provided in the prior solicitation for laundry services at Fort Rucker $284,553 for fiscal year 1983, $261,497 for fiscal year 1984 and $274,279 for fiscal year 1985 would be added to GOCO bids for purposes of evaluation. Crown indicates that it can see no logical reason for the costs of award on a GOCO basis to have decreased to the extent claimed by the Army.

The Army has generally explained that this reduction in estimated costs resulted from such factors as (1) a reduction in the estimated cost of utilities as a result of the exclusion from estimated consumption of that portion associated with space not actually provided but nevertheless previously charged to a GOCO contractor, (2) basing estimates of future utilities consumption on prior meter readings rather than on guesses as to the past consumption of utilities, (3) the adjustment of other estimated costs to reflect only the space actually to be provided to a GOCO contractor, and (4) the use of current prices.

In regard to the cost of utilities, Crown, considering the cost of electricity, gas, water, and sewage, estimates that award on a GOCO basis will result in a base year cost to the Government of $85,128.

Although the Army admits that the cost of utilities will exceed its $38,437 base year estimate in the solicitation as issued, it maintains that this cost will not exceed its $46,034 estimate in the amended solicitation. The Army explains that its latest estimate is based on the estimated cost of supplying electricity, steam (including the natural gas, fuel oil and electricity consumed in producing the steam), water and sewage disposal and it has provided us with a detailed analysis of the various cost items involved.

We have previously held that elements of cost or savings to the Government which are not included in the bid prices may properly be considered in evaluating bid prices to determine which bid will result in the most advantageous contract, provided that any amounts which are for application in such evaluation must be fairly representative on an actual or estimated basis of true costs or savings to the Government. *See also Clinton Engines Corp.,* 43 Comp. Gen. 327 (1963) (cost for transporting, modifying, installing Government-owned equipment); *cf. Lanson Industries, Inc.,* 60 Comp. Gen. 661 (1981), 81-2 C.P.D. ¶ 176; *Yardney Battery Division, Yardney Electrical Corp.,* B-215349, Nov. 8, 1984, 84-2 C.P.D. ¶ 511 (cost of Government-furnished equipment and materials).

The base year estimates of the cost of utilities and most other items for the base year are the critical estimates since the option year estimates are primarily derived by adding an inflation factor

to the base year estimates. Accordingly, we will restrict our discussion to whether the Army's estimate of base year costs is fairly representative of those which will be incurred.

After examining the parties' explanations as to how they derived their conflicting estimates of the likely base year cost of utilities, we conclude that Crown has failed to demonstrate that the Army has acted unreasonably in reaching its estimate. *Cf. Apex International Management Services, Inc.*, B-212220.2, May 30, 1984, 84-1 C.P.D. ¶ 584 (A-76); *Crown Laundry & Dry Cleaners Inc.—request for reconsideration*, B-204178.2, Aug. 9, 1982, 82-2 C.P.D. ¶115 (A-76). Crown's conflicting estimate of base year utility costs appears to be based upon either unexplained, speculative or mistaken assumptions.

We note that the Army's estimate that base year electric costs will total $5,068.82 is based on metered electrical consumption in past years, adjusted downward to reflect the amount of electricity registered on the same meter but consumed by printing facilities that would not be provided to a GOCO laundry services contractor. The Army priced the electricity consumed at the rate of $.0538 per kilowatt-hour found by the Army to be the direct cost to the Government of purchasing power wholesale at a rate of .0485 per kilowatt-hour and distributing it throughout Fort Rucker. By contrast, Crown bases its estimate of $21,941 for electricity on a largely unexplained estimate of consumption apparently priced at the purported commercial rate of $.258 per kilowatt-hour, approximately five times the rate actually paid by the Government.

Likewise, while the Army has explained that its $38,765.81 estimate for the cost of steam to be provided in the base contract year was based on actual past consumption, Crown has failed to explain how it arrived at its estimate for the consumption of natural gas, the predominant fuel in the generation of steam at Fort Rucker, and thus how it derived its estimate that the gas would cost $58,411.20.

As for the cost of water and sewage disposal for the base contract year, the Army explains that it assumed that each pound of laundry processed would require the use of 3 gallons of "process water" the 1983 guideline established by the International Fabricare Institute for allocating utility costs, and 0.63 gallons of "make-up water." The Army indicates that it then derived its total estimated cost of providing the water and disposing of the resulting sewage, $1,377, by reference to the established rates for water and sewage disposal at Fort Rucker and it has provided a detailed analysis of the costs considered in establishing those rates.

By contrast, Crown has based its estimate of $4,776.36 for water and sewage disposal on (1) an undated and untitled article attributed to "IFI" and which described "actual" consumption as amounting to 4.5 gallons per pound of laundry rather than the "theoretical" 3 gallons and (2) an unexplained, speculative estimate

of sewage treatment costs. Not only has Crown failed to show that the Army acted unreasonably in using a figure of 3.63 gallons, *see Protek Industries, Inc.*, B-209505, Sept. 22, 1983, 83-2 C.P.D. ¶ 359, but, in any case, the resulting difference in cost is only $329.34 when the water is priced at the established Fort Rucker rate.

Crown estimates that the base year cost for the maintenance and repair of the facilities to be provided to a GOCO contractor will total $62,088, well above the Army's estimate of $35,966. Crown admits that its estimate is based solely on the assumption that maintenance and repair costs are unlikely to decline below the $62,088 figure set forth in the prior solicitation since the age of the facilities is increasing and wages and repair costs generally are also increasing.

However, the Army reports that the decline in estimated costs in fact reflected merely (1) the substitution of estimates based on past recorded costs for prior speculation as to the costs of maintenance and repair and (2) this year's reduction in the amount of space considered in calculating the cost of maintenance and repair to only that actually to be provided to a GOCO contractor. Since Crown has introduced no evidence to the contrary, we find that Crown has again failed to carry its burden of demonstrating the unreasonableness of the Army's estimate of maintenance and repair costs.

Nor do we believe that Crown has shown the unreasonableness of the Army's estimate that the start-up costs for a boiler to provide steam to a GOCO contractor would total only $8,671. Crown's higher estimate of $21,729 is based on the expenditure of $9,229 for labor to operate the boiler plus the $12,500 in actual start-up costs identified in the prior solicitation.

The Army, however, explains that the cost of labor to operate the boiler was not included in its estimate of start-up costs because the labor required totaled less than one man-year and Army directives concerning cost comparisons require consideration only of whole man-years of labor. *Cf. Contract Services Company, Inc.*, B-210796, Aug. 29, 1983, 83-2 C.P.D. ¶ 268. In any case, we note that in establishing the rate for steam, the Army considered not only the cost of fuel but also the cost of "Operations, other than fuel" and of the "Maint. [Maintenance] of boiler plants." Since the boiler was to produce steam, this suggests that the cost of labor to operate the boiler was already included in the cost of steam. In addition, the Army indicates that $4,829 of the previously identified cost of start-up has already been expended. Since these funds were expended before bid opening and thus before any decision to award a contract to a GOCO firm, we do not believe that the Army was unreasonable in not adding this sum to GOCO bids for purposes of evaluation.

The Army provided in the amended solicitation that the rental value and cost of ownership of the laundry equipment and space to be provided to a GOCO contractor, estimated as $47,126 for the

base year, would be added to GOCO bids for purposes of evaluation. The Army explained in its response to this protest that this estimate included $21,436 for the rental value of the laundry equipment to be provided. Crown, however, has replied that the rental value of the equipment in fact totals $38,488.20, $17,052.20 more than estimated by the Army.

Although the Army now admits that it overlooked equipment, the base year rental value of which totals $410.64, it nevertheless maintains that its estimate is otherwise accurate. The Army indicates that, in accordance with Department of Defense (DOD) policy, it calculated the rental cost of individual pieces of equipment by first obtaining the current official cost for similar new equipment, then applying to that cost a standard DOD deflation factor to obtain the estimated initial acquisition cost, and finally by multiplying the estimated acquisition cost by a standard DOD monthly rental factor stated as a percentage of the acquisition cost.

The Army explains that some of the discrepancy between the two estimates of rental cost, a portion of which we estimate to total approximately $3,200, resulted when Crown calculated the unit acquisition cost by applying the standard deflation factor to the current acquisition cost of similar new equipment as of July-August 1984, 4-5 months after the solicitation was issued and after Crown had filed this protest. By contrast, the Army derived the rental value based upon the acquisition cost of similar new equipment as of the time when the solicitation was isssued.

The Army explains that the discrepancy was increased, by a sum which we estimate to total approximately $8,900, when Crown included in its estimate the rental value of certain boiler plant equipment. Although the boiler was scheduled to provide steam to a successful GOCO contractor, the cost of generating that steam was already included in the evaluation factor for the cost of utilities. Moreover, the Army maintains, and the solicitation indicates, that the boiler plant equipment would not be provided to a GOCO contractor.

The Army next identifies three laundry "Pressing Units, Coat, Body-Bosom Ajax" for which Crown allocated a separate rental cost. However, these units were in fact included as part of the laundry "Shirt Unit" for which Crown and the Army had already allocated a rental cost. This duplication added approximately $4,000 to Crown's estimate. The Army also points out that Crown erroneously added over $270 to the rental value of the laundry folding machines to be provided to a GOCO contractor when it used an erroneous current acquisition cost figure for the machines.

Finally, the Army refers to policy directives from the Controller of the Army directing contracting activities to ignore depreciation and the cost of capital for units with a replacement value of less than $1,000. The Army cites this policy as justification for exclud-

ing from its estimate approximately $1,100 in rental costs for equipment considered by Crown in calculating its estimate.

We consider the $410.64 error which the Army admits to having made in calculating the rental value of the laundry equipment to be provided to a GOCO contractor to be de minimis. Furthermore, given the Army's explanation as to the remaining discrepancies between the two estimates, we do not believe that Crown has shown the Army's estimate to be otherwise unreasonable.

The final issue is the reasonableness of the evaluation factor intended to reflect the rental value and cost of ownership of the equipment and space to be provided to a GOCO contractor. The Army indicates that the $47,126 evaluation factor included $25,690 as the rental value of the space calculated at a rate of $.60 per square foot. Crown, however, contends that the true rental value of the space was approximately $1.60 to $1.75 per square foot and has submitted quotations from real estate agents in support of its claim.

The Army obtained from three commercial sources estimates of $.05, $.75 and $1.00 per square foot as the rental value of a 42-year old, "temporary" wooden structure with concrete foundation used for an industrial/commercial activity and for which utilities were available. The Army then derived the $.60 per square foot rental value used in its evaluation by averaging these three estimates. As indicated above, Crown contends that the Army has understated the rental value of its property. Crown asserts that those who provided the Army with estimates were not aware of all the requirements of the solicitation and has furnished other, higher rental estimates in support of its assertion. In particular, Crown contends that the real estate agent who had provided the Army with the estimate of $.05 per square foot subsequently increased his estimate to $2.00 per square foot upon being given "additional information."

The Army responds that the "requirements" which it allegedly failed to provide those who provided it with quotations were not in fact requirements of the IFB, or were addressed in the contacts the Army made with local realty sources, or were already present in the existing structure. In addition, the Army asserts that Crown's rental quotations appear to be based upon more modern and more substantially-constructed buildings and include some higher-priced "office space" which under the IFB the Government is not required to provide to the contractor. With regard to the real estate broker who had provided a $.05 per square foot quotation to the Army, his subsequent letter to Crown states in pertinent part:

> Modern buildings ranging in floor space from 1000 to 2500 square feet are presently leasing for from $2.50 to $3.50 per square foot.
>
> The same type structure ranging in square footage up to 15,000 square feet are presently leasing for approximately $2.00 per square foot.
>
> The source of this information is present lease cost of floor space in existing shopping centers and office space.

The Army maintains that the $2.00 per square foot quotation is based upon "modern buildings" consisting of "existing shopping centers and office space" not comparable to the Ft. Rucker laundry building.

We do not believe Crown has shown the Army's estimate of the rental value of its building to have been unreasonable. We recognize that the estimate of $.05 per square foot given to the Army by one real estate agent was substantially lower than the other two and that had it been disregarded the estimated rental rate would have been $.875 per square foot instead of $.60. This is approximately one-third higher than the figure the Army used but still approximately half that which Crown contends should be applied. We note, however, that in his letter written to Crown after this protest was filed, which Crown has provided in support of its contention, the agent who had initially quoted the Army the figure of $.05 per square foot did not specifically repudiate that figure or claim that he had given it on the basis of inadequate or misleading information. He simply states that, based upon the "present lease cost of floor space in existing shopping centers and office space," "modern buildings" of 15,000 square feet are presently leasing for approximately $2.00 per square foot. We do not believe that this demonstrates that the Army's estimate of the rental value of a World War II-era "temporary" building in fair condition was unreasonable.

The protest is denied.

[B-216170]

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

An employee who attended a meeting sponsored by a private organization in a high rate geographical area was provided a lunch and dinner without cost to the Government. Under 5 U.S. Code 4111 and paragraph 4-2.1 of the Federal Travel Regulations, the employee's reimbursement for actual subsistence expenses which is limited to $75 per day need not be reduced by the value of the provided meals.

Matter of: Walter E. Myers—Actual Subsistence Expenses—Contributions From Private Sources, January 8, 1985:

Ms. Betty D. Gillham, an authorized certifying officer of the Bonneville Power Administration (BPA), Department of Energy, requests a decision concerning a claim for travel expenses filed by Mr. Walter E. Myers, a BPA employee. The issue is whether the actual subsistence expenses otherwise payable to Mr. Myers for his attendance at a meeting sponsored by a private organization must be reduced by the value of meals furnished without charge by the organization. Based on 5 U.S.C. § 4111, as implemented by para. 4-2.1 of Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), we hold that the authorized subsistence expenses are payable without a deduction for the provided meals.

BACKGROUND

Mr. Myers was authorized actual subsistence expenses at the daily maximum rate of $75 in order to attend a meeting in Boston, Massachusetts, during the period September 10 to September 16, 1983. The meeting was sponsored by the Electric Power Research Institute (EPRI), a non-profit corporation established to coordinate the research and development activities of contributing electric utilities. The EPRI did not charge the Government a registration fee for the meeting, and it furnished the attendees a dinner on September 14 and a lunch on September 15 without charge. Mr. Myers filed a travel voucher showing that he incurred lodging expenses of $68.64 on each of the 2 days in question and that, even with the dinner and the lunch provided by EPRI, he incurred meal expenses of $7.25 on September 14 and $28.56 of September 15. Since Mr. Myers' subsistence expenses of $75.89 on September 14 and $97.20 on September 15 exceed his maximum entitlement, he limited his claim to $75 for each day.

The BPA reduced Mr. Myers' daily subsistence allowance of $75 by $13.80 for September 14 and $6.90 for September 15, determining that these deductions represented the reasonable value to him of the dinner and lunch provided by EPRI. In determining the value of the meals, the agency referred to its regulations prescribing a meal allowance of 46 percent of the maximum subsistence rate in high rate geographical area ($34.50 where the maximum rate is $75), and authorizing 20 percent of that allowance ($6.90) for lunch and 40 percent ($13.80) for dinner.

In reducing Mr. Myers' subsistence allowance, the agency relied on our decision in *Judy A. Whelan,* B-207517, April 13, 1983. In that decision, we held that BPA properly reduced an employee's subsistence expenses by the reasonable value of lunches which were included in a registration fee paid by the Government and furnished to the employee as an integral part of a training course. We further decided that, in determining the reasonable value of lunches provided in a high cost area, BPA could apply its regulations prescribing a $23 daily meal allowance for per diem areas and requiring a 20 percent reduction of this amount for a provided lunch. With respect to this latter aspect of our decision in *Whelan,* BPA notes that it computed Mr. Myers' claim under its regulations governing meal allowances in high rate geographical areas rather than those pertaining to per diem areas. However, the agency states that it recently began applying the per diem guidelines approved in *Whelan* to determine the appropriate deduction for meals furnished in high cost areas.

Mr. Myers reclaimed the amount of $20.70 disallowed by BPA, maintaining that our decision in *Whelan* does not apply in this case since the Government was not charged a registration fee or otherwise requried to pay for the meals furnished by EPRI. He fur-

ther suggests that any deduction for the provided meals should be applied to his total subsistence expenses for each day and not to his daily maximum allowance, so as to permit reimbursement for lodging costs and other actual expenses not exceeding $75 per day.

Against this background, BPA questions whether our decision in *Whelan* requires an agency to reduce an employee's subsistence allowance by the value of meals furnished by a private organization. The agency states that its application of our *Whelan* decision in this context has had an adverse effect on employee morale because the deduction for provided meals further reduces reimbursement amounts which, in some high cost areas, are insufficient to cover the full costs of official travel.

OPINION

At the outset, we note that our decision in *Judy A. Whelan,* cited above, concerned the Government's provision of meals to an employee as an integral part of a training course. In that situation, we held that the value of provided meals must be deducted from subsistence expenses payable under the training expense provisions of 5 U.S.C. § 4109 (1982). Different statutes and regulations apply in this case, since the meals were furnished by a private organization without charge to the employee or the Government.

As a general rule, a private organization's payment of an employee's travel expenses either in cash or in kind represents an improper augmentation of the employing agency's appropriations as well as an unlawful supplementation of the employee's salary under 18 U.S.C. § 209 (1982). See 55 Comp. Gen. 1293 (1976), and cases cited therein. One statutory exception to this general rule is contained in 5 U.S.C. § 4111(a) (1982), which provides that an employee may directly accept a private contribution for training or travel and subsistence expenses for attendance at meetings if the contribution is made by a tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code [26 U.S.C. § 501(c)(3) (1982)]. If the employee is not authorized to accept contributions of travel expenses under section 4111(a), the agency may accept such a contribution on his behalf only if it has statutory authority to accept gifts or donations. See 46 Comp. Gen. 689 (1967); and 36 Comp. Gen. 268 (1956). Rules governing the acceptance of travel expenses under this latter criterion are outlined in 46 Comp. Gen. 689 (1967), and become relevant only if the provisions of 5 U.S.C. § 4111(a) do not apply to the contribution. See 49 Comp. Gen. 572 (1970).

In this case, the Internal Revenue Service has advised us that EPRI is a tax-exempt organization described in 26 U.S.C. § 501(c)(3). Accordingly, Mr. Myers was authorized under 5 U.S.C. § 4111(a) to accept the meals provided without charge by EPRI. His entitlement

to be reimbursed for the balance of his travel and subsistence expenses is governed by 5 U.S.C. § 4111(b), which provides as follows:

When a contribution, award, or payment, in cash or in kind, is made to an employee for travel, subsistence, or other expenses under subsection (a) of this section, an appropriate reduction, under regulations of the President, shall be made from payment by the Government to the employee for travel, subsistence, or other expenses incident to training in a non-Government facility or to attendance at a meeting.

Regulations implementing 5 U.S.C. § 4111(b), set forth in FTR para. 4-2.1, provide as follows:

Agency responsibilities.

* * * * * * *

b. Agency heads shall provide adequate safeguards to ensure that the following regulations are carried out:

* * * * * * *

(2) If an approved payment by a donor does not fully cover expenses * * * [incident to training in a non-Government facility, or travel, subsistence, or other expenses incident to attendance at a meeting], the agency may pay an amount considered sufficient to cover the balance of the expenses to the extent authorized by law and regulation, including 5 U.S.C. § 4109 and 4110. If an amount in excess of such balance has previously been paid by the agency, such amount shall be recovered from the employee * * *.

The above-quoted statute and regulations accord agencies considerable discretion to determine the extent to which travel allowances must be offset by the amount of a private contribution. In this regard, we note that section 4111(b) generally provides that an agency should make an "appropriate reduction" in travel expenses payable by the Government, and that the implementing regulations in FTR para. 4-2.1 allow agencies discretion to pay "an amount considered sufficient to cover the balance" of the employee's travel expenses. Neither the statute nor its implementing regulations expressly require an agency to reduce an employee's entitlement to other subsistence expenses actually incurred by the value of a private contribution.

The legislative history of 5 U.S.C. § 4111(b) shows that Congress enacted that section in order to preclude the Government from reimbursing travel expenses which have been covered by a private contribution. See H.R. Rep. No. 1951, 85th Cong., 2d Sess. 6 (1958). Consistent with this legislative intent, we have held that authorized per diem must be reduced by the value of subsistence items furnished in kind by a private organization. 49 Comp. Gen. 572, 576, cited previously. Since per diem is a commuted daily allowance payable without regard to actual expenses, payment of the full allowance would necessarily duplicate a private contribution covering a portion of the authorized subsistence expenses.

Actual and necessary subsistence expenses, however, are payable instead of per diem in designated high cost areas or where unusual circumstances make the per diem allowance inadequate. In contrast to per diem, actual subsistence expenses are payable only for those lodging and meal expenses which are actually incurred and

itemized by the employee. In accordance with these rules, an employee who accepts a meal from a private source may not claim any reimbursement for the meal since he did not actually incur a meal expense.

Since the rules governing reimbursement of actual subsistence expenses effectively preclude any payment which would duplicate a private contribution covering meals, we find no basis in 5 U.S.C. § 4111(b) for requiring an agency to reduce an employee's actual expense entitlement by the value of provided meals. Under FTR para. 4-2.1, the agency may pay the employee an amount considered sufficient to cover his claimed expenses, limited to the daily maximum rate of $75 stated in 5 U.S.C. § 5702 (1982) or the rate prescribed in FTR para. 1-8.6 for the particular high rate geographical area.

On this basis, we hold that the BPA was not required to reduce the actual expenses payable to Mr. Myers by the value of the meals furnished by EPRI. Under FTR para. 4-2.1, the agency may pay Mr. Myers an amount considered sufficient to cover his actual expenses, not to exceed the authorized rate of $75 per day.

We note that our holding in this case does not prevent an agency from limiting an employee's entitlement to subsistence expenses if it anticipates that some of those expenses will be covered by a private contribution. Although FTR para. 1-8.6 prescribes daily rates for high cost areas, FTR para. 1-8.1b(1) authorizes agencies to prescribe a per diem allowance for an individual in a high cost area if an appropriate official determines that any of the factors cited in FTR 1-7.3a would reduce the employee's travel expenses.

For the reasons stated above, we hold that BPA was not required to reduce the actual subsistence expenses payable to Mr. Myers by the value of meals furnished by EPRI. The agency may adjust his actual expense reimbursement in accordance with the standards prescribed above.

[B-217303]

Bids—Invitation For Bids—Amendments—Failure to Acknowledge—Wage Determination Changes

A bidder's failure to acknowledge a Davis-Bacon Act wage rate amendment may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly *de minimis*, and the bidder affirmatively evinces its intent to be obligated to pay the revised rates by acknowledging the amendment as soon as possible thereafter, but always prior to award. Modifies 62 Comp. Gen. 111.

Bids—Invitation For Bids—Amendments—Failure to Acknowledge—Materiality Determination

An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived.

Matter of: United States Department of the Interior—Request for Advance Decision; Ball & Brosamer, Inc. and Ball, Ball and Brosamer, Inc., A Joint Venture; Grade-Way Construction, January 11, 1985:

The United States Department of the Interior requests our advance decision on protests filed with the contracting officer by Ball & Brosamer, Inc., and Ball, Ball and Brosamer, Inc., A Joint Venture (Ball & Brosamer), and Grade-Way Construction (Grade-Way) under invitation for bids (IFB) No. 4-SI-20-04270/DC-7617, issued by the Bureau of Reclamation, Mid-Pacific Region. The procurement is for the construction of an earthfill dam and dike embankment. Ball & Brosamer and Grade-Way, respectively the apparent low and second low bidders, each protest that award of the contract to the other firm would be improper.

Specifically, the agency asks whether Ball & Brosamer's failure to acknowledge receipt of Amendments 5 and 6 to the solicitation requires rejection of the firm's bid as nonresponsive, or whether these failures properly may be waived as minor informalities.

The solicitation was issued on August 28, 1984, and six amendments to the solicitation were subsequently issued. Bid opening took place on October 30, 1984. Ball & Brosamer was the apparent low bidder with an offered price of $11,487,445, with Grade-Way second low at $11,790,368.[1] However, the contracting officer noted irregularities in Ball & Brosamer's bid since the firm had failed to acknowledge receipt of Amendments 5 and 6, as required by both subsection B.2 of the IFB and the amendments themselves. Grade-Way contends that Ball & Brosamer's bid is accordingly nonresponsive and should be rejected, making Grade-Way the remaining low, responsive bidder and therefore in line for the contract award. The agency believes that Ball & Brosamer's failure to acknowledge the two amendments is, in each case, a minor informality which properly may be waived, because neither amendment has a material effect upon the procurement. We essentially agree with the agency's position in this matter, and conclude that Ball & Brosamer's bid may be accepted, conditioned upon the firm's post-bid opening acknowledgement of Amendment 5, which we understand has already occurred. The failure to acknowledge Amendment 6 may be waived.

Amendment 5

Amendment 5 incorporated a revised Department of Labor wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276a. (1982) (the Act). The Act's principal purpose is to protect a contractor's employees from substandard earnings by fixing a floor under

[1] The government's estimate for the project is $14,801,320.

wages on Government projects. *United States v. Binghamton Construction Co., Inc.*, 347 U.S. 171 (1953). Because of that purpose, the traditional position of this Office has been that a bid which fails to acknowledge an amendment revising the wage rate for a labor category to be employed under the contract must be rejected. We have held that, without acknowledgment of such an amendment, a bidder legally cannot be required by the Government to pay the wages prescribed in the amendment, and the bid is therefore nonresponsive. See, *e.g., Morris Plains Contracting, Inc.*, B-209352, Oct. 21, 1982, 82-2 CPD ¶ 360; *X-Cel Constructors, Inc.*, B-206746, Apr. 5, 1982, 82-1 CPD ¶ 311. However, we have recognized that under some limited circumstances the failure to acknowledge a wage rate amendment can be cured after bid opening. *Brutoco Engineering & Construction, Inc.*, 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9.

Brutoco was premised on the theory that where the failure to acknowledge the wage rate amendment could properly be categorized as a minor informality under the regulations, and where the interests of the employees that the Act was designed to protect were in fact protected by a union agreement to which the bidder was a party, the defect could be properly cured after bid opening. We so concluded because we believed that permitting the amendment to be acknowledged after bid opening in these circumstances would neither adversely affect the competitive bid system nor deny the affected employees the protection afforded by the Act. Even without a union agreement, however, we think it obvious that the interests of the affected employees will not suffer if the defect is cured after bid opening since the wage rate will be incorporated into the contract as a result. Hence, we see no reason to require the existence of a union agreement as a condition to permitting a bidder to cure the defect after bid opening if the conditions exist for invoking the rules for correcting the defect as a minor informality under the Federal Acquisition Regulation, § 14.405(d)(2), 48 Fed. Reg. 42,102, 42,180 (1983) (to be codified at 48 C.F.R. § 14.405(d)(2)). *Brutoco Engineering & Construction, Inc., supra,* is modified to this extent.

Here, the parties generally agree that the only applicable labor category affected by Amendment 5 was electricians, with the hourly fringe benefits for that category being increased $1.00 by the revised wage rate determination. Ball & Brosamer contends that electrical work in the project is minor in terms of man-hours involved so that this increase will only total approximately $500. The agency accepts this estimate, but Grade-Way asserts that the increase will be closer to $1500. Even assuming that the increased electricians' benefits will total $1500, we note that this represents only .013 percent of Ball & Brosamer's bid price, and .495 percent of the difference between the bids. In our opinion, the total amount of increased electricians' benefits involved here is so minimal, given Ball & Brosamer's $11.4 million bid price and the substantial difference between the two bids, that we fail to see how Grade-Way

would be prejudiced if Ball & Brosamer now acknowledges Amendment 5.

Accordingly, we believe that a bidder's failure to acknowledge a wage rate amendment upon submission of its bid may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly *de minimis,* as here, and the bidder affirmatively evinces its intent to be obligated to pay the revised rates by acknowledging the amendment as soon as possible thereafter, but always prior to award.

Amendment 6

Amendment 6 incorporated numerous changes into the IFB, only two of which are seriously disputed by Grade-Way as to their materiality. Therefore, for purposes of our analysis, we will only address those two issues.

Amendment 6 modified subsection H.1 of the IFB by informing bidders that the rights-of-way for a particular quarry associated with the project, and for haul roads between the quarry and the damsite, would not be available for construction purposes until January 1, 1985. Subsection H.1, as previously amended, provided that the contractor was required to commence performance within 30 calendar days of receipt of the notice to proceed, which was anticipated to be December 12, 1984. Subsection H.1 further provided that the entire project was to be completed within 840 calendar days after award, with a particular access road from a local road to the dike to be completed no later than July 1, 1985.

Grade-Way urges that this modification to the solicitation was material since, if Ball & Brosamer had had knowledge of the fact that work could not commence until January 1, 1985, the firm's bid price could have increased. It is Grade-Way's position that Ball & Brosamer, anticipating that it could commence performance immediately upon receipt of the notice to proceed, had not factored costs for additional equipment and personnel into its bid that would be necessary to assure timely completion of the project because of the delay in having access to the quarry and haul roads.

To the contrary, both the agency and Ball & Brosamer assert that this modification was immaterial because it was not conceivable that a contractor would begin to perform immediately after receipt of the notice to proceed. Ball & Brosamer urges that a certain period of time would be required to marshal its equipment and personnel, to obtain the necessary bonds, and to submit and receive approval of a safety program. Also, the firm states that adverse weather conditions would preclude working in the quarry or on the haul roads until the following spring. The firm also notes that there are 10 non-work days between December 12, 1984, and January 1, 1985. In any event, the firm contends that subsection H.1 only requires that work commence within 30 days of the notice to

proceed. Therefore, the 20-day delay in having access to the quarry and haul roads does not affect the contractor's obligation to commence performance within that period.

We do not think that this 20-day delay as incorporated by Amendment 6 is material. An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived. *Emmett R. Woody,* B-213201, Jan. 26, 1984, 63 Comp. Gen. 182, 84-1 CPD ¶ 123.

The delay occasioned by the amendment did not alter Ball & Brosamer's legal obligation to complete the entire project within 840 calendar days after award, and the access road to the dike by July 1, 1985. In this regard, subsection 1.3.1 a. of the IFB, provides, in part that:

> * * * rights-of-way * * * will be provided by the government. * * * All work on the rights-of-way shall be performed by the contractor.
> * * * the unavailability of transportation facilities or limitations thereon shall not become a basis for claims for damages or extension of time for completion of work. * * *

Thus, despite its failure to acknowledge Amendment 6, Ball & Brosamer, by signing and submitting its bid, legally obligated itself to perform the work at its offered price within the contract period set forth in subsection H.1, irrespective of the delay in the availability of the rights-of-way to the quarry. The firm cannot now disavow its bid by claiming that it had not intended to obligate itself to complete the work within the slightly shorter period of time for performance that may be occasioned by the unavailability of the quarry and haul roads until January 1, 1985. Since Ball & Brosamer's legal obligation remains the same, Amendment 6 in this respect cannot be said to be material. *Emmett R. Woody, supra.*

Prior to the issuance of Amendment 6, subsection 4.3.2 b. of the solicitation had read as follows:

> Materials-Zone 1 of the earthfill portions of the dam and dike embankment shall consist of a mixture of CL (inorganic clays), SC (clayey sands), SM (silty sands), and ML (inorganic silts and very fine sands), available from borrow pits in borrow area C, and from excavations required for the dam and appurtenant works.

Amendment 6 added the following last sentence to that subsection:

> Fat clay (CH) material will not be allowed within earthfill, zone 1, portions of the embankment.

Grade-Way urges that this constituted a material change because bidders were now on full notice that fat clay material could not be used at all in zone 1. This accordingly meant that more selective loading and stockpiling of materials would be required than was originally anticipated, so as to avoid any fat clay material being used inadvertently, thus increasing costs with respect to methods of operation and additional time necessary to perform the work. Grade-Way also points out that the same prohibition against the use of fat clay material had been added earlier by Amendment 3 to

subsection 4.3.4 b., which governed the materials to be used in zone 1A. Thus, Grade-Way contends that bidders without knowledge of the specific prohibition against its use in zone 1, as imposed by Amendment 6, would have construed the two subsections in context to infer that the use of fat clay material was permissible in zone 1, but not in zone 1A. We find no merit in the firm's argument.

It is clear that bidders were always obligated to use a mixture of only four types of soils in zone 1, that is, inorganic clays, clayey sands, silty sands, and inorganic silts and very fine sands. Even though fat clay material was never specifically prohibited in zone 1 until the issuance of Amendment 6, we do not believe that bidders could reasonably interpret subsection 4.3.2 b. in its original form to mean that the use of fat clay material was in fact permissible. In our view, the additional language added by Amendment 6 was not material since, in essence, it merely reiterated the requirements of the IFB as originally set forth. *Doyon Construction Co., Inc.*, B-212940, Feb. 14, 1984, 63 Comp. Gen. 214, 84-1 CPD ¶ 194. Therefore, the legal obligation of bidders to use only the four specified soils in zone 1 never changed. *Emmett R. Woody, supra.* We thus conclude that Amendment 6 was not material, and Ball & Brosamer's failure to acknowledge it may properly be waived.

Accordingly, it is our opinion that the Department of the Interior would be legally correct in accepting Ball & Brosamer's low bid and in awarding the firm the contract, if the firm is determined to be a responsible prospective contractor.

[B-215189, et al.]

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

When record indicates that a protester has had difficulty in obtaining information as to whether, when, and at what price awards have been made, General Accounting Office (GAO) will consider protests that, so far as can be determined from the record, were filed within 10 days of the protester's notice that its offers had been rejected or that orders had been placed with other sources.

Defense Acquisition Regulation—Purchase of "Source Controlled" Parts (Sec. 1-313(c))—Approved Supplier Requirement—Applicability

When spare parts are critical to the safe and effective operation of aircraft propellers, with tolerances measured in ten thousandths of an inch, Defense Acquisition Regulation 1-313, which states that parts generally should be procured only from sources that have satisfactorily manufactured or furnished them in the past, is applicable.

Contracts—Negotiation—Offers or Proposals—Deficient Proposals—Blanket Offer of Compliances.

Blanket offer to meet all specifications is not legally sufficient to make a nonresponsive bid or offer responsive, and it is not enough that the bidder or offeror believes that its product meets specifications. GAO therefore will deny a protest against rejection of an offer from an unqualified source when the protester has not supplied evidence such as test reports that it can meet extremely precise specifications and has not demonstrated the existence of quality assurance procedures.

Contracts—Protests—Interested Party Requirement—Protester Not in Line for Award

When protester's price is not the lowest offered, a protest against award to any other firm at a higher price is without legal merit.

Contracts—Negotiation—Offers or Proposals—Evaluation—Not for SBA Review

Agency's determination that it is unable to evaluate an offer because of lack of technical information and test data need not be referred to Small Business Administration, since in rejecting the offer, the agency has not reached the question of the offeror's responsibility.

Matter of: Pacific Sky Supply, Incorporated, January 18, 1985;

This decision responds to multiple protests by Pacific Sky Supply, Incorporated, a small business whose unsolicited offers for spare parts for the C-130 aircraft have repeatedly been rejected by the Air Force because the firm is not a prime equipment manufacturer and has not otherwise been approved as a source for the parts in question.

We deny the protests, but note that under legislation enacted by the 98th Congress, Pacific Sky in the future may have a greater opportunity to become an approved source than it has for the protested procurements.

Basis of Protest:

The majority of Pacific Sky's protests are against the issuance of purchase requests under basic ordering agreements negotiated by Warner Robins Air Logistics Center, Robins Air Force Base, Georgia.[1] The firm consistently contends that it could supply spare parts meeting Air Force specifications at prices lower than those of the approved source.

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[1] Specifically, Pacific Sky's protests concern the following purchase requests (in the order in which they were issued): FD2060-83-32293; FD2060-84-58391; FD2060-84-58494; FD2060-84-58656; FD2060-84-59527; FD2060-59528; N00383-83-MPZ-3838 (issued by Warner Robins under a basic agreement negotiated by the Navy's Aviation Supply Office); FD2060-84-59906; FD2060-84-59912 (issued under invitation for bids No. F09603-84-B-0261, a 100 percent small business set-aside); and FD2060-84-60919.

Pacific Sky filed, but subsequently withdrew, similar protests against procurements by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas. *See* B-215758, B-217018, and B-217031, all closed without action by our Office.

According to the Air Force, data sufficient for competitive procurement is not available, and acquisition of such data would not be economical. It therefore has procured the spare parts using a restricted procurement method code. In virtually every case, the solicitation and Commerce Business Daily synopsis have advised offerors that to be considered for award, they must (1) be an approved source; (2) submit evidence of having satisfactorily supplied the required part directly to the Government or to the prime equipment manufacturer; or (3) submit other documentation that would allow the Air Force to determine that the part being offered is technically suitable for use with the C-130.

Timeliness:

The Air Force argues that, to the extent Pacific Sky challenges this requirement as unduly restrictive, the protests are untimely under our Bid Protest Procedures. These require protests against alleged improprieties that are apparent on the face of a solicitation to be filed by bid opening or the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1984). With only two exceptions, the protested solicitations closed on or before March 30, 1984, but Pacific Sky did not protest to our Office until May 10, 1984.[2]

We find, however, that the protests are not against the approved source requirement *per se*, but against the Air Force's rejection of Pacific Sky's unsolicited offers as nonresponsive. Pacific Sky states that it had difficulty in obtaining information as to whether, when, and at what price awards had been made. We therefore will consider those protests that, so far as we can determine from the record, were filed with our Office within 10 days of Pacific Sky's notice that its offers had been rejected or that orders had been placed with approved sources. *See* 4 C.F.R. § 21.2(b)(2).

Rejection of Pacific Sky's Offers:

The first timely protest concerns purchase request No. FD2060-84-58656, which was issued on December 23, 1983, closed on January 27, 1984, and awarded to Hamilton Standard Division of United Technologies on April 19, 1984. Pacific Sky states that it was not advised of the award price until May 7, 1984, a fact the Air Force does not dispute. Under this purchase request, the Air Force sought prices for 294 cams to be used in the C-130 propeller. Pacific Sky offered to supply the cams at a unit price of $36.50, compared with Hamilton Standard's $45.36.

In its protest, Pacific Sky states that in September 1983, in response to solicitation No. FD2060-83-31684, it had quoted the same

[2] In some cases, in submitting its unsolicited offers, Pacific Sky advised the Air Force that it protested any award at a price lower than its own. The agency did not regard these as valid protests. Neither do we. See *Precision Dynamics Corp.*, B-207823, July 9, 1982, 82-2 CPD ¶ 35, stating that a protest alleging a defect apparent on the face of a solicitation, filed with a bid or included in a proposal, is not a timely protest to the contracting agency.

price for 288 of the same cams. In connection with that procurement, the Air Force asked Pacific Sky to submit a sample, as well as engineering drawings and specifications. Since these apparently are still being evaluated, and since no award has been made under the September solicitation, Pacific Sky objects to rejection of its later offer.

The Air Force, however, states that the request for the sample and other information was an error on the part of inexperienced contracting personnel who did not consider whether the Air Force would be able to evaluate it. According to the Air Force, the drawings, which Pacific Sky certifies that it obtained legally, are (1) outdated and (2) do not contain test procedures. Since the Air Force has not independently developed such procedures, it cannot test the cams or ensure that they meet tolerances measured in ten thousandths of an inch. The Air Force therefore argues that its rejection of Pacific Sky's offer for the cams was reasonable and proper.

The Air Force raises the same objection, *i.e.,* insufficient data to evaluate the spare parts, to all of Pacific Sky's unsolicited offers. In addition, it states that its discussions with Pacific Sky reveal that the firm has no production capability and subcontracts to different, unidentified vendors. According to the Air Force, even qualification of a particular subcontractor would not be an adequate safeguard unless Pacific Sky agreed to use only that subcontractor. Further, the Air Force states, Pacific Sky deals in surplus parts, which may not be acceptable.

GAO Analysis:

In all of Pacific Sky's protests, the primary issue is whether the Air Force requirements for an approved source are consistent with statutory and regulatory requirements for maximum practicable competition. Given the critical nature of the parts in question, we find the Air Force's requirements, and resulting rejection of Pacific Sky's unsolicited offers, reasonable and in accord with the Defense Acquisition Regulation (DAR), § 1-313, *reprinted* in 32 C.F.R. pts. 1-39 (1984).

The purpose of this regulation is to ensure "safe, dependable, and effective operation of equipment," as well as the "requisite reliability and changeability of parts." It therefore permits their procurement on a restricted basis when fully adequate data, test results, and quality assurance procedures are not available or when the Government lacks the right to use them for procurement purposes. In such cases, DAR, § 1-313(c) states, the parts generally should be procured only from sources that have satisfactorily manufactured or furnished them in the past. The regulation concludes:

> The exacting performance requirements of specially designed military equipment may demand that parts be closely controlled and have proven capabilities of precise integration with the system in which they operate, to a degree that precludes the use of apparently identical parts from new sources, since the functioning of the

whole may depend upon latent characteristics of each part which are not definitely known. * * *

The same language appears in the Department of Defense Supplement to the Federal Acquisition Regulation, § 17.7203 (1984).

In our opinion, the critical tolerances and the essential function of parts for the C-130 propeller clearly bring the procurements protested by Pacific Sky within the scope of DAR, § 1-313. For example, the record reveals that one of the cams being procured under purchase request FD2060-84-58656, part no. 546446, controls the pitch of the propeller blades and protects the propeller against overspeed and negative torque on the engine during flight. This cam, according to Hamilton Standard, the prime manufacturer, is therefore critical to the safe operation of the 54H60 propeller on the C-130 aircraft. Pacific Sky has not previously supplied the part either directly to the Air Force or to Hamilton Standard.

Other than a blanket offer to meet all specifications, which is not legally sufficient, *cf. Zero Manufacturing Co.*, B-210123.2, Apr. 15, 1983, 83-1 CPD ¶ 416 (blanket statement that bidder will comply with all material specifications does not make an otherwise nonresponsive bid responsive); *Sutron Corp.*, B-205082, Jan. 29, 1982, 82-1 CPD ¶ 69 (in brand name or equal procurement, bidder must demonstrate that product meets all salient characteristics, and it is not enough that the bidder believes its product is equal or makes a blanket statement to this effect), Pacific Sky has provided our Office with no evidence that it can manufacture the parts in question to the extremely precise dimensions required. For example, it has not provided us with copies of reports from the FAA-approved repair station that it offered to have perform functional tests on the spare parts. Nor has Pacific Sky demonstrated the existence of quality control procedures or offered any assurances that it will use only qualified subcontractors and will supply only newly-manufactured parts. Pacific Sky's protests against awards at prices higher than its own are therefore denied. See *Compressor Engineering Corp.*, R-213032, Feb. 13, 1984, 84-1 CPD ¶ 180.

In two instances, Pacific Sky's protests are without merit because its price was not the lowest offered. In response to purchase request FD1060-84-59906, covering 2030 retaining rings, part no. 584086, California Propeller, an approved source and the proposed awardee, quoted unit and extended prices of $9.70 and $19,700.70, respectively, while Pacific Sky quoted $10.25 and $20,817.75. Under invitation for bids F09603-84-B-0261, which called for two first articles and 524 production units of a control drive sleeve, part no. 514826, Skyspares Parts, Inc. was the low bidder at $125 for each of the first articles and $24.15 for each of the production units. Pacific Sky bid $49.20 each without quoting a price for the first articles.

Additional Bases Protest:

In addition to its protests on the basis of price differentials, Pacific Sky contends that the Air Force should have referred its determination that the offers were nonresponsive to the Small Business Administration.

Responsiveness is a term generally associated with formally advertised procurements; it is occasionally used in connection with negotiated procurements (which in most cases these were) to denote a material requirement. *Center for Employment Training,* B-203555, Mar. 17, 1982, 82-1 CPD ¶ 252. Responsiveness refers to the bidder's or offeror's unconditional agreement to supply precisely what is called for in a solicitation. Responsibility, on the other hand, refers to the bidder's or offeror's ability to do so; it includes financial status, experience, and the like. See *Raymond Engineering, Inc.,* B-211046, July 12, 1983, 83-2 CPD ¶ 83.

The Small Business Act, as amended, 15 U.S.C. § 637(b)(7)(A) (1982), requires a contracting officer's finding that a small business is not responsible to be referred to the SBA, which will conclusively resolve the matter by issuing or refusing to issue a certificate of competency. *Skyline Credit Corp.,* B-209193, Mar. 15, 1983, 83-1 CPD ¶ 257. When a contracting officer makes a finding of nonresponsiveness, however, or determines that an offer is technically unacceptable, the Act does not apply. See *Rogar Manufacturing Corp.,* B-214110, Apr. 25, 1984, 84-1 CPD ¶ 479 (referral is not required when a bid is properly rejected as nonresponsive); *Advanced Electromagnetics, Inc.,* B-208271, Apr. 5, 1983, 83-1 CPD ¶ 360 (a finding of technical unacceptability need not be referred to SBA). Similarly, the Air Force's determination that it was unable to evaluate Pacific Sky's offers because of lack of information was not required to be referred to SBA, since the Air Force never reached the question of the firm's responsibility.

Finally, Pacific Sky complains of the Air Force's failure to notify it of the awards or to advise it of the reasons why it had not been accepted, as required by DAR, § 2-408.1. As we have often stated, failure to notify an unsuccessful bidder is a procedural deficiency that does not affect the validity of an otherwise proper award. *Emerson Electric Co.,* B-213382, Feb. 23, 1984, 84-1 CPD ¶ 233. We note that the record is replete with correspondence between the Air Force and Pacific Sky concerning the additional information that the agency believed should have been supplied in order for it to proceed with qualification of Pacific Sky. The protest on these bases therefore is also denied.

Conclusion:

Pacific Sky's protests are denied.[3]

[3] As noted, Pacific Sky may have a greater opportunity to compete in the future under legislation enacted by the 98th Congress: the Small Business and Federal Pro-

[B-215528]

Leaves of Absence—Court—Witness

Seven Administrative Law Judges (ALJs) seek court leave for service as witnesses for plaintiff in *Assn. of Administrative Law Judges, Inc. v. Heckler,* Civil Action No. 83-0124 (D.D.C.). The suit was brought by the plaintiff association to challenge certain practices of the Social Security Administration in management of ALJs and their caseloads. The ALJs attended the trial subject to court issued subpoenas and each testified for the plaintiff. They are entitled to court leave under 5 U.S. Code 6322(a)(2) (1982) for necessary traveltime, time spent testifying, and time waiting to testify.

Leaves of Absence—Court—Witness

Seven Administrative Law Judges (ALJs) seek court leave for service as witnesses for plaintiff in *Assn. of Administrative Law Judges, Inc. v. Heckler,* Civil Action No. 83-0124 (D.D.C.). Although each Judge is a member of the Association, none of them is an individual plaintiff nor is the lawsuit maintained as a class action. The Judges are not precluded from court leave under our decisions holding that such leave is not available to an employee who is a party to the lawsuit.

Matter of: Administrative Law Judges—Court Leave, January 22, 1985:

The Department of Health and Human Services (Agency) and the Association of Administrative Law Judges, Inc. (Association) have jointly requested an opinion of the Comptroller General regarding court leave under 5 U.S.C. § 6322 for seven Administrative Law Judges (ALJs) who were witnesses for the plaintiff in the matter of *Association of Administrative Law Judges, Inc. v. Margaret M. Heckler,* Civil Action No. 83-0124 (D.D.C). The suit was brought by the plaintiff, an Association of ALJs in the Social Security Administration (SSA), to challenge certain practices of SSA in management of ALJs and their case loads.

BACKGROUND

The trial in the case commenced on Tuesday, February 28, 1984, and concluded on Monday, March 12, 1984. On February 22, 1984, plaintiff's counsel mailed subpoenas to the seven ALJs that counsel intended to call as witnesses, ordering them to appear in the federal courthouse in Washington, D.C., on February 28, 1984.[1] The Re-

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curement Competition Enhancement Act of 1984, Pub. L. No. 98-577, § 202, 98 Stat. 3066, 3069 (1984), and the Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1216, 98 Stat. 2492 (1984). Both contain provisions concerning prequalification, testing, and other equality assurance procedures and require, among other things, that qualification be justified and standards specified; that potential offerors be provided an opportunity to demonstrate their ability to meet standards; and that agencies promptly advise offerors whether qualification was attained and, if not, why not. Potential offerors generally may not be denied the opportunity to submit offers and have them considered for award solely because they are not on lists of qualified bidders or manufacturers. Moreover, the Department of Defense Authorization Act states that the opportunity to qualify shall be "on a reimbursable basis," and both Acts state that in certain circumstances, the contracting agency must bear the cost of testing and evaluation for small business concerns.

[1] Several ancillary issues have been resolved through the compilation and augmentation of the administrative record in this case. For example, the agency alleged

gional Chief Administrative Law Judges were instructed to grant to each ALJ who testified for the plaintiff court leave for each day of travel, 1 day for the day on which the judge was ordered to appear, and leave for the day on which the judge actually testified. No judge testified for more than 1 day.[2]

At the end of the pay period, each judge signed for the court leave to which he or she believed himself or herself entitled and, pending our decision, no changes have been made in the amounts claimed by the individual judges on their leave cards. The agency states that when it receives our decision, adjustments will be made as appropriate.

ANALYSIS

The statute generally applicable to court leave for government employees as witnesses in actions to which the United States is a party is 5 U.S.C. § 6322, which provides in subsection (a) that a Federal employee is entitled to leave, without loss of or reduction in pay or leave to which he is otherwise entitled, when in response to a summons in connection with a judicial proceeding he serves: (1) as a juror, or (2) except as provided in subsection 6322(b), as a witness on behalf of any party when the United States, the District of Columbia, or a state or local government is a party to the proceeding.

Section 6322(a) was amended to its present form in 1976 with a view toward "eliminating inequities" between Government employees apearing on behalf of the Government who are effectively paid for the court time, "and those who are required to take annual leave or leave without pay when they appear as witnesses on behalf of a private party in a judicial proceeding to which the

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that subpoenas for the ALJs lacked the seal of the District Court and all the ALJs to whom they were mailed resided beyond the 100-mile limit set forth in Rule 45 of the Federal Rules of Civil Procedure. The Association has verified that while the embossed seal may not be visible on the photocopies of the subpoenas the originals were stamped with the seal of the District Court for the District of Columbia. The Association also convincingly argues that the witnesses became subject to the subpoenas when they arrived within the 100-mile limit and remained under the compulsion thereof until they were released by the Association's attorneys. In any event, it is clear from the court leave statute and its legislative history that an official "subpoena" is not needed in order to satisfy the requirement of a "summons" contained in 5 U.S.C. § 6322. S. Rep. 1371, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5014, 5019 (a summons is an official request, invitation, or call, evidenced by an official writing); S. Rep. No. 830, 94th Cong., 2d Sess. reprinted in 1976 U.S. Code Cong. & Ad. News 1207. Finally, the agency expressed uncertainty as to whether the ALJs received customary witness fees with regard for 5 U.S.C. § 5515. The Association advised this Office that the ALJs were asked to waive those fees and no such fees were in fact paid.

[2]The dates on which the judges actually testified in the courtroom are as follows: Judge Charles N. Bono testified on February 28. Judges Robert B. Murdock, Francis Mayhue, David T. Hubbard, Jerry Thomasson, and Joyce Krutick Barlow testified on February 29 and Judge Ainsworth H. Brown testified as a rebuttal witness on March 12. Because the trial did not proceed as quickly as plaintiff's counsel had anticipated, several of the ALJs (Thomasson, Hubbard and Mayhue), who testified on the 29th had been expected to testify on the 28th.

United States is a party." S. Rep. No. 830, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Admin. News, 1207-08. Thus, the legislative intent is to treat witnesses for and against the Government and Government agencies on equal terms.

Our past decisions have held that the authority of 5 U.S.C. § 6322 to grant court leave to a government employee summoned as a witness in certain proceedings does not extend to an employee who is the plaintiff in such action. *Wilma Pasake,* 59 Comp. Gen. 290 (1980), and *James L. Sweeney,* B-201602, April 1, 1981. In 62 Comp. Gen. 87 (1982), we applied this same rationale to deny court leave to an employee who was the defendant in a state court action.

This line of decisions, however, is not applicable to the present case. The preclusion of court leave for an employee who is a "party in the court action" does not extend to the members of a plaintiff or defendant organization where the individual members are not, in fact, parties. In this case, the Association of Administrative Law Judges, an incorporated organization, was the only plaintiff. While the Association presumably sought to serve the interests of its membership by this lawsuit, none of the members was named as a plaintiff nor was the suit maintained as a class action on behalf of the members.

For the above reasons, each of the ALJs is qualified for court leave in connection with their service as witnesses. The only issue that remains is the amount of court leave to which they are entitled. The submissions by the agency and the ALJs do not come to grips directly with this issue. As noted previously, the agency allowed court leave only for travel days, the day the judge was ordered to appear, and the day he or she actually testified. It is not entirely clear from the record before us whether the additional leave claimed by the ALJs represents time that the ALJs were required to spend at the trial incident to their roles as witnesses or whether it represents time they spent there as observers or advisors to the Association's counsel.

We do not believe that court leave may be used for periods of time beyond that reasonably incident to the employee's role as a witness. In addition to necessary traveltime and time spent testifying, this would include time waiting to testify. With regard to this case, the ALJs do not specifically assert, nor do their affidavits demonstrate that their claims cover only witness/related time. On the other hand, the agency does not specifically assert that the claims go beyond witness-related time. The agency does say, as noted above, that appropriate adjustments will be made when our decision is received.

Accordingly, we cannot resolve this issue on the present record. Instead, we conclude that the claims should be allowed as stated unless the agency determines, after consultation with the ALJs and counsel for the Association, that the amount of time claimed is excessive under the standard set forth above.

CONCLUSION

Each of the seven ALJs attended the trail in question in response to a summons in connection with a judicial proceeding for which they served as witnesses on behalf of a plaintiff organization where the United States was a party to the proceeding. Accordingly, we conclude that the seven ALJs should be allowed court leave under 5 U.S.C. § 6322(a)(2) for the amount of time that each judge is entitled to under the standards set forth above.

If any annual leave that is credited to the seven Administrative Law Judges as a result of this decision is required to be forfeited by the maximum carry-over provision of 5 U.S.C. § 6304(a), then such forfeited leave should be treated as having been caused by administrative error and credited to a separate leave account for the employee under 5 U.S.C. § 6304(d)(1) and (2).

[B-215768]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset

The Survivor Benefit Plan is an income maintenance program for the families of deceased service members. Social security "offset" provisions were included in this program because annuities are intended to complement a Plan participant's social security coverage. No reduction of an annuity by this offset is appropriate, however, if the Social Security Administration determines that the annuitant is completely ineligible for social security survivor benefits. Therefore, an annuity offset is not required in the case of an Army Reserve sergeant's widow who was determined ineligible for social security survivor benefits because of her receipt of a governmental pension based on her own employment.

Matter of: Mary E. Branham, January 22, 1985:

The question presented is whether a military Survivor Benefit Plan annuity may properly be subjected to reduction under social security offset provision contained in the Plan even though the Social Security Administration has determined that the annuitant is not entitled to social security survivor benefits.[1] We conclude that the Survivor Benefit Plan annuity is not subject to reduction in those circumstances.

BACKGROUND

Mrs. Mary E. Branham is the surviving spouse of Sergeant Major Roy L. Branham, USAR (Retired). Prior to his death Sergeant

[1] This action is in response to a request received from Mr. J. E. Boone, Special Disbursing Agent, U.S. Army Finance and Accounting Center, for an advance decision concerning the propriety of certifying a voucher for payment in the amount of $1,087.50 in favor of Mrs. Mary E. Branham, which amount represents additional Survivor Benefit Plan annuity moneys due to her for the period ending May 31, 1984, if it is concluded that her annuity is not subject to the social security offset. The request was forwarded here by the Office of the Comptroller of the Army after it was assigned submission number DO-A-1443 by the Department of Defense Military Pay and Allowance Committee.

Branham had become qualified for retirement with pay as a member of the Army Reserve, and he had elected to participate in the Survivor Benefit Plan, thus choosing to receive military retired pay at a reduced rate in order to provide the annuity authorized by that Plan for his wife if she survived him.

Mrs. Branham is a retired Federal employee and is entitled to a civil service annuity in her own right. Following her husband's death, a Social Security Administration claims representative made a determination that she was ineligible for social security survivor benefits because of her status as a civil service annuitant, under provisions of the social security laws and regulations applicable to certain persons receiving pensions based on governmental employment not covered by social security.[2]

Army finance and accounting officials have determined that Mrs. Branham is entitled to a Survivor Benefit Plan annuity. Doubts have arisen, however, concerning the matter of whether that annuity should be reduced under a social security "offset" provision of the Survivor Benefit Plan by an amount equal to the social security survivor benefit that would apparently otherwise have been paid to her based on her marriage to Sergeant Branham, but for the fact that she is also entitled to the civil service annuity based on her own employment.

Analysis and Conclusion

The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the families of deceased service members. The provision of this statutory Plan brought into question here, subsection 1451(a)(3), prescribes a formula for the reduction of an annuity payable to a surviving spouse predicated on—

> * * * the amount of the survivor benefit, if any, to which the widow or widower would be entitled under title II of the Social Security Act (42 U.S.C 401 et seq.) based solely upon service by the person concerned * * *.

The Congress included this social security "offset" provision in the Survivor Benefit Plan legislation because members of the uniformed services have social security coverage, and annuities under the Plan were generally designed to complement social security benefits.[3]

We have consistently held that this offset against a Survivor Benefit Plan annuity is to be based on social security benefits attributable to the military service of the deceased Plan participant to which the annuitant "would be entitled," even if the annuitant may not have actually applied for such benefits and may otherwise, for example, have elected instead to receive social security payments based on personal employment or the employment of some

[2] 42 U.S.C. § 402(b)(4)(A) and 20 C.F.R. § 404.408a.

[3] See, generally, S. Rep. No. 1089, 92d Cong., 2d Sess. 29, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3288, 3304; H.R. Rep. No. 481, 92d Cong., 1st Sess. 14 (1971).

third person.[4] We have also expressed the view, however, that an offset is inappropriate if the Social Security Administration has made a determination that the annuitant is ineligible for such benefits.[5]

In the present case, the Social Security Administration made a determination that Mrs. Branham had no eligibility for or entitlement to social security survivor benefits in any amount whatever during the period in question. That determination is not subject to review by the Department of the Army, or by us.[6]

As indicated, the Social Security Administration's determination was based on provisions of law and regulation which place restrictions on the social security survivor benefits payable to certain persons receiving pensions based on governmental employment. We are unaware of any similar provision contained in the Survivor Benefit Plan, however, which might operate to reduce an annuity under the Plan on account of the recipient's independent and concurrent entitlement to a civil service annuity.

As further indicated, the Survivor Benefit Plan was designed as a family income maintenance program, and social security offset provisions were included because Plan annuities were intended to complement service members' social security coverage. Here, the determination was that Mrs. Branham would not be eligible for or entitled to any social security survivor benefits as the result of Sergeant Branham's death, so that there appears to be no basis for a reduction in the amount of her Survivor Benefit Plan annuity under the social security offset provision specifically brought into question, or for any other reason.

Accordingly, we conclude that Mrs. Branham's Survivor Benefit Plan annuity was not subject to reduction. The voucher presented for decision is returned for payment, if otherwise correct.

[B-216016]

Subsistence—Per Diem—Temporary Duty—Long-Term Assignments

An employee received travel and subsistence allowances during an alleged 6-month detail in Washington, D.C., and then was permanently assigned to Washington. Whether a particular location should be considered a temporary or permanent duty station is a question of fact to be determined from the orders directing the assignment, the duration of the assignment, and the nature of the duties to be performed. Under the facts and circumstances of this case, we conclude that the employee's 6-month detail in Washington constituted a legitimate temporary duty assignment. Therefore, he was entitled to temporary duty allowances in Washington until the day he received definite notice of his transfer there.

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[4] See, generally, *Mary L. Lott,* 60 Comp. Gen. 129, 132 (1980); *Marjorie S. Nester,* 58 Comp. Gen. 795 (1979); *Mary K. Bitterman and Carmen K. (Kincaid) Klimes,* 57 Comp. Gen. 339, 341-343 (1978).

[5] *Mary K. Bitterman and Carmen K. (Kincaid) Klimes,* 57 Comp. Gen. at 340-341.

[6] See 42 U.S.C. § 405; 20 C.F.R. § 404.900 *et seq.*

Officers and Employees—Transfers—Agency Liability for Expenses of Transfer

An employee was transferred from Chicago, Illinois, to Washington, D.C., following a 6-month temporary duty assignment in Washington. The employee's claim for moving expenses may be allowed if otherwise proper, since the change of an employee's official station to the location of his temporary duty assignment will not defeat his entitlement to the relocation expenses authorized by 5 U.S.C. 5724 and 5724a.

Vehicles—Rental—Long-Term Basis—Temporary Duty

An employee was reimbursed for the costs of renting an automobile to transport his personal effects from his permanent duty station to his temporary duty site, and for local transportation at his temporary duty station. The employee may not retain full reimbursement for the automobile rental charges since the rental was not approved based on a determination of advantage to the Government, and there is no authority to reimburse rental costs for periods in which no official business is performed. However, the employee may retain reimbursement attributable to his use of the rental car for official travel, limited to the constructive cost of transportation by a more advantageous mode.

Matter of: Bertram C. Drouin—Temporary Duty vs. Permanent Change of Station, Relocation Expenses, and Reimbursement for Automobile Rental Charges, January 22, 1985:

The Commissioner of Customs has requested our decision concerning Mr. Bertram C. Drouin, a former employee of the United States Customs Service stationed in Chicago, Illinois, who was alledgely detailed to Washington, D.C., for 6 month prior to a permanent reassignment there. The Commissioner frames the issues for our determination as follows: (1) whether Mr. Drouin's 6-month detail in Washington should be regarded as temporary duty or as a permanent change of station; (2) whether Mr. Drouin must repay any portion of the temporary duty allowances he received during the 6-month detail; (3) whether Mr. Drouin may be allowed reimbursement for relocation expenses associated with his transfer from Chicago to Washington; and (4) whether Mr. Drouin may retain reimbursement for the costs of renting and storing and automobile during the period of his detail in Washington.

For the reasons discussed below, we hold that Mr. Drouin's 6-month detail constituted a legitimate temporary duty assignment, and, therefore, that he may retain the travel and subsistance expenses he received in Washington. However, if Customs determines that Mr. Drouin received definite notice of his transfer to Washington prior to the end of his detail, he may not retain the temporary duty allowances he received after the date of that notice. Further, we hold that Mr. Drouin may be paid relocation expenses associated with his transfer from Chicago to Washington, even though the transfer followed an extended period of temporary duty. Finally, we hold that Mr. Drouin may not retain full reimbursement for the automobile rental and storage charges in question, since the rental was not authorized as advantageous to the Government, and the

automobile was used primarily for personal travel. However, Mr. Drouin may be allowed rental charges attributable to his use of the automobile for official travel, limited to the constructive cost of transportation by a mode which is more advantageous to the Government.

TEMPORARY DUTY ALLOWANCES

Facts

In 1982, Customs abolished its Office of Special Enforcement in Washington, D.C., leaving the agency without an office to handle international enforcement. At the request of the Deputy Director, Office of Investigations, Mr. Drouin was detailed from his position as Regional Director (Investigations), Chicago, Illinois, to Washington, D.C., and assigned responsibility for establishing and organizing a new office for the supervision of international enforcement. The Deputy Director, who supervised Mr. Drouin during the detail, states that the selected Mr. Drouin for the assignment because he had previously managed international enforcement, and because local personnel lacked the necessary experience.

On August 9, 1982, Mr. Drouin reported for duty in Washington under orders authorizing travel for the period August 9 to September 7, 1982, and describing the purpose of the travel as a "detail to headquarters." He was not assigned to any established position during the detail, but served under a series of different job titles until February 19, 1983. On that date, Mr. Drouin was permanently transferred to Washington and assigned to the newly created position of Director, Office of International Enforcement Staff. Between August 9, 1982, and February 19, 1983, Mr. Drouin received $8,959.56 in temporary duty allowances.

Following an audit of various travel and relocation claims filed by Mr. Drouin, Customs' Office of Internal Affairs decided that Mr. Drouin's 6-month detail represented a permanent change of station rather than a temporary duty assignment, and, therefore, that he should repay the temporary duty allowances he had received. As support for this conclusion, Internal Affairs cited our decisions holding that an employee who is notified of a permanent change of station before reporting for temporary duty at the new station may not be paid per diem after he arrives there. For reasons which are discussed below, Internal Affairs found that Mr. Drouin knew he would be transferred to Washington before he reported for temporary duty there on August 9, 1982.

The Office of Internal Affairs also found it significant that, shortly after Mr. Drouin began his detail in Washington, the Regional Commissioner (Enforcement), North Central Region, request that the region be reimbursed for his per diem and salary expenses. Further, the Office of Internal Affairs noted that Mr. Drouin relinguished his apartment in Chicago after beginning his detail in

Washington, and that his family maintained a separate residence in the Washington area.

The Deputy Assistant Commissioner, Office of Enforcement, disagreed with Internal Affairs' conclusion that Mr. Drouin knew he would be transferred to Washington before he reported for temporary duty there. In view of this disagreement, the Commissioner of Customs asked us to determine whether Mr. Drouin's detail during the period August 9, 1982, to February 19, 1983, should be regarded as temporary duty or as a permanent change of station, and whether he must repay any portion of the temporary duty allowances he received during that period.

Discussion

Nature of the Assignment

The Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), do not contain a formal definition of a "temporary duty assignment." However, under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem or actual subsistance expenses at his permanent duty station or at the place of abode from which he commutes daily to his official station.

The agency's designation of an employee's permanent duty station is not determinative. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982). In 31 Comp. Gen. 289, 291 (1952), we stated that:

> * * * the authority to determine and designate the post of duty of an officer or employee of the Government includes only the authority to fix the place at which the employee should actually establish official headquarters, and from which he should in fact operate, which, ordinarily is the place where the employee would be required to spend most of his time. The designation of any other place, for the purpose of giving the employee a subsistence allowance for the greater portion, or all, of his time, is not within the authority vested in the head of a department or other administrative official charged with the duty of designating posts of duty of Government employees, and does not entitle an employee to per diem when absent therefrom and performing duty at another place, which latter place is in fact his post of duty. [Citations omitted.]

We have held that the question whether an assignment to a particular location should be considered a temporary duty assignment or a permanent change of station is a question of fact to be determined from the orders directing the assignment, and from the nature and duration of the assignment. *J. Michael Tabor,* B-211626, July 19, 1983; and *Don L. Hawkins,* B-210121, July 6, 1983. The duration and nature of the duties assigned are of particular importance in making the determination as to whether an assignment to a particular location is a permanent change of station. *Peter J. Dispenzirie,* 62 Comp. Gen. 560 (1983); and *Don L. Hawkins, supra,* at 4.

1. *The duration of the assignment.* Although there is no hard and fast rule as to the permissible duration of a temporary duty assignment, we have generally stated that such assignments are of brief duration. See *J. Michael Tabor,* B-211626, *supra,* at 5; and 36

Comp. Gen. 757, 758 (1957). Thus, in *Peck and Snow,* B-198887, September 21, 1981, we determined that an assignment of 2 years and 9 months was, in fact, a permanent change of station rather than a temporary duty assignment. Similarly, in *Peter J. Dispenzirie,* 62 Comp. Gen. 560, above, we held that a 2-year assignment could not be regarded as temporary duty. Further, in *J. Michael Tabor,* B-211626, cited previously, we determined that an assignment of 18 months was far in excess of the reasonable duration of a temporary duty assignment. See also 36 Comp. Gen. 757.

On the other hand, we have held that assignments lasting for 2 to 4 months generally should be regarded as temporary duty assignments. *Nelson J. Krohn,* B-200745, September 1, 1981; and *Peck and Snow,* B-198887, *supra,* at 5. In *Frederick C. Welch,* 62 Comp. Gen. 80, above, we held that the assignment of an employee to a seasonal worksite for 6 months every year constituted a "long term" temporary duty assignment, rather than a permanent change of station. Also, in *Robert E. Larrabee,* 57 Comp. Gen. 147 (1977), we approved an agency's designation of a 17 month assignment as temporary since the assignment was initially intended to cover only a 5 month period, and was twice extended for no more than 6 months at a time.

Mr. Drouin reported for duty in Washington on August 9, 1982, under orders authorizing temporary duty travel for a 1-month period ending September 7, 1982. His detail was extended to February 19 1983, for a total duration of 6 months. Under these circumstances, and in line with the above cited decisions, we hold that Mr. Drouin's detail was of sufficiently short duration to constitute a legitimate temporary duty assignment.

2. *The nature of the duties performed.* As we discussed previously, the character of an assignment must be determined not only from its duration, but also from the nature of the duties assigned. Examples of duties normally associated with a temporary duty assignment include: an assignment to a replacement pool for further assignment; an assignment to a school as a student for the purpose of pursuing a course of instruction of definite duration; or an assignment to a particular station under conditions contemplating a further assignment to a new duty station or a return to the old duty station 24 Comp. Gen. 667, 670 (1945). In contrast, we held in *Peter J. Dispenzirie,* 62 Comp. Gen. 560, cited previously, that the assignment of an employee to act as the head of a regional office for 2 years is not the type of assignment which is normally made on a temporary basis. In *J. Michael Tabor,* B-211626, above, we held that an employee serving as an administrative assistant for 17 months could not be considered to be on temporary duty, since the record did not show that he had special skills needed to perform the assignment, or that local personnel could not have been assigned to the duties.

In this case, Mr. Drouin was detailed to Washington for the purpose of establishing and organizing a new office of international enforcement. The Deputy Director, Office of Investigations, states that he requested the temporary assignment because Mr. Drouin had previously managed international enforcement, his assistance was "critically needed due to a headquarters reorganization," and "no one in headquarters could manage the [new] division because of the lack of experience." During the period of the detail, Mr. Drouin was not assigned to an established position but served under a series of different job titles.

Considering the transitory nature of the project to which Mr. Drouin was assigned, and the agency's need for his special skills and experience, we conclude that Mr. Drouin's assignment in Washington fulfilled a legitimate objective of temporary duty. Compare *J. Michael Tabor,* B-211626, above. Accordingly, for the reasons stated above, we hold that Mr. Drouin was properly assigned to a temporary duty status for the period beginning August 9, 1982.

Notice of Transfer

As indicated previously, the Office of Internal Affairs determined that Mr. Drouin was not entitled to temporary duty allowances in Washington because he knew he would be transferred there before beginning his detail on August 9, 1982. Apparently, this finding was based on an interview conducted with Mr. Drouin on January 31, 1983, in which he stated that the Commissioner of Customs had decided "more than 6 months ago" to permanently reassign him to Washington. Internal Affairs also relied on an interview with the Assistant Regional Commissioner (Enforcement) in Chicago, who said that Mr. Drouin had informed him of the transfer "sometime prior to October 1, 1982."

The Deputy Assistant Commissioner, Office of Enforcement, disagreed with the conclusion reached by Internal Affairs, explaining the relevant facts as follows. In the latter part of 1981, the Commissioner of Customs tentatively offered Mr. Drouin a permanent reassignment to Washington, and Mr. Drouin rejected this offer. Sometime prior to August 1982, Customs officials generally discussed the staffing of management positions in the new office of international enforcement and identified Mr. Drouin as a candidate for reassignment, but deferred the selection of personnel pending the creation of the new office. At the time Mr. Drouin reported for temporary duty in Washington, he was an applicant for positions in several of Customs' regional offices. It was not until after Mr. Drouin reported for temporary duty in Washington that he applied for a permanent position there. The Commissioner of Customs selected Mr. Drouin for reassignment to Washington in January 1983, and his permanent position there was established on February 17, 1983.

As pointed out by Internal Affairs, we have held that a transfer is effective on the date an employee arrives at his new duty station. *Thomas S. Roseburg,* B-188093, October 18, 1977. On this basis, we have held that an employee who receives definite notice of a permanent change of station prior to reporting for temporary duty at the new station is not entitled to be paid per diem or actual subsistence expenses after he arrives there. See *John W. Corwine,* B-203492, December 7, 1982.

The record before us does not support a determination that Mr. Drouin received definite notice that he would be transferred to Washington before he reported for temporary duty there in August 1982. While Mr. Drouin may have been aware prior to August 1982, that he was being considered for a permanent reassignment to Washington, the Commissioner of Customs did not select him for the reassignment until January 1983. Under these circumstances, we conclude that Mr. Drouin could not have received definite notice of his appointment to a permanent position in Washington before January 1983. See generally *Modesto Canales,* B-186595, July 7, 1977, and April 10, 1978.

We note, however, that per diem may not be allowed at a place where an employee is on temporary duty after he receives notice that such place is to become his permanent duty station, even though there may be an administrative delay in the processing and issuance of a formal transfer order. See *Modesto Canales,* B-186595, cited above. Although the record indicates that the Commissioner of Customs decided to permanently reassign Mr. Drouin to Washington in January 1983, there is no documentation concerning the date upon which this decision was communicated to Mr. Drouin. Accordingly, Customs should ascertain whether Mr. Drouin received notice of the transfer before the end of his detail on February 19, 1983, and, if necessary, redetermine his entitlement to temporary duty allowances.

Ancillary Issues

As further support for its determination that Mr. Drouin's assignment to Washington represented a permanent change of station, the Office of Internal Affairs points out that the Regional Commissioner (Enforcement), North Central Region, requested and received reimbursement for Mr. Drouin's salary and temporary duty expenses beginning October 1, 1982. However, the Assistant Regional Commissioner (Enforcement) of the North Central Region, who initiated the request for reimbursement, explains that, "[a]lmost without question, when someone requests an employee who I have control over for a TDY [temporary duty] assignment, I want to know who is going to pay the expenses. That's a routine with me and I did it in the case of Mr. Drouin." Since it appears that the North Central Region routinely requests reimbursement

for salary and subsistence expenses associated with the temporary duty travel of its employees, we do not believe that its request for reimbursement of Mr. Drouin's temporary duty expenses has any bearing on the character of his assignment in Washington.

The Office of Internal Affairs also considers it signficant that Mr. Drouin gave up his apartment in Chicago after beginning his detail in Washington, D.C., and that his family maintained a separate residence in the Washington area. However, there is no requirement that an employee maintain a residence at his permanent duty station in order to qualify for per diem or actual subsistance expenses while on temporary duty away from that station. See *Robert E. Larrabee,* 57 Comp. Gen. 147 (1977), at 150, 151; and *Nicholas G. Economy,* B-188515, August 18, 1977. Furthermore since it appears that Mr. Drouin did not reside with his family during the period of his temporary duty assignment in Washington, there is no basis for reducing his lodging expenses during that period. Compare *Sanford O. Silver,* B-187129, January 4, 1977, 56 Comp. Gen. 223.

RELOCATION EXPENSES

Mr. Drouin incurred $837.71 in relocation expenses during the period March 6 to April 8, 1983. While the record does not contain a description of the claimed expenses, Customs poses a general question as to whether relocation expenses are allowable where an employee is transferred to the location at which he has been performing extended temporary duty.

As noted previously, an employee who is transferred to the location at which he is performing temporary duty may not be paid per diem after he receives definite notice of the transfer. However, the fact that an employee is transferred to his temporary duty site does not defeat his entitlement to the relocation expenses authorized by 5 U.S.C. §§ 5724 and 5724a (1982). See *Steven F. Kinsler,* B-169392, October 28, 1976; and *NOAA Ship DISCOVERER,* B-167022, July 12, 1976. Under sections 5724 and 5724a, a transferred employee may be reimbursed for various moving expenses including the costs of transporting his family and household effects to the new duty station, residence sale and purchase expenses, and miscellaneous expenses. Accordingly, Mr. Drouin may be reimbursed for relocation expenses in the amount of $837.71, if payment for the claimed items is otherwise allowable under 5 U.S.C. §§ 5724 and 5724a.

AUTOMOBILE RENTAL CHARGES

Facts

Mr. Drouin periodically rented an automobile while he was temporarily stationed in Washington, D.C. After he was reimbursed for

rental and storage charges totaling $1,877.42, Customs' Office of Internal Affairs questioned his entitlement to be reimbursed for those expenses.

The audit report prepared by Internal Affairs shows that, shortly after Mr. Drouin reported for temporary duty in Washington, his supervisor verbally authorized him to use a rental car to return to Chicago for the purpose of picking up his personal effects. Mr. Drouin traveled to Chicago by a mode of transportation not described in the record, and, on October 26, 1982, he rented a car there. On October 29, 1982, Mr. Drouin used the rental car to travel from Chicago to Cincinnati, Ohio, where he apparently performed temporary duty for 2 days. He left Cincinnati on November 1, arrived in Washington on November 2, and returned the car to the rental company on November 7, 1982. During the period October 26 to November 7, 1982, Mr. Drouin incurred automobile rental charges totaling $872.03.

The remaining rental and storage charges are attributable to Mr. Drouin's use of a rental car for local transportation in Washington during the period August 9 to November 14, 1982. Mr. Drouin rented a car locally on 5 different occasions, retaining the car for periods of 2 days to 3 weeks without the knowledge or approval of his supervisor. Mr. Drouin states that he rented the car for official purposes, explaining that he and other Customs employees temporarily stationed in Washington used a rental car to commute between their lodgings and the temporary worksite.

The Office of Internal Affairs concluded that Mr. Drouin was indebted for the cost of renting and storing an automobile in Washington, since he could have used a less expensive mode of local transportation. However, Internal Affairs found that Mr. Drouin could be reimbursed for the automobile rental charges he incurred in moving his personal effects from Chicago to Washington, not to exceed the cost of common carrier transportation between those two points.

Discussion

Under FTR para. 1-3.2, an employee may use a rental car only if an appropriate official has determined that the use of a common carrier or other method of transportation would not be more advantageous to the Government. See *Robert P. Trent,* B-211688, October 13, 1983. Even if competent authority determines that a rental car is more advantageous to the Government, an employee may not be reimbursed for the cost of the rental unless he uses the automobile for official purposes. FTR para. 1-1.3b. See also *Raymond E. Vener,* B-199122, February 18, 1981. Accordingly, we must determine whether Mr. Drouin received proper authorization for the rental of an automobile, and used the automobile for official purposes, (1) for his travel from Chicago to Washington, during the

period October 26 to November 7, 1982; and (2) for local transportation in Washington, between August 9 and November 14, 1982.

1. *Travel from Chicago to Washington.* As indicated above, the record indicates that Mr. Drouin's supervisor verbally authorized him to rent an automobile to transport his personal effects from Chicago to Washington. However, there is no evidence that this official determined that Mr. Drouin's rental of an automobile would be more advantageous to the Government than his use of a common carrier or other method of transportation, as is required by FTR para. 1-3.2.

Furthermore, we note that Mr. Drouin rented the car in Chicago on October 26, used it for travel between October 29 and November 2, and did not return it to the rental agency until November 7, 1982. Thus, the rental car either sat idle or was retained for Mr. Drouin's personal convenience on 8 days during the 12-day rental period. Also, Mr. Drouin's use of the rental car to transport his belongings from Chicago to Washington must be regarded as personal, since, at the time, he was only temporarily assigned to Washington and had not been permanently transferred there. See generally *Laddie V. Birge, Jr.,* B-190525, April 7, 1978. As we indicated previously, there is no authority to reimburse the cost of car rental for a period in which no official business is performed. See *Lawrence B. Perkins,* B-192364, February 15, 1979.

We note, however, that Mr. Drouin traveled from Chicago to Washington via Cincinnati, Ohio, where he apparently performed temporary duty for 2 days. Where an employee performs official travel by a mode of transportation not authorized as advantageous to the Government, we have allowed reimbursement limited to the constructive cost of transportation by a more advantageous mode. See *Robert P. Trent,* B-211688, *supra,* at 10, 11; and *Sandra Massetto,* B-206472, August 30, 1982. Therefore, if Customs determines that Mr. Drouin actually performed temporary duty in Cincinnati, he may be reimbursed for his return travel to Washington, not to exceed the constructive cost of travel by common carrier or another permissible mode of transportation.

2. *Local travel in Washington, D.C.* As indicated above, Mr. Drouin periodically rented an automobile in Washington so that he and other Customs employees could commute between their lodgings and the temporary duty site. However, this rental was not approved based on a determination of advantage to the Government, as is required by FTR para. 1-3.2. Furthermore, we note that FTR para. 1-2.3, pertaining to local transportation, contemplates that an employee on temporary duty will ordinarily lodge in close proximity to the temporary duty site. Thus, we have disallowed local travel expenses occasioned by an employee's remote lodging, unless the employee demonstrates that adequate lodging in the immediate vicinity was unavailable or that he achieved an overall cost savings

in travel expenses. *Seymour A. Kleiman,* B-211287, July 12, 1983; and *James Wasserman,* B-192112, October 11, 1978.

There is nothing in the record to show that Mr. Drouin was unable to obtain lodging in an area serviced by public transportation, or that he secured lodgings in a remote area in order to achieve an overall cost savings. Absent such evidence, Mr. Drouin may not retain reimbursement for those rental charges which exceed the cost of allowable local transportation by a mode which is determined to be advantageous to the Government. See *Robert P. Trent,* B-211688, *supra,* at 10, 11.

CONCLUSION

For the reasons stated above, the Commissioner's four questions are answered as follows: (1) Mr. Drouin's 6-month detail in Washington was in fact a temporary duty assignment; (2) he may, therefore, retain all temporary duty allowances he received during the detail, unless Customs determines that he received definite notice of his transfer prior to the end of the detail; (3) Mr. Drouin may be paid relocation allowances associated with his transfer from Chicago to Washington; and (4) Mr. Drouin may retain reimbursement for automobile rental and storage charges only to the extent that he used the automobile for official purposes, and then limited to the constructive cost of travel by a more advantageous mode of transportation. In collecting amounts owed by Mr. Drouin, Customs should comply with the procedures set forth in 5 U.S.C. § 5514, as amended by the Debt Collection Act of 1982, Public Law 97-365, § 5, 96 Stat. 1751.

[B-215598]

Officers and Employees—Transfers—Real Estate Expenses—Time Limitation—Mandatory

An employee entered into a "land sale agreement" in order to sell his former residence at his previous permanent duty station. Claim is denied here since the expenses in question were not incurred until 3 years and 26 days after the employee reported for duty at his new duty station. This is in excess of the maximum allowable period permitted for the completion of real estate transactions, 3 years in this case. *Larry W. Day,* 57 Comp. Gen. 770 (1978), clarified.

Matter of: Bobbie W. Curtis—Real Estate Expenses—Extension of Time Limit, January 23, 1985:

This decision is in response to a request from Mr. Kenneth F. Chute, Finance and Accounting Officer, National Security Agency (NSA), Fort George G. Meade, Maryland. The question presented is whether an NSA employee may be reimbursed for certain otherwise allowable relocation expenses resulting from the sale of his residence at his former duty station where the residence was sold through a "land sale" agreement and the expenses in question were not actually incurred until 3 years and 26 days after he re-

ported for duty at his new duty station. We hold that the employee's claim must be denied since the expenses in question were not incurred within the maximum allowable time period of 3 years.

Mr. Bobbie W. Curtis, an employee of NSA, was authorized permanent change of station (PCS) travel and relocation expenses from his former residence in Shrewsbury, Pennsylvania, to his new duty station in Omaha, Nebraska, by a travel order dated November 7, 1980. He reported for duty in Omaha on January 5, 1981. His former residence was sold through a "land sale" agreement, which was executed on July 20, 1981. In August 1981, NSA paid certain expenses connected with this agreement. However, the "final settlement" for other expenses was not made until January 31, 1984, which was 3 years and 26 days after Mr. Curtis reported for duty in Omaha, Nebraska. These other expenses for which Mr. Curtis seeks reimbursement amount to $917.35, consisting of $167.35 for costs of transfer of deed, and $750 for the transfer tax. The agency does not dispute the difficulties that Mr. Curtis had in selling his former residence, which was also a reason for using a "land sale" agreement. Consequently, under the provisions of Joint Travel Regulations, vol. 2, para. C14000-2 (Change No. 208, February 1, 1983), (JTR), NSA granted Mr. Curtis an extension of time to complete his real estate transactions to January 5, 1984. See also paragraph 2b of GSA Bulletin FPMR A-40, Supplement 4, August 23, 1982, which is the basis for the above JTR provision.

Our decisions regarding what are variously referred to as "land sale agreements," "land sale installment contracts," or "contracts for deed" are applicable since such contractual arrangements typically involve transfer of the deed only after full payment of the purchase price by installments over a period of time, as is the case here. Drawing on the common law notion of equitable conversion, we have held that the transfer of equitable ownership of property which is effected through a valid land sale contract amounts to a "purchase" for purpose of reimbursement. *Larry W. Day,* 57 Comp. Gen. 770 (1978), citing *Larry J. Light,* B-188300, August 29, 1977. In this case, although legal title to the property was retained by the seller (Mr. Curtis), the effect of the contract was to transfer equitable ownership of the property to the buyer. Thus, the "settlement date" involved in this transaction was the date the contract was executed, namely, July 20, 1981. See *Larry J. Light,* B-188300, *supra,* at 3.

The question which arises is whether Mr. Curtis' expenses may be considered as having been incurred within the time period allowed for reimbursement. See *Larry W. Day,* 57 Comp. Gen. 770, 772 (1978). Based on the rationale that all employees should be treated uniformly, *Day* held that an employee who enters into a "contract for deed" transaction may only be reimbursed for real estate expenses incurred within 2 years of the date of his transfer,

i.e., the date on which he reported to this new permanent duty station.

The 2-year period was used in *Day* because, under the then existing version of paragraph 2-6.1e of the Federal Travel Regulations, the maximum time period that could be allowed for the completion of real estate transactions was 2 years. We note however, that in Mr. Curtis' case the maximum 2-year time limit of the earlier version of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), could be and was extended to a maximum of 3 years because of a subsequent change in the FTR. The new provisions permitting an extention of the 2-year time limitation for completion of residence transactions to 3 years, were added to FTR para. 2-6.1e by GSA Bulletin FPMR A-40, Supplement 4, August 23, 1982, and were effective for employees whose 2-year entitlement period had not expired prior to August 23, 1982. See paragraph 2b of GSA Bulletin FPMR A-40, Supplement 4, August 23, 1982. Accordingly, the time allowable for employees in Mr. Curtis' situation is a maximum of 3 years. *Larry W. Day,* 57 Comp. Gen. 770 (1978), which allowed only a maximum of 2 years, is thus clarified to recognize that the period for incurring reimbursable expenses in a "land sale" or "contract for deed" type cases is the maximum time period permitted for the completion of real estate transactions under the applicable provisions of the Federal Travel Regulations.

In the present case, since the expenses for which Mr. Curtis seeks reimbursement were incurred after January 5, 1984 (3 years from the date on which he reported to his new permanent duty station), they were not incurred within the applicable maximum time limitation of 3 years. Thus, these expenses are not reimbursable.

Accordingly, the voucher submitted by Mr. Curtis will be retained in this Office and may not be certified for payment.

[B-214091]

Contracts—Food Services—Retention of Percentage of Receipts for Repairs and Improvements

The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguishes 35 Comp. Gen. 113.

Matter of: General Services Administration Concession Contract, January 28, 1985:

This decision is in response to a request from the Inspector General of the General Services Administration (GSA). The Inspector General inquires regarding the validity of a food service concession contract entered into between Guest Services, Inc. (GSI) and GSA

in view of 31 U.S.C. § 3302(b) (1982), which requires that money received for the Government be deposited in the Treasury, and 40 U.S.C. § 303b (1982), which requires that leases of Government property be for money consideration only and that no part of the consideration be "any provision for the alteration, repair, or improvement" of the property. As set forth below, we conclude that the contract in question violates neither 31 U.S.C. § 3302(b) nor 40 U.S.C. § 303b.

FACTS

Pursuant to a July 21, 1971 contract with GSA, GSI operates food concessions and other services in public buildings. GSA, in turn, provides appropriate space in Government buildings as well as certain equipment. Although no rent is charged, GSA assesses standard level user charges for the space used by GSI in Government buildings against the agencies occupying the buildings. The contract also includes a provision whereby GSI is to credit a certain percentage of its income to a reserve which is to be used for the purchase of new equipment. Contract clause IX provides, in part:

> B. RESERVE FOR PURCHASE AND REPLACEMENT OF GOVERNMENT-OWNED EQUIPMENT:
>
> GSI shall establish a Reserve in its accounting system for the replacement of Government-owned equipment which shall be used, with the approval of GSA, for the replacement of Government-owned equipment and its component parts. The Reserve shall also be available with the joint approval of the contracting parties for the purchase of new equipment, which shall thereupon become the property of the Government.
>
> C. At the end of each accounting period GSI shall credit to the Reserve on its books an amount up to one and one-half (1½%) percent of its gross income under this Agreement for such periods, and such amounts shall be a general obligation of the Corporation for the above purpose.* * *

The contract further provides that all equipment acquired under the reserve fund provision "shall become the property of the Government." (Clause VIIIC.) In the event of contract termination, the balance of the reserve is paid by GSI to GSA, either in cash or in assets. (Clause XVIIF.) Prior to contract termination, the reserve fund remains exclusively within the control of GSI.

DISCUSSION

The first statute to which the Inspector General addresses his inquiry is 31 U.S.C. § 3302(b) (1982) which reads:

> * * * [A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

This statute requires an agency to deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes an authorized repayment or

unless the agency has statutory authority to retain the funds for credit to its own appropriations. *See, e.g.,* 62 Comp. Gen. 678, 679-80 (1983); 62 Comp. Gen. 70, 72-73 (1982).

The second statute for consideration is 40 U.S.C. § 303b (1982), which reads:

> * * * [E]xcept as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts.

This statute requires that Federal agencies lease their property for money consideration only. It expressly prohibits the Government from accepting agreements to alter, repair, or improve leased property as consideration. B-205685, December 22, 1981.

In 35 Comp. Gen. 113 (1955), we reviewed a somewhat similar concession contract covering Government buildings outside the District of Columbia. The contract in 35 Comp. Gen. 113 included a reserve clause, which, like the clause here under review, required that a fixed percentage of the contractor's gross revenue be set aside in an account to be used for the repair and replacement of Government-supplied equipment. However, unlike the reserve clause here under review, the reserve clause in 35 Comp. Gen. 113 required the actual deposit of funds in a "special account in a bank," rather than a simple book entry in the contractor's internal accounts.

We concluded in 35 Comp. Gen. 113 that the reserve clause there under review violated both 31 U.S.C. § 484 (now § 3302(b)) and 40 U.S.C. § 303b. We found that funds deposited pursuant to the reserve clause constituted "money for the use of the United States" within the meaning of section 484, and accordingly, those funds were required to be deposited as miscellaneous receipts

We conclude that 35 Comp. Gen. 113 is distinguishable from the case at hand, and that the reserve clause here under review does not violate either 31 U.S.C. § 3302(b) or 40 U.S.C. § 303b. Here, the reserve constitutes a mere bookkeeping entry in the internal accounts of GSI. Unlike the circumstances in 35 Comp. Gen. 113, there is no actual transfer of funds into a bank account for the future use of the Government. The reserve in this case does not constitute "money for the Government," which would be required to be deposited as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b) or 40 U.S.C. § 303b (assuming that the GSA-GSI agreement is a "lease" under the latter section), but rather constitutes a balance sheet indication of the extent of GSI's responsibility to repair and replace Government property. In the past we have taken the position that when a private party responsible for loss or damage to Government property agrees to replace it or have it repaired, the agency may accept the offer and is not required to

transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts. B-87636, August 4, 1949. *See also* 14 Comp. Dec. 310 (1907). (We note, however, that any reserve balance paid to GSA upon contract termination would be required to be deposited in the Treasury as miscellaneous receipts.)

On the question of whether the agreement under consideration in 35 Comp. Gen. 113 was a lease under 40 U.S.C. § 303b, we observed that:

> Whether the contracts are leases or not, they partake of the nature of leases to such an extent that the provisions of 40 U.S.C. § 303(b) properly may be regarded as at least persuasive that * * * there should not be included in the consideration any provision for repair or improvement of the properties involved. 35 Comp. Gen. at 116.

We reached the same result and found agreements to violate section 303b in 41 Comp. Gen. 493 (1962) (concession contract for visitor services in national parks), 42 Comp. Gen. 650 (1963) (audio tour system in the National Zoo), and 49 Comp. Gen. 476 (1970) (management contract for parking garage in Federal building).

However, in view of the unique nature of the GSA-GSI agreement here under review, we conclude that the analysis in 35 Comp. Gen. 113, and subsequent cases, should not be applied in the instant case. As the submission of the GSA General Counsel points out, GSI historically has maintained a very close relationship with the Federal Government. During its early history, and until years after the signing of the agreement here in question, GSI served the Federal Government only, operated exclusively on Federal property and was substantially controlled by the Government. In a 1978 report, this Office reviewed the same GSA-GSI agreement here under review. General Accounting Office, Benefits General Services Administration Provides By Operating Cafeterias In Washington, D.C., Federal Buildings, LCD-78-316, B-114820, May 5, 1978. In that report, we concluded:

> Although GSA could charge GSI for the use of cafeteria space, the July 21, 1971, agreement between GSA and GSI provides, in part, the GSA is to furnish suitable space and certain equipment at no charge other than the consideration of GSI's operating and using them for the benefit of the Government. GSA is given the right to review GSI's annual budget and the menu pricing structure for foods and beverages. We determined that the *agreement between GSA and GSI does not involve a lease of space but, instead, is a license to use assigned space* in consideration of the performance of the agreed to services. The agreement is not unlawful, improper, or contrary to public policy, even though GSI may appear to enjoy a competitive advantage over other food service operators in the vicinity of Federal cafeterias.
>
> * * * * * * *
>
> If cafeteria operations were required to be fully self-supporting, the cost of food to the customer could increase considerably. *These cafeterias cannot be compared to commercial ones,* because operating hours are limited to breakfast and lunch during regular Government workdays only. A captive but limited clientele is served, and food prices must be approved by GSA. If the meal prices were set to cover full costs, the drop in patronage might be so great as to make the operations impractical.
>
> Without the substantial indirect assistance provided, GSA believes that the contractor could not provide reasonably priced food service in Federal buildings. *Id.* at Appendix I, 3-4, 6 [Italic supplied.]

Our conclusion that the GSA-GSI agreement constitutes a license, not a lease, and was not unlawful was based on such factors as the absence of rent, absence of a specific term, limitations on the right of exclusive possession and control, and the right to revoke the permit at any time. B-114820-O.M., December 14, 1977.

Therefore, we conclude that it would not be appropriate in the case at hand to apply the analysis of 35 Comp. Gen. 113, and subsequent cases, in view of the historically unique nature of the GSA-GSI agreement and our conclusion in our 1978 audit report, discussed above, that the agreement was not unlawful. Accordingly, we conclude that the 1971 GSA-GSI concession contract here under review violates neither 31 U.S.C. § 330.2(b) (1982) nor 40 U.S.C. § 303b (1982).

We note that the submission of the GSA Inspector General indicates that the relationship between GSI and the Government has been evolving into a more arms-length relationship. For example, no active Federal employees are now on GSI's board, and GSI is now audited by a private firm, rather than by the General Accounting Office. We conclude, nonetheless, that enough of the unique relationship between GSI and the Government remains, such that our conclusion in our 1978 report that the 1971 GSA-GSI agreement is not unlawful continues to be valid.

[B-217020]

Postal Service, United States—Authority—Omnibus Reconciliation Act of 1981

Omnibus Reconciliation Act of 1981 language established a new subchapter to ch. 45 of title 5, U.S.C. (5 U.S.C. 4511-4514). The new section 4514 of title 5 reads as follows: "No award may be made under this title after September 30, 1984." Question posed is whether use of the word "title" in section 4514 should be read literally which would mean that all title 5 awards authority expired after Sept. 30, 1984. It is clear from the legislative history that the reference to "title" should have been "subchapter." The clear congressional intent as shown from the legislative history is controlling over the drafting error contained in the statutory language. Federal courts have allowed the expressed intention of Congress to prevail over the erroneous language of a statute.

To The Honorable William D. Ford, United States House of Representatives, January 28, 1985:

This is in response to your letter dated October 18, 1984, stating that some uncertainty exists as to whether authority to make "awards" under title 5, United States Code, other than those provided for in 5 U.S.C. §§ 4511-4514, still exists, and requesting our opinion on this matter. We have reviewed the relevant statutory language in light of applicable principles of statutory construction, and are of the opinion that the language of 5 U.S.C. § 4514 does not affect any of the award provisions in title 5 except the provisions for awards for cost savings disclosures found in 5 U.S.C. §§ 4511-4514.

You have stated that the uncertainty regarding the awards provisions of title 5 originated in section 1703 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, approved August 13, 1981, 95 Stat. 357, 755, which authorized the payment of cash awards to Federal employees who disclose fraud, waste, or mismanagement. It did so by adding a new subchapter II to chapter 45 of title 5, United States Code (5 U.S.C. §§ 4511-4514). The new section 4514 of title 5 reads as follows:

> No award may be made under this *title* after September 30, 1984. [Italic supplied.]

This provision, if read literally, would mean that all title 5 awards authority expired after September 30, 1984. You state that it is clear that Congress intended the termination provision of 5 U.S.C. § 4514 to apply only to the cash awards program established under the new subchapter II of chapter 45, title 5 U.S.C. Accordingly, you advise us that the reference to "title" in section 4514 should be to "subchapter."

The legislative history of the Omnibus Act provides a useful background. Section 1703 originated in the House of Representatives, and, as passed by the House, provided permanent authority to make cash awards for cost savings disclosures. However, during the conference with the Senate, it was agreed to establish the program on an experimental basis, and the conferees further agreed that authority to make these awards under the new subchapter would terminate after fiscal year 1984. This agreement is reflected in 5 U.S.C. § 4514, quoted above, and is explained in the conference report as follows:

> The second amendment agreed to by the conferees provides that no award may be made under the new cash awards program after September 30, 1984. The three-year life of the program conforms with the three-year reconciliation instructions and provides opportunity for Congressional review of the effectiveness of the cash awards program. H.R. Rep. No. 208, 97th Cong., 1st Sess. 914 (1981).

It is clear, therefore, that the reference to "title" in section 4514 should have been "subchapter" since that section is part of the newly created "Subchapter II—Awards For Cost Savings Disclosures" under section 1703 of the Omnibus Budget Reconciliation Act of 1981. The drafting error may have occurred because the new subchapter II was enacted as part of title XVII of the Omnibus Act. In any event, it is our opinion that the clear congressional intent, as shown in the quoted Conference Report, is controlling over the drafting error contained in the statutory language.

There is ample authority for this approach. In cases similar to this case, federal courts have allowed the expressed intention of Congress or a state legislature to prevail over the erroneous language of a statute. See *Southeastern Financial Corp. v. Smith,* 397 F. Supp. 649 (D. Ala. 1975); *Ronson Patents Corp. v. Sparklets Devices, Inc.,* 102 F. Supp. 123 (E.D. Mo. 1951); *Fleming v. Salem Box Co.,* 38 F. Supp. 997 (D. Ore. 1940).

In *Fleming,* the court refused to accept at face value a specific reference in section 17 of the Fair Labor Standards Act of 1938 to section 20 of the Anti-Trust Act. After examining the legislative history of the Fair Labor Standards Act, the court concluded that:

[I]t is certain that a mistake was made in the substitution of the figures and that the intention was to refer to Section 17 of the Anti-Trust Act. A palpable clerical error clearly shown should not override legislative intention. 38 F. Supp. at 998.

In *Ronson,* the defendant moved to dismiss a patent infringement suit on the ground that a private act of Congress extending plaintiff's patent for 7 years was ineffective because the act had incorrectly specified the reissue date of the patent as "December 12, 1923." The correct date of reissue was December 12, 1933. In denying defendant's motion, the court observed that:

We understand the law to be, if the error in a legislative act is apparent on the face of the act and can be corrected by other language of the act, it is not fatal. The rule is stated in 59 C.J. 991: "Mere verbal inaccuracies, or errors in statutes in the use of words, numbers, grammar, punctuation, or spelling, will be corrected by the court, whenever necessary to carry out the intention of the legislature as gathered from the entire act. If the legislative intent is clear, it must be given effect regardless of inaccuracies of language. * * *" 102 F. Supp. at 124; *accord,* J. Sutherland, *Statutory Construction* §§ 47.36 and 47.37 (4th ed. Sands 1973).

Clerical or other errors in legislation are ordinarily construed so as to give effect to a demonstrated legislative purpose. A clear exposition of the limited scope of the "plain meaning rule" is found in the following excerpt from *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543–544 (1940):

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * * Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown." [Footnotes omitted.]

Cases applying these principles, often in reliance upon *American Trucking,* are numerous. Thus, though a statutory provision may be thought literally unambiguous in isolation, we nonetheless should consider the legislation as a whole and may also look to its legislative history in determining its purpose and its proper construction.

Indisputably, the purpose of the expiration of authority language of 5 U.S.C. § 4514, enacted simultaneously with and placed in the same subchapter as the awards for cost savings disclosures, was limited to terminating the cost savings disclosure awards authority after 3 years. Undoubtedly, that provision's reference to "title"

rather than "subchapter" was simply a legislative inadvertence or mistake. A cardinal rule of statutory construction is to "ascertain from the entire statute the intention to be accomplished by the enactment. When that intention is clear it should be carried out, even though it may be necessary to strike out or insert certain words." *Pressman* v. *State Tax Commission,* 102 A.2d 821 (Md. 1954).

We have here a situation where a congressional intention, otherwise clear, was in part mistakenly or inaccurately stated. Under such circumstances courts have allowed the substitution of language in order to carry out the demonstrable legislative intention, observing, however, when doing so, that this technique of construction is to be exercised with caution. See 2A Sutherland, Statutory Construction, § 47-36 (4th ed. 1973).

Accordingly, for the reasons given above, we conclude that the language of 5 U.S.C. § 4514 does not affect any of the award provisions found in title 5, United States Code, other than the provisions for awards for cost savings disclosures found in 5 U.S.C. §§ 4511-4514.

[B-215441, B-215630]

Quarters Allowance—Basic Allowances for Quarter (BAQ)—With Dependent Rate—Eligibility—Separation of Husband and Wife

A divorced member of the uniformed services, who is paying child support for a dependent residing with the member's former spouse in Government quarters, is not entitled to a basic allowance for quarters at the with-dependent rate. However, if the dependent resides with the member in private quarters for more than 3 months, he or she is entitled to the increased allowance, since under 37 U.S.A. Code 403 and the pertinent regulations, periods in excess of 3 months are considered nontemporary.

Matter of: Major Garry R. Scott, USAF and Captain Christopher Bonwich, USAF, January 29, 1985:

A divorced member of the uniformed services who is paying child support for a dependent child in an amount greater than the amount specified in the applicable regulation is entitled to receive basic allowance for quarters at the with-dependent rate unless his or her dependent resides in Government quarters. Questions have arisen concerning the member's entitlement when a dependent who normally lives with the former spouse in Government quarters visits the member, who is not residing in Government quarters, for an extended period of time.[1] We find that a member is entitled to

[1] Questions were submitted by two different disbursing officers, the Chief, Accounting and Finance Branch, Comptroller Division, Barksdale Air Force Base, Louisiana, and the Accounting and Finance Officer, Hill Air Force Base, Utah. The Department of Defense Military Pay and Allowance Committee assigned submission number DO-AF-1442 to the matter. We have combined the submissions and will treat them as one case because of the similarity.

the increased allowance when the dependent resides with the member for more than 3 months.

Major Gary R. Scott and his spouse were divorced in 1978. Under the terms of their divorce decree, the child of their marriage was placed in the custody of its mother. Major Scott was ordered to pay child support, the amount of which exceeds the difference between the with-dependents and the without-dependents basic allowance for quarters rates. He was also permitted visitation rights. While the child is visiting him, he has the duty to the child of care, control, protection and reasonable discipline, and the duty to provide him with food, clothing, and shelter.

Major Scott's former wife is now remarried to another member of the uniformed services. His dependent child resides with its mother and stepfather in Government quarters. Since a member is not entitled to basic allowance for quarters at the with-dependents rate when his dependent (s) on account of whom the increased allowance is paid, resides in Government quarters, Major Scott is paid basic allowance for quarters as a member without dependents while his child resides with its mother and stepfather in the assigned quarters. (See Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), paragraph 30237a(2) (change 79); 58 Comp. Gen. 100 (1978)).

However, since Major Scott's child resided with him in his own private quarters during a visitation period from June 15 to September 5, 1983, Major Scott has presented a claim for payment of basic allowance for quarters at the with-dependents rate for that period.

In June 1981, Captain Christopher Bonwich was married to Captain Rosemary Bonwich each having at that time a child. In January 1983, Christopher and Rosemary Bonwich were divorced. Under their divorce decree, Mrs. Bonwich was awarded custody of both children and Mr. Bonwich was awarded reasonable visitation rights, including continuous visitation during 4 months of the year with his own natural child, and 30 days' continuous visitation with Mrs. Bonwich's natural child. Mr. Bonwich is to pay support for the two children in the amount of $334 per month, but he is not required to pay any child support during any continuous visitation period of 30 days with either of the children.

Mr. Bonwich is stationed at Hill Air Force Base, Utah where he resides in private quarters. Mrs. Bonwich is stationed at Myrtle Beach Air Force Base, South Carolina, where she and the two children reside in Government quarters. Mr. Bonwich claims basic allowance for quarters and variable housing allowance as a member with dependents, covering a period of continuous visitation with his natural child from April 6, 1984, through September 1, 1984.

Under the applicable statutes and regulations, members of the uniformed services who are entitled to basic pay are entitled to a basic allowance for quarters unless they are provided Government quarters adequate for themselves and their dependents. 37 U.S.C.

§ 403, implemented by part 3, chapter 2 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM). If the dependent of two members who are divorced or legally separated resides in private quarters, the parent who does not have custody may be paid an increased allowance on account of that dependent if that member pays support on behalf of his or her dependent in a monthly amount equal to or greater than the difference between the basic allowance for quarters without dependents and the increased allowance on account of dependents. DODPM, paragraph 30236a(1). If, on the other hand, that member's dependent resides in Government quarters, the member is not entitled to an increased quarters allowance on account of his dependent, even though he pays support. DODPM, paragraph 30237.

Basically, the question to be resolved is what period of time constitutes more than a short visit for the purposes of providing an increased allowance to the members in the circumstances presented.

In a similar situation involving entitlement to an increased allowance for members whose dependents visit or reside in Government quarters assigned to another member the question arose as to how long the dependents could stay in the Government quarters before the member lost entitlement to the increased allowance. We concluded that 3 months was a reasonable time period for the dependents to reside in Government quarters assigned to another member before loss of entitlement to the increased allowance. 37 Comp. Gen. 517 (1958); DODPM, Table 3-2-4, Note 11. That conclusion was based in part on the fact that under the applicable law members without dependents continued to receive a basic allowance for quarters while performing periods of field duty or sea duty of less than 3 months since such periods were considered temporary. See 37 U.S.C. § 403(c)(3). By analogy this rule was extended to the situation where a member's dependents reside in Government quarters assigned to another member.

It is our opinion that, in the absence of a controlling regulation to the contrary, the same rational should be applied in these cases. That is, when the dependent who resides with the former spouse in Government quarters, resides with the member paying child support for a period in excess of 3 months it should not be considered of a temporary nature within the meaning of the law authorizing the allowance. Thus, the member is entitled to the basic allowance for quarters at the with-dependent rate. Similarly, a member who is not paying child support during the period the dependent resides with the member would be entitled to the increased allowance if the period is more than 3 months.

Under that rule Major Scott is not entitled to the increased allowance while his dependent resides with him since the period of time is considered to be temporary (less than 3 months), even though he continues to pay child support during the period of the visit.

Captain Christopher Bonwich is entitled to the increased allowances since at least one dependent resides with him for a period of time considered nontemporary (3 months or more). This is the case regardless of whether he pays child support during this period.

[B-216112]

Compensation—Prevailing Rate Employees—Wage Schedule Adjustments—Statutory Limitation—Mandatory

The cap on wage increases for prevailing rate employees during fiscal year 1982 and similar provisions for fiscal years 1983 and 1984 are applicable to prevailing rate employees at Barksdale A.F.B., Louisiana, even though that wage area was initially covered by the Monroney Amendment, 5 U.S. Code 5343(d), in fiscal year 1982. Higher wage rates which resulted from considering wage rates from another area as required by the Monroney Amendment must not be implemented to the extent that they exceed the statutory increase cap. There is nothing in either the language or the legislative history of the Monroney Amendment or the pay increase cap provisions which would support the view that the pay increase caps are not applicable to the intitial establishment of wages under the provisions of the Monroney Amendment.

Matter of: Prevailing Rate Employees at Barksdale A.F.B., Louisiana, January 29, 1985:

The matter before us concerns whether the maximum salary increase for prevailing rate employees in effect for fiscal year 1982, and similar pay increase maximums or caps for fiscal years 1983 and 1984 are applicable to wage schedules which are established pursuant to the initial application of the Monroney Amendment, 5 U.S.C. § 5343(d), to a wage area.[1] Wage schedules and rates which are set in accordance with the provisions of the Monroney Amendment are subject to the pay increase caps in effect for fiscal years 1982, 1983, and 1984.

The National Federation of Federal Employees as the representative of prevailing rate employees at Barksdale Air Force Base, Louisiana, contends that those employees were erroneously denied their proper rates of pay during fiscal years 1982, 1983 and 1984. The Federation advises that the pay rates of these prevailing rate employees are set in accordance with the provisions of the Monroney Amendment. Ordinarily, the wage schedules of prevailing rate employees are based upon a survey of wages paid by private employers in the local wage area for similar work performed by regular full-time employees. See 5 U.S.C. § 5343. However, under the Monroney Amendment when, for a principal type of federal wage position, there is an insufficient number of comparable jobs in private industry in the local wage area, the pay for comparable positions in private industry in the nearest similar wage area must

[1] This matter has been presented by Mr. James M. Peirce, President, National Federation of Federal Employees, under our procedures set forth at 4 C.F.R. Part 22 for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. The General Counsel, Office of Personnel Management, submitted the comments of that agency on January 11, 1985.

be considered. The wage schedules and rates are then determined on the basis of both the local private industry rates and the rates for the nearest similar wage area.

The Shreveport, Louisiana area, which includes Barksdale Air Force Base, first qualified for the application on the Monroney Amendment in fiscal year 1982. However, in establishing the wage schedules for the Shreveport area, after complying with the data gathering requirements of the Monroney Amendment, the lead agency (the Department of Defense) [2] applied the pay cap of 4.8 percent which was applicable to federal employees in fiscal year 1982. The Office of Personnel Management concurs with the lead agency's view that the pay cap was applicable to the employees in question. The National Federation of Federal Employees contends that the application of the 4.8 percent pay cap denies the employees involved the benefits intended to be conferred by the Monroney Amendment.

During fiscal years 1982 through 1984 there were caps on the pay increases which could be allowed prevailing rate employees.[3] The pay increase cap in effect in fiscal year 1982 at the time the Monroney Amendment first became applicable to the wage area which includes Barksdale Air Force Base, provided:

> (b)(1) Notwithstanding any other provision of law, in the case of a prevailing rate employee described in section 5342(a)(2) of title 5, United States Code, or an employee covered by section 5348 of that title—
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> * * * * * * *
>
> (B) any adjustment under subchapter IV of chapter 53 of such title to any wage schedule or rate applicable to such employee which results from a wage survey and which is to become effective during the fiscal year beginning October 1, 1981, shall not exceed the amount which is 4.8 percent above the schedule or rate payable on September 30, 1981 * * *. Section 1701(b), Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, August 13, 1981. 95 Stat. 357, 754.

Similar restrictions on increases in wage rates of prevailing rate employees were enacted each year since fiscal year 1979. The legislative history of the first of this type of cap on wage increases for prevailing rate employees shows that the cap was enacted so that prevailing rate employees would be subject to a pay cap similar to that applicable to General Schedule employees. See S. Rep. No. 939, 95th Cong. 2d Sess. 55-56 (1978).

The National Federation of Federal Employees contends that the pay rates which result from the initial application of the Monroney

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[2] The lead agency is the agency designated by the Office of Personnel Management to plan and conduct a wage survey, analyze the survey data and issue the required wage schedules for a wage area. See 5 C.F.R. § 532.201.

[3] See section 2202 of the Deficit Reduction Act of 1984, Public Law 98-369, July 18, 1984, 98 Stat. 494, 1058; section 202(b) of the Omnibus Budget Reconciliation Act of 1983, Public Law 98-270, April 18, 1984, 98 Stat. 158, 159; section 110 of Public Law 98-107, October 1, 1983, 97 Stat. 733, 741; section 107 of Public Law,, 97-377, December 21, 1982, 96 Stat. 1830, 1909; section 109 of Public Law 97-276, October 2, 1982, 96 Stat. 1186, 1191; and section 1701(b) of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, August 13, 1981, 95 Stat. 357, 754. (5 U.S. Code 5343 note).

Amendment to a wage area are not to be regarded as wage survey adjustments for purposes of the pay caps on prevailing rate pay increases. The basis for this view is the decision 50 Comp. Gen. 266 (1970), in which we held that retroactive adjustments made when the Monroney Amendment was initially put into effect were not adjustments made pursuant to wage surveys, but were adjustments required to bring the wage rates involved in line with the requirements of law as contained in the Monroney Amendment.

Wage schedules under the Monroney Amendment were first issued almost 2 years subsequent to the effective date of that amendment because the method of computing wage rates under the new requirements had not been resolved. It was not until July 14, 1970, that the Civil Service Commission issued its regulations implementing the amendment although it had been effective and applicable to all surveys ordered or in process on or after the date of enactment, October 12, 1968.

The question was whether the provision in 5 U.S.C. § 5344, authorizing retroactive increases in pay when adjustments resulting from wage surveys are delayed, was to be applied to the initial retroactive adjustments under the Monroney Amendment. If that section had been applicable, retroactive payments to employees no longer employed would not have been allowed by the specific terms of the section. However, we held that these initial retroactive increases did not result from an "order granting the increases" in terms of that section, but that the wage schedules originally applied were invalid since they had not been computed in accordance with the Monroney Admendment. Thus, employees paid under the original schedules were not properly compensated under the law, and the retroactive increases in pay resulting from the adjusted schedules implementing the Monroney Amendment were to be regarded as corrections required by the Monroney Amendment and not the result of an order granting an increase in pay pursuant to a wage survey.

The National Federation of Federal Employees argues that the implementation of a new wage survey following a wage area's initial qualification for the application of the Monroney Amendment is to be distinguished from the ordinary wage survey process since the Monroney Amendment requires a new survey which, unlike the prior surveys, uses data from both the wage area in question and from another wage area. Its view is that the pay increase for the initial year in which an area qualifies under the Monroney Amendment is not an increase which results from wage survey adjustments, but results from the fact that the employees in that area qualify for use of a new pay schedule. In the circumstances under consideration in 50 Comp. Gen. 266, the pay adjustments initially made pursuant to wage surveys had been erroneous because those adjustments did not take into consideration the elements required to be considered by the Monroney Amendment. The retroac-

tive revisions in those pay adjustments, to make pay comply with the Monroney Amendment, were corrections required by law and all persons who had been paid at the incorrect rates were entitled to retroactive pay. However, the holding in that decision does not support the proposition that pay adjustments which are established pursuant to the initial application of the Monroney Amendment—which involves a wage survey—are not to be regarded as adjustments in pay rates or schedules which result from a wage survey for the purpose of the application of the pay cap to prevailing rate employees.

In the situation under consideration no erroneous pay rates were implemented. A survey was concluded and pay adjusted as a result thereof. There is nothing in either the express language or the legislative history of the Monroney Amendment which would support the view that the initial pay rates or schedules established in a particular wage area pursuant to the Monroney Amendment are not to be regarded as pay adjustments which result from a wage survey. Furthermore, neither the language nor the legislative history of the provisions caping the pay increases of prevailing rate employees for fiscal years 1982 through 1984 indicate that pay established pursuant to the initial application of the Monroney Amendment is not deemed to be a wage survey adjustment. Furthermore, the language and legislative history of prevailing rate employees' pay caps for fiscal years 1979 through 1985[4] provide no basis to distinguish schedules established pursuant to the initial application of the Monroney Amendment to a wage area.

The National Federation of Federal Employees contends that it would be contrary to the doctrine disfavoring repeals by implication [5] to hold that the caps on the annual pay adustment of prevailing rate employees also apply to initial adjustments under the Monroney Amendment. They argue that a measure intended to equalize the annual cost-of-living increases of wage grade and General Schedule employees should not be interpreted in a manner that repeals a measure which is intended to ensure a fair rate of pay for workers in certain areas.

We note, however, that although the pay increase caps may modify the effect of the Monroney Amendment, the caps do not repeal the provisions of the Monroney Amendment. Employees previously covered continue to benefit from the application of the Monroney Amendment, and wage increases of newly covered employees may be enhanced because of that amendment if the local wage data would have produced an increase of less than the maximum allowable under the cap. We note that the Office of Personnel Management has apparently determined that, in the absence of the

[4] Section 114 of Public Law 96-369, October 1, 1980, 94 Stat. 1351, 1356; section 613 of the Treasury, (5 U.S. Code 5343 note) Postal Service, and General Government Appropriations Act, 1979, Public Law 95-429, October 10, 1978, 92 Stat. 1001, 1018.

[5] See *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 at 190 (1978).

Monroney Amendment, the average pay schedule increase in the Shreveport wage area for fiscal year 1982 would have been approximately 4.3 percent rather than the average wage schedule increase of 4.74 percent, the maximum allowable under the pay ceiling after rounding of the pay increase.

In view of the above, we conclude that an adjustment of pay resulting from the initial application of the Monroney Amendment in a wage area was not exempt from the pay caps in effect during fiscal years 1982 through 1984.

[B-216315.3]

Office of Management and Budget—Circulars—No. A-76—Exhaustion of Administrative Remedies

General Accounting Office (GAO) affirms its dismissal of a protest against the propriety of a cost comparison performed pursuant to OMB Circular A-76 when the solicitation contained a provision setting forth an administrative appeals procedure that the protester did not exhaust. This administrative procedure is the final level of agency review afforded protesters, and until such time as this procedure is completed the protester has not exhausted its administrative remedies.

Contracts—Protests—Administrative Actions—Outside Scope of Protest Procedure

Pre-opening protest to contracting officer, requesting that Government's bid, prepared for cost comparison purposes, be rejected as nonresponsive because of alleged use of incorrect wage rates, is not a substitute for a timely-filed appeal of the cost comparison. Protests and cost comparison appeals are separate administrative procedures; the cost comparison appeal has nothing to do with bid responsiveness, but rather is used to determine the correctness of the figures used to decide whether an agency should contract-out or perform in-house.

Matter of: ISS Energy Services, Inc.—Request for Reconsideration, January 29, 1985:

ISS Energy Services, Inc. for a second time requests reconsideration of our decision *ISS Energy Services, Inc.*, B-216315, Sept 17, 1984, 84-2 CPD ¶ 305, *aff'd on reconsideration,* Dec. 4, 1984, 84-2 CPD ¶ *620,* regarding contract No. GS-11C-40321.

We affirm our dismissal.

ISS's protest concerned alleged deficiencies in a cost comparison performed by the General Services Administration in accord with Office of Management and Budget (OMB) Circular No. A-76. We dismissed the protest because ISS had not exhausted the administrative appeals procedures established by GSA. In its first request for reconsideration, ISS insisted that GSA had no such procedure and therefore the requirement for exhaustion was inapplicable. We pointed out, however, that GSA had indeed provided for an appeals procedure which was set forth in the solicitation. We therefore affirmed our dismissal of September 17, 1984.

ISS, in its second request for reconsideration, acknowledges that it did not file an appeal in accord with the procedure set forth in the solicitation. Before bid opening, however, ISS had written the contracting officer, stating that it believed GSA's bid, for cost com-

parison purposes, would be based on incorrect wage rates. If so, ISS requested that the bid be rejected as nonresponsive. Before the start of the 15-day period for public review of the cost comparison, however, GSA rejected this request. ISS argues that this exchange should satisfy the requirement for exhaustion of administrative remedies because the result of a later appeal, filed under the procedure set forth in the solicitation, would not have been any different.

The Federal Acquisition Regulation (FAR), in accord with OMB Circular No. A-76, requires that agencies establish appeals procedures for informal administrative review of cost comparisons. The regulations further provide that this type of procedure must afford prospective contractors an independent, objective review of the initial cost comparison result reached by the agency. FAR, § 7-307, 48 Fed. Reg. 42,102, 42,128 (1983) (to be codified at 48 C.F.R. § 7-307). The administrative appeals procedure established by GSA implements this regulation.

Although initially expressed in terms of bid responsiveness, ISS's allegation concerns the correctness of the figures used in the calculation of GSA's bid and consequently, the propriety of the cost comparison between this bid and the bids submitted by prospective contractors. This allegation therefore should have been raised under the cost comparison appeals procedure, where the government's bid would have been adjusted, if appropriate, rather than rejected as nonresponsive.

While GSA's procedure does not preclude a prospective contractor from filing a protest, the regulatory scheme contemplates that such matters will be raised under the appeals procedure after an initial cost-comparison result is reached and publicly announced. In a formally advertised procurement, this occurs at bid opening. *See* FAR, § 7.306(a). We do not believe that the filing of a protest can be used as a substitute for the filing of a cost comparison appeal, as the appeal process is distinct from the protest procedures prescribed in FAR, § 14-407-8.[1] This process is the final level of agency review afforded prospective contractors and accordingly, administrative remedies are not exhausted until such time as it is completed.

ISS did not avail itself of GSA's appeals procedure. In addition to the solicitation provision advising bidders that such a procedure existed, the record shows that ISS received a letter from the contracting officer stating when the 15-day public review period would begin and end. ISS could have filed, but elected not to file, a timely challenge to the cost comparison results.

We again affirm our dismissal of September 17, 1984.

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[1] Protests and appeals of cost comparisons are two separate administrative procedures. They differ in a number of respects. Most importantly, protests may be decided by contracting officers, as was the case with ISS's protest, whereas cost comparison appeals are considered by officials other than contracting officers. This ensures that appeals are reviewed independently and objectively.